

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10-02-2014

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THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

Application Nos.441, 442, 444 & 445 of 2013 & A.No.5712 of 2013

M/s.L&T Finance Ltd.,
Represented by its Zonal Legal Manager,
Mr.C.Balasubramanian,
Monteith Place,
47, Monteith Road,
Chennai-600 008.

.. Applicant in
all Applications

Vs.

M/s.J.K.S.Constructions Pvt. Ltd.,
12, Sammandam Street,
Bharathipuram,
Chromepet, Chennai
Tamil Nadu-600 044

Also at:

M/s.J.K.S.Constructions Pvt. Ltd.,
2B, Sai Sananda Apartments,
No.51, Velachery Main Road,
Velachery, Chennai
Tamil Nadu-600 042.

.. Respdt. in A.Nos.
441,442,444 & R1
in A.No.5712/2013

M/s.J.K.S. Mines & Minerals Pvt. Ltd.,
12, Sammandam Street,
Bharathipuram,
Chromepet, Chennai
Tamil Nadu-600 044

Also at:

M/s.J.K.S. Mines & Minerals Pvt. Ltd.,
2B, Sai Sananda Apartments,
No.51, Velachery Main Road,
Velachery, Chennai
Tamil Nadu-600 042.

.. Respdt. in
A.No.445/2013

Palladium Infrastructures and Projects Ltd., H.No.8-2-348, Road No.3, Banjara Hills, Hyderabad, Andhra Pradesh-500 057.	..	R2/Garnishee in A.5712/2013
Military Engineering Services (MES), INS Rajaji Naval Air Station, SH-58, Arakonam, Tamil Nadu-631 006.	..	R3/Garnishee in A.5712/2013
Military Engineering Services (MES), Sulur, Coimbatore, Tamil Nadu-641 402.	..	R4/Garnishee in A.5712/2013
Military Engineering Services (MES), Tambaram (E), Chennai-600 059, Tamil Nadu.	..	R5/Garnishee in A.5712/2013
ABIR Infrastructure Pvt. Ltd., 143-144, Udyog Vihar, Phase-IV, Gurgaon, Harayana-122 015.	..	R6/Garnishee in A.5712/2013

Applications 441, 442, 444, 445 and 5712 of 2013 are filed by the applicant under Section 9 of the Arbitration and Conciliation Act, 1996, praying inter alia for the appointment of Advocate Commissioners to seize and possess the hypothecated equipment and for the issue of a prohibitory order restraining the Garnishees from making payment to the borrower.

For Applicant in all applications	:	Mr.M.S.Krishnan, S.C. For Mr.Ramesh Madhavan Iyer.
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For Respondents in all applications	:	Mr.K.Prahalad Bhat Ravi
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COMMON ORDER

All these applications are filed under Section 9 of the Arbitration and Conciliation Act, 1996, praying inter alia for the appointment of Advocate

Commissioners to seize and possess the hypothecated equipment and for the issue of a prohibitory order restraining the Garnishees from making payment to the borrower.

2. I have heard Mr.M.S.Krishnan, learned Senior Counsel for the applicant and Mr.K.Prahalad Bhat Ravi, learned counsel for the respondent.

3. The applicant, at various points of time, extended credit facilities to the respondent, for the purchase of machinery and equipment. Under one agreement dated 11.02.2010, bearing Deal No.549303, the applicant financed the purchase of one machine. The amount financed was re-payable in 36 monthly instalments commencing from March 2010 and ending in February 2013.

4. Under the second loan agreement dated 11.11.2010, bearing Deal No.646427, the applicant financed the purchase of two machinery and equipment and the amount financed was re-payable in 35 monthly instalments commencing from December 2010 and ending in October 2013.

5. Under the third loan agreement dated 13.12.2010, bearing Deal No.646428, the applicant financed the purchase of four machinery and equipment and the amount financed was re-payable in 23 instalments commencing from January 2011 and ending in November 2012.

6. Under the fourth loan agreement entered into on 30.3.2011 bearing Deal No.711954, the applicant financed the purchase of four machinery and equipment and the amount financed was re-payable in 35 monthly instalments commencing from May 2011 to March 2014.

7. Under the loan agreement dated 08.8.2011, bearing Deal No.776327, the applicant financed the purchase of one machine and the amount financed was re-payable in 36 monthly instalments commencing from March 2012 and ending in February 2015.

8. Contending that the respondent committed default in making payment of the various instalments under the loan agreements dated 11.02.2010, 11.11.2010, 13.12.2010 and 08.8.2011, the applicant came up with four applications in A.Nos.441, 442, 444 and 445 of 2013, praying for appointment of Advocate Commissioners to seize and possess the machinery and equipment financed under those four agreements. On 30.01.2013, this Court passed an *ex parte* order appointing an Advocate Commissioner for seizing and possessing the machinery and equipment. But, the Advocate Commissioner has not so far been able to seize and possess the machinery and equipment.

