

(2009) 06 MAD CK 0190

In the Madras High Court

Case No : Application No. 1798 and 2269 of 2009

Tata Capital Ltd.

APPELLANT

Vs

Rani, Proprierix, M. Kantharaju, K. Manjunatha and B.E.
Billimoria and Co. Ltd.
Rani, Proprierix, M. Kantharaju
and K. Manjunatha Vs Tata Capital Ltd.

RESPONDENT

Date of Decision : 23-06-2009

Acts Referred:

Arbitration Act, 1940 — Section 18

Arbitration and Conciliation Act, 1996 — Section 11, 21, 36, 9

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 39 Rule 1, Order 39 Rule 2, 20

Citation : (2010) 1 CTC 176

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : M.S. Sampath, in application No. 1798 of 2009, for the Appellant; V. Ayyadurai, Advocate for Respondent Nos. 1 to 3, for the Respondent

Judgement

P. Jyothimani, J.—The applicant in Application No. 1798 of 2009 is a Finance Company which has extended financial facilities to the respondents 1 to 3 for the purchase of batching plant with other accessories. A loan agreement was entered into between the applicant and the respondents 1 to 3 on 25.11.2007, under which the total agreement amount arrived at was Rs. 73,85,820/-payable by the respondents 1 to 3 in 34 monthly instalments commencing from 3.2.2008 and ending with 3.11.2010 at the rate of Rs. 2,17,230/- each as monthly instalments. As per the clauses in the agreement, in the event of default in payment of monthly instalments, the respondents 1 to 3 have to pay compensation charges at 36% p.a. for the belated payment. According to the applicant/financier, the respondents 1 to 3 have defaulted payment and paid only 2 instalments. Under the agreement, hypothecations were made. Since the default in payment continued, notice was issued on 26.3.2009. The respondents 1 to 3 are bound to return the assets by way of repossession. The loan agreement also provides for a clause of arbitration under Clause No. 23. The

applicant intends to enforce the said arbitration clause.

2. By virtue of power to repossess the assets, the applicant arrived at the total sum of amount due from the respondents 1 to 3 under the said loan agreement at Rs. 72,27,725.19 as on 17.4.2009. The applicant is entitled to safeguard its interest till the arbitration proceedings are completed and the applicant is taking steps to appoint an Arbitrator as per the terms of the agreement. In spite of notice, the respondents 1 to 3 have not surrendered the asset which is the only security available. In these circumstances, the Application has been filed by the applicant for an order prohibiting the 4th respondent, who is the Garnishee and who owes amount to the respondents 1 to 3, from paying any amount to the respondents 1 to 3 and directing the 4th respondent/garnishee to deposit a sum of Rs. 72,27,725.19 as an interim measure.

3. This Court by order dated 24.4.2009, having satisfied about the prima facie case, issued prohibitory order against the 4th respondent/Garnishee from making any payment to the respondents 1 to 3 for a period of eight weeks.

4. The respondents 1 to 3 in Application No. 1798 of 2009 have filed A. No. 2269 of 2009, to vacate the said prohibitory order dated 24.4.2009 and to dismiss the said Application No. 1798 of 2009 contending inter alia that the first respondent in Application No. 1798 of 2009 has entered into a hire purchase agreement with the applicant/financier on 25.11.2007 for raising a loan of Rs. 58,41,731/- to purchase a new Batching Plant and the respondents 2 and 3 have stood as guarantors. An objection is raised that the 4th respondent not being a party to the agreement, against whom no arbitration proceedings can be initiated, cannot be prohibited from paying the amount due to the respondents 1 to 3.

4(a). Further, it is the case of the respondents 1 to 3 who have filed the vacate-application that as per Clauses 23 and 24 of hire purchase agreement, the parties agreed to confer jurisdiction in the competent Court at Mumbai and therefore, the Application filed u/s 9 of the Arbitration and Conciliation Act, 1996 before this Court is not maintainable, since this Court has no jurisdiction.

4(b). It is further stated that as per the clause in the agreement, the machineries which were fixed on the earth alone stood as security and the financier would be entitled only to sell the asset and in the absence of any provision under the agreement permitting the financier to restrain the garnishee, the Application is not maintainable as per Clause 18(a) of the agreement. Even though it is stated by the respondents 1 to 3 that the loan Application was originally made for earth moving plant, the financier forced the respondents 1 to 3 to change it for batching plant, they have in fact purchased the said machines.

