

(2013) 02 BOM CK 0163

In the Bombay High Court

Case No : Arbitration Petition No. 1321 of 2012

Tata Capital Financial Services Limited

APPELLANT

Vs

Deccan Chronicle Holdings Limited and Another

RESPONDENT

Date of Decision : 06-02-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 2(1)(e), 34, 34(2)(b)
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(1), Order 21 Rule 21, Order 34 Rule 1, Order 34 Rule 14
Evidence Act, 1872 — Section 81
Specific Relief Act, 1963 — Section 14(3)(c)
Transfer of Property Act, 1882 — Section 92, 93, 94, 96, 97

Citation : (2013) 2 ARBLR 181

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, Ashok Paranjape, Leena Desai and Girish Thakur instructed by MDP and Partners in ARBP No. 1321/2012 and Shakuntala Joshi with Anand Poojari instructed by S.I. Joshi and Co. in ARBP No. 1095/2012, for the Appellant; Gaurav Joshi in ARBP No. 1321/2012 with Vivek Deo, Samsher Garud and Aagsti Vibhule instructed by y Jaykar and Partners in ARBP Nos. 1321 and 1095/2012 and Vaibhav Sugdhare in ARBP No. 1095/2012, for the Respondent

Judgement

R.D. Dhanuka, J.—By these petitions filed u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short), petitioner seeks appointment of court receiver in respect of various properties described in the petition, for injunction and for an order and direction against the respondents to secure, in favour of the petitioner, its claim with interest. As the respondents have raised various issues on maintainability of both these petitions, which are common in both the petitions, same were heard together and are being disposed of by a common order. Some of the facts emerging from the pleadings filed in ARBP No. 1321/2012 are as under:

By orders dated 24th February, 2012 and 12th March, 2012, this court accorded

sanction to the scheme of arrangement filed by Tata Capital Limited (TCL) and Tata Capital Financial Services Limited (TCFSL) by virtue of which, the securities and/or benefits, rights and obligations under any security arrangements, collaterals, agreements, instruments of whatsoever nature in connection with or pertaining to or relatable to the transferred financial services activity of TCL stood transferred to TCFSL.

On 13th April, 2011, the petitioner sanctioned grant of working capital term loan facility in favour of respondent no. 1 for meeting the working capital requirement of the company of an amount of Rs. 100,00,00,000 (100 crores) on the terms and conditions recorded therein. The respondents executed various documents in favour of the petitioner to secure the repayment of loan amount. By letter dated 5th April, 2012, the petitioner communicated about the amended fixed rate of interest to the respondents. By letter dated 15th April, 2011, the first respondent requested the petitioner to disburse the entire loan amount of Rs. 100 crores into their bank account with Canara Bank, Prime Corporate Branch, Secunderabad. The petitioner accordingly disbursed the said amount as requested by the first respondent.

2. By letter dated 12th July, 2012, addressed to the first respondent, the petitioner brought to their notice that there was downgrading of their rating for long term bank facilities/instruments to CARE B from CARE AA and short term bank facilities from CARE A1+ to CARE A4 with credit "watch" by the Credit Analysis and Research Limited. The petitioner informed that the revision in rating was due to default by the first respondent on short term non-convertible debentures. The petitioner placed reliance upon the press release in this regard. The petitioner called upon the first respondent to cure the said material adverse effect as per Clause 1.1 (e) of the agreement within seven days from the date of the said letter and to make immediate payment of all the outstanding dues under the said term loan. There was no reply to the said letter.

3. By letter dated 3rd August; 2012, the petitioner requested the first respondent to make payment of all the outstanding dues on or before 12th, August, 2012 as they had not cleared the material adverse effect within the stipulated time period. The petitioner called upon the first respondent to forthwith create additional security in favour of the petitioner to secure the credit facility till all the outstanding dues were fully repaid/liquidated. There was no reply to the said letter.

4. By letter dated 17th August, 2012, the petitioner through its advocate called upon the first respondent being the principal borrower and second respondent being the guarantor, jointly and/or severally to pay to the petitioner a sum of Rs. 100,86,97,052 payable as on 10th August, 2012 with further additional interest @ 3% per annum over and above the agreed interest rate from 11th August, 2012; making it clear that in case, respondents failed to comply with the said notice, the said notice shall be construed as a notice invoking arbitration against the respondents. The respondents failed to make any payment to the petitioner.

5. On 24th August, 2012, the petitioner filed this petition u/s 9 of the Act for interim measures. During the pendency of this petition, the respondents, through their advocate's reply dated 22nd August, 2012 (received by petitioner's advocate on 31st August, 2012), informed the petitioner that they were in the process of a strategic transaction which shall significantly mitigate the present risk profile of the first respondent and any precipitate action at that stage, would be value destroyer for one and all. The petitioner was informed that the respondents were nearing a permanent resolution along with the prospective investor which shall give detailed presentation to the CEOs of all their key lenders within the next 15 days including the petitioner. The respondents informed that due to global recession and economic slowdown, the inflow of commercial advertisement revenue got hampered and the revenues fell drastically which was a temporary phenomena. The respondents alleged that temporary slack in business resulted in downgrading by CARE. The market share and the reputation of respondents' clients was still intact and the respondents' clients would strictly adhere to its commitments and assured the petitioner of its amounts as per the agreed terms. The respondents alleged that they had not defaulted to that extent which warranted issuance of the subject notice. The respondents requested the petitioner not to go by the news reports. In the said letter, the respondents stated that without prejudice to their interest or without admitting the liability as claimed in the notice issued by the petitioner, all outstanding dues would be paid by the respondents according to the agreed terms as per the entitlement. The respondents requested the petitioner to continue with the terms of agreement without recalling the loan facility and the respondents would honour the commitments as agreed.

6. By an ad interim order dated 4th September, 2012 passed by S.J. Kathawalla, J. this court observed that it was prima facie satisfied that an amount of Rs. 101 crores is due and payable by the respondents to the petitioner towards outstanding loan amount. By the said ad interim order, respondent no. 1 was directed not to dispose of, alienate, encumber, part with possession and/or create any third party rights in respect of the property described in Exhibit P to the petition and directed respondent no. 2 not to withdraw any of the cash and bank balances set out in the net worth certificate and shall also not dispose of the land, buildings and vehicles and investments in respondent no. 1. The respondents were also directed to disclose on oath the assets and properties owned by each of them. Respondent no. 1 was directed not to withdraw any amount in cash in the aggregate of Rs. 5 crores from its bank accounts set out in Prayer Clause (f) of the petition, until the next date of hearing.

7. By an order dated 6th November, 2012, this court passed further ad interim order in the above matter. As the respondents did not file affidavit as directed by this court by order dated 2nd November, 2012 disclosing on oath the assets and properties owned by each of them, this court observed that respondents were delaying disposal of the arbitration proceedings. Large amount of claim was involved, however, by way of last chance, this court directed the respondents to

file affidavit-in-reply in the matter within one week from the date of the said order. This court observed that though the securities in favour of the petitioner were inadequate, with a view to protect such huge claims, this court directed the respondents to maintain status quo in respect of investment in other entities as reflected in the net worth certificate at page 98 of the petition till next date of hearing. The second respondent was directed to maintain status quo in respect of the investments in other entities reflected at page 98 of the petition and continued the ad interim order passed by this court earlier. This court also directed the respondents to comply with ad interim order earlier passed and to file affidavit disclosing the assets within two weeks from the date of the said order. The matter was adjourned to 21st November, 2012 for hearing and final disposal.

8. The respondents have filed affidavit opposing the reliefs claimed by the petitioner however, without disclosing assets and properties owned by the respondents on oath though directed by this court.