9. In the meantime, the respondent committed default even in respect of the agreement dated 30.3.2011. Therefore, going by past experience, the applicant came up with A.No.5712 of 2013, not for the appointment of advocate commissioner, but for a prohibitory order against Garnishees. Therefore, the said application was also taken up along with the other applications. After the arguments in all the applications commenced, the applicant came up with better affidavits, containing additional pleadings. These pleadings were primarily intended to bring on record two facts, namely, (a) that during the pendency of the first four applications, namely

A.Nos.441, 442, 444 and 445 of 2013, the applicant invoked the arbitration clause and the arbitrator had actually passed awards on 03.7.2013, and (b) that there is an imminent necessity for safeguarding the interest of the applicant, in view of the financial position of the respondent. In other words, in respect of loan agreements dated 11.11.2010, 13.11.2010, 11.02.2010 and 08.8.2011, which corresponds to A.Nos.441, 442, 444 and 445 of 2013, the applicant has already secured arbitration awards on 03.7.2013. In respect of loan agreement dated 30.3.2011, which corresponds to A.No.5712 of 2013, the agreement itself was terminated only on 22.11.2013 and the arbitration clause has been invoked. Therefore, no award has been passed in respect of the loan agreement dated 30.3.2011.

10. In the light of the fact that the applicant has already secured awards in respect of four loan agreements that correspond to four out of five applications on hand, what the applicant now seeks, as seen from the better affidavits, is a direction to the respondent at least to provide security for the award amount, or to direct the Garnishees to bring into Court, the amounts due and payable by them to the borrowers. The Garnishees are parties only to A.No.5712 of 2013.

11. The respondent has filed counter affidavits in each of the applications. After the applicant came up with better affidavits, containing more facts, the respondent filed an additional common counter affidavit.

12. Basically, the respondent borrower is opposing all the above applications, not on the ground that they never committed any default in

payment of the instalments, nor on the ground that no amount is due and payable by them. Today, the respondent cannot also raise any dispute with regard to the liability under the arbitration awards, since the respondent has not brought up before me, till this date, any petition under Section 34 of the Act, challenging any of the four awards. Therefore, as on date, I have to proceed on the footing that there is no serious dispute about the liability of the respondent under the arbitration awards.

13. Interestingly, even the counter and additional counter affidavits of the respondent do not dispute the claim of the applicant on merits, except by way of a faint plea that the rate of interest is exorbitant and that huge payments have been made by way of instalments. There is not even any dispute raised by the respondent with regard to the number of instalments defaulted under all the agreements in question.

14. But, nevertheless, the respondent has raised a few legal issues regarding the maintainability of the applications. Unfortunately, the system of administration of justice generally develops a cold feet to equity, justice and good conscience, when defaulters engage the Court's attention in serious legal issues. The case on hand is no exception and hence, let me consider those legal issues.

STEP IN AID TOWARDS EXECUTION

15. The first objection of the respondent to the maintainability of the above applications is that what the applicant is seeking in these applications, are not measures of interim protection covered by Section 9, but an attempt

at execution. According to the respondent, the applicant should only file execution proceedings and that an application under Section 9 cannot be converted into a step in aid of execution.

16. I do not think that the above objection can be sustained. It is well settled by now that an application under Section 9 is maintainable, both at the pre-reference stage as well as post-award stage, apart from the stage when arbitral proceedings are pending. I have considered this issue in detail in ***Van Oord Dredging & Marine Contractors B.V. v. Marg Limited (O.A.No.598 of 2013 & A.No.3575 of 2013 decided on 23.10.2013)***. It was held therein that a direction to the award-debtor to furnish security for the claim amount, cannot be taken to be equivalent to enforcement of the award. The expression used in Section 9(ii)(b) is "***securing the amount in dispute in the arbitration***". Even in cases where a petition under Section 34 against the award had been admitted, it eclipses only the award and not "***the dispute in the arbitration***". We may take it that once a petition under Section 34 is admitted, the Court becomes powerless to enforce the award. But still the dispute that was the subject matter of the arbitration does not cease to exist. Therefore, going one step behind the award, a party can always seek an interim protection under Section 9. Any relief sought by an award holder, for the realisation of the whole or part of the award amount alone, can be construed to be a step in aid of execution. Any remedy sought to secure the award amount or to secure the hypothecated property or a

prohibitory order to secure the award amount, cannot be treated as a step in aid of execution.

17. For instance, if an award is passed for payment of money, and if the award holder comes to know that the award debtor is making attempts to dispose of the only property available with him, the award holder is always entitled to approach this Court under Section 9 for an order of attachment. The interim measures of protection contemplated by Section 9, are not confined or limited only to the pre-award stage. Therefore, the first objection as to the maintainability of the application is rejected.

Applications infructuous

18. The second objection is that inasmuch as the first four applications were filed before the final awards were passed, the reliefs sought in those applications have become infructuous, after the awards were passed. In other words, the contention of the respondent is that the applicant sought certain reliefs in A.Nos.441, 442, 444 and 445 of 2013, by way of interim protection, either during the pendency of the arbitration proceedings or pending invocation of arbitration. But, during the pendency of these applications for interim reliefs, awards have been passed and hence, according to the respondent, these applications have become infructuous.

19. But the above objection cannot be sustained. Proceedings under Section 9, though akin to proceedings of interlocutory nature, stand on a different footing. Whenever interlocutory applications are filed, pending disposal of certain main proceedings in a Forum like a Civil Court, those

interlocutory proceedings would normally terminate along with the main proceedings. Generally, proceedings of interlocutory nature do not stand alone, but are actually co-terminus along with the main proceedings.

20. But the above general proposition, would hold good only when the interlocutory proceedings are also before the same Forum which is seized of the main proceedings. Where interlocutory proceedings are made on stand-alone basis, they need not necessarily be co-terminus always. As a matter of fact, whenever a property is attached even in terms of Order XXXVIII, Rule 5 of the Code of Civil Procedure, the attachment does not lapse, upon a decree being passed. Under Rule 11 of Order XXXVIII, a property, which is under attachment before judgment, need not be re-attached after a decree is passed, when an application for execution of a decree is filed. In other words, the benefit of attachment before judgment continues even after the decree, even in Civil Courts. Therefore, the applications cannot be said to have become infructuous.

