Madras High Court
Flywheel Logistics Solutions ... vs M/S.Hinduja Leyland Finance Ltd on 17 September, 2020

C.M.A.Nos.25 to 28
and C.M.P.Nos.
617 to

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2020

CORAM :

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020
and C.M.P.Nos.271, 273, 275, 277, 289,
617 to 621, 623 to 640 of 2020

Flywheel Logistics Solutions Pvt. Ltd.
Rep. by its Authorized Representative
F-213/E-1, Old M.B.Road,
Lado Sarai, New Delhi - 110 030. ... Appellant
(in all C.M.A

versus

1.M/s.Hinduja Leyland Finance Ltd.,
Rep. by its Authorized Representative
Having its Registered Office at
No.1, Sardar Patel Road, Guindy,
Chennai - 600 032.
Also having Corporate Office at
No.167-169, 3RD Floor, Anna Salai,
Saidapet, Chennai - 600 015.

2.Meenakshi Syal ... Respondents

(in all C.M.As.) Common Prayer: Appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996, to set aside the impugned/interim order dated 23.11.2019 passed by Sole Arbitrator, Mr.S.Samuel, Advocate at Chennai, in Application No.1 of 2019 in Arbitration Case Nos.ACP No.HLF-FLY Nos.3/2019, 4/2019, 5/2019, 1/2019, 2/2019, 20/2019, http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 19/2019, 21/2019, 26/2019, 10/2019, 6/2019, 13/2019, 18/2019, 27/2019, 9/2019, 7/2019, 16/2019, 23/2019, 14/2019, 28/2019, 11/2019, 25/2019, 17/2019, 8/2019, 12/2019, 15/2019, 22/2019 and 24/2019 respectively.

For Appellant : Mr.Abishek Jebaraj
(in all C.M.As.)

For Respondents : Mr.V.Balasubramani
(in all C.M.As.)

: Mr.Sharath Chandar
Amicus Curie

COMMON JUDGMENT

These Civil Miscellaneous Appeals have been filed challenging the interim Orders passed by the learned arbitrator to seize the vehicles.

2. Since, the dispute is said to have been arisen in hire purchase agreements, in respect of around 28 trucks, entered between the parties on 30.09.2017 and the fact that in all the appeals, similar disputes have arisen out of the hire purchase agreements, though styled as a different contract, as the matter involves one and same and similar to each other, this Court is inclined to dispose of all the appeals in a Common http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Judgment.

3. These Civil Miscellaneous Appeals have been filed challenging the Order of the learned arbitrator under section 17 of the Arbitration and Conciliation Act to seize the vehicle.

4. Brief facts leading to filing of these appeals are as follows : The appellant by various loan agreements dated 30.01.2017 has availed loan to purchase vehicles from the respondent. As there was default in repayment of the instalments, the respondents invoked arbitration clause provided under the agreement. Accordingly, a notice has been sent invoking arbitration dated 14.09.2019 indicating various nature of contract entered between the parties and default committed by the respondent and the amount due thereon. The respondent has also nominated Mr.Samuel, Advocate as an Arbitrator and the respondent has also requested the appellant to settle the dues in an amicable manner. Pursuant to the above notice, the so called arbitrator issued notice dated 23.11.2019 fixing the hearing dated of arbitration on 09.12.2019. While issuing notice indicating the hearing date on 09.12.2019, the learned http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 arbitrator appears to have received a claim petition on 23.11.2019 and an application under section 17 of the Arbitration and Conciliation Act and passed interim Orders to seize the vehicles on the same day.

5. It is to be noted that the arbitration hearing date has been fixed on 09.12.2019. In all the matters, a cyclostyle order has been passed by the learned arbitrator appointing an employee of the respondent as a receiver to seize the vehicles. Pursuant to the said Order, it appears that more than 26 trucks were said to have been seized and kept idle from 02.12.2019. Challenging the interim Orders passed by the learned arbitrator, the present appeals have been filed.

Heard the learned counsel appearing for the appellant and the respondents and Mr.Sharath Chandar, Amicus Curie.

6. It is appropriate to set out the framework of Sections 9 and 17 of the Act and to examine their scope, object and purpose, for consideration of the following interim measures http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 A. Interim Injunctions B. Appointment of Receiver C. Seizure of Vehicles D. Power to order sale E. Furnishing Security pending arbitral proceedings

7. Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

8. SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT, 1996 reads as follows :

Section 9 of the Act empowers the Court to grant http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 interim measures in three stages ie., a) before the commencement of arbitral proceedings b) during the arbitral proceedings and c) at any time after the making of the arbitral award but before it is enforced under Section 36 of the Act.

9. The purpose of this provision has been felicitously set out by Lord MustillIn Conservatory and Provisional Measures in International Arbitration, 9th Joint Colloquium, in the following words :

> 3. The principles governing the exercise of power under Section 9 are no longer res-integra. The locus classicus is the decision of the Supreme Court in Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479, wherein it was held as under :
>
> 19. When a party applies under Section 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.

http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Mr Subramanium is, therefore, right in submitting that when an application under Section 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 under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words before or during arbitral proceedings occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 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 an Arbitral Tribunal. But a situation may so demand that a party may choose to apply under Section 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 under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction under Section 9 can pass a 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.