Facts of ARBP No. 1095 of 2012

9. On 13th May, 2011, the petitioner and the first respondent executed facility agreement by which the petitioner advanced a term loan facility to the tune of Rs. 25,00,00,000 (25 crores) repayable with interest @ 12% per annum within the period of two years from the date of execution of the said agreement. On 13th May, 2011, the second respondent executed demand promissory note in favour of the petitioner guaranteeing the repayment of the loan instalments due and payable by the first respondent to the petitioner. It is the case of the petitioner that the respondents committed default in making payment of instalments. It is the case of the petitioner that pursuant to the agreement executed between the parties on 13th May, 2011, the first respondent by deed of simple mortgage dated 20th May, 2011 registered with the Assistant Sub-Registrar, Mumbai - 3, created pari passu charge in favour of the petitioner on all that piece and parcel of N.A. land admeasuring about 2152.25 square yards together with sheds and structures as described in Exhibit D to the petition.

10. Vide letter dated 24th May, 2012 addressed to the first respondent, the petitioner exercised "call option" as per Clause 12 of Schedule II of the agreement and called upon the first respondent to repay the entire outstanding loan amount of Rs. 25 crores with interest. The petitioner made it clear that if the respondents failed to pay dues as demanded, dispute, differences and claims under the agreement shall be referred to sole arbitration of Mr. Bharat B. Jain. The first respondent failed to comply with the said notice dated 24th May, 2012. By e-mail dated 4th July, 2012, the petitioner rejected the request of the first respondent for extension of time limit for clearing the outstanding dues. By notice dated 3rd August, 2012, petitioner called upon the respondents to pay to the petitioner Rs. 25,02,61,250 towards the claim of the petitioner as of 20th July, 2012 with further overdue compensation @ 15% per annum from 21st July, 2012 till the date of payment and/or realisation. The respondents did not give

any reply to the said notice nor made any repayment to the petitioner.

11. By an ad interim order dated 3rd September, 2012, passed by S.J. Kathawalla, J., this court observed that prima facie, amounts were due and payable by the respondents to the petitioner. This court appointed court receiver for the purposes of making an inventory of the mortgaged property and directed to appoint the respondents as his agents but without security and royalty. By an order dated 14th September, 2012, this court directed the court receiver to take possession of the property at Mumbai on or before 18th September, 2012. By common order dated 6th November, 2012 in the aforesaid matters, this court observed that there was huge claim made by the petitioner in both these matters and the securities in favour of the petitioner were inadequate and, therefore, with a view to protect such huge claims, directed the respondents to maintain status quo in respect of investments in other entities as reflected in net worth certificate at page no. 98 of ARBP No. 1321/2012 and continued the ad interim order passed by this court earlier. According to the petitioner, they have to recover Rs. 25,02,61,350 with further interest @ 15% per annum on the said amount from 21st July, 2012 till payment in this petition.

12. Mr. Gaurav Joshi, the learned counsel appearing for the respondents in ARBP No. 1321/2012, submits that the petitioner in the said petition is seeking interim orders in respect to the immovable properties purportedly mortgaged in its favour by the respondents. It is submitted that enforcement of mortgage of immovable property is a claim which is not arbitrable in nature. It is submitted that petitioner cannot invoke arbitration agreement for enforcement of mortgage. The learned counsel placed reliance upon the provisions of Transfer of Property Act, 1882 read with Order 34 of the Code of Civil Procedure, 1908 ("CPC") relating to the procedure prescribed for adjudication of the mortgage suits, rights of the mortgagees and the mortgagors, the parties to a mortgage suit and the powers of the court adjudicating a mortgage suit. The learned counsel submits that such suits are intended to be decided by the public for a (courts) and cannot be decided by private fora (arbitral tribunals). The learned counsel submits that as the arbitrator cannot adjudicate upon a mortgage suit, reliefs sought by the petitioner by way of interim measures, which is in aid of the final relief, thus, also cannot be granted by this court u/s 9 of the Act. The learned counsel submits that before considering the grant of any interim measure u/s 9 of the Act, this court will have to first decide the issue as to whether an interim order can be passed in favour of the petitioner when the dispute between the parties is non-arbitrable. The learned counsel placed reliance upon the judgment of Supreme Court in case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and more particularly paragraph 19 in support of his plea that court has to decide the plea of jurisdiction/arbitrability of claim. Paragraph 19 (paragraph 18 of Arb. LR) of the said judgment reads thus (at pages 309-310 of Arb. LR):

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or

validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(1)(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum [See M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi,] When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication [See AIR 1948 12 (Privy Council)]

13. The learned counsel appearing for the respondents placed reliance upon the judgment of Supreme Court in case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, . Paragraphs 32 to 41 and 45 to 53 (paragraphs 20 to 25 and 26.3 to 30 of Arb. LR) of the said judgment read thus (at pages 173-175 and 177-180 of Arb. LR):

32. The nature and scope of issues arising for consideration in an application u/s 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application u/s 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application u/s 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of

"arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application u/s 34 of the Act, relying upon sub-section (2)(b)(i) of that section.

33. But where the issue of "arbitrability" arises in the context of an application u/s 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application u/s 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or tribunal.

34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:

(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter-claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

35. Arbitral tribunals are private for a chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public for a constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the

legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is in-arbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, u/s 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well recognised examples of non-arbitrable disputes are--(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. [Vide Black's Law Dictionary.]

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force".

40. Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007]:

Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal

purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an arbitral tribunal is empowered to give.

The subsequent edition of Russell [23rd Edition, Page 470, Para 8.043] merely observes that English Law does recognise that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England [2nd Edition 1989] have observed thus:

In practice, therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English Law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not..... Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the ratable value of land, a divorce decree, a winding-up order....

(Emphasis supplied)

Mustill and Boyd in their 2001 Companion Volume to the 2nd Edition of Commercial Arbitration, observe thus (page 73):

Many commentaries treat it as axiomatic that "real" rights, that is rights which are valid as against the whole world, cannot be the subject of private arbitration, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not.....An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless.

(Emphasis supplied)

45. In Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, this court held that grant of probate is a judgment in rem and is conclusive and binding not only on the parties but also the entire world; and therefore, courts alone will have exclusive jurisdiction to grant probate and an arbitral tribunal will not have jurisdiction even if consented by the parties to adjudicate upon the proof or validity of the Will.

46. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore, if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals.

47. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, 1908, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (Sections 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Sections 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security.

48. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (courts) and, therefore, impliedly barred from being referred to or decided by private fora (arbitral tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion.

48.1. Rule (1) of Order 34 provides that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right of redemption can, therefore, make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, cannot get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with likelihood of divergent results.

48.2. In passing a preliminary decree and final decree, the court adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption,

persons having an interest in the mortgaged property, auction purchasers, persons in possession. An arbitral tribunal will not be able to do so.

48.3. The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to mortgagor/defendant or other persons entitled to receive the same. An arbitral tribunal will not be able to do so.

48.4. Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Form Nos. 9, 10 and 11 of Appendix "D" to the Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit or any other party interested in the mortgage security or the right of redemption, pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an arbitral tribunal will not be able to do so.

48.5. The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time-to-time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, changes, expenses and interest, upon such terms as it deems fit. The arbitral tribunal will have no such power.

49. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.