21. In A.Nos.441, 442, 444 and 445 of 2013, this Court had already passed orders appointing Advocate Commissioners to seize and possess the equipment. So far, they have not been seized. After the passing of the orders appointing Advocate Commissioners, there has been only one change of circumstance and that is the passing of awards in favour of the applicant. Therefore, to say that the only change of circumstance that had taken place during the pendency of the above applications, had resulted in the applications becoming infructuous, is to say the least, atrocious, especially

when the position of the applicant has improved, by the passing of the awards.

ARBITRABILITY

22. The third objection of the respondent is that the dispute raised by the applicant is not even arbitrable. Since the applicant's claim is based upon loan cum hypothecation agreements, the dispute between the parties is with respect to the enforcement of a charge on moveable properties. Therefore, the contention of the respondents is that the applicant is seeking to enforce a right in rem and hence, the same cannot be resolved through arbitration.

23. In support of the said contention, Mr.K.Prahalad Bhat Ravi relied upon the decision of the Supreme Court in ***Booz Allen and Hamilton Inc vs. SBI Home Finance Ltd {2011 (5) SCC 532}***, wherein the Supreme Court held that a suit for sale, foreclosure or redemption of mortgaged property can be tried only by a Public Forum and not by an Arbitral Tribunal. According to the learned counsel for the respondent, the claim of a lender on the basis of a hypothecation or a charge created on movable properties, is in no way distinct and different from a suit on mortgage and that therefore, the principle laid down in *Booz Allen*, would apply squarely to the facts of the case. Therefore, according to the learned counsel for the respondent, the applicant should have gone before a Civil Court and cannot seek a reference of the dispute to arbitration. If the applicant cannot seek a reference of the dispute to arbitration, they cannot also invoke Section 9.

24. In response to the above contention, Mr.M.S.Krishnan, learned

Senior Counsel for the applicant, contended that there is a distinction between a pledge and a hypothecation, as brought out lucidly by a Division Bench of the Andhra Pradesh High Court in ***State Bank of India vs. S.B.Shah Ali {AIR 1995 AP 134}***. There is also a distinction between a *jus in rem* and a *jus ad rem*, as indicated by the Law Lexicon and as expounded by the Patna High Court in ***Mahabir Dass vs. Motibhai Narsibhai Patel {AIR 1971 Pat. 27}***. The difference between *jus in rem* and *jus ad rem* was also brought out by the Supreme Court in ***Gajraj Jain vs. State of Bihar {AIR 2004 SC 3392}***. Therefore, it is contended by the learned Senior Counsel for the applicant that the dispute is arbitrable and that the application under Section 9 is maintainable.

25. I have carefully considered the above submissions.

26. As pointed out by Mr.K.Prahalad Bhat Ravi, learned counsel for the respondent, Common Law recognised two types of rights viz., positive and negative rights. A positive right corresponds to a positive duty, while a negative right corresponds to a negative duty. A similar distinction exists in the case of wrongs. In his "Jurisprudence" (4th Edition-1913), John W. Salmond, the learned Author points out that in the case of a negative right, the interest, which is its de facto basis, is of such a nature that it requires for its adequate maintenance or protection, nothing more than the passive acquiescence of other persons. All that is asked by the owner of the interest is to be left alone in the enjoyment of it. In the case of a positive right, on the other hand, the interest is of a less perfect and self-sufficient nature,

inasmuch as the person entitled, requires for the realisation and enjoyment of his right, the active assistance of other persons. Salmond draws the distinction between the two types of rights, by quoting the right of a person to the money in his own pocket and the right of a person to the money in the pocket of his debtor. Salmond also draws the distinction between real and personal rights. A real right corresponds to a duty imposed upon persons in general. A personal right corresponds to a duty imposed upon determinate individuals. A real right is available against the world at large. A personal right is available only against particular persons. My right to the peaceful occupation of my farm is a real right, for all the world is under a duty towards me not to interfere with it. But if a lease of the farm is granted to a tenant, the right to receive the rent from him is only personal.

27. After pointing out those distinctions, Salmond goes on to state as follows:-

"The main purpose of mortgages and other forms of real security is to supplement the imperfections of a personal right by the superior advantages inherent in a right of the other class. Furthermore, these two kinds of rights are necessarily very different in respect of the modes of their creation and extinction. The indeterminate incidence of the duty which corresponds to a real right, renders impossible many modes of dealing with it, which are of importance in the case of personal rights.

The distinction between a real and a personal right is otherwise expressed by the terms right in rem (or in re) and right in personam.

Jus in rem literally means a right against or in respect of a thing, while jus in personam is a right against or in respect of a person."

The learned Author also states that in truth, every right is, at the same time, one in respect of something viz., its object and against some person viz., the person bound. In other words, every right involves not only a real, but also a personal relation.

28. Explaining what a *jus ad rem* is, Salmond states: "The commonest and most important kind of *jus in personam* is that which has been termed by the Civilians and Canonists as *jus ad rem*. I have a *jus ad rem*, when I have a right that some other right shall be transferred to me or otherwise vested in me. *Jus ad rem* is a right to a right. A debt, a contract to assign property and a promise of marriage are examples of this. It is clear that such a right to a right must be in all cases in *personam*".