4(c). It is the case of the respondents 1 to 3 that the financier instead of taking repossession of the plant under the agreement for repossession, has not only given a Criminal Complaint, but also filed the present Application No. 1798 of 2009 to harass the respondents. It is also stated that due to the non-functioning of the machinery which has been installed for supply of materials to the 4th

respondent, there was no amount due from the 4th respondent to the respondents 1 to 3.

4(d). It is further stated that taking advantage of the fact that the third respondent, viz., Manjunatha, who stood as guarantor in the loan agreement, has entered into an independent agreement with the 4th respondent in respect of another similar plant exclusively owned by him, under which the 4th respondent had some obligation to pay amount to the third respondent, the present Application has been filed for prohibitory order preventing the 4th respondent from getting the amount which is due under a contract independent of the agreement in question. Therefore, it is stated that the Application for pro-order is liable to be dismissed on the point of jurisdiction, suppression of material facts, violation of terms of agreement and abuse of process of law.

4(e). It is also stated that no part of cause of action in respect of grant of loan has arisen at Chennai since the agreement has been signed at Bangalore and the machinery which is the subject matter of security has been installed at No. 9, Beratana Agrahara, Hosur Main Road, Electronic City Post, Bangalore-560 100.

5. Mr. M.S. Sampath, learned counsel for the applicant in Application No. 1798 of 2009 has submitted that the entire cause of action for the said loan agreement dated 25.11.2007 has arisen in Chennai within the jurisdiction of this Court as it is specifically averred in the affidavit filed by the petitioner/financier in paragraph-8 that the proposal of respondents 1 to 3 was received at Chennai and the same was approved and agreement was approved and signed at Chennai and the amount was due and became payable at Chennai. While referring to the proposal given by the first respondent to the applicant/financier dated 5.10.2007, he would submit that the first respondent has made an Application to the applicant/financier in the Chennai Office at T. Nagar and the guarantors and the applicant have signed at Chennai. He would refer to the loan/hypothecation agreement dated 25.11.2007 which is found available in the annexure and submit that the agreement was entered into at Chennai and in fact, the authorised signatory of the applicant/financier who is having Office at T. Nagar, Chennai has also signed while the respondents 1 to 3 have also signed at Chennai.

5(a). According to him, as per records, even though the Head Office of the applicant/financier is situated at Mumbai, no part of cause of action of the finance agreement had arisen at Mumbai and the entire cause of action arose at Chennai and therefore, Clause 24 of the agreement would not apply to this dispute as no part of cause of action in respect of loan agreement had arisen at Mumbai and the cause of action arose at Chennai only. He would also rely upon Section 20 of CPC and the judgments reported in M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company, ; Kotak Mahindra Finance Ltd. Vs. T. Thomas Educational Trust A Charitable and Educational Trust and Others, Tata Finance Limited Vs. Pragati Paribahan and Others, to substantiate his contention in this regard. In respect of jurisdiction to pass prohibitory order, he would rely

upon the judgments in *Om Sakthi Renergies Limited Vs. Megatech Control Limited* and *A.P. Transco*, and *Ganesh Benzoplast Ltd., Mumbai*, *Ramkant S. Pilani and Shankarmal G. Pilani Vs. Sundaram Finance Ltd., Chennai* and *Oil and Natural Gas Corporation Ltd., Mumba*,

6. On the other hand, Mr. V. Ayyadurai, learned counsel for the respondents 1 to 3 would submit that the parties are to act as per the clauses in the agreement and as per Clause 24 of the agreement relating to jurisdiction, the parties have agreed that the Courts at Mumbai are having exclusive jurisdiction and therefore, they are bound by the same. It is his submission that inasmuch as the Head Office is admittedly in Mumbai and the loan itself has been sanctioned by orders of the Head Office, it cannot be said that the Courts at Mumbai have no jurisdiction at all. It is his submission that the cause of action has arisen at Mumbai, Chennai and Bangalore, where the machinery has been installed and in such event, the parties, for their convenience, can confer jurisdiction on the Courts in any one of the places and it cannot be said that the said Clause 24 has to be ignored. He would also rely on the communication in the form of release order dated 27.9.2007 issued by the applicant to its branch at Bangalore stating that the 1st respondent with her Bangalore address is the hirer and therefore, the Court at Mumbai has jurisdiction. He would rely upon the judgment in *Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd.*, and *Hazari Lal Vs. Haryana Khadi and Village Inds. Board* and *Another*, to insist that by virtue of Clauses 23 and 24 of the agreement, the Application filed u/s 9 of the Arbitration and Conciliation Act, 1996 before this Court is not maintainable.