50. The appellant contended that the suit ultimately raises the following core issues, which can be decided by a private forum--(i) Whether there is a valid

mortgage or charge in favour of SBI? (ii) What is the amount due to SBI? and (iii) Whether SBI could seek eviction of appellant from the flat, even if it is entitled to enforce the mortgage/charge? It was submitted that merely because mortgage suits involve passing of preliminary decrees and final decrees, they do not get excluded from arbitrable disputes. It is pointed out that the arbitral tribunals can also make interim awards deciding certain aspects of the disputes finally which can be equated to preliminary decrees granted by courts, and the final award made by the arbitrator, after detailed accounting, etc. could be compared to the final decree by courts. It is, therefore, contended that there is no impediment for the parties to mortgage suits being referred to arbitration u/s 8 of the Act.

51. If the three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 27(ii) above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-à-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided.

52. The following observations of this court in a somewhat different context, in *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, are relevant (at pages 47-48 of Arb. LR):

16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

53. Having regard to our finding on question (iv) it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal. Therefore we uphold the dismissal of the application u/s 8 of the Act, though for different reasons.

14. Relying upon the judgment of Supreme Court in case of *Booz Allen*, the learned counsel for the respondents submits that reliefs claimed in the petition filed u/s 9 are for protection of mortgaged properties and thus, in view of the

aforesaid judgment, rights claimed by the petitioner are rights in rem which can be decided only by a civil court and not by an arbitral forum and thus, no relief u/s 9 of the Act can be granted by this court.

15. Mr. Joshi, the learned counsel then submits that even notice of demand and invoking arbitration clause issued by the petitioner was also for enforcement of mortgage along with other claims. It is submitted that if part of the claim cannot be referred to arbitration and such claim cannot be segregated from other claims, no part of dispute can be referred to arbitration and the same can be decided only by a civil court. It is submitted that jurisdiction of this court invoked, is based on mortgage. It is submitted that if claim for enforcement of mortgaged properties is given up, this court will have no territorial jurisdiction as the instalments were payable at Hyderabad. Respondents are carrying on business at Hyderabad. No cause of action had arisen at Mumbai other than creation of mortgage. It is submitted that even by consent of parties, jurisdiction cannot be conferred on courts at Mumbai as no part of cause of action has arisen at Mumbai. It is submitted that present proceedings are filed at Mumbai in view of the fact that mortgage deed was executed at Mumbai.

16. Mr. Gaurav Joshi, the learned counsel then submits that once the claim for mortgage is given up, it ceases to be the subject matter of arbitration and thus, no relief u/s 9 can be granted against such mortgaged property. In such an event, petitioner would be treated as unsecured creditor. It is submitted that if mortgaged property is not a security in favour of the petitioner, petitioner cannot apply for any interim measure in respect of such property unless petitioner makes out a case that underlined principles under Order 38 Rule 5 of the Code of Civil Procedure, 1908 have been satisfied by the petitioner. The learned counsel submits that petitioner has not alleged that the respondent has disposed of any assets or that disposed of any assets with an intention to defeat the decree that might be passed in favour of the petitioner. It is submitted that no case is made out under Order 38 Rule 5 of the CPC, 1908. The learned counsel placed reliance upon the judgment of this court in case of *Nimbus Communications Limited Vs. Board of Control for Cricket in India* and another, and more particularly paragraphs 16 to 24 which read thus (at pages 125-131 of Arb. LR):

16. Section 9 of the Arbitration and Conciliation Act, 1996 enables a party to apply to the court either before or during the arbitral proceedings or at any time after the making of an award but before it is enforced in accordance with Section 36. Clause (ii) enables a party to seek an interim measure of protection in respect of the following matters:

(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,

and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

17. The provision enunciates that the court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Now it is in this background, that it would be necessary to consider the basic issue raised. The submission of the first respondent is that when a court passes an order providing for an interim measure of protection for securing the amount in dispute in arbitration, the power can be exercised only subject to the restrictions which are spelt out in Order 38 Rule 5 of the CPC 1908. Order 38 Rule 5 applies in a situation where at any stage of a suit, the court is satisfied that the defendant--(i) is about to dispose of the whole or part of his property; or (ii) is about to remove the whole or part of his property from the local limits of the jurisdiction of the court with intent to obstruct or delay the execution of any decree that may be passed against him. In such an event the court may direct the defendant either to furnish security in such sum as may be specified in the order, to produce the property and place it at the disposal of the court when required or the value of the same or such portion as may be sufficient to satisfy the decree. The exercise of the power under Rule 5 of Order 38 is thus conditioned by two requirements, the first being in regard to the conduct of the defendant, in that he is about to alienate his property or to remove it from the jurisdiction of the court and the second, the intention of the defendant to obstruct or delay the execution of a decree that may be passed against him. Parliament in the provisions of Section 9(ii)(b) contemplated an interim measure of protection to secure the amount in dispute in the arbitration. The object underlying the conferment of the power upon the court is to ensure that the fruits of an arbitral award which may eventually be passed against the defendant to the claim are not lost to the claimant by a dissipation of the property in the meantime. The issue as to whether the power which has been conferred on the court u/s 9 is hedged in by the specific provisions of the Code of Civil Procedure, 1908 came up before a Division Bench of this court initially in *National Shipping Company of Saudi Arabia Vs. Sentrans Industries Limited*, . The issue before the court was whether the power exercisable by the court u/s 9(ii)(b) of passing an interim measure for securing the amount in dispute in the arbitration was restricted by the conditions of attachment before judgment as prescribed under Order 38 Rule 5. Mr. Justice R.M. Lodha (as the learned judge then was)

speaking for the Division Bench held that as a principle of law a special provision of the nature embodied in Section 9(ii)(b) cannot be restricted by importing the provisions of Order 38 Rule 5. The Division Bench held that though the power u/s 9(ii)(b) has not been made subject to the stringent provisions of Order 38 Rule 5, the exercise of the power is guided by the paramount consideration that the claimant who obtains an award in his favour before the arbitrator ultimately is able to derive the fruits of the adjudication in executing the award. The Division Bench held as follows (para 10, pages 417-418 of Arb. LR):

The order u/s 9(ii)(b) is in the nature of interim protection order. In a special provision of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38 Rule 5 of the CPC as it is. The legislature while enacting Section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38 Rule 5 of the CPC as it is.

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The provisions of Order 38 Rule 5, CPC cannot be read into the said provision as it is nor can power of the court in passing an order of interim measure u/s 9(ii)(b) be made subject to the stringent provision of Order 38 Rule 5. The power of the court in passing the protection order to secure the amount in dispute in the arbitration before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of CPC but has to be exercised *ex debito justitiae* and in the interest of justice. The court while considering the application for interim protection u/s 9(ii)(b) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order contemplated u/s 9(ii)(b) is granted by the court to protect the interest of the party seeking such order until the rights are finally adjudicated by the arbitral tribunal and to ensure that the award passed by arbitral tribunal is capable of enforcement. Though the power given to the court u/s 9(ii)(b) is very wide and is not in anyway controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the arbitral tribunal may not be able to execute the award. The obstructive conduct of the opposite party may be one of the relevant considerations for the court to consider the application u/s 9(ii)(b). The party seeking protection order u/s 9(ii)(b) ordinarily must place some material before the court, besides the merits of the claim, that order u/s 9(ii)(b) is eminently needed to be passed as

there is likelihood of an attempt to defeat the award, though as indicated above, the provisions of Order 38 Rule 5, CPC are not required to be satisfied. The statutory discretion given to the court u/s 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief u/s 9(ii)(b) and we hold that the provisions of Order 38 Rule 5 of the CPC cannot be read as it is and imported in Section 9 of the Act of 1996. We also hold without hesitation that the court is competent to pass an appropriate protection order of interim measure as provided u/s 9(ii)(b) outside the provisions of Order 38 Rule 5, Code of Civil Procedure. Each case u/s 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience.