29. The Law Lexicon defines a *jus ad rem* as a right to a thing or a right to a thing without possession. However, it defines *jus in rem* as follows:-

"Jus in rem. '*Jus in rem*' is a right in respect of a thing. A right in rem postulates a duty imposed upon all persons generally. A right in rem is protected against the world at large. Where the intervention of the Court is sought for the

adjudication of a right or title to property, not merely as between the parties but against all persons generally, the action is in rem.
Viswanathan vs. Abdul Wajid, AIR 1963 Sc 1, 15."

30. In ***Mahabir Dass vs. Motibhai Narsibhai Patel {AIR 1971 Pat. 27}***, the Patna High Court pointed out that a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced. This transfer of an interest actually distinguishes a mortgage from a charge. In a charge, no right in *rem* is created, but the right is something more than a personal obligation for it is a *jus ad rem*, that is, a right to payment out of the property specified. Thus the Patna High Court considered a charge not to be equivalent to a mortgage, but to be only a *jus ad rem* and not a *jus in rem*.

31. Similarly, the Supreme Court pointed out in ***Gajraj Jain vs. State of Bihar {AIR 2004 SC 3392}*** that there is a difference between a charge and a mortgage. In the case of a charge under Section 100 of the Transfer of Property Act, there is no transfer of interest in the property. A charge is not a *jus in rem*. It is *jus ad rem*. It creates a right of payment out of the property charged with the debt or out of the proceeds of realisation of such property.

32. In ***Olympus Superstructures Pvt. Ltd vs. Meena Vijay Khetan {1999 (5) SCC 651}***, the Supreme Court held that the right to specific performance of an agreement of sale deals with contractual rights and that therefore, it is certainly open to the parties to agree to refer the issues relating to specific performance, to arbitration. The Court pointed out

that there is no prohibition either in the Specific Relief Act or in the Arbitration and Conciliation Act for referring a claim relating to specific performance of an agreement of sale concerning immovable property to arbitration.

33. Similarly in ***Chiranjilal Shrilal Goenka vs. Jasjit Singh {1993 (2) SCC 507}***, the Supreme Court held that the grant of Probate is a judgment in rem and is conclusive and binding not only on the parties, but also on the entire world. Consequently, the Supreme Court held that the Courts alone have exclusive jurisdiction to grant Probate and that an Arbitral Tribunal will not have jurisdiction even if the parties consented to the adjudication.

34. In *Booz Allen*, which arose under Section 8 of the Arbitration and Conciliation Act, 1996, the Supreme Court took up for consideration 4 questions, the last of which was whether the subject matter of the suit, being money lent on a mortgage, was arbitrable or not. While holding that such disputes are not arbitrable, the Supreme Court laid down the following propositions:-

(i) There are 3 facets of arbitrability relating to jurisdiction of the Arbitral Tribunal viz., (1) whether the disputes are capable of adjudication and settlement by a private forum or whether they would exclusively fall within the domain of public fora (2) whether the disputes are covered by the arbitration agreement or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement and (3)

whether the parties have referred the disputes to arbitration or not.

(ii) Arbitral Tribunals are private fora chosen voluntarily by the parties to the disputes to adjudicate their disputes in place of Courts and Tribunals which are public fora constituted by the laws of the country. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy.

(iii) Certain categories of cases though not expressly reserved for adjudication by a public fora, may by necessary implication stand excluded from the purview of private fora. The well recognised examples of non-arbitrable disputes are (1) disputes relating to rights and liabilities arising out of criminal offences; (2) matrimonial disputes; (3) guardianship matters; (4) insolvency and winding up matters; (5) testamentary matters; (6) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction.

(iv) The cases which are excluded from the purview of private fora by necessary implication, relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals.

(v) Generally and traditionally, all disputes relating to rights in personam are considered to be amenable to arbitration and all disputes relating to rights in rem are required to be adjudicated by Courts and public Tribunals, being unsuited for private arbitration.

(vi) However, disputes relating to subordinate rights in personam

arising from rights in rem have always been considered to be arbitrable.

35. When the decision in *Olympus Superstructures*, was brought to the notice of the Supreme Court in *Booz Allen*, the Supreme Court distinguished the decision in *Olympus*, by pointing out that an agreement to sell or an agreement to mortgage does not involve any transfer of right in rem, but create only a personal obligation. The Court also pointed out that the provisions of the Transfer of Property Act such as Sections 85 to 90, 97 and 99 read with Order XXXIV of the Code of Civil Procedure make it clear that such suits are intended to be decided by public fora and that therefore they are impliedly barred from being referred to or decided by private fora.

36. Interestingly, an argument was advanced in *Booz Allen*, on behalf of the borrower that certain core issues such as the validity of the mortgage, the amount due to the bank etc., are raised in the adjudication and that at least these issues fall within the purview of the jurisdiction of the Arbitral Tribunal. In other words, it was contended that such disputes contained arbitrable as well as non-arbitrable parts and that the whole dispute cannot be thrown out of arbitration. But rejecting the said argument, the Supreme Court pointed out that a suit for enforcement of the mortgage with reference to an immovable property deals with the right of several classes of persons who have the right to participate in the proceedings, relating to the enforcement of the mortgage, vis-a-vis, the mortgagor and the mortgagee. Therefore, even if some of the issues or questions in a mortgage suit are arbitrable, the issues in a mortgage suit cannot be divided. Therefore, the

Court eventually held that a suit for enforcement of a mortgage by sale should be tried only by a Court and not by an Arbitral Tribunal.

