IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 18 OF 2016

TATA Capital Financial Services Ltd. & Ors. .. Petitioners
Vs.
Gupta Corporation Private Limited & Ors. .. Defendants

WITH
ARBITRATION PETITION NO. 1305 OF 2015

TATA Capital Financial Services Ltd. .. Petitioner
Vs.
Gupta Corporation Private Limited & Ors. .. Defendants

Mr.S.U. Kamdar, senior advocate a/w. Mr.Chetan Kapadia, Mr.Yashesh Kamdar, Mr. Tushar Kadam and Ms. Radhika i/b Dixit i/b MDP and Partners for Petitioners in both petitions.

Mr.Santosh Chate for Respondent No.1 in CARBP/18/2016.

Mr.Devendra V. Chauhan i/b Mandar Soman for Respondent No.2 in CARBP/18/2016.

Mr.Santosh Ghate i/b Tarar Law Associates for Respondent Nos.1, 2 and 3 in ARBP/1305/2015.

Mr.Mandar Soman for Respondent No.4 in ARBP/1305/2015.

Ms.Gaurangi Patil for Respondent No.4 in CARBP/18/2016 and for Respondent No.6 in ARBP/1305/2015.

Mr.Suyog Nildawar, authorized signatory of Respondent No.4 in ARBP/1305/2015 present.

CORAM : K.R.SHRIRAM, J.
DATE : 13TH DECEMBER, 2016

P.C.

1 Both the above petitions are filed under Section 9 of the Arbitration and Conciliation Act, 1996, as amended (the said Act).

2 The Petitioner is a non-banking finance company and a wholly owned subsidiary of Tata Capital Limited duly registered with the Reserve Bank of India. In Arbitration Petition No.1305 of 2015, Respondent No.1 is the principal borrower, Respondent Nos.2 and 3 are the Directors of Respondent No.1 and guarantors for the repayment of amounts lent by the Petitioners to Respondent No.1, Respondent No.4, of which Respondent No.2 is the Director, has mortgaged all its assets to the Petitioner for the amount lent to Respondent No.1 and Respondent No.5 and Respondent No.6 are the occupants of the two premises owned by Respondent No.4 that are mortgaged to the Petitioner of which the Petitioner is seeking appointment of the Court Receiver pending the arbitration proceedings.

Respondent No.2 and Respondent No.3 in Arbitration Petition No. 1305 of 2015, are not parties to Arbitration Petition No.18 of 2016 whereas the other four are.

3 By these two petitions, what the Petitioner is seeking is basically to secure amounts due and payable by Respondent No.1 as per the Loan Agreement, dated 27^{th} June 2011 that was executed between the Petitioner and Respondent No.1.

4 During the course of arguments, the counsel for the Petitioner has

stated that he is pressing for the appointment of the Court Receiver and take physical possession only so far as the premises which is occupied by Respondent No.6-K.D. Entertainment, being Shop No.121 in Building Raipur Mall at Raipur City. So far as Respondent No.5 is concerned, Shri Kamdar is seeking only symbolic possession by the Court Receiver. I am told that Respondent No. 5 has been paying the license fees to Respondent No.4 and Respondent No.4 voluntarily informed the Court that they will deposit the license fees in the Court which they have done upto May 2016.

Shri Soman stated that the order dated 21st April 2016 was challenged before the Appeal Court and the Appeal Court set aside the Single Judge's order and directed the matter to be heard *de-novo* by this Court and hence they did not make any payment after May 2016.

5 It would be convenient if the parties are referred by their names since both the petitions were heard and are being disposed by this common order. Respondent No.4 in Arbitration Petition No.1305 of 2015 who is Respondent No.2 in Arbitration Petition No.18 of 2015-Gupta Infrastructures (India) Private Limited is referred hereinafter as Gupta Infrastructures; Reliance Corporate IT Park Ltd. (Respondent No.5 in Arbitration Petition No.1305 of 2015 and Respondent No.3 in Arbitration Petition No. 18 of 2016) is hereinafter referred to as Reliance; K.D.

