

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COURT RECEIVER'S REPORT NO.476 OF 2016

In the matter of the order dated 27.12.2016 passed by the Sole Arbitrator, Hon'ble Justice Dr. S. Radhkrishnan (Former Judge of the Bombay High Court)

M/s. Shakti International Private Limited .. Claimant

Versus

M/s. Excel Metal Processors Private Limited .. Respondent

Mr. J.P. Sen Senior Advocate alongwith Mr. Rohaan Cama, Mr. A. Lad and Biju Joseph, instructed by B.J.Law Offices LLP, Advocates for Claimant.

Mr. Rashmin Khandekar alongwith Ms. Madhu instructed by M/s. Naik and Naik, Advocates for Respondent.

Mr. Sharan Jagtiani alongwith Mr. Vishal Narichania for the Court Receiver.

Mr. Vivek Patil, Advocate pursuant to the Notice dated 7th January, 2017.

Dr. M.S.Deshpande, Court Receiver, Present.

CORAM: S.J. KATHAWALLA, J.

Reserved on: 24th January, 2017

Pronounced on: 16th March, 2017

JUDGMENT:

1. The above Court Receiver's Report dated 28th December, 2016 ("Report") is filed by the Court Receiver, High Court, Bombay, seeking directions on "*Whether the Registry should accept the matters wherein the Arbitral Tribunal appoints the Court Receiver, High Court, Bombay, as a Receiver for execution of orders passed by it etc.*". The need to file the present Report arose since the Arbitral Tribunal in the dispute between M/s. Shakti International Pvt. Ltd. ("the Claimant") and M/s. Excel Processors Pvt. Ltd. ("the Respondent"), on an Application of the Claimant under Section 17 of the Arbitration and Conciliation Act, 1996, as amended on 23rd October, 2015 (hereinafter "the Amended Act") passed an Order dated 27th December, 2016, appointing the Court Receiver, High Court, Bombay, as Receiver of certain goods, and communicated the same to the Court Receiver, High Court, Bombay.

2. The Report raises the legal issue as to *whether an arbitral tribunal has the power to appoint the Court Receiver, High Court, Bombay as a Receiver under Section 17 of the Amended Act.*

3. Given the nature of the issue involved, the Court Receiver engaged Counsel to make submissions on its behalf. Further, the parties to the arbitration were also heard on this issue. Since the issue is of wider significance than this particular

matter, a Notice was issued on 7th January, 2017, so that any person interested could make submissions on the question involved.

SUBMISSIONS

4. Mr. Jagtiani, on behalf of the Court Receiver, High Court, Bombay (“*the Court Receiver*”), submitted that an arbitral tribunal has no power to appoint the Court Receiver as a *Receiver* when passing an interim order under Section 17 of the Amended Act. His submission is based upon the unique position of the Court Receiver as an employee of the High Court of Judicature at Bombay and, therefore, subject to the supervision only of the Chief Justice of this Court (or a Judge as designated by the Chief Justice). He therefore submits that no arbitral tribunal can exercise any power of appointment, which amounts to supervision and control, over the Court Receiver.

5. In support of this submission Mr. Jagtiani relies upon the following decisions:

(i) *I.C.I.C.I Ltd. v. Patheja Brothers Forgings and Stampings Ltd. and others*¹;

(ii) *Bank of Tokyo-Mitsubishi Ltd. v. M/s. Chembra Estates and others*²;

1 2000 (3) Mh. L.J. 212

2 2001 (2) Mh. L.J. 206

(iii) *The Bank of Tokyo-Mitsubishi Ltd. v. M/s. Chembra Estates and others*³; and

(iv) *Girish M. Joshi v. Jagat Manubhai Parikh and others*⁴

6. Mr. Jagtiani then referred to the provisions of Chapter XXX of the Bombay High Court (Original Side) Rules, which deal with the appointment of the Court Receiver and connected provisions relating, inter alia, to filing of accounts, fees/charges to be paid and discharge of the Court Receiver. He submitted that even under the said High Court Rules, the Bombay High Court has the power to appoint any other person to act as a Receiver in a matter.