6(a). He would also contend that by virtue of Clause 18(a) of the loan agreement, which enables the financier to effect seizure of assets only, the present Application for prohibiting the 4th respondent to make payment to the third respondent in respect of different machinery which is not the subject matter of the loan agreement is not maintainable, since there is no cause of action for arbitration in respect of the above said machinery which exclusively belongs to the third respondent and which had never been given as security for the loan transaction in the present case. He would also rely upon the judgment in *Arch Hi-rise Arch Hi-Rise (P) Ltd. Vs. Yatin Bhimani and Others*, to substantiate his contention that the garnishee is not a party to the agreement against whom arbitration proceedings cannot be initiated and therefore, no order can be passed u/s 9 of the Arbitration and Conciliation Act, 1996 against the garnishee. In this regard, he also relied upon the judgment in *Kalinga Mining Corporation v. Arbind Construction Company Pvt. Ltd.*, 2007 (3) RAJ 471 (Orissa). He would also submit that by applying the Principle of contra-preferentum a duty was cast on the financier to explain about Clauses 23 and 24 of the agreement to the first respondent, and inasmuch as such duty has not been performed by the financier/applicant, the agreement should be treated as unilateral, by relying upon the judgments reported in *Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others*, and *Mumbai Metropolitan Region Development Authority Vs. Unity Infraproject Ltd.*,

7. Before going into the respective submissions made by the learned counsel, some of the relevant facts, as borne out from the records, are that the proposal for purchase of the plant under the hire purchase scheme in the form of Application was submitted by the first respondent on 5.10.2007 to the applicant at its Chennai Southern Regional Office situated at No. 116, Thyagaraja Road, T. Nagar, Chennai-17. The said proposal in the form of Application at its end specifically states, "dated at Chennai this 5th day of October 2007". A reference to the proposal also makes it clear that the first respondent/borrower has her permanent residence at Bangalore. The said Application was approved by the applicant after close monitoring at Chennai as it is found in the seal of the applicant's Chennai Office. of course, there is a seal containing "S. Sridharan, SAP Code 24278, Bangalore" which may be Officer's Code of the applicant/financier.

8. The loan-cum-hypothecation-cum-guarantee agreement was entered into between the applicant and the first respondent, being the borrower. At the end of the agreement, it has been signed by the financier/applicant through its authorised signatory at T. Nagar, Chennai. In annexure-I to the said loan agreement dated 25.11.2007, in column No. 9, it is stated that the date and place of agreement are 25.11.2007 and Chennai.

9. It is also clear from the facts that the name of financier/applicant is described with its Registered Office at Mumbai and the seal of notary who has attested the said agreement states that the execution was admitted before him at Bangalore. In nowhere, the release order dated 27.9.2007 filed by the first respondent in the typed-set of papers states that the applicant from the registered Office at Mumbai has passed the said order.

10. On the other hand, the said release order which has been addressed by the applicant to the dealer of the machinery at Mumbai indicates the name of first respondent as the hirer and the first respondent's name with his Bangalore address as well as Bangalore code number of the dealer is given and except those things, there is nothing to show that the Head Office of the applicant at Mumbai had played any role in the loan transaction which is the subject matter of the Application.

11. In such view of the matter, it is highly doubtful to presume that clause 24 of the agreement which speaks about the jurisdiction can be relied upon for the purpose of deciding the question of jurisdiction. For better appreciation, it is necessary to reproduce the relevant clauses viz., Clauses 23 and 24 of the agreement which are as follows:

23. ARBITRATION:

All disputes, differences and/or claims arising out of this Loan Agreement or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Mumbai in accordance with the Arbitration and Conciliation Act, 1996, or any statutory

amendments thereof and shall be referred to a person to be appointed by the Lender, in the event of death, refusal, neglect, inability, or incapability of the person appointed to act as an Arbitrator, the lender may appoint a new Arbitrator. The award of the Arbitrator shall be final and binding on all parties concerned.