Entertainment (Respondent No.6 in Arbitration Petition No.1305 of 2015 and Respondent No.4 in Arbitration Petition No. 18 of 2016) is hereinafter referred to as K.D. Entertainment. Respondent No.1 in both the petitions-Gupta Corporation Private Limited is referred to as Gupta Corporation/Respondent No.1 and the Petitioners in both the petitions are referred as the Petitioner/s. Respondent No.2 and Respondent No.3 in Arbitration Petition No.1305 of 2015 are hereinafter referred to as Guarantors. As stated earlier, they are not parties to Arbitration Petition No.18 of 2015.

6 In or about June 2011, Respondent No.1 (who is common in both the petitions) approached the Petitioner with a request for granting a Term Loan Facility upto an amount of Rs.50,00,00,000/- for the purpose of meeting its capex requirement and money margin requirement of Group Companies (Facility). This request was sanctioned vide letter dated 22nd June 2011 on the terms and conditions set out therein. The said Sanction Letter, as acceptance, was signed by Respondent No.1 and the Guarantors. Respondent No.1 and the Petitioner also executed a Term Loan Agreement, dated 27th June 2011.

7 As security for the amount disbursed/for the facility to Respondent No.1, Gupta Infrastructures deposited with the Petitioners, the Title Deeds relating to the two properties which are occupied by Reliance and K.D. Entertainment. These are Shop Nos.112B admeasuring 11546.03 sq.ft. on the first floor of the Raipur Mall and Shop No.121 admeasuring 15334.50 sq.ft. situated on the first floor of the Raipur Mall, being situated at land admeasuring 23,082 sq.mtrs. (approximately 5.70 acres) situated at Raipur District. Respondent No.5 is in occupation of Shop No.112B and Respondent No.6 is in occupation of Shop No.121.

It is not disputed by either Respondent No.1 or Gupta Infrastructures or the Guarantors that there are substantial amounts payable by Respondent No.1 and the Guarantors to the Petitioner. Since the amounts were not paid, the Petitioners commenced arbitration proceedings and as the Petitioners apprehend that Respondent No.1, Guarantors and Respondent No.4 are likely to create third party rights to defeat the claim of the Petitioners, the Petitioner/s filed the present petitions.

8 Shri D.V. Chauhan, appeared for Gupta Infrastructures in Commercial Arbitration Petition No. 18 of 2016 and Shri Mandar Soman, appeared for Gupta Infrastructures in Arbitration Petition No.1305 of 2015. For the same party, two different counsels appeared in the two petitions

9 Counsel appearing for Gupta Infrastructures submitted that this Court could not exercise its jurisdiction because :

(a) Once the arbitral tribunal has been constituted, in view of amendment to Section 9 of the said Act, (w.e.f. 23.10.2015), the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.;

(b) Gupta Infrastructures was not party to the Loan Agreement.;

(c) Arbitration Proceedings covered under Arbitration Petition No.18 of 2016 which is for enforcement of a mortgage and that is not arbitrable; and as the enforcement of a mortgage is not arbitrable, the Court cannot grant any relief under Section 9 of the said Act; and

(d) In any event, the ground for relief sought is paragraph 12 of Arbitration Petition No.18 of 2016; what is averrred therein is not sufficient for the Court to exercise its jurisdiction and grant the reliefs as sought.

(a) Once the arbitral tribunal has been constituted, in view of amendment to Section 9 of the said Act, (w.e.f. 23.10.2015), the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious :-

10 On this, Shri Kamdar for the Petitioners submitted that Reliance and K.D. Entertainment are not parties to any Arbitration Agreement and therefore, Arbitral Tribunal will not have any power to pass any order against Reliance and K.D. Entertainment.

11 A Division Bench of this Court in ***Girish Mulchand Mehta & Anr. Vs. Mahesh S. Mehta & Anr.***[1], has held that Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. Paragraphs 12 and 13 of the said judgment read as under :

> *12 The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under Section 9 can be invoked only by a party to the Arbitration Agreement.*
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> *Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court*