18. In a subsequent decision of the Supreme Court in *Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others*, the Supreme Court held that the power u/s 9 cannot be read as independent of the Specific Relief Act and it could not be contended that the restrictions placed by the Specific Relief Act cannot control the exercise of the power u/s 9. The court observed that while entertaining an application u/s 9, the court must have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Consequently, the general rules that govern the court while considering the grant of an interim injunction at the threshold would be attracted even while dealing with an application u/s 9. The court also noted the principle that when a power is conferred under a special statute and is conferred on an ordinary court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure would apply. The Supreme Court adverted to the position which was inter alia taken by the Division Bench of this court that the power u/s 9 is not controlled by Order 38 Rule 5 of the Code of Civil Procedure, 1908, but left it open to be determined in an appropriate case.

19. In the decision of the Supreme Court in *Adhunik Steels* the respondent had obtained a mining lease from the State Government of Orissa and had an agreement with the appellant for raising manganese ore on its behalf. The term of the agreement was ten years with an option to renew. The respondent issued a notice of termination calling upon the appellant to remove itself from the site contending that its contract was in violation of the Mineral Concession Rules, 1960. The appellant thereupon moved the District Court u/s 9 for an injunction restraining the respondent from terminating the contract and from dispossessing it at site. The District Court allowed the application u/s 9. The High Court in appeal upheld the contention of the respondent that the loss if any that may be sustained by the appellant could be calculated in monetary terms and that in view of Section 14(3)(c) of the Specific Relief Act, an injunction could not be granted. In that view of the matter, the High Court did not consider it fit to enquire into the issue of the balance of convenience. Before the Supreme Court it was urged on behalf of the appellant that Section 9 was independent of Order 39 of the Code of Civil Procedure, 1908 and the exercise of the power was not

subject to the provisions contained in the Specific Relief Act. The Supreme Court dealt with the submission in the following terms (para 10, pages 364-365 of SCACTC=page 71 of Arb. LR):

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 dehors 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.

20. The Supreme Court noted that the power to grant injunction by way of specific relief is covered by the Specific Relief Act, 1963, injunction being a form of specific relief. Section 9, the Supreme Court noted, does not contain any special condition nor does it provide for a special procedure. The court noted that whether an interim measure should be ordered permitting the appellant to carry on mining operations in the face of an attempted termination of the contract would lead the court to a consideration of the classical rules for the grant of such an interim measure. This, it was held, had to be considered based on the well settled principles in that behalf. Consequently the Supreme Court held as follows (para 18, page 368 of SCACTC=page 75 of Arb. LR):

Therefore, on the whole, we feel that it would not be correct to say that the power u/s 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection.

21. The Supreme Court directed that while the respondent should not enter into a contract for mining and lifting of minerals with any other entity until conclusion of the arbitral proceedings, there was no justification in preventing it from carrying on the mining operations by itself.

22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since Section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the court would apply. Consequently, where an injunction is sought u/s 9 the power of the court to grant that injunction cannot be exercised independent of the principles which

have been laid down to govern the grant of interim injunctions particularly in the context of the Special Relief Act 1963. The court, consequently, would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9 specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii), the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the court that the defendant is about to alienate the property or remove it beyond the limits of the court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in *Arvind Constructions* and *Adhunik Steels*, it would not be possible to subscribe to the position that the power to grant an interim measure of protection u/s 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure, 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of Section 9 under which it has been specified that the court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. This has been interpreted in both the judgments to mean that the normal rules that govern the court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this court in *National Shipping Company* notes that though the power u/s 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this court that the exercise of power u/s 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure, 1908 cannot stand in view of the decision of the Supreme Court in *Adhunik Steels*.

23. In a recent judgment of a learned Single Judge of the Delhi High Court in

Steel Authority of India Ltd Vs. AMCI Pty Ltd. and Another, , the judgment of the Division Bench of this court in National Shipping Company was relied upon. The Delhi High Court observed that the provisions of Order 38 Rule 5 would serve as a guiding principle for the exercise of the jurisdiction while dealing with a petition u/s 9 requiring the respondent to furnish security and the basic consideration is that the court should be satisfied that the furnishing of security is essential to safeguard the interest of the petitioner.

24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the court held that the basic principles governing the grant of interim injunction would stand attracted to a petition u/s 9, the court was of the view that the power u/s 9 is not totally independent of those principles. In other words, the power which is exercised by the court u/s 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure, 1908. The exercise of the power u/s 9 cannot be totally independent of those principles. At the same time, the court when it decides a petition u/s 9 must have due regard to the underlying purpose of the conferment of the power upon the court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power u/s 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908, the rigors of every procedural provision in the Code of Civil Procedure, 1908 cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory remedies must furnish a guide to the court when it determines an application u/s 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5, therefore, has to be borne in mind while deciding an application u/s 9(ii)(b).

17. The respondents also placed reliance upon the judgment of Supreme Court in case of Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, , paragraphs 4 to 6 of which read thus:

4. The object of supplementary proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5, CPC in particular, is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The scheme of Order 38 and the use of the words "to obstruct or delay the execution of any decree that may be passed against him" in Rule 5 make it clear that before exercising the power under the said rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint

and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5, CPC. It is well settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5, CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or is about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 3, CPC. Courts should also keep in view the principles relating to grant of attachment before judgment [See Premraj Mundra Vs. Md. Maneck Gazi and Others, , for a clear summary of the principles.]

18. The next submission of Mr. Joshi; the learned counsel appearing for respondent, is that if the petitioner gives up the claim in respect of mortgaged properties and such claim is not the subject matter of the dispute in arbitration, in view of Section 9(ii)(c) of the Act, petitioner is not entitled to apply for any interim measures in respect of such mortgaged properties.

19. Mr. Vaibhav Sugdhare, the learned counsel appearing for the respondents in ARBP No. 1095 of 2012, adopts the legal submissions made by Mr. Gaurav Joshi, the learned counsel appearing for respondents in ARBP No. 1321 of 2012. In addition to such submissions, the learned counsel placed reliance upon the judgment of Supreme Court in case of Dr. B. Singh Vs. Union of India (UOI) and Others, in support of the plea that the entire case of the petitioner for interim measures is based on newspaper reports and in view of Section 81 of the

Evidence Act, 1872, newspaper reports per se do not constitute legally acceptable evidence. The learned counsel placed reliance upon paragraph 3 of the said judgment which reads thus:

3. Before we go into the desirability of even entertaining such a petition, background in which the petition has been filed needs to be noticed.