24. JURISDICTION:

Subject to the provisions of Clause 23 above, any Suit, Petition, reference or other filing permitted or required to be made pursuant to the Arbitration and Conciliation Act, 1996 in respect of the matters arising out of this Agreement including, without limitation, a petition for appointment of an Arbitrator or Arbitrators u/s 11 of the Arbitration and Conciliation Act, 1996 shall be instituted only in competent Courts at Mumbai.

12. It is true that the said clauses confer jurisdiction to the competent Courts situate in Mumbai. In the absence of any material to show that any part of cause of action has arisen within the jurisdiction of the Courts at Mumbai, so as to conclude that, that part of cause of action has arisen at Mumbai, apart from Chennai and Bangalore and therefore, the parties are well within their rights to choose anyone of three places for jurisdiction to decide the disputes between them, it is not possible to hold that the Courts at Mumbai alone have jurisdiction.

13. It is well settled law that the parties cannot confer jurisdiction on a Court within whose jurisdiction no part of cause of action has arisen. Section 20 of CPC which speaks about jurisdiction of Court in instituting a Suit states as follows:

Section 20. Other Suits to be instituted where defendants reside or cause of action arises.- Subject to the limitation aforesaid, every Suit shall be instituted in a Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises. Explanation I (Omitted)

Explanation.- A Corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

14. In M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company, , a Full Bench of the Supreme Court was dealing with the issue of territorial

jurisdiction and held that the parties cannot confer jurisdiction on Court where the Corporation has its Principal Office when the Corporation is having subordinate office in the place where cause of action arose. While referring to the words, "at such place" found in the Explanation to Section 20, C.P.C., the Supreme Court held as follows:

12.....The Explanation is really an explanation to clause (a). It is in the nature of a clarification on the scope of Clause (a) viz. As to where the Corporation can be said to carry on business. This, it is clarified, will be the place where the principal office is situated (whether or not any business actually is carried on there) or the place where a business is carried on giving rise to a cause of action (even though the principal office of the corporation is not located there) so long as there is a subordinate office of the corporation situated at such place. The linking together of the place where the cause of action arises with the place where a subordinate office is located clearly shows that the intention of the legislature was that, in the case of a corporation, for the purposes of Clause (a), the location of the subordinate office, with the local limits of which a cause of action arises, is to be the relevant place for the filing of a Suit and not the principal place of business. If the intention was that the location of the sole or Principal Office (within the limits of which a cause of action arises) are to be deemed to be placed where the corporation is deemed to be carrying on business, the disjunctive "or" will not be there. Instead, the second part of the Explanation would have read "and, in respect of any cause of action arising at any place where it has a subordinate office, also a such place.

15. It is well established as declared by the Apex Court as it is seen in Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd., that when two or more competent Courts can entertain a Suit on the basis that a part of cause of action has arisen within the jurisdiction of each and every Court, it is open to the parties to the contract to vest the jurisdiction in one such Court based on their convenience to decide and try the disputes between them. By referring to Section 20 of the CPC and tracing various judgments of the Apex Court on this issue starting from A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, till the latest judgment on the issue in Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd., the Apex Court in the above judgment in Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd., has held as follows:

22. There are a number of decisions of this Court wherein it was held that where there may be two or more competent Courts which can entertain a Suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agree to vest jurisdiction in one such Court to try the dispute which might arise as between themselves, such agreement would be valid and binding.

16. It is also made clear as it is seen in AIR 2002 2402 (SC) that such clause in the agreement agreeing to have the jurisdiction of one such Court for deciding their disputes is not against the public policy. On facts, as I have narrated above,

especially when prima facie it is found that there is no evidence to show that any part of cause of action has arisen within the jurisdiction of Mumbai, the above judgments are of no help to the first respondent to invoke Clause 24 of the agreement conferring jurisdiction on the Courts at Mumbai.