10. The requirement of manifest intention to arbitrate was expounded further in Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155, wherein it was observed thus:

> The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the proximately contemplated or manifestly intended arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made before i.e. in contemplation of arbitral proceedings. The court, approached by a party http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms.
>
> 11. In Firm Ashok Traders case, the Supreme Court held that a party moving the Court under Section 9 must ensure that arbitral proceedings are commenced within reasonable time. However, as the expression reasonable time was nebulous and was prone to the vagaries of judicial interpretation, the Law Commission of India in its 246th Report on the Arbitration and Conciliation Act, 1996 recommended the insertion of a clause fixing the outer limit for commencement of arbitration proceedings. Thus, Section 9(2) was introduced vide the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) specifically setting out that where the Court passes an order for any interim measure of protection the arbitratal proceedings http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 shall be commenced within 90 days from the date of such order or within such time as the Court may determine.

12. Like any other interim relief, the relief sought for and granted under Section 9 can only be in aid of and as ancillary to the main relief which may be available to the party on final determination of

his rights before the Arbitral Tribunal. As was pointed out by the Supreme Court in Orissa Manganese and Minerals Limited v Synergy Ispat Private Limited that an interim order, the effect of which would be tantamount to granting the final relief, cannot be passed in an application under Section

13. Yet another well settled principle pointed out by the Supreme Court in Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd., (2007) 7 SCC 125, relying on the observations in the Siskina case [1979] AC 210, is that the right to obtain an interim measure/order cannot constitute a cause of action. An interim measure pleaded and sought for by the applicant must be parasitic on a pre-existing cause of action and explains this in the following passage from the judgment in http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 the Siskina case:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant teethe plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.
>
> 14. Section 9(1) enumerates the list of interim measures and most of the interim measures enumerated therein are taken from the Second Schedule to the Arbitration Act, 1940 and are directly referable to a provision in the Code of Civil Procedure, 1908 and the same is clear from the following chart :

Measure under Section Corresponding Corresponding 9 of the A & C Act provision in II Schedule provision in the Code http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 to the 1940 Act Appointment of a Rule 5 of Schedule II Order XXXII guardian for a minor or person of unsound mind for the purposes of arbitral proceedingsSection 9(1)(i) Directing the Rule 1 of Schedule II Order XXXIX Rule 6 & 7 preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement Section 9(1)(ii)(a) Securing the amount in Rule 2 of Schedule II Order XXXVIII Rule 5 dispute in the arbitration Section 9(1)(ii)(b) Detention, preservation Rule 3 of Schedule II Order XXXIX Rule 7 or inspection of any property or thing which the subject matter of the dispute and for this purpose authorizing any person to enter upon and land or building in the possession of any party, causing samples to be taken or observation to be made any experiment to be tried which may be necessary or expedient for the purpose of obtaining full http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 information or evidence Section 9(1)(ii)(c) Interim Injunction or Rule 4 of Schedule II Order XXXIX Rules 1 & Appointment of a 2 and Order XL Rule 1 Receiver Section 9(1)(ii)(d) Such other interim Nil Section 94(e) measure of protection as may

appear to the Court to be just and convenient (Section 9(1)(ii)(e)

15. In view of the above, it is clear that the Court has to bear in mind the parameters governing the exercise of discretion to grant or withhold interim orders, of the nature alluded to above, for the grant of such interim measures under Section 9. In Techmo Car SPA v Madras Aluminium Co Ltd [2004 2 MLJ 470] a Division Bench of this Honble Court approved the application of the time honoured triple test for the grant of interim injunctions under Section 9 and has observed as under :

> 9. While exercising the discretion the Court applies the following tests: (i) whether the petitioner has a prima facie cases; (ii) whether the balance of convenience is in favour of the petitioner; and (iii) http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 whether the petitioner would suffer an irreparable injury if his prayer for interim order is disallowed. It is also settled principle that the object of interim order is to protect the party against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. It is equally to be noted that the need for such protection has, however, to be weighed against the corresponding need of the opposite party to be protected against injury resulting from his having been protected from exercising his own legal rights for which he could not be adequately compensated.

The Court must weigh one need against another and determine whether the balance of convenience lies. The concept of discretion implies good faith in discharging public duties. The exercise of discretion has to be based on relevant considerations. When it is exercised by taking into extraneous considerations, such action has to be quashed. The concept of absolute, untrampled or unfettered discretion is wholly inappropriate to a public authority. When given power to exercise discretion it has to be used for public good. When it is found that no right thinking or conscientious person would have exercised the discretion in the manner it was exercised, the action http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 will have to be quashed. The power is to use the discretion and not abuse it. The authority granted discretion has to exercise power in a fiduciary capacity. As said earlier, Section 9 of the Act deals with interim measures.

16. In Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corpn., (2007) 6 SCC 798, the Hounourable Supreme Court expressed a prima facie view that the exercise of power under Section 9 would be governed by the well-settled principles governing the grant of such orders under the Code of Civil Procedure and has observed as under :

> 15. The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. The reliance placed on Firm Ashok Traders v. Gurumukh Das Saluja [(2004) 3 SCC 155] in that behalf does not also help much, since this Court in that

> case did not answer that question finally but prima facie felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order 18 Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay.

But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognised principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver.