1 2010 (1) Bom.C.R.31

under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

13. The Appellants, however, place reliance on the decision of the Kerala High Court in the case of Shoney Sanil v/s. M/s. Coastal Foundations (P) Ltd. & Ors. reported in AIR 2006 Kerala (206). In that case the question considered was whether the writ-Petitioner, admittedly, a third party to an alleged Arbitral Agreement between the Respondents inter se, and who had in his favour a confirmed Court sale and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, injuncted or subjected to other Court proceedings under Section 9 of the Act? The Kerala High Court held that orders under Section 9 (ii)(c) can be passed only in relation to subject matter of dispute in arbitration which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third party rights. It concluded that on a plain reading of Section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party holding possession on the basis of Court sale could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act. Instead, it held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject matter of the Arbitration Agreement, Section 9 cannot be invoked to affect his rights. At the same time, the Kerala High Court has plainly opined that it is possible to pass orders under Section 9 against a third party if such person is claiming under the party to

> *the Arbitration Agreement. Thus understood, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The Appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 Society who is party to the Arbitration Agreement. In absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the Appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings.*

This has also been followed by a Single Judge of this Court in ***Calvin Properties & Housing v Green Fields Cooperative Housing & Ors.*** [2]. Shri Soman submitted that Gupta Infrastructures is not a person claiming under Respondent No.1 and therefore, no order against Gupta Infrastructures could be passed. Shri Soman also submitted, by relying upon ***Cotton Corporation of India Limited Vs. United Industrial Bank Limited & Ors.***[3]**,** that an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceedings and since no relief has been sought against Gupta Infrastructures in the Arbitral proceedings taken out by the Petitioner under the Loan Agreement (covered under Arbitration Petition No.1305 of

2 2014 (2) Bom.CR.398
3 (2011) 5 SCC 532

2015), no interim relief can be granted against Gupta Infrastructures. In my view, both these submissions of Shri Soman are fallacious and they are covered by **Girish Mulchand Mehta** (supra).

12 I do not agree with Shri Soman because the property that is owned by Gupta Infrastructures, has been mortgaged to the Petitioners as security for the money lent to Respondent No.1, Respondent No.2, one for the Guarantors is also a common Director of Respondent No.1 and Gupta Infrastructures. Moreover, Gupta Infrastructures will be affected by any order passed against Respondent No.1 so far as the mortgaged properties are concerned. Therefore, in my view, the Petitioner/s is justified in filing this petition and seeking interim measures and Section 9 can be invoked against Gupta Infrastructures.

(b) Gupta Infrastructures was not party to the Loan Agreement :

13 This is a non-starter as Gupta Infrastructures is party to the mortgage agreement that has an arbitration clause and the same is covered under the arbitration proceedings covered under Arbitration Petition No.18 of 2015. My views while dealing with (a) above squarely applies here also.

(c) Arbitration Proceedings covered under Arbitration Petition No.18 of 2016 which is for enforcement of a mortgage and that is not arbitrable; and as the enforcement of a mortgage is not arbitrable, the Court cannot grant any relief under Section 9 of the said Act :-

14 Shri Chauhan submitted that in the Statement of Claim already filed, which is covered under Arbitration Petition No.18 of 2016, the substantial relief sought is (a) an Award and order be passed directing Respondent No.1 and Gupta Infrastructures to pay the Petitioner a sum of Rs.66,26,44,805/-; and (b) that it be declared that the payment of the aforesaid amount is duly secured by a valid and subsisting mortgage of the immovable properties. Counsel submitted that in view of these reliefs sought, the claim is not arbitrable and since the claim is not arbitrable, the Court should not exercise its power under Section 9 of the said Act.

Shri Chauhan relied upon a judgment of the Apex Court in ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited & Ors.***[4] and submitted that the Apex Court has, in paragraph 51 of the said judgment, held that a claim for enforcement of mortgage is not arbitrable and even if some of the issues or questions in a mortgage suit are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided and therefore, the Petitioner cannot ask for the relief as they have sought, for a declaration that the money claim is duly secured by a valid and subsisting

4 (2011) 5 SCC 532

mortgage but when it comes to a immovable property, they should file a separate suit.

Shri Chauhan also submitted that this Court in ***Tata Capital Financial Services Limited & Ors. Vs. Deccan Chronicle Holdings Limited*** [5] has exercised jurisdiction on the basis that in that case the statement of claim has not been filed and it was not before the Court while hearing under Section 9 of the Act and therefore the Court cannot reject the application for interim measures. Shri Chauhan submitted that the Court came to a conclusion that if the statement of claim is not before the Court while hearing application under Section 9 of the said Act and if the Petitioner raises any such relief which is beyond the jurisdiction of Arbitral Tribunal, it was open to the respondent to always challenge the jurisdiction of the Arbitral Tribunal under Section 16 of the said Act.