37. But a careful look at the decision in *Booz Allen*, would show that the Court came to the conclusion that it did, first on the basis that a claim for enforcement of a mortgage is a right in rem and next on account of the fact that a very detailed procedure for the enforcement of mortgages is prescribed, both by the Transfer of Property Act and by Order XXXIV of the Code of Civil Procedure. The Court also recognised that at times, third party rights may also be involved in the matter of enforcement of mortgages and that a procedure for adjudication of such rights is provided in Order XXXIV, though those parties cannot participate in the arbitration proceedings.

38. But in so far as the hypothecation is concerned, it is neither governed by the Transfer of Property Act, nor governed by the provisions of Order XXXIV of the Civil Procedure Code. Hypothecation is not governed by any other statute also. I had an occasion to consider the scope of Section 9 of the Arbitration and Conciliation Act, 1996 in ***L&T Finance Ltd vs. G.G. Granites {2013 (6) CTC 654}***, where I pointed out the following:-

(i) The expression "mortgage" is defined in Section 58 of the Transfer of Property Act, 1882 and the expression "pledge" is defined in Section 172 of the Contract Act, while the expression "hypothecation" is not defined anywhere.

(ii) As pointed out by the Division Bench of the Andhra Pradesh High Court in *State Bank of India*, hypothecation is a creation of a charge on

movables without parting with possession, while a pledge is the bailment of goods as security for repayment of a debt.

(iii) It is only under the SARFAESI Act, 2002 that the word "hypothecation" came to be defined as a charge in or upon any movable property, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallisation of such charge into fixed charge on movable property.

39. If there is no dispute about the fact that hypothecation is not a creation of the statute, but a creation only of a contract between the parties, it is impossible to hold that hypothecation creates a right in rem. Today, I have my own doubts about the strict line of demarcation between rights in rem and rights in personam, that could have existed a century ago. As a matter of fact, the Supreme Court proceeded simply on the basis that the right to enforce a mortgage can be exercised only in accordance with the procedure prescribed by Order XXXIV of the Code of Civil Procedure and that therefore, the same could be dealt with only by public fora like Civil Courts and not by a private fora such as Arbitral Tribunals.

40. But the provisions of Order XXXIV of the Code were made irrelevant by several enactments, such as The State Financial Corporations Act, The RDDB Act, 1993 and the Securitisation Act, 2002. The Code of Civil Procedure itself has undergone a lot of changes, after 1999 and 2002. I do not know whether, after the decision in *Booz Allen*, the thrust given to

alternative dispute resolution mechanism under Section 89 of the Code, by virtue of CPC (Amendment) Act 46 of 1999, stands diluted in so far as suits for sale, foreclosure or redemption of mortgaged property are concerned.

41. In ***Afcons Infrastructure Ltd vs. Cherian Varky Construction {2010 (8) SCC 24}***, the Supreme Court considered the scope of Section 89 of the Code and indicated that cases which are not suited for ADR process should not be referred under Section 89. In paragraph 18 of the decision, the Supreme Court indicated that the following categories of cases are normally considered to be not suitable for ADR process:-

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title

against government.

(vi) Cases involving prosecution for criminal offences.

42. In 19 of the same decision, the Supreme court pointed out that all other suits and cases of civil nature, in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts (including all money claims);
- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including -

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/co-parceners/co-owners; and
- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing

relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);

- disputes between employers and employees;
- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including

- disputes where a trader/supplier/manufacture/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

43. Therefore, the Supreme Court itself has recognised the fact that disputes between bankers and customers are amenable to resolution through one of the modes prescribed under Section 89 CPC. If *Booz Allen* is taken to have finally sealed the fate of arbitrability of claims for sale, foreclosure and redemption of mortgages, I do not know what happens to a case of private sale by a mortgagee in exercise of a specific power conferred by virtue of Section 69(1) of the Transfer of Property Act. Section 69(2) of the Transfer of Property Act prescribes the procedure to be followed by the mortgagee, for exercising the power of private sale without the intervention of the Court. Whenever a notice in terms of Section 69(2)(a) is served, the mortgagors usually file civil suits for injunction, with or without a prayer for redemption. If there is a prayer for redemption, there may be no difficulty in following *Booz Allen*. If there is no prayer for redemption, I do not know whether a petition under Section 8 of the Arbitration Act could be entertained in such

suits, where the prayer is only for a bare injunction, challenging merely the quantum of liability or the validity of the procedure adopted. There is one more area which has become grey. Under Section 69(3), the only remedy available to the mortgagor, is for damages, if a sale had taken place in the professed exercise of the power under Section 69(1). I do not know if these claims are also not arbitrable, in view of the decision in *Booz Allen*.

44. If the enforcement of a mortgage is permitted by law to be carried out through private sale, without the intervention of any public fora like a Civil Court, I do not know why it cannot be done by a private fora. In other words, Section 69(1) of the Transfer of Property Act confers a right upon the parties to prescribe in the deed of mortgage itself that it is open to the mortgagee to enforce the mortgage without the intervention of Court. What is possible without the intervention of the Civil Court, may be possible with the intervention of a private fora also. Therefore, there are ever so many questions that require a scientific analysis.

45. Be that as it may, neither the provisions of the Transfer of Property Act nor the provisions of the Code of Civil Procedure, including Order XXXIV, are applicable to the enforcement of right created by hypothecation of a movable property.

46. As pointed out by the Patna High Court in *Mahabir Dass*, a mortgage is the transfer of an interest in specific immovable property and it is this transfer of an interest that distinguishes a mortgage from a charge.