17. However, inAdhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125, which was decided two months after the decision in Arvind Constructions Co. (P) Ltd case, the Supreme Court fully endorsed the applicability of the underlying principles of the Code of the grant of interim measures under Section 9 and has held as follows :

> 11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 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. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act

18. In view of the aforesaid authoritative pronouncements of the http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Honourable Supreme Court, it is now beyond cavil that the Court exercising discretion to grant or withhold interim measures under Section 9 will have to be guided by the well-recognized principles governing the grant of such reliefs under the Code of Civil Procedure, 1908.

19. SECTION 17 OF THE ARBITRATION CONCILIATION ACT, 1996

Prior to the 2015 Amendment, Section 17 of the Arbitration and Conciliation Act read as under ;

> Interim measures ordered by arbitral tribunal (1) Unless otherwise agreed by partied, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1). Prior to the 2015 Amendment, the Tribunal was a toothless tiger as its power to pass interim orders were severely restricted in contradistinction http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 to the wide powers available to a Court under Section 9. The scope of the unamended Section 17 was explained by the Supreme Court in Managing Director, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619, in the following words:

> 58.A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even

> under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof.
>
> 20. In Sri Krishan v Anand [2009 112 DRJ 657] the Delhi High http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Court on a purposeful construction of Section 17, held that though an interim order of the Tribunal was not capable of enforcement proprio vigore, the Tribunal could always apply to the Court to take action for contempt under Section 27(5) of the Act. This view was also upheld by the Supreme Court in Alka Chandewar v ShamshulIshrar Khan [2017 16 SCC 119].

21. Noticing the unsatisfactory state of the law, the Law Commission of India, in its 246th Report on the Arbitration and Conciliation Act, 1996 recommended that the powers of a Tribunal under Section 17 must be brought in line with the powers of a Court under Section 9. The rationale for doing so was spelt out by the Commission in the following words This is to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. When this provision is read in conjunction with section 9(2), parties will by default be forced to approach the Arbitral Tribunal for interim relief once the Tribunal has been constituted. The Arbitral Tribunal would continue to http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 have powers to grant interim relief post-award. This regime would decrease the burden on Courts. Further, this would also be in tune with the spirit of the UNCITRAL Model Law as amended in 2006

22. From the above, it is clear that the object of amending Section 17 of the Act was to vest with the Tribunal with the same powers as a civil court in relation to the grant of interim measures. In other words, the power to pass interim measures imposes a discretion vested in the Tribunal would have to be exercised in consonance with the well settled principles governing the grant of such reliefs by the civil court.

23. Section 17 was, accordingly, amended by Act 3 of 2016. Under Clause 17(1) the Tribunal was given identical powers of the Court under Section 9. A fortiori, the Arbitral Tribunal can now pass orders akin to those passed under Section 9. As a natural corollary, it follows that the ratio of the decision in Adhunik Steels would apply equally to Tribunals as well, with the result that Tribunals passing interim measures under Section 17 would be bound to observe the guiding principles http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 governing the grant of such reliefs under the Code. The discretion conferred on the Arbitral Tribunal under Section 17 to pass interim measures is undoubtedly judicial. As the Supreme Court pointed out in Dev Prakash v Indra [2018 14 SCC 292] judicial discretion has to be disciplined by jurisprudential ethics and can by no means conduct itself as an unruly horse.

24. Vide the 2015 Amendment, Clause (2) of the Section 17 was substituted with a new clause declaring that the interim order passed by the Tribunal would be deemed to be an order of the civil court and shall be enforceable under the CPC in the same manner as if it were an order of the Court. This provision was inserted to specifically get over the issue of enforceability of the interim orders of the Tribunal that had proved to be the bane of the unamended Section 17.

25. It may also be noticed that the 2015 Amendment also introduced an anomaly as it gave the power to the Arbitral Tribunal to pass an interim order after it has made the award but before it is enforced http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 under Section 36. Under Section 32, upon making of an award the Tribunal would become functus officio, and cannot pass an interim order. Noticing this incongruity, in 2018 the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India under the Chairmanship of Justice B.N Srikrishna recommended the deletion of the expression or at any time after making of the arbitral award but before it is enforced in accordance with Section 36 from the text of Section 17(1).

The Committee observed thus :

Upon the making of the final arbitral award, under section 32, the arbitral proceedings shall terminate. Once the proceedings terminate, the arbitrator / tribunal becomes functus officio. Hence, once the arbitral tribunal becomes functus officio, after the final arbitral award is rendered, no application can be made for grant of interim measures under section 17(1).

26. Accordingly, vide the Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019) the expression or at any time after making of the arbitral award but before it is enforced in http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 accordance with Section 36 has been deleted from the text of Section 17(1) with effect from 30.08.2019 [vide notification S.O 3154[E] of the Ministry of Law and Justice]. Thus, the position post the 2019 Amendment is that the power under Section 17 (1), though identical with Section 9(1) in content, is subject to the restriction that it can be exercised by the Tribunal only during the pendency of proceedings before it.