According to the petitioner, as reflected in the petition, basis of the petition is a copy of the representation purported to have been received from one Ram Sarup which was addressed to the President of India with copies to the Chief Justice of India, Ministry of Law and Justice, Chief Justice of Punjab and Haryana High Court, Governor of Haryana and Bar Council of India wherein allegations were made against respondent no. 3. Only on the basis of what is stated therein of which apparently the petitioner himself cannot legitimately claim to have any personal knowledge the petitioner filed a writ petition before the Punjab and Haryana High Court which was dismissed. The petitioner makes a grievance that aforesaid Ram Sarup had received acknowledgement of the representation addressed to the President of India wherein it was also noted that the same had been forwarded to the Secretary to the Government of India, Ministry of Law, Justice and Company Affairs (Department of Legal Affairs) for appropriate action. But no action was taken to look into the allegations. It is not clear from the writ petition as to whether the petitioner had sent any representation to the President and other constitutional functionaries as the enclosures to the writ petition show that aforesaid Ram Sarup had sent representations to the President with copies to the other functionaries. The copy of the representation dated 18.10.2003 shows that it was sent by Ram Sarup. The second representation is dated 13.12.2003 in which reference has been made to a representation purported to be dated 28.11.2003. In the representation dated 13.12.2003 reference is made to the acknowledgement dated 12.11.2003. This creates an impression that the acknowledgement dated 12.11.2003, of the President's Secretariat relates to the representations sent by Ram Sarup. But the copy of purported acknowledgement filed as Annexure P2 shows as if it was sent by the petitioner. No copy of any representation dated 28.10.2003 as indicated in Annexure P2 has been filed along with the petition. The petitioner nowhere has stated that he has any personal knowledge of the allegations made against respondent no. 3. He does not even aver that he made any effort to find out whether the allegations have any basis. He only refers to the representation of Ram Sarup and some paper cuttings of news items. He has not indicated as to whether he was aware of the authenticity or otherwise of the news items". It is too much to attribute authenticity or credibility to any information or fact merely because, it found publication in a newspaper or journal or magazine or any other form of communication, as though it is gospel truth. It needs no reiteration that newspaper reports per se do not constitute legally acceptable evidence. Strangely, in the affidavit accompanying the writ petition he has stated as follows:

That I have read over the contents of accompanying writ petition pages 1 to 13,

para nos. 1 to 18, synopsis and list of dates, pages A to C and I say that the same are true and correct on knowledge and based on the record of the case.

The affidavit shows that the contents were true and correct to his knowledge and based on records. Strangely, it has not been indicated as to what is the source of his knowledge and are based on what records. Even the copy of the order passed by the Punjab and Haryana High Court where he filed writ application on allegedly identical issues, as indicated in the petition, has been annexed. The casual and cavalier fashion it appears to have been handled and of late attempted to be made ipse dixit, in a laconic and lackadaisical manner compels to draw the only inference that the petitioner is a busy body bent upon self publicity sans any sense of responsibility unmindful of the adverse impact, at times it may go to create at the expense of decency and dignity of constitutional offices and functionaries and there is no element or even trace of public interest involved in the petition.

20. Mr. Virag Tulzapurkar, the learned senior counsel appearing on behalf of the petitioner in ARBP No. 1321/2012, submits that the present proceedings filed by the petitioner are for interim measures u/s 9 of the Act. Petitioner has not so far filed any statement of claim before the arbitral tribunal. The learned senior counsel submits that it is always open to the petitioner to make a claim either for enforcement of mortgage or for recovery of money simpliciter based on other securities furnished by the respondents. It is submitted that the respondents have presumed that the petitioner would file a claim for enforcement of mortgage before the arbitral tribunal. It is submitted that as statement of claim, which would be filed by the petitioner at appropriate stage before the arbitral tribunal, is not before this court, court cannot refuse to grant interim reliefs based on presumption of the respondents that petitioner would apply for enforcement of mortgage against the respondents before the arbitral tribunal. The learned senior counsel invited my attention to paragraph 12 of the judgment of Supreme Court in case of Booz Allen to demonstrate that the Supreme Court was considering the scope of Section 8 of the Act made in a pending suit. Paragraph 12 (paragraph 7 of Arb. LR) of the said judgment extracts the reliefs claimed in suit filed in the Bombay High Court, which reads thus (at page 168 of Arb. LR):

12. As the loan amount due by RV Appliances was not repaid, SBI filed a mortgage suit (Suit No. 6397/1999) in the High Court of Bombay on 28.10.1999 against Capstone (first defendant), appellant (second defendant) and RV Appliances (defendant no. 3) in regard to the mortgaged property (Flat No. 9A) for the following reliefs:

(a) for a declaration that the 1st Defendant as mortgagor was due in a sum of Rs. 8,46,10,731 with further interest on the principal sum at the rate of 16.5% per annum and additional interest for delayed payment at the rate of 2% per month from 1st September, 1999 till payment or realisation;

(b) for a declaration that the amount and interest mentioned in Prayer (a) above is secured in favour of the plaintiffs by a valid and subsisting mortgage of Flat No. 9A and three garages (suit premises);

(c) for a direction to the first defendant to pay to the plaintiff the amount and interest in Prayer (a) by such date as may be fixed by the court for redemption of the mortgage and in the event of the first defendant failing to make payment by that date, the suit premises be sold by and under the orders and directions of the court in enforcement and realisation of the mortgage thereon and the net realisation thereof be paid over to the plaintiff in or towards satisfaction of its claim herein;

(d) for a personal decree against the first defendant to the extent of any deficiency in sale realisation;

(e) that the second defendant be ordered to vacate the suit premises and hand over possession thereof to the plaintiff to enable the plaintiff effectively to enforce and realise its security thereon.

21. The learned senior counsel submits that in the said suit, the plaintiff had asked for a declaration that the first defendant as mortgagor was liable to pay various amounts and had applied for a declaration that the said amount was secured by a valid and subsisting mortgage and the plaintiff had also applied for a direction against the defendant for redemption of the mortgage and or an order and direction to vacate the mortgaged premises and to hand over possession thereof to the plaintiff to enable the plaintiff to effectively enforce and realise its security thereon. The learned senior counsel placed reliance on paragraphs 33 to 38 of the said judgment and submitted that when an application u/s 8 is made in a pending suit before the court, such court which is seized of the suit has to decide all aspects of arbitrability and the same cannot be left to the decision of the arbitrator. In that context, it has been held by the Supreme Court that if the subject matter of the suit is capable of adjudication only by a public fora or the relief claimed can only be granted by a special court or tribunal, such court would refuse an application u/s 8 to refer the parties to arbitration. The learned senior counsel submits that the petitioner would not claim for enforcement of mortgaged properties in arbitration. It is submitted that money claim thus, would not be a claim in rem but would be an action in personam which has to be a subject matter of arbitration. The learned senior counsel placed reliance on paragraph 38 of the said judgment and submits that all disputes relating to rights in personam are considered to be amenable to arbitration. The learned senior counsel then submits that a mortgage suit for sale of mortgage property is an action in rem and a suit of mortgage is not a mere suit for money. The learned senior counsel placed reliance upon paragraph 48.1 to paragraph 48.5 of the said judgment and submits that under Order 34 Rule 1 of the CPC, all persons having an interest either in the mortgage security or in the right of redemption, shall be joined as parties to any suit relating to the mortgage, so as to avoid any multiplicity of the suits and if such dispute is referred to arbitration,

all such third parties having an interest in the mortgaged property or right of redemption, cannot get themselves to be impleaded as a party to the arbitration proceedings, nor get their claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration. It is further submitted that this situation would not arise in the facts of this case, as the petitioner would not file claim for enforcement of mortgage. The learned senior counsel placed reliance upon Order 34 Rule 14 of the CPC which reads as under:

14. Suit for sale necessary for bringing mortgaged property to sale--(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order 2 Rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended.

22. The learned senior counsel submits that there is no bar in filing money claim under Order 34 Rule 14 arising under mortgage. The only condition provided under Rule 14 is that the mortgagee shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order 2 Rule 2. The learned senior counsel submits that only if money decree is not satisfied, petitioner cannot bring in the mortgaged property to sell otherwise than by instituting a suit for sale in enforcement of mortgage.

23. The learned senior counsel submits that under Order 21 of the CPC, execution can be against other properties. The learned senior counsel placed reliance upon paragraphs 34 and 36 of the judgment in support of this submission. The learned senior counsel then submits that even if any claim is made by the claimant for enforcement of mortgage before the arbitral tribunal, it is always open to the claimant to withdraw that claim voluntarily or on an objection, if any, raised by the opponent u/s 16 of the Act. It is submitted that money claim does not come under the purview of judgment of Supreme Court in case of *Booz Allen*.