Shri Chauhan relied upon another judgement of a Single Judge of this Court (S.J.Kathawalla, J.) in ***Indepay Networks Pvt. Ltd. and Anr. Vs. Datamatics Software Services Ltd. & Ors.*** [6] and submitted that a suit for enforcement of mortgage was not arbitrable.

15 It is trite that a claim for enforcement of mortgage is not arbitrable. In ***Indepay Networks Pvt. Ltd.*** (supra), the plaintiff has filed the suit for

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5 2013(3) Bom. C.R. 205

6 CHS/669/2013 in S/294/2013 (Unreported) pronounced on 25th November 2013

enforcement of mortgage, redemption of the mortgage and by sale of the mortgaged assets and and the sale proceeds be paid over to the plaintiffs in satisfaction of its claim against the defendants. The defendants in that suit had filed an application under Section 8 of the said Act. In that background, the Court came to the conclusion that since the suit was for seeking specific performance of enforcement of the mortgage and enforcement of a mortgage being an enforcement of a right in rem, the same will have to be decided by this Court and not by an Arbitral Tribunal. Similar submissions were made and considered by a Division Bench of this Court in an unreported judgement in ***Deccan Chronicle Holdings Limited Vs. L & T Finance Limited*** [7], where similar issues were raised. It will be useful to reproduce paragraphs 5, 6, 7, 8, 9 and 10 of the said judgment :

> *6 We will deal with each of the three submissions separately. In Booz Allen and Hamilton Inc. (supra), the Supreme Court held that a suit on a mortgage is not a mere suit for recovery of monies but constitutes an action in rem which is to be decided by a Court and not by an arbitral tribunal. The principle which has been laid down is as follows :*
>
> > *"An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but creates only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance, will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged*

7 Appeal (Lodg.) No.130 of 2013 in ARBP/1095/2012 dt. 8.08.2013 (Unreported)

> *property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided in courts of law and not by arbitral tribunals."*

7. In both the cases in appeal, it is common ground that the claim in arbitration is not for the enforcement of a mortgage. In both cases, the two creditors have asserted a claim for the recovery of monies due and outstanding. Order XXXIV Rule 14 of the Code of Civil Procedure, 1908 provides as follows :

> *"O.34, R.14 : Suit for sale necessary for bringing mortgaged property to sale.-*
>
> *(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.*
>
> *(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended."*

Hence, where a mortgagee obtains a decree for the payment of money in satisfaction of a claim under a mortgage, before the mortgaged property can be brought to sale, a suit for sale in enforcement of the mortgage has to be filed and such a suit can be instituted notwithstanding anything contained in Order II Rule 2 of the Code. Consequently, both the creditors were justified in seeking to assert their money claims in arbitration. The creditors would thereafter be entitled to espouse their rights under Order XXXIV Rule 14 of the Code. The principle which has been laid down by the Supreme Court in Booz Allen and Hamilton Inc. (supra) has not been breached because the claim in the *arbitration was not an assertion of a right in rem but a claim for the recovery of monies due and outstanding simpliciter. There is no merit in the first submission.*

8 The second submission proceeds on a logical fallacy. When a creditor, who has a mortgaged security in his favour, confines the claim in arbitration for the recovery of monies due and outstanding, he does not relinquish the mortgaged security or abandon his right to bring the mortgaged security to sale by subsequently instituting a suit as envisaged in Order XXXIV Rule 14. The creditor cannot enforce a right in rem in the course of arbitral proceedings. Hence, a claim for the enforcement of the mortgaged security cannot be entertained in arbitration. But when the creditor asserts a money claim simpliciter in the course of arbitral proceedings, the law does not compel him to relinquish his mortgaged security as a condition for asserting the money claim in arbitration or to abandon his right as a secured creditor to bring the mortgaged property to sale by filing an independent suit in accordance with Order XXXIV Rule 14. Consequently a secured creditor can invoke the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 which is a provision incidental to or ancillary to the arbitration proceedings for seeking an interim measure of protection that would ensure that the fruits of the arbitral award are not destroyed or lost by dealings of the debtor with the properties in the meantime. That is exactly what has been done by the secured creditors and correctly accepted by the learned Single Judge.