17. On the other hand, the fact that the first respondent who is admittedly having her place of business at Bangalore has chosen to make an Application to the applicant/financier at Chennai as it is seen in the agreement makes it clear that this Court has jurisdiction apart from the competent Courts at Bangalore. In such view of the matter, it is not possible to accept the contention of the learned counsel for the respondents 1 to 3 that this Court has no jurisdiction to entertain the above Application u/s 9 of the Arbitration and Conciliation Act, 1996. Further, mere fixing the place of arbitration at Mumbai in the agreement does not take away the power of this Court u/s 9 of the Arbitration and Conciliation Act, 1996.

18. In the absence of any evidence to show that any part of the cause of action has arisen at Mumbai, it is not possible to hold that under Clause 24 of the agreement, the Courts at Mumbai alone could have exclusive jurisdiction in this matter.

19. In respect of the next contention raised by the learned counsel for the respondents 1 to 3 regarding cause of action, it is relevant to extract clause 18(a) of the agreement which confers certain rights on the financier in case of default committed by the obligors which is as under:

Clause 18. CONSEQUENCE OF EVENT OF DEFAULT:

(a) If one or more of the events specified in Clause 17 above occurs ("Event of Default"), the Lender by notice in writing to the Obligors, declare the Loan to be immediately due and payable (whereupon the same shall become due and payable together) and forthwith recall the Loan together with all interests and other monies payable by the Obligors pursuant to this Loan Agreement, and in default of such payment enforce the charge created in terms of this Loan Agreement. Further, the Lender shall be entitled to, at all times to, take possession, seize, recover, appoint a receiver/manager, remove the Asset from its place of standing, and also be entitled, on such term as may be deemed fit by the Lender, without the intervention of Court or authority, to sell the Asset by public auction or by private contract at the best available prices according to the prevailing market condition including as regards repossessed vehicles/assets realise its claims in respect of the Loan, without being bound or being liable for any loss/losses that the Obligors may suffer due to such action and without prejudice to the Lender's other rights and remedies as stated herein or otherwise in law entitled to:

The said clause enables the financier to repossess the subject matter of finance agreement and also to effect sale.

20. The judgment of the Division Bench of Calcutta High Court in Arch Hi-Rise (P)

Ltd. v. Yatin Bhimani and Ors., 2007 (5) RAJ 510(Cal), relied upon by the learned counsel for the respondents 1 to 3 has no application to the case on hand for the reason that it is not in issue in this case that the 4th respondent garnishee has been dragged to the arbitration proceedings. It is only in this Application filed u/s 9 of the Arbitration and Conciliation Act, 1996, for securing the amount in dispute, as an interim measure, the garnishee is made as a party. In such event, it is just and possible for this Court, by exercising its jurisdiction, to pass interim orders u/s 9 of the Act to secure the amount with the garnishee. It is only in cases of preservation or sale of goods, the interim measure u/s 9 of the Act must be relatable to the subject matter of arbitration agreement, whereas in cases of securing amount in dispute of arbitration, certainly the jurisdiction of this Court can be invoked for the purpose of protecting the interest of the parties which is just and convenient. It is relevant to extract Section 9 of the Arbitration and Conciliation Act, 1996 which is as follows:

Section 9. Interim measures, etc., by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(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.

21. While dealing with the points to be satisfied by the Court while passing orders u/s 9 of the Act as an interim measure, the Supreme Court has held in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., that the Court must be satisfied that there is in existence a valid arbitration agreement and the applicant intends to make the dispute to arbitration and in such event, the Court has

jurisdiction to pass orders u/s 9 of the Arbitration and Conciliation Act, 1996 as the facts and circumstances of the case warrant. The relevant passage of the said judgment is as follows:

20. When a party applies u/s 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam, is therefore right in submitting that when an Application u/s 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the Application u/s 9 is filed, the proceedings have not commenced u/s 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9 it would not be necessary that a notice invoicing the arbitration clause must be issued to the opposite party before an Application u/s 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to Arbitral Tribunal but a situation may so demand that a party may choose to apply u/s 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders u/s 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction u/s 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an Application u/s 9 merely because no notice has been issued u/s 21 of the 1996 Act.

The existence of Clause 18(a) of the agreement does not, in my view, take away the powers of this Court to pass orders as an interim measure in the interest of justice based on the facts and circumstances of the case.