7. Mr. Jagtiani then submitted that the power of an arbitral tribunal under Section 17 of the Amended Act is to appoint any person to act as a private receiver, but that cannot include any appointment of a Court Receiver. He then submitted that on a correct interpretation of the provisions of the Amended Act, and in particular Section 17 and Section 9 thereof, whilst the powers of an arbitrator are undoubtedly wider than they previously were, an arbitral tribunal is still not a “Court”—or, in the case of an arbitral tribunal having its seat in Mumbai—the High Court, Bombay. Therefore, Section 17 of the Amended Act does not entitle an

3 *2001 Vol. 103 (2) Bom. L.R. 501*

4 *Unreported decision dated 11th September, 2009 in Writ Petition. No. 2527 of 2009.*

arbitral tribunal to appoint an employee or Officer of the High Court, Bombay to act as a Receiver in a matter. He relied upon the following Judgments to show how the powers of an arbitral tribunal were understood at different times under the different arbitration regimes:

- (i) *Surendra Kumar Roy Chowdhury v. Sushil Kumar Roy Chowdhury*⁵;
- (ii) *MD, Army Welfare Housing Organization v. Sumangal Services (P) Ltd.* ⁶;
- (iii) *Intertoll ICS Cecons O & M Co. Pvt. Ltd. v. National Highways Authority of India*⁷; and
- (iv) *Baker Hughes Singapore Pte. v. Shiv-Vani Oil and Gas Exploration Services Ltd.* ⁸.

8. Mr Jagtiani also submitted that the Amended Act is a Central Legislation and must be understood to have the same meaning throughout the territory of its operation. All over India, the power of civil courts to appoint a Receiver is to be found in Order XL of the Code of Civil Procedure, 1908 (“the CPC”). Under this provision, it is a private person who is appointed to act as a Receiver or a ‘Private Receiver’ in a particular matter, with such powers as may be conferred upon the Receiver by the civil court. The powers of an arbitral tribunal to make an

5 *AIR 1928 Cal 256*

6 *(2004) 9 SCC 619*

7 *ILR (2013) 1 Del 1018*

8 *2014 SCC Online Bom 1663*

appointment under Section 17 of the Amended Act are akin to such powers of the civil court under Order XL of the Code of Civil Procedure, 1908. The relevant proviso of the amended Section 17 does not empower an arbitral tribunal having its seat within the territorial jurisdiction of this High Court to appoint the Court Receiver, High Court, Bombay.

9. Mr. Jagtiani further submitted that any interpretation of Section 17 of the Amended Act to allow arbitral tribunals to appoint Court Receiver will lead to interference in the functioning of the Office of the Court Receiver, which is already burdened with a large volume of matters. Moreover, if arbitral tribunals have that power, then it will be unregulated in the sense that the concerned personnel from the Office of the Court Receiver will have to report to the arbitral tribunal in the manner as directed by the tribunal. This will cause extreme difficulties in the functioning of the Office of the Court Receiver, which has limited personnel and resources. It will also operate unfairly because resources will be deployed for the benefits of parties in newly commenced arbitrations instead of for the benefit of litigants who have been in queue from much prior in point of time. Further, he submitted that this problem will be compounded because under the Amended Act, arbitrations are to be completed in a very short time frame and if the Court Receiver is allowed to be appointed directly by arbitral tribunals, then it would amount to priority being given to those appointments.

10. Mr. Khandekar, appearing for the Respondent, also made submissions in support of the contention that the arbitral tribunal has no power under Section 17 of the Amended Act to appoint the Court Receiver, High Court, Bombay, to act as a Receiver in an arbitral dispute. His submissions were on the same lines as those advanced by Mr. Jagtiani. In addition to the Judgments on the position of the Court Receiver relied upon by Mr. Jagtiani, he relied upon a judgment in the case of *ICICI Bank Ltd. v. J.K. Synthetics & Anr.*⁹. He too made submissions on the relevant provisions of the High Court Rules and on the interpretation of Section 17 of the Amended Act. On the interpretation of Section 17 of the Amended Act, he relied upon the Judgment of the Apex Court in the case of *Tirath Singh v. Bachittar Singh & Ors.*¹⁰.