27. PRINCIPLES GOVERNING THE EXERCISE OF POWERS UNDER SECTION 17(1) A. INTERIM INJUNCTIONS i. Section 17(1)(ii)(d) vests power with an Arbitral Tribunal to pass an order of interim injunction during the pendency of the proceedings before it. An identical power has been vested with the Court under Section 9(1)(ii)(d), with the difference that it may be exercised by the Court before the commencement of Arbitral proceedings and after the award has been passed but before it is enforced in accordance with Section 36. After the decision of the Supreme Court in Adhunik Steels http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125it is no longer open to doubt that this power must be guided by the well settled principles underlying the grant of interim injunctions under the Code and has held as follows :

> 11. The concluding words of the section, and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.
>
> 28. It may be noticed that the concluding words of Section 17(1) is now identical with Section 9(1) and runs and the court shall have the http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 same power for making orders as it has for the purpose and in relation to any proceedings before it. A fortiori, there can, therefore, be no quarrel that the Tribunal, like a Court under Section 9(1) is, therefore, legally mandated to test the case of the applicant with reference to the well-known parameters of a) prima facie case b) balance of convenience and c) irreparable loss before granting an order of injunction.

ii. In C.S.S. Corp Private Limited v. Space Matrix Design Consultants Private Limited, (2012) 1 CTC 225, a Division Bench of this Honble Court reiterated this requirement in the following words :

> 13. Section 9 of Arbitration and Conciliation Act enables the parties to approach the Court for certain interim measure of protection in respect of the enumerated remedies available thereon. Section 9 of the Act contemplates interim measure to protect and secure the amount in dispute in arbitration. But that does not mean that even without any pleadings in respect of the fact that the asset of the Appellant will be lost, the Respondent is entitled to file Application under Section 9 of Arbitration and Conciliation Act. In fact, in granting injunction or passing any order under Section 9, three http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 golden principles under law have to be taken note of by the Courts viz., (i) prima facie case; (ii) balance of convenience; and (iii) irreparable loss and injury.
>
> 29. Though Section 19 of the Arbitration and Conciliation Act states that the Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908, this is primarily targeted at unshackling the Arbitral Tribunal from the procedural wrangles of the Code. On the other hand, principles governing the grant of injunctions, appointments of receiver etc are a part of the substantive law of the country. By virtue of Section 28(1)(a) of the Act the Tribunal shall be bound to decide in accordance with the substantive law for the time being in force in India.

iii. There is no gainsaying that the purpose of an temporary injunction is to maintain the status quo (Shiv Kumar Chadha v. Municipal Corpn. of Delhi, (1993) 3 SCC 161).

iv. In the case of injunctions granted ex-parte the Court is bound to observe the principles set out by the Supreme Court inMorgan Stanley http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Mutual Fund v. Kartick Das, (1994) 4 SCC 225 wherein it was observed thus :

> 36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are
>
> (a) whether irreparable or serious mischief will ensue to the plaintiff;
>
> (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;
>
> (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
>
> (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
>
> (e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.
>
> (f) even if granted, the ex parte injunction would be for a limited period of time.

http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020

(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court. v. Interim mandatory injunctions : The principles governing the grant of interim mandatory injunctions are no longer res integra. The leading case on the point is the decision of the Supreme Court in DorabCawasji Warden v. CoomiSorab Warden, (1990) 2 SCC 117, where the principles were set out thus :

> 16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial

may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

30. These principles are law under Article 141 of the Constitution and the Arbitral Tribunal, as well as the Court would be duty bound to follow it in letter and in spirit.

31. B. APPOINTMENT OF A RECEIVER i. The decision of the Supreme Court inAdhunik Steels has settled the law that the appointment of a Receiver in exercise of powers under Section 9 of the Act can be done only if the case is brought within the accepted principles under the Code. This is clear from the following http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 observations of the Apex Court.

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. ii. Under the Code, Courts possess powers to appoint Receivers if it finds it just and convenient to do so. The expression just and convenient though of wide amplitude require the Court to exercise caution and circumspection as the appointment of the Receiver is a drastic remedy. Hence, the Courts have insisted that the applicant must establish a heightened threshold of an excellent chance of success as distinguished from a mere prima facie case under Order XXXIX. It is for the applicant to plead and establish this exacting requirement, and a http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Receiver will not be appointed on the mere ipse dixits of the applicant or on the basis of bald and unsubstantiated averments.

iii. In Three Cheers Entertainment (P) Ltd. v. CESC Ltd., (2008) 16 SCC 592, the Supreme Court has also strongly deprecated the practice of passing ex-parte orders appointing Receivers and the Apex Court has observed thus :

> 22. We fail to understand as to on what basis, the Joint Receivers were appointed. No prayer was made therefor on the said date. No application was filed. The matter was placed before the learned Single Judge only for confirmation of the ad interim order passed and not for deciding on Prayer (c) concerned. A bare perusal of the said order would clearly indicate that even a prima facie finding had not been arrived at warranting appointment of Receiver. No reason has been assigned in support thereof.