The Patna High Court held that in a charge, no right in rem is created, though the right is something more than a mere personal obligation. The Patna High Court held that it is a jus ad rem.

47. As pointed out by the Division Bench of the Andhra Pradesh High Court in *State Bank of India*, a hypothecatee is entitled even to take possession of the hypothecated goods and bring them to sale, if the contract provides for such a right, without the intervention of Court. While such a right is conferred by contract in India, it is conferred in England by statute itself. The powers of seizure and sale of hypothecated chattels are governed by the provisions of The Bills of Sale Act, 1882 in England. Once such a right is exercised, the only remedy left for the borrower/hypothecator is to seek damages.

48. One argument advanced by Mr.K.Prahalad Bhat Ravi, learned counsel for the respondent is that since hypothecation creates only a charge, the respondent could as well create a second charge in favour of someone else and that once this is done, the enforcement of hypothecation by the applicant would naturally involve third party rights. Therefore, he contended that it is actually a right in rem which falls outside the scope of arbitration.

49. But the above argument is wholly unacceptable. As pointed out by the Supreme Court in ***Eureka Forbes Limited vs. Allahabad Bank {2010 (6) SCC 193}***, physical domain over the hypothecated goods is in no way a sine qua non for enforcing creditor's rights against the borrower. Under the terms of the contract, it is obligatory upon the respondent to deal with the

goods only with the leave and permission of the applicant. There is a prohibition under the contract between the applicant and the respondent for the creation of a second charge. Therefore, it is not open to the respondent to contend that he would set at naught, the provision for arbitration, by violating and committing a breach of the terms of the agreement. No one can seek to enlarge his rights, by committing a breach of the terms of the contract.

50. In ***Mahamaya Debi vs. Haridas Haldar* {(1915) ILR 42 Cal. 455}**, a Division Bench of the Calcutta High Court held that foreclosure is a remedy of the mortgagee which is not confined to mortgages of land and that it is equally applicable to mortgages of chattels. It was held by the Division Bench of the Calcutta High Court in that case that the turn of worship in a temple, was not like a pledge of a movable property. Therefore, the Division Bench came to the conclusion that the plaintiff is a mortgagee not of immovable, but of intangible property. In such circumstances, the Division Bench held that Order XXXIV of the Code of Civil Procedure would apply.

51. But the ratio laid down in *Mahamaya Debi*, relied upon by the learned counsel for the respondent is doubtful. Without first getting into the question whether a pledge or hypothecation of a movable property would also attract the provisions of Order XXXIV, the Division Bench went on to hold that the remedy of foreclosure of intangible right is governed by Order XXXIV. Therefore, I do not think that the decision in *Mahamaya Debi*, reflects the correct position in law.

52. Consequently, the decision of this Court in ***Dwarampudi Basivireddi vs. Gadi Kamaraju {AIR 1933 Mad. 241}***, which followed *Mahamaya Debi*, would also does not appear to reflect the correct position in law. In any case, neither *Mahamaya Debi* nor *Dwarampudi Basivireddi*, dealt with a case of hypothecation. After the judgement of the Supreme Court in *Gajraj Jain*, indicating the distinction between a charge and a mortgage, the above decisions do not hold good.

53. Merely because a security interest is created in movable property and merely because the hypothecatee is held to be a secured creditor in the decision of the Division Bench of this Court in ***Rehaboth Traders vs. Canara Bank {1998 (2) MLJ 318}***, hypothecation and mortgage cannot be equated. Though Order XXXIV generally speaks only about the mortgage-security, the heading given to Order XXXIV clearly indicates that the provisions therein relate only to suits governing mortgages on immovable property. Taking clue from the heading given to Order XXXIV, the Bombay High Court held in ***Official Assignee of Bombay vs. Chimniram Motilal {AIR 1933 Bom. 51}*** that at the outset, there is no reference to movable property in Order XXXIV and that since the substantive provisions of Order XXXIV use such words as "mortgage", "mortgage security" and "mortgage property" without any distinction between movables and immovables, the heading should be taken in effect to be defining those general words and limiting their operation to mortgages on immovable property.

54. If at all there is any doubt, the doubt is also cleared by Rule 15 of

Order XXXIV. Sub-rule (1) of Rule 15 of Order XXXIV states that all the provisions contained in Order XXXIV, which applies to a simple mortgage, shall, so far may be, apply to a mortgage by deposit of title deeds within the meaning of Section 58 and to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882. Therefore, it is clear that primarily the provisions of Order XXXIV apply to simple mortgages as well as to mortgages by deposit of title deeds, within the meaning of Section 58. Section 58(a) of the Transfer of Property Act clearly defines a mortgage only as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced, by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. This definition in Section 58(a), can be seen in contrast to the definition as given in English Conveyancing Act, 1881, under which a mortgage includes any charge on any property for securing money or money's worth.

55. Even Section 100 of the Transfer of Property Act, to which a reference is made in Order XXXIV, Rule 15(1) of the Code, deals only with the creation of a security in an immovable property, for the payment of money. Section 100 of the Transfer of Property Act, indicates that where immovable property is made security for payment of money and the transaction does not amount to a mortgage, a charge is created on the property. Therefore, Order XXXIV, Rule 15 is a clear indication to the fact that the procedure prescribed therein applies only to mortgages of or charges

on immovable property.