11. Mr. J.P. Sen, learned Senior Counsel appearing for the Original Claimant, on the other hand submitted that the question that arises in this Report is not a matter for judicial determination but is a matter to be decided at an administrative or policy level by this Court. He submitted that on a proper interpretation of Section 17 of the Amended Act, there is no fetter or restriction on the power of the arbitrator to appoint any person whom the arbitrator deems fit to act as a Receiver under Section

⁹ 2005 Vol 107(2) Bom. LR 272

¹⁰ AIR 1955 SC 830

17(1)(d) of the Amended Act. This, according to him, would allow an arbitrator to appoint the Court Receiver, High Court, Bombay, and it is for the High Court to decide (on the administrative side) whether or not the services of the Court Receiver are to be made available to arbitrators, but that this determination is not a precondition to the exercise of power by the arbitrator.

12. Mr. Sen submitted that the above course of action is not inconsistent with any of the Judgments relied upon by Mr. Jagtiani or Mr. Khandekar and that this Court has in the past, and as recognised by these judgments, permitted the Debt Recovery Tribunal to exercise control over the Court Receiver, High Court, Bombay. He submits that it is a matter of record that the City Civil Court also appoints the Court Receiver, High Court, Bombay, in several matters.

13. Mr. Sen submitted that an arbitral tribunal has wide powers under the Amended Act to make an appointment and it is for the persons so appointed, i.e., the Court Receiver, High Court, Bombay, to accept or refuse such appointment. He submits that this approach is consistent with a harmonious and literal interpretation of the provision. He also relies upon the provision, which appears after Section 17(1) (ii) (e) of the Amended Act, and states that the arbitral tribunal shall have the same powers for making orders as the Court has for the purpose of and in relation to any proceedings before it. He submits that it is a completely different matter that

the Court Receiver, High Court, Bombay, depending upon the policy/administrative directions passed by this Court, may be constrained to decline the appointment. This, however, according to him, cannot be a reason to read Section 17 of the Amended Act restrictively. In support of the argument on interpretation, he relies upon the Notes on Clauses for the Arbitration and Conciliation (Amendment) Bill, 2015, which says that the arbitral tribunal “*shall have power to grant all kinds of interim measures which the Court is empowered to grant under Section 9.*”

14. Mr. Jagtiani, in response argued that the requirement of having every appointment of a Court Receiver, High Court, Bombay, approved by this Court (usually by the Receiver placing a report before this Court on its judicial side), is contrary to the purpose of Section 17 of the Amended Act, and would lead to a form of supervision or intervention of the Court over orders of the arbitral tribunal, which is inconsistent with Section 5 of the Act. He also submitted that in the absence of any administrative policy or directions on this issue at hand, the appointment of the Court Receiver, High Court, Bombay, is not contemplated by the statutory provisions at all, by reason of the official position he holds. If the Original Claimant’s argument is correct, an arbitral tribunal can, under Section 17 of the Amended Act, pass orders issuing directions to other officers and departments of this Court, such as the Prothonotary and Senior Master or the

Taxing Master, which could never be the scope or intendment of Section 17 of the Amended Act.

15. In further response, Mr. Sen submits that Section 5 of the Act does not come into play if the appointment of the Court Receiver, High Court, Bombay, is to be approved on the administrative side of the Court and therefore the reliance on it is misplaced.

STATUS OF THE COURT RECEIVER —HIGH COURT, BOMBAY

16. To appreciate whether the Court Receiver, High Court, Bombay, is liable to be appointed by a private forum like an arbitral tribunal, it would be relevant to understand the status or position of the Court Receiver, High Court, Bombay. This has been discussed in various judgments referred to by the parties, which arose in the context of transfer of bank suits (in which the Court Receiver, High Court, Bombay, had already been appointed) to the Debt Recovery Tribunal, when the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (“**RDB Act**”) came into force.