No jurisdictional fact that it was just and proper to appoint a Receiver as is required under Order 40 Rule 1 of the Code of Civil Procedure was recorded far less why the same was found to be necessary and emergent. In any event, a show-cause notice at the first instance should have been issued. http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 iv. In T. Krishnaswamy Chetty v. C. Thangavelu Chetty, AIR 1955 Mad 430, this Honble Court formulated five principles which it termed as panchsadachar which were to guide the Courts in exercise of jurisdiction to appoint Receivers. This decision has been quoted with approval by several High Courts, and is, therefore, a locus classicus on the powers of the Court to appoint a Receiver under the Code. The principles laid down are as under :

> 17.The five principles which can be described as the panchsadachar of our Courts exercising equity jurisdiction in appointing receivers are as follows:
>
> (1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie; he has very http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be in

medio, that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less in medio is sufficient to vest a Court with jurisdiction to appoint a receiver. Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc. v. In Parmanand Patel v. Sudha A. Chowgule, (2009) 11 SCC 127, the Supreme Court broadly restated these principles in the following passage :

23. A Receiver, having regard to the provisions http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 contained in Order 40 Rule 1 of the Code of Civil Procedure, is appointed only when it is found to be just and convenient to do so. Appointment of a Receiver pending suit is a matter which is within the discretionary jurisdiction of the Court. Ordinarily the Court would not appoint a Receiver save and except on a prima facie finding that the plaintiff has an excellent chance of success in the suit.

24. It is also for the plaintiff not only to show a case of adverse and conflict claims of property but also emergency, danger or loss demanding immediate action. Element of danger is an important consideration. Ordinarily, a Receiver would not be appointed unless a case has been made out which may deprive the defendant of a de facto possession. For the said purpose, conduct of the parties would also be relevant. vi. Very recently, the Supreme Court in Dev Prakash v Indra (2018) 14 SCC 292, held, in the context of appointment of a Receiver for immovable property, that the very purpose of a temporary injunction and receivership is to protect the property from acts of waste, damage and http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 alienation during the pendency of the suit. The Supreme Court set aside the order directing sale of the property through public auction and observed thus :

> The direction for disposal of the suit property by public auction, in the facts and circumstances of the case, clearly militates against the fundamental precept of preservation of subject-matter of any dispute pending adjudication in a court of law, more particularly relatable to a civil litigation, to appropriately decide on the rights of the parties for administering the reliefs to which they would be entitled eventually on the culmination of the adjudication. As it is, the very essence of the concept of temporary injunction and receivership during the pendency of a civil litigation involving any property is to prevent its threatened wastage, damage and alienation by any party thereto, to the immeasurable prejudice to the other side or to render the

> situation irreversible not only to impact upon the ultimate decision but also to render the relief granted, illusory. We do not wish to burden this order by the decisions of this Court on the issue except referring to the one in MaharwalKhewaji Trust v. BaldevDass [MaharwalKhewaji Trust v. BaldevDass, (2004) 8 SCC 488 : AIR 2005 SC http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 104] , wherein it has been underlined that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property to be changed, which may include alienation or transfer thereof leading to loss or damage been caused to the party who may ultimately succeed and which would as well lead to multiplicity of proceedings. These are the broad substantive principles that must govern the appointment of a Receiver either before the Court under Section 9 or under Section 17 of the Act before the Tribunal.

31. C. SEIZURE OF VEHICLES i. The Tribunal or the Court is very often approached by finance companies and banks for interim measures to seize and secure the vehicles lent to hirers under a hire purchase/hypothecation agreement. The power to re-possess the vehicle for defaults in payment of instalments by the borrowers is a creature of the contract. Though it is well settled that finance companies/banks can exercise this contractual power to re-possess the asset [Harita Finance Limited v ATV Projects http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 India Limited, 2003 2 LW 179], the exercise of this power can be only in a manner known to law.

ii. The Supreme Court has, in no uncertain terms, condemned the use of hirelings to recover possession of the vehicle without recourse to the remedies available in law. Thus, in ICICI Bank Ltd. v. Prakash Kaur, (2007) 2 SCC 711, it has been observed as under :

> 16.Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ peJtitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics. iii. In Citicorp Maruti Finance Ltd. v. S. Vijayalaxmi, (2012) 1 SCC 1, a three judge bench of the Supreme Court reiterated its earlier decision in Prakash Kaur, and observed as under http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down. iv. In L & T Finance Ltd. v. G.G.

> Granites, (2013) 5 LW 714, traced the power to seize and possess a hypothecated property to Section 9(ii)(a) &(c) of the Act. Post the 2015 Amendment, this would correspond to Section 17(1)(ii) (a) & (c) in the case of the Arbitral Tribunal and held that this power was traceable to Order XXXIX Rule 7(1)(a) and (b) of the C.P.C empowering Civil Courts to appoint a Commissioner to seize the hypothecated asset. The L& T Finance case has authoritatively laid down that the principles under these provisions in the Code can be taken as guidelines for the proper and fair exercise of http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 powers conferred by Section 9. A fortiori, post the 2015 Amendment, this would apply to an Arbitral Tribunal exercising identical powers under Section 17.

v. While the finance company or Bank may have a contractual right to repossess the asset upon Commission of default by the borrower, it cannot be again said that in many cases mechanical seizure of vehicles, en masse, may lead to substantial injustice. It is common knowledge that in a number of cases the borrowers generate income by putting these vehicles to use. Therefore, it may be worthwhile for the Tribunal to balance equities, in appropriate cases, by allowing the vehicles to operate while at the same time direct that some portion of the income got from plying these vehicles be deposited to the credit of the finance company. The Tribunals are under no obligation to pass orders seizing vehicles mechanically. In a vast majority of these cases, a common sense approach would not only ensure that the finance company is able to realise some portion of the outstanding dues periodically while at the same time enabling the borrower to retain the vehicle to generate income. http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 vi. The emphasis is that seizure and sale is not a one size fits all approach. In an appropriate case, the Tribunal can resort to the aforesaid procedure instead of sale. While a finance company may have the right to repossess the asset under the terms of the contract, the Court or Tribunal when petitioned for an order of seizure is certainly bound to apply its mind to balance the equities and cannot pass orders seizing vehicles for the asking.