56. A look at the Transfer of Property Act, would show that the Act is divided into 8 Chapters, the first containing the preliminaries, the second containing the provisions relating to transfer of property, whether movable or immovable, the third dealing with sales of immovable property, the fourth dealing with mortgages of immovable property and charges on immovable property, the fifth dealing with leases of immovable property, the sixth, seventh and eighth Chapters dealing respectively with exchanges, gifts and transfer of actionable claims. Order XXXIV is made applicable only to Chapter IV, as indicated by Rule 15. Hence, the contention that since hypothecation creates a charge on movable property, the principles laid down in *Booz Allen*, would apply to the enforcement of hypothecation also, cannot be accepted.

57. In ***Md. Sultan vs. Firm Of Rampratap Kannyalal {AIR 1964 AP 201}***, a suit was filed for recovery of the share certificates pledged by the plaintiff with the defendant as security for a loan borrowed from the defendant. The defendant raised a plea that the suit was not properly valid. The Court Fee Examiner raised an objection regarding valuation of the suit on the ground that the share scripts are movables having market value and that therefore, court fee is payable under Section 23(1)(a) of the Andhra Pradesh Court Fees Act. The Trial Court upheld the objection of the Court Fee Examiner, with regard to the first relief claimed in the suit viz., the redemption of pledge. When the matter was taken to the High Court by way of revision, the Court first pointed out that the Court Fees Act, does not

specifically provide for a suit for redemption of a pledge. However, Section 31(8) provided for a suit for redemption of a mortgage. Since Section 31(8) did not specifically referred to mortgages of immovables, the Court pointed out that the language of Section 31 is comprehensive enough to include within its meaning, a mortgage of movable property. After having said so, the Court moved on to the next question as to whether the pledge of share certificates was actually a mortgage or not. After referring to Sections 172 and 148 of the Contract Act and also Sections 58 and 100 of the Transfer of Property Act, the Andhra Pradesh High Court pointed out that although hypothecation or the mortgage of movables are not specifically mentioned in the Contract Act, they have to be given effect to, as the Contract Act is not an exhaustive law on the subject and that such transactions had been long recognised in India. Therefore, in effect, the Court held that hypothecation or mortgage of movable property is valid in India. On the distinction between a pledge and a mortgage, the Court indicated that in a pledge, there is only a bailment and that in a mortgage, there is some sort of transfer of right in property by way of security. If the possession of the goods remains with the borrower, the transaction is one of mortgage. But if the possession is in the hands of the lender, the transaction is one of pledge.

58. Interestingly, the Court indicated, in paragraph 11, that hypothecation stood on a different footing. It was stated in paragraph 11 of the Report, that in a case of hypothecation, a general lien is created, but possession is not transferred. In the case of a pledge, a special interest and

not special property is transferred. However, in the case of mortgage, a general but limited interest in property is transferred with or without possession. The learned Judge of the Andhra Pradesh High Court also extracted the passage from the opinion of Willes, J., in ***Halliday vs. Holgate* {(1868) L.R.3 Ex.299}**, quoted with approval by this Court in ***Radhakrishnan vs. Madras People's Bank Limited* {AIR 1943 Mad. 73}**, to the following effect:-

- (i) that there are three kinds of security;
- (ii) that the first kind of security is a simple lien;
- (iii) that the second is a mortgage; and
- (iv) that the third being a security intermediate between a lien and a mortgage viz., a pledge.

Therefore, ultimately, the Andhra Pradesh High Court held that the transaction in that case was not a mortgage of movables. Hence, it is clear that every hypothecation need not necessarily be a mortgage of movables. In any case, what applies to a mortgage of immovable property need not necessarily apply to a mortgage of movable property, necessitating the Court either to follow the procedure prescribed by Order XXXIV of the Code or to make such a case come within the purview of the ratio laid down in *Booz Allen*.

59. In ***Tata Capital Financial Services Limited vs. Deccan Chronicle Holdings Limited* {2013 (3) Bom.CR 205}**, a learned Judge of the Bombay High Court held that in an application under Section 9, the

arbitrability of the dispute cannot be gone into, especially when no statement of claim had been filed before the Arbitral Tribunal. The learned Judge pointed out that even in cases of a valid mortgage, it may be open to the mortgagee to file only a simple claim for recovery of money by taking advantage of Order XXXIV, Rule 14, without seeking the enforcement to mortgage. The learned Judge also pointed out that proceedings under Section 9 cannot be equated with proceedings in a pending suit under Section 8. But I do not wish to go so far. In this case, there is no mortgage. Hypothecation is certainly not a mortgage and the procedure prescribed by Order XXXIV does not apply. The enforcement of a hypothecation is a right *ad rem* and not a right *in rem*.

60. In ***Garlapati Ramanaiah Naidu vs. L&T Finance Ltd {2012 (5) CTC 172}***, a Division Bench of this Court considered the effect of *Booz Allen*, as seen from paragraph 36 onwards. But the Division Bench did not hold the dispute to be non-arbitrable, despite a finding that there was a loan cum hypothecation agreement.

61. Therefore, I hold that the dispute between the parties is an arbitrable dispute. The principles laid down by the Supreme Court in *Booz Allen*, will not apply to cases of this nature, where the loan advanced is secured by the creation of hypothecation of movables. Therefore, there is no iota of doubt that the dispute between the parties is arbitrable and that the invocation of arbitration was well founded.

MERITS:

62. Having rejected all the grounds of maintainability raised by the respondent, now let me move on to the merits of the dispute to see whether the applicant has made out a case for the grant of the reliefs prayed for.