9 As regards the applicability of Order XXXVIII Rule 5 of the Code, to an application under Section 9 of the Arbitration and Conciliation Act, 1996, it needs to be noted that Section 9(ii)(b) allows a party to apply to the Court before, during or after the arbitral proceedings for securing the amount in dispute in the arbitration. Moreover under sub-clause (d) of Clause (ii) of Section 9, the Court is empowered to appoint a Receiver whereas under sub-clause (e) of Clause (ii) of Section 9 *the Court may order such interim measure as may appear just and convenient. In the judgment of a Division Bench of this Court in Nimbus Communications Ltd. and another Vs. Board of Control for Cricket in India and another2, this Court after having due regard to the judgments of the Supreme Court on the subject including in Adhunik Steel Ltd. Vs. Orissa Manganese and Minerals (P) Ltd.3, held as follows :*

> *"24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish*

> *a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b)."*
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> *10 The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process.*
>
> (emphasis supplied)

Therefore, the Division Bench, after considering ***Booz Allen*** (supra), came to the conclusion that if the arbitration proceedings is only for recovery of money or monies due and outstanding and not for enforcement of mortgage security, the Arbitral Tribunal will have jurisdiction. The Court held that when a creditor, who has a mortgaged security in his favour, confines the claim in arbitration for the recovery of monies due and outstanding, he does not relinquish the mortgaged security or abandon his right to bring the mortgaged security to sale by subsequently instituting a suit as envisaged in Order XXXIV Rule 1 of Code of Civil Procedure, 1908 (CPC). The Court also held that when the creditor asserts a money claim simplicitor in the course of arbitral proceedings, the law does not compel him to relinquish his mortgaged security as a condition for asserting the money claim in arbitration or to abandon his right as a secured creditor to bring the mortgaged property to sale by filing an independent suit in accordance with Order XXXIV Rule 14 of CPC. The Court concluded that a a secured creditor can invoke the provisions of Section 9 of the said Act which is a provision incidental to or ancillary to the arbitration proceedings for seeking an interim measure of protection that would ensure that the fruits of the arbitral award are not destroyed or lost by dealings of the debtor with the properties in the meantime.

16 In the statement of claim filed already, the Petitioner is only seeking to assert the money claim simplicitor and for a declaration that the money claim is duly secured by a valid and subsisting mortgage. The Petitioner in the arbitration proceedings is not seeking enforcement of the mortgage security. Therefore, in my view, the Arbitral Tribunal will have jurisdiction and consequently this Court also has jurisdiction to consider whether the relief sought under Section 9 of the said Act can be granted.

17 This will also take care of the submissions made by Shri Chauhan that the issues cannot be divided.

(d) In any event, the ground for relief sought is paragraph 12 of Arbitration Petition No.18 of 2016; what is averrred therein is not sufficient for the Court to exercise its jurisdiction and grant the reliefs as sought :-

18 As regards, the submissions of the respondents that barring bald statements in the petition that they apprehend Gupta Infrastructures would dispose the assets to defeat the claim of the Petitioner, there is nothing on record. As regards the premises occupied by Reliance, Shri Kamdar submitted that since Reliance is paying the license fees, they are not insisting for the Court Receiver to take physical possession at this stage but only symbolic possession.

19 As regards K.D. Entertainment is concerned, the Petitioner placed on record a letter of intent, dated 26th June 2015 entered into between the K.D. Entertainment and Gupta Infrastructures. Shri Kamdar submitted that though the letter of intent provides for entering into a leave and license agreement, no such Agreement has been entered into and the arrangement under the agreement between the parties is not to pay regular license fee but to share the revenue of net sale and hence the arrangement is rather questionable.

20 Shri Kamdar submitted that there is nothing on record to show what is the revenue that Gupta Infrastructures has earned from K.D. Entertainment so far as the Shop No. 121 is concerned. Shri Soman, stated on instructions from one Suyog Nildawar, Authorized Signatory of Gupta Infrastructures, that they have received Rs.2 lakhs as security deposit and only from this month onwards, the revenue generation would get triggered.

Shri Kamdar submitted that it is necessary in such a case that the Court Receiver should be appointed and directed to take physical possession and K.D. Entertainment could be appointed as the agent of the Court Receiver after entering into a proper agency agreement on usual terms and conditions.