17. In *I.C.I.C.I Ltd. v. Patheja Brothers Forgings and Stampings Ltd. (supra)*, the issues for consideration before this Court were:

(a) whether this Court had jurisdiction to issue directions to the Court Receiver in suits in which the Court Receiver stood appointed prior to 16th July, 1999, i.e., the date on which the Central Government by notification established the Debt Recovery Tribunal under Section 3 of the RDB Act; and

(b) If not, whether the High Court was empowered to give directions to the Court Receiver regarding the properties which were in custody of the Court Receiver till such time as the Debt Recovery Tribunal/Central Government set up an alternative office/machinery with a proper infrastructure.

18. The Court at paragraph 5 (pages 215-216) set out a brief history, status and functioning of the Office of the Court Receiver as follows:

“..... prelude

Before 1929, Receivership was granted to private persons. Gradually, the business in the hands of the private Receiver increased and it was thought it had grown too big to be entrusted to a single private individual. It was, therefore, decided that the work should be assigned to a salaried office on the establishment of the High Court. As a result, in 1929 the Government created the post of the Court Receiver, who took over all the pending Receiverships from the private Receiver. The system sanctioned by the Government for running the office, after it was taken over, was that the office should

budget for its normal expenditure which the Government will pay in the first instance but which had to be recouped to them from the takings of the office other than the Receiver's commission. In 1932, the office was made a permanent department of the High Court. The Court Receiver was directed to continue to charge to the estates under his management all expenses incurred in connection with his office including the payment of rent and to credit all recoveries to the Government. Accordingly, Rule 592 of the O.S. Rules, inter alia, provides that the Court Receiver shall charge to the estates under his management a sum towards the expenses of his office including his salary. Under Rule 591, the Court Receiver is directed to charge fees according to a prescribed scale. Under Rule 595, a Receiver is required to file accounts in the office of the Commissioner. In appropriate cases, this Court is also empowered to appoint a Receiver other than the Court Receiver. Such Receiver is also required to file accounts in the office of the Commissioner [See Rule 594 (a)]. When the Court Receiver is discharged, he is required to file his accounts upto the date of his discharge. Similarly, under Rule 924, the accounts of the Court Receiver are required to be audited by Accountant General and if any question between the auditor and the Court Receiver relating to accounts arises for determination, the question is required to be referred to the Chief Justice. This is under Rule 926. As stated in my order dated 4th February, 2000, properties worth Rs.2000 crores are in possession of the Court Receiver, High Court, Bombay. These consist of shares, fixed deposits, jewellery, plant and machinery, buildings, dry docks, tea estates, ships, amounts in the personal ledger accounts of the Court Receiver with R.B.I. as also amounts lying in the hands of the

Court Receiver in cash and cheques. The office of the Court Receiver, High Court, Bombay has various departments like accounts, department/section, cash department, record department, general administration department, etc. The Court Receiver, High Court, Bombay and the entire staff constitute a permanent department of the High Court. The Court Receiver is a high-ranking official. The present Court Receiver holds the pay scale of Additional Prothonotary and Senior Master. The Court Receiver has to enter into agency agreements after the properties become custodial legis. As a Court Receiver, she has to sign bills/vouchers. At this stage, it is important to note that after deducting costs, charges and expenses as also the commission by the Court Receiver, Banks and Financial Institutions are required to be paid the net royalty amount even during the pendency of the suit pursuant to the orders of the Court. These payments are made by the Court Receiver by cheques. Hence, the Court Receiver is required to sign cheques and payment vouchers by which net royalty amount is remitted to the parties to the suit. The Court Receiver is also required to sign daily vouchers to meet office expenses. The Court Receiver is also required to pay expenses to the officers, who visit the site by way of daily allowances. These officers are also required to go out of Bombay. The Court Receiver is also required to sign salary bills. The Court Receiver is also required to pay security guards who are appointed to protect plants, machinery and immovable properties all over India. The Court Receiver is also required to pay fees to Valuers, Architects and Chartered Accountants. In some cases, Court Receiver is also required to sign returns under the Income Tax Act. All these facts are mentioned only to indicate that in Bombay the