vii. In Cholamandalam DBS Finance Limited v Sudheesh Kumar [2010 1 LW 951], a Division Bench of this Court formulated guidelines that must be followed while entertaining applications for appointment of Advocate Commissioners to seize hypothecated vehicles and report to Court and has observed thus :

> The guidelines are:
>
> a) If the pleadings in the affidavit make out that it is just and convenient to grant interimorders, and if, prima facie, the balance of convenience is in favour of the applicant, then an ex parte order appointing an advocate commissioner may be passed, but simultaneously notice shall be ordered to go to the respondent indicating the http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the Court to also serve private notice on the respondents personally at the time when

the vehicle is seized. But, an affidavit must be sworn to by the Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

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

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

d) The application shall not be closed without hearing the other side after notice is served. Before closing the http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 application, the Court shall also ascertain whether the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then orders shall be passed putting the applicant on terms as laid down in Sundaram Finance's case (cited supra), because section 9 depends on a close nexus with the initiation of arbitral proceedings;

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

f) The remuneration for advocate commissioners appointed by this Court shall be commensurate with the work done, since the financiers will shift this burden only on the already beleaguered borrower.

One other advantage in hearing the respondent before the closing of application is the clue that we get from Firm Ashok Traders' case[(2004) 3 SCC 155], cited supra, where the Supreme Court encouraged the parties to suggest a solution. If that is really possible, then even at the initial stage, the entire matter will come to a happy resolution. Therefore, it is not only in the interest of natural justice and fairness, but also as a pragmatic measure that we have laid down these guidelines. http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 Post the 2015 Amendment to Section 17, these guidelines will equally apply to applications before Arbitral Tribunal for appointment of Advocate Commissioners to seize hypothecated vehicles.

32. POWER TO ORDER SALE i. Section 9(1)(ii)(a) empowers the Court to order the sale of the goods which are the subject matter of the agreement. An identical power is available to the Arbitral Tribunal under Section 17(1)(ii)(a). In L & T Finance Ltd. v. G.G. Granites, (2013) 5 LW 714 this

Honble Court held that these powers are akin to those granted under Order XXXIX Rule 6 of the Code, and that the principles laid down therein must guide the exercise of power under Section 9. A fortiori, post the 2015 Amendment these observations would apply equally to Arbitral Tribunals under Section 17.

ii. Order XXXIX Rule 6 the Court may order interim sale of a movable property forming the subject matter of the proceeding or which is attached before judgment. Sale may be ordered where the property is subject to speedy or natural decay [as in the case of perishable goods] or http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 for any other just and sufficient cause which may make it desirable to have it sold at once. Before ordering sale, Order XXXIX Rule 8 mandates that the Tribunal must order notice to the other side. This is the norm. Notice cannot be dispensed with save in exceptional cases where the object of the sale would be defeated by the delay involved in ordering notice. But these cases would be few and far between.

iii. The requirement of notice also ensures that the borrower is put on notice about the sale price. The expression in such manner and on such terms as it thinks fit occurring in Order XXXIX Rule 6 would show that the power to fix the price and the terms of the sale is with the Court. When an application is made to the Arbitral Tribunal the fixation of the price and the settlement of terms of sale must be done by the Tribunal itself. This function cannot be delegated to the applicant, as a duty is cast on the Tribunal to see that the asset is not being frittered away and is sold for a fair and reasonable value. http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 iv. It would also be necessary that the disposal of these vehicles be done through public auction. Though most of the companies, nowadays, resort to this method there appears to be no uniform procedure adopted for this purpose. Invitation for participation in public auction ensures transparency and it would ensure that the entire sale process is free from bias or discrimination andbeyond reproach. A public auction ensures fair price and maximum return and would ensure that the vehicles are not collusively disposed off for paltry sums thus causing legal injury to the debtor.

33. ORDERS DIRECTING FURNISHING OF SECURITY i. The power under Section 9(1)(ii)(b) and Section 17(1)(ii)(b) is analogous to the provisions of Order XXXVIII Rule 5 of the Code. The applicability of the provisions of the Code to an application to furnish security under Section 9(1)(ii)(b) is no longer res-integra. In Nimbus Communications Ltd. v. Board of Control for Cricket in India , (2013) 1 Mah LJ 39, the Division Bench of the Bombay High Court, has held as under :

http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 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 under section 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, http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 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.

34. Similar principles can be garnered from the Division Bench decisions of this Honble Court in A-1 Biz Solutions v Cascade Billing Centre [2011 SCC Online Mad 924], C.S.S Corp Private Limited v Space Matrix Design Consultants Private Limited [2012 1 CTC 225] and Sundaram Finance Limited v M.K Khunhabdulla [2014 3 CTC 159]. A fortiori, these considerations would now apply equally to applications under Section 17 as well.

ii. In Raman Tech. & Process Engg. Co. v. Solanki Traders, (2008) 2 SCC 302, the Supreme Court pointed out the drastic and http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 extraordinary nature of the power under Order 38 Rule 5 and opined thus :

> 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 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 http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 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 5 CPC.

Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra v. Md. Manech Gazi [AIR 1951 Cal 156] for a clear summary of the principles.) iii. The power under Section Section 17 (1)(ii)(b) being extraordinary in nature the onus would be on the applicant to plead and establish that the requirements of the law are met. In this connection, the judgment of Ratnam, J in N. Pappammal v L. Chidambaram [AIR 1984 Madras 70] is instructive, and reads thus :

> 6. The essential requirements for invoking the power of court to effect an attachment under O. 38, R.

5(1), C.P.C., are that the Court must be satisfied that the defendant is about to dispose of the whole or any part of his or her property, or the defendant is about to remove the whole or any part of his or her property from the local limits of the jurisdiction of the court and the defendant is intending so to do with a view to cause http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 obstruction or delay the execution of any decree that may be passed against him or her. It is incumbent that the plaintiff should state precisely the grounds on which the belief or apprehensions are entertained that the defendant is likely to dispose of or remove the property. It may even be necessary in some cases to give the source of information and belief. A mere mechanical repetition of the provisions in the Code or the language therein without any basic strata of truth underlying the allegation or vague and general allegations that the defendant is about to dispose of the property or remove it beyond the jurisdiction of the court totally unsupported by particulars would not be sufficient compliance with the first part of O. 38, R. 5, (1), C.P.C.

35. Therefore, in the absence of any specificity about the basis for the claimants belief or apprehension, the Arbitral Tribunal cannot direct the other side to furnish security on the basis of surmises. The applicant must clearly plead and in some cases provide the basis of his source of information or belief that the debtor is attempting to secrete his assets to prevent the execution of the award against him. Furthermore, the amount http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 to be secured must be a definitive sum and cannot include an indeterminate amount like damages as held in Intertoll ICS Cecons O & M Co Private Limited v NHAI [ILR 2013 2 Del 1018].

36. It is relevant to note that as the very same arbitrator has dealt many matters of the respondent and applications have also been filed before this Court to terminate the mandate of the arbitrator in O.P.Nos.212 to 244 of 2020, this Court by Order dated 15.07.2020, after perusing the entire materials found that there are various infirmities in the entire proceedings of the arbitrator and having found that the learned arbitrator became dejure to perform as an arbitrator, had passed an Order terminating the mandate of the arbitrator.

37. Even in the given cases, the Order passed by arbitrator under section 17 is not sustainable under law for the simple reason that no notice whatsoever issued to the applicant before passing the order and the 26 trucks, which were subject matter of the hire purchase agreement, http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275,

277, 289, 617 to 621, 623 to 640 of 2020 secured by the respondent were kept idle from December 2019 till today. It is a common knowledge, whenever, machineries or a motor vehicles are kept in idle, without any use, its value will automatically diminish and there will be wear and tear of all the parts. Therefore, the ultimate sufferer is the person who is already in adversity.

38. In some of the cases, Order obtained under section 17 of the Arbitration and Conciliation Act, vehicles have been sold without even notice to the hirer. The sale is also not transparent and no public auction is conducted and fate of the sale is also not known. Such proceedings is also totally against law. Whenever a vehicle is sold, such sale should be only by way of public auction, after giving wide publicity in a widely circulated newspaper.

39. In such view of the matter, this Court is of the view that while appointing a receiver as an interim measure under section 17 of the Arbitration and Conciliation Act, the tribunal has to follow the procedure well established as indicated above in various judgments. http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020

40. Similarly, while passing an Order for attachment before judgment, the Order is also mechanically passed to attach the property in order to make unsecured debt to secured debt. It is well settled law that an Order of attachment before the judgment is a drastic remedy. Such an Order cannot be passed mechanically without following the procedures as laid down under Order 38 Rule 5 of Code of Civil Procedure. It is held to be drastic by the Apex Court and such Orders cannot be passed under section 17 of the Arbitration and Conciliation Act to make an unsecured debt as a secured debt without following settled position of law. No doubt Section 17 of the Arbitration and Conciliation Act provides power to pass interim measure to preserve the property or secure any amount etc. But, at the same time, while passing such an Order, which is like that of an Order of a Civil Court, the procedure contemplated under law has to be strictly followed. This Court has come across many cases, where even without making sufficient allegations in the applications, to satisfy the Court to pass such an Order, such Orders are casually passed. Such Order also, in my view cannot be sustained in http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 the eye of law. While passing any such Order, atleast the fundamental principles established under law and declared by the Apex Court has to be followed by the arbitrator. In the impugned Orders, none of the procedures are followed by the learned arbitrator while passing Orders under section 17 of the Arbitration and Conciliation Act.

41. It is further to be noted that a number of arbitrations have been conducted by the same arbitrator. Though the arbitrator in the declaration has mentioned that he has no interest or personal interest with the respondent, it was found otherwise by this Court in an earlier occasion and passed Orders in the above Original Petitions. Therefore, his appointment is terminated by this Court and a new arbitrator has been appointed in those matters to commence the proceedings afresh. When the appointment itself has been terminated, this Court is of the view that as the Order has been passed without following any substantial procedure established under law, such an Order is certainly in violation of the fundamental policy of India and it cannot stand in the eye of law.