22. The jurisdiction of this Court while passing prohibitory orders u/s 9 of the Arbitration and Conciliation Act, 1996 has been confirmed by the Division Bench of this Court in *Om Sakthi Rennergies Limited Vs. Megatech Control Limited and A.P. Transco*, wherein it was held that even though the provisions contained in Order 38, Rule 5, Code of Order 39, Rule 1 are not available in the Arbitration and Conciliation Act, the principles applicable in respect of injunction as well as prohibitory orders are made applicable, by referring to the earlier judgment of the Supreme Court in *I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.*, The relevant portion of the judgment is as follows:

13. Coming then to the merits of the case, there is no dispute that the appellant

has a power purchase agreement with the garnishee for 20 years commencing from 24.01.2004 and each month there would be a billing of Rs. 80 lakhs approximately. Even, if the first respondent ultimately succeeds in the arbitration proceedings, there will be no difficulty in recovering the money in terms of the ultimate award, since the garnishee is liable to pay the monthly bills based on the power purchase agreement, and there is no danger or apprehension that the first respondent could not recover the money, in case they succeed in the arbitration proceedings. In view of the continuous earning from the very same garnishee at the rate of Rs. 80 lakhs per month, there is no apprehension that the first respondent will not be able to realise the money due in case the first respondent gets a favourable award. In our opinion, the first respondent has failed to make out any prima facie case in their favour and no irreparable damage or injury would be caused if prohibitory order was not granted. No irreparable loss would be caused to the first respondent as they can be well compensate by the Arbitrator, if ultimately it is found that they are entitled to the claim. Mr. Panchu, however, submitted that the power to grant interim relief cannot be controlled or restricted by invoking the provisions of Order 38, Rule 5 or Order 39, Rules 1 and 2, C.P.C. He placed strong reliance on the decision of a Division Bench of this Court reported in Ganesh Benzoplast Ltd., Mumbai, Ramkant S. Pilani and Shankarmal G. Pilani Vs. Sundaram Finance Ltd., Chennai and Oil and Natural Gas Corporation Ltd., Mumbai, We have carefully analysed the said judgment. The judgment merely states that when Section 9 of the Act does not specifically require any averment in any particular form as contemplated either under Order 38, Rule 5 of the C.P.C. or u/s 18 of the Arbitration Act, 1940, there is no need to make such averment in the affidavit file in support of the Application seeking a prohibitory order. It is true that the provisions like Order 38, Rule 5 or Order 39, Rules 1 and 2, C.P.C. are not contained in the Arbitration and Conciliation Act, 1996, but its principles will be applicable as has been held by the Supreme Court in M/s. I.T.I. Limited v. M/s. Siemens Public Communications Network Limited (supra), wherein it was held that for want of specific exclusion of CPC in the Act of 1996, it cannot be inferred that the Code was not applicable, but that would mean that the provisions of the Code have to be read into as it is, when the Court exercises powers as prescribed under the Act of 1996.

23. That was also the view of another Division Bench of this Court in Ganesh Benzoplast Ltd., Mumbai, Ramkant S. Pilani and Shankarmal G. Pilani Vs. Sundaram Finance Ltd., Chennai and Oil and Natural Gas Corporation Ltd., Mumbai, Therefore, the contention of the learned counsel for the respondents 1 to 3 that in view of Clause 18(a) of the agreement, there is no cause of action for arbitration that arose within the jurisdiction of this Court is not sustainable.

24. It is no doubt true that while passing orders u/s 9 of the Arbitration and Conciliation Act, 1996 as an interim measure, there is no scope for the Court to interpret the words in the contract so as to extend the said agreement to a new area when the parties to the agreement have consciously entered into the terms.

It is also true that a party seeking interim relief must show his eagerness and bona fide intention for initiation, continuation and disposal of main arbitral proceedings, as held by the Orissa High Court in *Kalinga Mining Corporation v. Arbind Construction Company Pvt. Ltd.*, 2007 (3) RAJ 471 (Ori.), which was relied upon by the learned counsel for the respondents 1 to 3. In the instant case, it is brought to the notice of this Court that the applicant by communication dated 8.4.2009 made its intention clear to initiate arbitration proceedings in terms of the agreement.