Court Receiver, High Court, Bombay discharges a very important function. The properties are spread over in India between Assam and Kanyakumari. One more fact needs to be mentioned that the State Government provides annual grant to the High Court. The budget allocation also includes office of the Court Receiver, High Court, Bombay. After deduction all costs, charges and expenses, the Court Receiver remits the balance amounts to the State Government. In the last Financial Year ending on 31st March, 1999, the office of the Court Receiver, High Court, Bombay earned net revenue for the State Government of about Rs. 2 crores. These facts are required to be mentioned also for a different reason. With the coming up of the DRT, all suits, in which the claim is below Rs. 10 lakhs, remained within the jurisdiction of this Court. Apart from the Bank suits, we have private suits. In thousands of these suits Court Receiver's office still continues to have jurisdiction. As stated hereinabove, the office of the Court Receiver, High Court, Bombay is a department of the High Court. In last 60 years, this office has worked only for the High Court and not for any other Court like Small Causes Court. It is made clear once again that the Court Receiver has not worked for Small Causes Court or any other judicial forum." (Emphasis Supplied).

19. In paragraph 8 (pages 222-223), the Court went on to state that:

"One point needs to be clarified that in cases where Court Receiver has been appointed before 16th July, 1999, the properties in possession of the Court Receiver shall continue to remain custodia legis. I do not find any merit in the contention advanced that on and from 16th July, 1999, the Court Receiver stood discharged

automatically. The Court Receiver can only be discharged by this Court inasmuch as she has been appointed by this Court. Even in cases where proceedings stand transferred to DRT, the properties shall continue to remain custodia legis either under the High Court or under the DRT. By way of clarification it is once again reiterated that the property shall remain custodia legis with the Court Receiver till such time as the DRT appoints a receiver under the Act, in which event, a request will be made by the receiver of DRT to the Court Receiver to hand over the properties to the receiver of DRT. Therefore, there is no merit in the contention advanced that after 16th July, 1999, a fresh application will become necessary, seeking appointment of a receiver, to the DRT. As stated above, the legislature has deleted the words de novo from section 31. This itself indicates that no fresh application for appointment of receiver is required to be made to DRT. If this Court has already appointed a receiver before 16th July, 1999, the property shall continue to remain custodia legis till the suit is disposed of by the DRT. Hence, no fresh application for appointment of receiver is required to be made to DRT. It may be open to DRT, on an application of a party, to discharge its receiver. However, ipso facto by reason of transfer of suits and proceedings the Court Receiver shall stand discharged. There will be no question of making a fresh application for appointment of a receiver. As stated above, proceeding before the Court Receiver is an ongoing process till the rights of the parties to the properties in the hands of the receiver are decided. Only informal handing over of the properties by the Court Receiver to the receiver of DRT will follow and, therefore, there is no question of

‘de novo’ proceedings being adopted for appointment of Court Receiver.” (emphasis supplied)

20. With respect to issue (b), the Court further stated that the Debt Recovery Tribunal did not have adequate machinery to take possession and management of the properties, which were already custodia legis. Therefore, till the Debt Recovery Tribunal appointed its own receiver, this Court held that it could certainly issue directions on the reports of the Court Receiver regarding the management and protection of the assets which were custodial legis. However, this Court decided that administratively, it would not be possible to lend the services of the Court Receiver to the Debt Recovery Tribunal as in the past too, the Court Receiver’s services were not lent to the Small Causes Court. The relevant observations (again as regards the status of the Court Receiver) at paragraph 10 (pages 224 —226) read as under:

“10. Although I have come to the conclusion that all suits and proceedings stood transferred on 16th July 1999 an important point which arises on the facts of these cases is that the DRT has no infrastructure to take possession of the properties worth Rs. 2000 crores. Although, DRT is now given the power to appoint Receivers, there is no adequate infrastructure provided to DRT to take possession and charge of the properties which are in the custody of the Court Receiver, High Court, Bombay. The working of the Receiver’s office as detailed hereinabove, the question that arises is what steps this Court should take to protect and manage the said