63. In the first 4 applications viz., A.Nos.441, 442, 444 and 445 of 2013, the prayer is for the appointment of an Advocate Commissioner to seize and possess the hypothecated equipment. In those applications, this Court passed an order on 30.1.2013, appointing an Advocate Commissioner to seize and possess the equipment. But, unfortunately, the Commissioner could not seize and possess the equipment, since the equipment in question are (i) a Concrete Mixing Plant (ii) a Bituman Sprayer Plant as well as the Asphalt Mixing Plant and Paver (iii) a Vibratory Compactor and (iv) another Vibratory Compactor. Therefore, the equipment have been left in the construction sites where the borrower appears to have undertaken some work.

64. Therefore, the applicant came up with the last of the applications viz., A.No.5712 of 2013, seeking a prohibitory order to restrain the Garnishees from making payments to the borrower.

65. Curiously, the borrower does not have any dispute with regard to their liability to make payment. Today, even if they dispute their liability to make payment, I would not hear the borrower on that question, in view of the fact that arbitration awards had been passed on 3.7.2013. Till date, no petition under Section 34 of the Act, has so far been brought up before me for hearing. The borrower has been clever enough to file a petition under

Section 34, but not to bring it up for hearing at all even for admission tii date.

66. The applicant came up with better affidavits in all the applications, expressing apprehension that the borrower has secreted the equipment. In response to the better affidavits, the respondent filed additional common counter affidavit. In paragraph 3 (d) of the additional common counter affidavit, the respondent has admitted liability at least to the extent of Rs.1,07,51,115/-. After having admitted liability to that extent, the respondent has taken a curious stand that the said amount is payable only as per the award of the sole Arbitrator and that if the said award is set aside or held unenforceable, the respondent would not be liable to pay any money. Additionally the respondent has stated that they are entitled to recover damages on account of the applicant charging exorbitant rates of interest. Such an utterly dishonest stand taken by the borrower can hardly be appreciated especially at this distance of time. The contracts were entered into in 2010-2011. The respondent has come up with such a stand about exorbitant rate of interest after having suffered arbitral awards. Therefore, the intention of the borrower to deprive the applicant of even the admitted liability is crystal clear.

67. What is more atrocious is the fact that the respondent has claimed in paragraph 4 of the common counter affidavit that they have been making regular payments. This contradicts the statement made in paragraph 3(d) of the common counter affidavit.

68. As a matter of fact, after the appointment of an Advocate Commissioner by this Court and after he made an attempt to seize and possess the equipment, the borrower sent a letter dated 3.7.2013 to the applicant, agreeing to pay the outstanding balance amount under all the contracts, in a sum of Rs.1,43,42,840/-, on or before 15.7.2013. Along with the letter, the borrower also issued two cheques, one for a sum of Rs.20,00,000/- and another for a sum of Rs.17,16,482/-. For the balance amount, they issued two post dated cheques. But the cheque for Rs.1,05,00,000/- bearing No.120736 dated 18.7.2013 got dishonoured for insufficient funds. The borrower did not dishonour the cheque on the ground that there was no liability or on the ground that they had a claim due to exorbitant rate of interest. This shows that even at that time, the borrower had no dispute about the liability. As I have pointed out earlier, in paragraph 3(d) of the common counter affidavit, there is an admission of liability to the extent of at least Rs.1,07,51,115/-. This common counter affidavit was sworn to on 2.12.2013. Despite this admission, the borrower has not exhibited any intention to make payment. On the contrary, the borrower has only indulged in a lot of legal research on how to defeat the claim of the creditor and how to deprive the creditor of their dues. It is true that in an adversarial system of litigation, the borrower has the right to do so. But the court has a different obligation. In such circumstances, I am of the view that there must be a prohibitory order, restraining the Garnishees from making payment of the amounts. I am conscious of the fact that it is a drastic order. I would not

venture to pass such a drastic order, had the respondent-borrower had exhibited some element of fairness, by at least agreeing to make payment of the admitted liability in easy instalments. After having admitted liability to the extent of at least Rs.1.07 crores, the respondent does not have the mind even to pay this liability in easy instalments, which if asked for, would have been granted by me willingly. Today, the respondent wants the applicant to execute the award. But the respondent has already filed a original petition under Section 34, but has not numbered the same and brought it up for admission. Therefore, the intention of the respondent-borrower appears to be to deprive the applicant of their legitimate dues.

69. It must be remembered that the equipment that the respondent-borrower bought out of the credit facilities extended by the applicant, are the ones, by the use of which the applicant is generating income for their company. While generating income for themselves out of the very same equipment, it is unfair on the part of the respondent to refuse to pay at least some portion of it to the applicant towards the bare minimum of admitted liability. In such circumstances, I have no alternative except to pass a prohibitory order.

70. In view of the above, the reliefs sought in A.Nos.441, 442, 444 and 445 of 2013 are rejected. A.Nos.441, 442, 444 and 445 of 2013 are dismissed.

71. In A.No.5712 of 2013, there will be an order, directing the Garnishees viz., respondents 2 to 6, to bring into Court, the amounts, if any,

due and payable by them to the first respondent, to the extent of the admitted liability of Rs.1,07,51,115/-, within a period of one week from today. The copy of this order shall be communicated to respondents 2 to 6 immediately. Respondents 2 to 6 are directed to file into Court either a report of compliance of this order or a statement if they owe or do not owe any money to the respondent-borrower.

Call A.No.5712 of 2013 on 18.2.2014.

Index : Yes
Internet : Yes
kpl/Svn

10-02-2014

V.RAMASUBRAMANIAN,J.

kpl/Svn

order in
A.Nos.441, 442, 444 & 445
of 2013 & A.No.5712 of 2013

10-02-2014