25. While passing orders u/s 9 of the Act which gives a limited scope to the Court, it is also true that prima facie case has to be made out apart from balance of convenience and suffering of irreparable loss, if the interim measure is not granted. That apart, the Court u/s 9 of the Act cannot enter into the actual dispute which has to be decided only in the arbitration. By passing interim order against the garnishee in order to protect the interest of the parties who are anxious to settle the dispute by arbitral proceedings, it cannot be said to be an order interfering with the arbitration.

26. The submission made by Mr. V. Ayyadurai, learned counsel for the respondents 1 to 3, placing reliance on the Principle of contra preferentum, is also not applicable to the case on hand. The Principle of contra preferentum was enunciated based on the celebrated concept that in cases of contract where any clause is capable of giving different meaning and when there is ambiguity, the benefit of ambiguity must be given to the grantee and in such event the strict interpretation must be given against the grantor. The said principle was enunciated by the Full Bench of the Supreme Court in *Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others*, in the following paragraphs:

12. In his attempt to establish that by this later lease the lessor granted a lease even of these minerals which had been excluded specifically by Clause 16 of the earlier lease, Mr. Jha has arrayed in his aid several well established principles of construction. The first of these is that the intention of the parties to a document of grant must be ascertained first and foremost from the words used in the disposition clause, understanding the words used in their strict, natural grammatical sense and that once the intention can be clearly understood from the words in the disposition clause thus interpreted it is no business of the Courts to examine what the parties may have said in other portions of the document. Next it is urged that if it does appear that the later clauses of the document purport to restrict or cut down in any way the effect of the earlier clause disposing of property the earlier clause must prevail. Thirdly it is said that if there be any ambiguity in the disposition clause taken by itself, the benefit of that ambiguity must be given to the grantee, the rule being that all documents of grants must be interpreted strictly as against the grantor. Lastly it was urged that where the operative portion of the document can be interpreted without the aid of the preamble, the preamble ought not and must not be looked into.

13. The correctness of these principles is too well established by authorities to justify any detailed discussion. The task being to ascertain the intention of the parties, the cases have laid down that that intention has to be gathered by the words used by the parties themselves. In doing so the parties must be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go on saying something, which is irreconcilable with what has gone before, the Courts have evolved the principle on the theory that what once had been granted cannot next be taken away, that the clear disposition by an earlier clause will not be allowed to be cut down by a later clause. Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But even here the rule has to be borne in mind that the document being the grantor's document it has to be interpreted strictly against him and in favour of the grantee.

27. Applying the Principle of contra preferentum to the facts of the case, there is no scope to conclude that there is any ambiguity in the clauses of the finance agreement to decide that the applicant being the financier in a dominant position should have explained the consequences of such ambiguous clauses to the borrower viz., the first respondent and that there is failure on the part of the applicant/financier to explain the same and therefore, the benefit should be given to the first respondent/borrower. I am of the considered view that the said celebrated Principle of contra preferentum that in case of contract which is unilateral, the grantee should be given the benefit of such construction, has no application to the facts and circumstances of the case. In fact, the said Principle of contra preferentum has been explained by the Bombay High Court in *Mumbai Metropolitan Region Development Authority v. Unity Infraprojects Ltd.*, 2009 (2) RAJ 132 (Bom), in the following paragraphs:

21. The Contra Preferentum Rule.

This principle is explained thus:

When there is a doubt or ambiguity in the words of an exclusion clause, the words are construed more forcibly against the party putting forth the document, and in favour of the other party." *Ghaziabad Development Authority Vs. Union of India and Another*,

See also Pollock & Mulla's Indian Contract and Specific Relief Acts, 12th Edition, Pg. 2761.

22. The principle is elucidated in Halsbury's Laws of England (4th Edition, Pg. 559) thus:

... any ambiguity is to be construed against the party putting forward the clause for his protection.

Posting that an ambiguity is created between Clause 44.2 and Clause 44.3 on the other hand, applying the Contra Preferentum Rule, a presumption would be

drawn against the party that claims the benefit of the exclusion clause, in this case, the MMRDA.

In such view of the matter, the order passed by this Court in Application No. 1798 of 2009 dated 24.4.2009 is made absolute and the A. No. 2269 of 2009 stands dismissed.