Submissions of the Petitioners on Interim Measures as Prayed

24. Mr. Tulzapurkar, the learned senior counsel then submits that u/s 9(ii)(b) of the Act, the petitioner is entitled to apply for reliefs securing the amount in dispute in the arbitration irrespective of the property having been mortgaged in favour of the petitioner by the respondent. The learned senior counsel placed reliance upon Section 9(ii)(d) and (e) of the Act in support of his plea that petitioner is entitled to apply for interim injunction or appointment of receiver or such other interim measures or protection as may appear to the court to be just and convenient even if such properties are not subject matter of the dispute in arbitration. It is submitted that for the purposes of interim relief u/s 9(ii)(d) and

(e), it is not necessary that such properties shall be subject matter of dispute in arbitration. It is thus, submitted that even if it is assumed that there is no claim for enforcement of mortgage in arbitration proceedings, u/s 9(ii)(d) and (e), petitioner would be entitled to apply for interim injunction or appointment of receiver of such properties which may include the property mortgaged in favour of the petitioner.

25. Insofar as issue of territorial jurisdiction raised by the respondents in respect of ARBP No. 1321/2012 is concerned, the learned senior counsel submits that disbursement of loan amount to the respondents has been made by the petitioner at Mumbai. The loan agreement was executed by the respondent in Mumbai. Both the parties have agreed under the said agreement that in respect of all matters, courts at Mumbai shall have exclusive jurisdiction. It is submitted that thus, in view of the fact that material part of cause of action has arisen in Mumbai and in view of the agreement conferring the jurisdiction on court at Mumbai, this court has jurisdiction to entertain and dispose of the present petition u/s 9 of the Act. Merely because the mortgaged property is situated at Hyderabad, is of no significance.

26. The learned counsel placed reliance upon Order 2 Rule 2(1) and (2) of CPC and submits that petitioner may relinquish his claim for enforcement of mortgage with leave of court and may file a separate suit after obtaining such leave. This court, therefore, cannot refuse to grant interim measures only on ground that petitioner has sought reliefs in respect of mortgaged properties in the present petition. It is submitted that relinquishment of claim is a choice of petitioner subject to provisions of Order 2 Rule 2 of CPC. It is submitted that notice of demand made by the petitioner calling upon the respondent to redeem the mortgage, cannot be considered as statement of claim before the arbitrator. The petitioner may give up part of claim before the arbitrator.

27. Ms. Shakuntala Joshi, the learned counsel appearing on behalf of the petitioner in ARBP No. 1095/2012, adopts the legal submissions made by Mr. Tulzapurkar, the learned senior counsel appearing for the petitioner in ARBP No. 1321/2012 and further submits that petitioner in that case will also press for a money claim before the arbitral tribunal if so advised and would apply for appropriate amendment before the arbitral tribunal and thus, no interim measures can be refused by this court based on the submissions made by the respondents that there could not be any split of claim and the entire demand notice and the petition filed u/s 9 was on the premise that the same was for enforcement of mortgaged properties. The learned counsel submits that in addition to the property mortgaged in favour of the petitioner, the respondents have also executed promissory note and the second respondent has given personal guarantee in favour of the petitioner. Petitioner can always apply for enforcement of such security which are not in the nature of mortgage. The learned counsel invited my attention to Prayer Clause (f) of the petition by which, the petitioner prayed for direction against the respondents to furnish the

security of whatsoever nature to secure the claim of the petitioner. The learned counsel submits that such relief cannot be refused on the ground that petitioner has also applied for appointment of court receiver in respect of the mortgaged property or that in the notice of demand, the petitioner had called upon the respondents to redeem the mortgage.

28. Insofar as issue of jurisdiction raised by the respondents in ARBP No. 1095/2012 is concerned, the learned counsel submits that the promissory note was executed at Mumbai, payment was demanded from Mumbai, payment under promissory note was to be made at Mumbai, both the parties had agreed in the agreement that dispute, if any, between the parties would be subject to the exclusive jurisdiction of the court at Mumbai. It is submitted that as material part of cause of action between the parties has arisen in the jurisdiction of this court, this court only has jurisdiction to try and dispose of this petition.

29. Mr. Tulzapurkar, the learned senior counsel appearing for the petitioner in ARBP No. 1321/2012 submits that as the respondents committed default, the petitioner had issued notice on 3rd August, 2012 calling upon the respondents to cure the material adverse effect. The said notice dated 3rd August, 2012 was followed by notice dated 17th August, 2012 by which respondents were called upon to pay Rs. 100 crores and odd due and payable as on 10th August, 2012 with further additional interest. There was no response to the said notice by the respondents till the present petition was filed by the petitioner. Even in the reply given by the respondents, which was received by the petitioner on 31st August, 2012, the respondents requested the petitioner to continue with the terms of agreement without recalling the loan facility and agreed to honour the commitments as agreed. The respondents though informed the petitioner that all outstanding amounts will be paid according to agreed terms, did not pay any amount. The learned senior counsel submits that in the said reply it was admitted that due to global recession and economic slowdown, the inflow of commercial advertisement revenue got hampered and the revenues fell drastically. It was the case of the respondents that the respondents had not defaulted to that extent which warranted issuance of the subject notice. The respondents informed that they were in process of strategic transaction which shall significantly mitigate the present risk profile of the respondents and would get a permanent resolution and thus, petitioner should not initiate precipitate action at that stage, which will be value destroyer for one and all.

30. The learned senior counsel invited my attention to the affidavit-in-reply filed by the respondents in which, respondents have simpliciter alleged that the claim amount of Rs. 101 crores was incorrect and such allegation was totally vague and false. It is also contended by the respondents that as the court receiver is already appointed in respect of the properties and an injunction order has already been passed by this court, apprehension of the petitioner is baseless. In paragraph 21 of the said affidavit, it is alleged by the respondents that the first respondent was in process of restructuring its outstanding to various banks and

financial institutions. The respondents also pleaded that there is already an injunction against the respondents from withdrawing any amount in cash in the aggregate of Rs. 5 crores from the bank accounts. The learned counsel invited my attention to paragraph 25 of the said affidavit in which, it is pleaded by the respondents that four bank accounts of the first respondent are already attached. The respondents have admitted that they have other creditors too and the respondents need some means available to them to discharge the dues of such other creditors and to deprive them of such rights, would be highly oppressive and unwarranted. The learned counsel also invited my attention to the averments made in the petition and more particularly paragraphs 9, 12, 13, 16, 17, 18 and 19 of the petition in support of the plea that the petitioner has not only pleaded, but has made out a case that the respondents would create third party rights in respect of the said properties in view of large number of creditors and liability of the respondents may be more than Rs. 3000 crores from the multiple lenders. The learned counsel submits that these facts narrated in various paragraphs in petition, are not disputed in affidavit-in-reply. The learned counsel submits that thus, the petitioner has satisfied the principles of Order 38 Rule 5 of CPC, which are applicable to the application u/s 9 of the Act. Thus, the petitioner deserves to be granted interim relief independently in this petition, so as to secure claim of the petitioner.