Ms. Gaurangi Patil, counsel appearing for K.D. Entertainment submitted that they will abide by the orders of this Court.

21 It is true that the basic principal covering the exercise of discretion of the Court in appointing a Receiver is whether it is just and convenient to do so and the Court has to come to a conclusion that it is proper to appoint a Receiver.

22 In this case, Gupta Corporation, i.e., Respondent No.1, has to pay huge amounts almost Rs.60 crores, to the Petitioner/s. Gupta Infrastructures

has mortgaged the properties for the loan advanced to Gupta Corporation. Shri Padmesh Gupta, the Guarantor, is the common Director of both Gupta Infrastructures and Gupta Corporation. It is also to be noted that all the documents regarding the loan as well as mortgage has been signed by the Guarantor- Padmesh Gupta, who is Respondent No.2 in Arbitration Petition No.1305 of 2015.

The letter of intent between K.D. Entertainment and Gupta Infrastructures also leaves a lot to be said. The letter of intent is dated 26th June 2015 and provides that Leave and Licence Agreement should be executed within a period of 30 days or earlier from the date of signing the letter of intent. Almost 1 ½ years have passed since the letter of intent has been signed and the Leave and Licence Agreement is yet to be executed. Though the License Fee Security Deposit clause provides that the intended Licencee shall have to pay interest free Security Deposit equivalent to Three (3) months of license fee payable on signing of this Letter of Intent-One (1) month deposit on signing of the LOI and balance of two (2) months deposit on possession for fit out and on operation respectively (Total security deposit of Rs. 6 lakhs); only Rs.2 lakhs has been paid till date. It is not clear how this amount of Rs.2 lakhs per month has been agreed/arrived at, because the license fee module reads as under :

License Fees Module :

License Fees Module	***Fixed Rental / License Fee Module*** *a) Revenue share @ 9% on net sale.* *b) In default of license fee payment, the delayed payment will be charged interest @ 21% p.a. and Licensor shall have a right to discontinue to essential services of the Intended Licensee.* *c) The above charges shall be payable by the Licensee to the Licensor on or before the 7th day of each & every month in advance without fail.*

23 All this leave a lot to be said about the Leave and License Agreement. The entire arrangement appears to be a camouflage to avoid making payments to the Petitioners who are admittedly the creditors of Respondent No.1 and Guarantors. As held by this Court in ***Deccan Chronicle Holdings Limited*** (supra), when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental

principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process.

24 In view of the above, I am satisfied that to secure the ends of justice and to preserve the sanctity of the arbitral process, the interest of the Petitioner has to be protected and it is just and convenient to do so. Protective orders are necessary.

25 Therefore, pending both the arbitral proceedings, making of arbitral award and final execution of the Arbitral Award, the Court Receiver, High Court, Bombay be appointed as Receiver of the mortgaged properties as under :-

(a) As regards Shop No.121 occupied by KD Entertainment is concerned, the Court Receiver to take physical possession. If K.D. Entertainment desires, they could be appointed as an agent of the Court Receiver under the usual terms and conditions.

(b) So far as Shop No.112-B occupied by Reliance is concerned, the Court Receiver is only to take symbolic possession and Reliance is directed to deposit license fees directly with the Prothonotary and Senior Master, High Court, Bombay.

The Prothonotary and Senior Master shall invest the amount in a Fixed Deposit with a nationalized bank for one year at a time, to be renewed year to year until further orders.

Gupta Infrastructures also to deposit the licence fees that they have collected since May 2016 till date with the Prothonotary and Senior Master, High Court, Bombay. These amounts also to be invested in Fixed Deposit with a nationalized bank and to be renewed year to year until further orders.

26 Shri Soman, on instructions, states that they will deposit this amount within two weeks with the Prothonotary and Senior Master. Statement accepted.

27 Gupta Infrastructures to forward a copy of this order to Reliance for due compliance and Reliance shall act on a copy of this order duly authenticated by the Associate of this Court and strictly comply with this order. The Petitioner is also at liberty to forward a copy of this order to Reliance.

28 Both the petitions accordingly stands disposed.

29 Shri Chauhan and Shri Soman seek stay of this order. Stay refused.

(K.R. SHRIRAM, J.)