Being an arbitral tribunal and having a trooping of Civil Court, while making decisions, the arbitral tribunal has to follow the procedure as http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 contemplated under law. If any interim Order of injunction is to be passed exparte, certainly, the tribunal has to keep in mind the well settled principles of law. While granting interim injunctions, only on being satisfied that there is a prima facie case in favour of the applicant and that balance of convenience is in his favour and irreparable loss or injury is likely to occur in the event of injunction not granted and only on being satisfied with the above grounds, interim Order of injunction can be granted by the tribunal. Whereas, in many Orders, this Court has come across, particularly in the arbitration cases, arising out of higher purchase and finance agreement, the arbitrator nominated by the financiers are passing Orders mechanically, without following any rule of law. Any such Order, in my view, cannot be sustained in the eye of law. Therefore, while passing any Order in the nature of interim injunction, the basic well established principles have to be followed by the arbitrator.

42. While passing any order for preservation or interim custody or a sale of any goods, which is subject matter of arbitral agreement or to http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 secure any amount, also preservation, the well established principles have to be followed by the arbitrators. Similarly, whenever the arbitral tribunal finds that such interim measures have to be passed, the arbitrator has to satisfy himself prima facie case of the applicant. The tribunal also has to find out the actual dispute and bonafide contest existing between the parties. Prima facie in the sense, the tribunal has to satisfy that the plaintiff has made positive averments that he has a strong case and legal right over the property, which has to be preserved or protected. To find out balance of convenience, the tribunal has to find out whether there is any bonafide contest between the parties and on which side the balance of convenience lies. Similarly, the tribunal also has to weigh whether in the event of not granting any injunction, the applicant will be really put to irreparable loss and injury. Only on being satisfied with these facts, interim Orders, particularly in the nature of injunction, can be granted.

43. This Court has also come across mechanical Orders passed for appointment of receiver to seize the vehicle. Though the contract for hire purchase provides for repossession of vehicles by appointing a http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 receiver, the tribunal has to follow the procedures as contemplated under law. When the properties are movables, running machineries, receiver cannot be mechanically appointed to seize the movables out of which the respondent is earning his livelihood. Merely because the contract provides for repossession of machineries, Order directing repossess the vehicle cannot be passed mechanically without the tribunal satisfying well settled position of law. If really, the appointment of receiver is required, to secure the amount to secure the amount, receiver can be appointed to oversee the business and collect the income and not to seize machineries to keep them in idle condition. When such Orders are passed and machineries are kept in idle, it will in fact diminish not only the value of the machineries but also lead to loss of livelihood of the other side. Such circumstances has to be foreseen by the tribunal while passing the Orders.

44. As per Order 40 of Civil Procedure Code, the purpose of appointing a receiver as contemplated under Order 40 has to oversee the property in respect of which the receiver is to be appointed. The http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 receiver, in fact, would be given a power to manage, protect and preserve and improve the property, besides collection of rents thereon. Even the Court has no power to remove from possession or custody of the property, any person whom any party to suit has not a present right so to remove. Whenever the receiver is appointed in respect of the property, he has to furnish security as the court thinks fit, duly to account for what he shall receive in respect of the property and submit his accounts at such periods and in such form as the Court directs and pay the amount due from him as the Court directs and be responsible for any loss occasioned to the property by his wilful default or gross negligence. As far as management of the property is concerned, he has responsibility over the property and he cannot commit gross negligence. Sub Clause 4 of Order 40 CPC deals with enforcement of receiver duties. High Court Amendment (Madras) Act that in the event, the receiver failed to submit the accounts, the Court can even attach his property.

45. A reading of the above provision makes it clear that mechanically receiver cannot be appointed to deal with the property. His http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 appointment is coupled with the responsibilities and duties. Whereas, in the pretext of power granted in the contract, the receivers have been mechanically appointed under section 17 of the Arbitration and Conciliation Act, particularly in the dispute arising out of the hire purchase agreement. Therefore, the Order of the tribunal is capable of execution as a decree of a civil Court, the arbitral tribunal has to follow the procedures as contemplated under law.

45. This Court also place on record of appreciation to Mr.Sharath Chander, Amicus Curiae placing various judgments of the Apex Court referred above.

46. Accordingly, these Civil Miscellaneous Appeals are allowed and the Orders passed by the learned Arbitrator Application No.1 of 2019 in Arbitration Case Nos.ACP No.HLF-FLY Nos.3/2019, 4/2019, 5/2019, 1/2019, 2/2019, 20/2019, 19/2019, 21/2019, 26/2019, 10/2019, 6/2019, 13/2019, 18/2019, 27/2019, 9/2019, 7/2019, 16/2019, 23/2019, 14/2019, 28/2019, 11/2019, 25/2019, 17/2019, 8/2019, 12/2019, http://www.judis.nic.in C.M.A.Nos.25 to 28, 30 and 66 to 88 of 2020 and C.M.P.Nos.271, 273, 275, 277, 289, 617 to 621, 623 to 640 of 2020 15/2019, 22/2019 and 24/2019 is set aside. Consequently, connected Petitions are closed. No costs.

17.09

Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes
vrc

N.SATHISH KUMAR, J.

C.M.A.Nos.25 to 28, 30 and 66 to 88 of
and C.M.P.Nos.617 to 621, 623 to 64
271, 273, 275 and 277 of 2

http://www.judis.nic.in