31. Ms. Shakuntala Joshi, the learned counsel appearing for the petitioner in ARBP No. 1095/2012 also invited my attention to various paragraphs in the petition and more particularly paragraphs 11 to 18, 20, 23 and 25 of the petition in support of the plea that petitioner has made out a case of attachment before the judgment and other interim measures in this case. The learned counsel has also invited my attention to the notice of demand issued by the petitioner on 3rd August, 2012 to which, there was no response from the respondents. The learned counsel also invited my attention to affidavit-in-reply dated 28th December, 2012 filed by the respondents which does not raise any dispute in respect of the huge claim of the petitioner. It is submitted that this court, after hearing both the parties, have granted ad interim reliefs in favour of the petitioner which are not challenged by the respondents. It is submitted that the petitioner, thus, deserves to be granted further reliefs as prayed for in the petition.

Reasonings

32. Supreme Court in *Booz Allen* has held that when in an application filed u/s 8 of the Act, issue of arbitrability arises, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. The Supreme Court held that a mortgage is a transfer of a right in rem and a mortgage suit for sale of the mortgaged property is an action in rem for enforcement of a right in rem. It is also held that suit for mortgage is not a suit for money. As suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral

tribunals. Supreme Court, however, after considering Order 34 of CPC held that rights of mortgagees and mortgagors in a mortgage suit are intended to be decided by public fora and, therefore, impliedly barred from being referred to or decided by private fora, i.e. arbitral tribunals. Supreme Court held that while deciding a mortgage suit, court decides and adjudicates not only the interest of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction purchasers, persons in possession and an arbitral tribunal will not be able to do so.

33. On perusal of judgment of Supreme Court in case of Booz Allen, it is clear that Supreme Court, after considering the prayers in the plaint in a mortgage suit, has held that as the suit was for enforcement of mortgage and was a suit in rem, issue of arbitrability having been raised by the defendant in such suit in the application filed u/s 8 of the Act, such issue of arbitrability has to be decided by the court hearing the suit and cannot be left to be decided by the arbitral tribunal. Question, however, which arises for consideration of this court in the present proceedings is whether in an application u/s 9 of the Act while deciding a relief in the nature of interim measures and in the absence of the plaint before this court, whether this court shall decide the issue of arbitrability of the claims which are not even before this court and on that ground, dismiss the application u/s 9 for interim measures?

It is not in dispute that the petitioner has not filed any statement of claim before the arbitral tribunal seeking any enforcement of the mortgaged property under deeds of mortgage insofar as ARBP No. 1321 of 2012 is concerned. The learned counsel appearing for the petitioners in both the matters submit that considering the law laid down by the Supreme Court in case of Booz Allen, petitioners would not apply for enforcement of mortgage in the arbitration proceedings and on this ground, this court cannot reject the present application u/s 9 on the presumption that even in the arbitration proceedings, the petitioner would apply for enforcement of mortgage and which would be beyond the jurisdiction of the arbitral tribunal. On perusal of the Supreme Court judgment in case of Booz Allen, in my view, it is clear that if the plaint and/or statement of claim before the arbitral tribunal is not before the court while hearing application u/s 9 of the Act, court cannot reject the application for interim measures on the ground that the petitioner may ultimately apply for enforcement of mortgage which would be beyond the jurisdiction of the arbitral tribunal. In my view, it is for the petitioner to decide what claims the petitioner would make before the arbitral tribunal. If the petitioner chooses not to apply for enforcement of mortgage and files a simpliciter suit for recovery of money or for enforcement of any other properties which were not mortgaged by the respondents in favour of the petitioner, such proceedings would be the proceedings in personam and not in rem which obviously would be within the jurisdiction of the arbitral tribunal to adjudicate upon. In my view, even if any such relief by way of enforcement of mortgage is claimed before the arbitral tribunal, petitioner would always have liberty to

decide whether to withdraw such claims and/or seek amendment for moulding its reliefs, which would be within the jurisdiction of the arbitral tribunal. In my view, if any such reliefs are claimed which are beyond the jurisdiction of the arbitral tribunal and cannot be adjudicated upon, mechanism u/s 16 is provided by the legislature to raise issue of jurisdiction by the respondents before the arbitral tribunal. On hearing such application u/s 16, an arbitral tribunal can always decide whether any of the claims made by the claimants were within its jurisdiction to adjudicate upon. In my view, proceedings u/s 9 filed in this court by the petitioner for interim measures, cannot be equated with the proceedings filed in a pending suit for referring the parties to arbitration u/s 8 of the Act of 1996. Thus, in my view, reliance placed by the respondents on the judgment of Supreme Court in case of Booz Allen is of no assistance to the respondents while opposing application u/s 9 of the Act of 1996.

34. Perusal of Order 34 Rule 1 of the CPC, 1908 provides that all persons, having an interest either in the mortgaged security or in the right of redemption, shall be joined as party to any suit relating to mortgage so as to avoid any multiplicity of the suits. I am inclined to accept the submission of Mr. Tulzapurkar, the learned senior counsel that that situation would not arise in the facts of this petition, as the petitioner would not file a claim for enforcement of mortgage.

35. Perusal of Order 34 Rule 14 of the CPC, 1908 clearly indicates that there is no bar in filing money claim even by a mortgagee notwithstanding anything contained in Order 2 Rule 2. The said provision indicates that a mortgagee shall not be entitled to bring the mortgaged property to sell otherwise than by instituting a suit for sale. In the event of the claimant not satisfied with the money decree, he cannot bring the mortgaged property to sell otherwise than by instituting a suit for sale of mortgaged properties. In my view, it is for the petitioner/claimant to decide whether to file a money claim before the arbitral tribunal and file a separate suit for enforcement of mortgage after complying with the provisions of Order 2 Rule 2.

36. I am not inclined to accept the submission made by Mr. Gaurav Joshi and Mr. Vaibhav Sugdhare appearing for the respondents that in the notice of demand issued by the petitioners, there was demand for enforcement of mortgaged properties or that there were various averments in the application, which indicate that the petitioner had proposed to apply for enforcement of mortgage before the arbitral tribunal and thus, no interim measures can be granted by this court u/s 9. In my view, a party, who is praying for larger relief, can withdraw such relief and/or mould it and apply for smaller reliefs. Even court can mould and/or grant smaller relief though larger reliefs are claimed by a party before it. In my view, court or arbitrator/cannot reject the entire petition merely because part of the larger relief claimed by the petitioner cannot be granted for want of jurisdiction, when other part is not outside the jurisdiction of the court or arbitrator.

37. The next question raised by the respondents is about territorial jurisdiction of this court to entertain the present petition on the ground that mortgaged

properties are situated outside the territorial jurisdiction of this court and as claim for enforcement for mortgage is not pressed by the petitioner, and the fact that the respondents are carrying on business at Hyderabad, this court has no jurisdiction to entertain, try and dispose of the present petition in view of Section 2(1)(e) of the Act of 1996.

38. On perusal of the documents annexed by the petitioner in both the petitions and the averments made in the petitions, it is clear that the loan was advanced from Mumbai, payments of some of the instalments were made by the respondents to the petitioner at Mumbai, promissory notes were executed at Mumbai. Material cause of action, thus, has arisen within the jurisdiction of this court. In my view, this court has thus, jurisdiction to entertain, try and dispose of the present petitions. I am not inclined to accept the submission made by the respondents that if relief in respect of enforcement of mortgage is not pressed, in respect of remaining reliefs, this court does not have jurisdiction to consider such reliefs.

39. The next issue raised by the respondents is that the petitioners have not made out any case for grant of reliefs as claimed in the petitions which are in the nature of attachment before judgment akin to the principles of Order 38 Rule 5 of the CPC of 1908 in the facts of this case. As the petitioners do not press for reliefs for enforcement of mortgaged properties, no reliefs as claimed in the petitions for appointment of court Receiver and also injunction in respect of such properties, be granted u/s 9.

40. On reading of Section 9 of the Arbitration and Conciliation Act, 1996, it is clear that the court can grant interim measures u/s 9(ii)(b), (d) and (e) even if the property or things are not subject matter of the dispute in arbitration. It is clear that for granting interim measures or protection, the court would not have power to grant such interim measures, if it is for preservation, interim custody or sale of any goods, the detention, preservation or inspection of any property or thing 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 unless such goods or property are subject matter of arbitration. I am, thus, not inclined to accept the submission of the respondents that if the petitioner gives up its claim for enforcement of mortgaged properties, no interim measures can be granted u/s 9 by this court for recovery of money claim simpliciter.

41. The Division Bench of this court in the case of Nimbus Communications, after advertent to the judgments of the Supreme Court and the judgment of the Division Bench of this court, has held that the principles laid down in the Code of Civil Procedure, 1908 for grant of interlocutory remedies must furnish guide to the court when it determines the application u/s 9 of the Arbitration and Conciliation Act, 1996 and underlying basis of Order 38 Rule 5 thereof has to be borne in mind while deciding application u/s 9(ii)(b).

42. The question that arises for consideration of this court in these petitions is whether the petitioners have made out a case for appointment of the court receiver and in any event, for attachment before judgment, applying the principles of Order 38 Rule 5 of the Code of Civil Procedure.

43. As far as ARBP No. 1321 of 2012 is concerned, the record produced by both the parties indicates that in view of the default committed by the respondents, notice dated 3rd August, 2012 was issued by the petitioner calling upon the respondents to cure the material adverse effect and the said notice was followed by notice dated 17th August, 2012, by which the respondents were called upon to pay Rs. 100 crores plus interest. There was no response to the said notices till the said petition was filed by the petitioner. The respondents gave evasive reply to the said notices after filing of this petition and requested the petitioner to continue with the terms of agreement without recalling the loan facility and agreed to honour the commitments as agreed: The respondents, however, contended that it was due to global recession and economic slowdown that the inflow of commercial advertisement revenue got hampered and the revenues fell drastically, which was a temporary phenomena. The respondents informed that they were in process of a strategic transaction which shall significantly mitigate the present risk profile of the respondents and would get permanent resolution. The respondents requested the petitioner not to initiate precipitate action at that stage. Even in the affidavit-in-reply filed by the respondents, there is no specific denial to the claims made by the petitioner. The respondents have vaguely alleged that claim made of Rs. 101 crores was not correct. The respondents submitted that it was in the process of restructuring its outstandings to various banks and financial institutions. The respondents admitted that four bank accounts of the respondents have been already attached and that there were other creditors also for whom, the respondents need some means available to them to discharge the dues of such other creditors. The stand taken by the respondents is that this court has already appointed receiver in respect of the assets of the respondents and, therefore, the petitioner, was fully protected.

Perusal of the averments in the petition and more particularly in paragraphs 9, 12, 13, 16 to 19 indicated that the petitioner has placed on record sufficient material, which indicated that the financial condition of the respondents is in very bad shape and the respondents were proposing to take steps to sell their assets so as to deprive the petitioner of recovery of its legitimate dues. The petitioner has pleaded that there are large number of creditors and liabilities to the respondents which may be more than Rs. 3000 crores with multiple lenders, which averment is not disputed by the respondents in the affidavit-in-reply. The petitioner has also pleaded that there are several proceedings pending, including winding up proceedings against the respondents. Perusal of record, thus, indicates that the respondents were about to alienate their properties which are required to be protected. In my view, the petitioner has made out a case for attachment before judgment and satisfies the principles of Order 38 Rule 5 in this case and deserves to be granted interim measures.

44. As far as ARBP No. 1095 of 2012 is concerned, the respondents have not replied to the legal notice issued by the petitioner. Even in the affidavit-in-reply, there is vague denial of the claim. This court has already appointed ad interim receiver in respect of the assets of the respondents. Perusal of paragraphs 11 to 18, 20, 23 and 25 of the petition, in my view, makes out the case for attachment before the judgment and for grant of interim measures. The respondents have not disputed the huge claim of the petitioner against the respondents. Considering this fact, this court has already granted ad interim relief which has not been impugned by the respondents by filing any appeal. In my view, the petitioner in that arbitration petition also is entitled to reliefs as claimed and satisfies the criteria laid down by the Division Bench of this court in the case of Nimbus Communications.

45. As far as submissions made by the respondents in ARBP No. 1321 of 2012 that the entire proceedings filed by the petitioner are based on newspaper reports, which are not conclusive and no reliance thereon can be placed is concerned, in my view, the record indicates that the proceedings are not filed on the basis of any newspaper reports, but are filed independently and such averments are not disputed by the respondents. *For the reasons recorded aforesaid, I pass the following order:

Arbitration Petition No. 1321 of 2012

(a) Respondent no. 1 is directed to furnish security in favour of the petitioner in the sum of Rs. 101,71,03,644 as on 23rd August, 2012 with further interest at the rate of 3% p.a. over and above the agreed rate from 24th August, 2012 and other expenses, costs and charges, etc. to the satisfaction of the Court Receiver, High Court, Bombay, within four weeks from today, failing which,

(b) the Court Receiver, High Court, Bombay is appointed as Receiver of the properties described in Exhibit P and assets/properties described in Exhibit Q to the petition, with a direction to appoint respondents as agents of the court receiver on usual terms and conditions and on payment of royalty and security. Till the court receiver takes possession of the properties described in Exhibit P and Exhibit Q, there shall be injunction in respect of the properties described in Exhibit P and Exhibit Q against respondent nos. 1 and 2, their employees: servants and agents in terms of Prayer Clauses (b) and (d).

(c) There shall be attachment of the bank accounts in terms of Prayer Clause (f) and injunction in terms of Prayer Clause (g): The aforesaid interim orders as well as ad interim order granted on 6th November, 2012 shall continue till disposal of the arbitration proceedings and for the period of four weeks thereafter.

(d) The respondents are directed to disclose on oath or affidavit the assets and properties owned by each of them within two weeks from today failing which appropriate action under the provisions of Contempt of Court Act, 1971 shall be initiated against the respondents.

(e) Liberty is granted to the petitioner after such disclosure on oath is made by the respondents to apply for further reliefs.

(f) Petition is disposed of in the aforesaid terms. There shall be no order as to costs.

Arbitration Petition No. 1095 of 2012

The following reliefs are granted which shall continue till the disposal of the arbitration proceedings and for the period of four weeks thereafter:

(a) The respondents are directed to furnish security in favour of the petitioner in the sum of Rs. 25,02,61,350 as on 20th July, 2012 with further overdue compensation at the rate of 15% p.a. from 21st July, 2012 and expenses, cost, charges within two weeks from the date of the order to the satisfaction of the Court Receiver, High Court, Bombay, within four weeks from today, failing which,

(b) the Court Receiver, High Court, Bombay is appointed as Receiver in respect of the properties described in Exhibit G to the petition with a direction to appoint respondents as his agents on usual terms and conditions and on payment of royalty and or furnishing security.

(c) Till the court receiver takes possession of the properties, the respondents, their agents, servants are restrained by an order and injunction from in any manner parting with the possession, creating third party rights, alienating or encumbering the properties described in Exhibit D and Exhibit. G to the petition.

(d) The respondents are directed to disclose unencumbered property on oath by filing affidavit within two weeks from the date of this order.

(e) Liberty is granted to the petitioner after such disclosure on oath is made by the respondents as directed to apply for further reliefs.

(f) Petition is disposed of in the aforesaid terms. There shall be no order as to costs.

* Para No. 47 Corrected vide Speaking to minutes Order dated 21.02.2013.