properties during the transitional period? On one hand, the Court's jurisdiction has been transferred to D.R.T. and on the other hand DRT is not in a position to take possession and manage the said properties. These assets constitute securities created in favour of the Banks and Financial Institutions. They cannot be permitted to be dissipated. It has been urged on behalf of the Banks and Financial Institutions that till adequate/alternate machinery is set up by the Central Government, this Court should manage the properties which are already custodia legis. On the other hand it has been urged that once the suits/proceedings stand automatically transferred to DRT this Court cannot issue directions regarding preservation and management of the properties after 16th July 1999 and such directions can be given only by DRT. However DRT can only appoint its Receiver. The question is whether the said Receiver would be in a position to take charge of the above properties from the Court Receiver, High Court, Bombay. The matter involves large number of administrative problems. At the outset, it may be mentioned that the Central Government carries a wrong impression that the Court Receiver, High Court, Bombay in the past has lent its services to other Courts. That is not so. As stated above, the Court Receiver, High Court, Bombay is an establishment of the High Court. As stated above, it is required not only to protect the properties, but it is also required to maintain accounts of the royalty received and the expenses debited. The remission of the revenue goes to the State Government. It is not clear as to whether the Central Government and the State Government had entered into any agreement to share the revenue. Moreover, the Court Receiver, High Court, Bombay is required to attend a large number of non-banking suits, which are

pending in this Court and if the services of the Court Receiver, High Court, Bombay are required to be lent to other Courts, additional staff would be required. The fact therefore, remain that the Central Government should take immediate steps to set up an independent machinery to assist the DRT and during the concessional period this Court is of the view that notwithstanding transfer of suits and proceedings to DRT this Court can continue to give appropriate directions to the Court Receiver, High Court, Bombay regarding management of the assets and properties in the hands of the Court Receiver till the Receiver appointed by the DRT takes charge of the said assets and properties. In this connection, the position in law can also be seen. When a Court Receiver is appointed by the Court, the properties come under the management of the Court. The Receiver enters into an agency agreement after taking formal possession. During the subsistence of the agency agreement, the receiver monitors implementation of the terms and conditions mentioned in the agency agreement. To give an illustration, a Court Receiver has been appointed in the case of a Tea Estate in one of the above suits. The Tea Estates are located outside Bombay. The highest bidder is appointed as agent. That bidder enters into an agency agreement with the Court Receiver. As long as that agency agreement subsists, the Court Receiver is required to protect and manage the Tea Estates. It is for this reason that till the Court passes an order discharging the Court Receiver with or without passing of accounts the agency agreement subsists. The jurisdiction of the Civil Courts to grant reliefs by way of appointment of Receiver, is therefore, determined by C.P.C. and Specific Reliefs Act. Even under the DRT [Act](#), the words 'de novo' have been deleted by the Ordinance which indicates that the

legislature intends that the Receiver appointed prior to the transfer shall continue till alternate arrangements are made by the DRT to take charge of the properties which are custodia legis. The office of the Court Receiver, High Court, Bombay has a historical background. It is unique to Mumbai. It has done a wonderful job over the years particularly in the matter of earning revenue for the State. It has been protecting the properties all over India over the years. The authority of the Court Receiver over the properties continues till the Court discharges the Receiver by passing an express order to that effect. It is for this reason that even in execution proceedings after a decree is passed a Receiver can be appointed by the Court to take steps to protect the property till the Banks or Financial Institutions take adequate steps to recover the sale proceeds. Even where a suit is decreed, it has been held that there was nothing in the Code, which limited the power of the Court to appoint a Receiver when it became so necessary. Ultimately, a Court Receiver is appointed under equity jurisdiction. In the case of Hiralal Patni v. Loonkaran Sethiya reported in AIR 1962 SC 21, one of the contentions raised on behalf of the appellant was that the Receiver appointed in the suit ceased to be a Receiver qua the rights of the parties to the suit when the final decree was made. This argument has been discussed at length in the said judgment. It was held that where a Receiver is appointed in a suit without his tenure being expressly defined he will continue to be the Receiver till he is discharged. It may be mentioned that in the said judgment also it has been laid down that although as between the parties to the suit the functions of the Receiver have terminated with the determination of the suit, the Court Receiver is still amenable to the Court as its officer until he has complied with the Court's

direction as to the disposal of the funds which he has received during the course of his receivership. It is also laid down that in appropriate cases, upon sufficient cause being shown, the Court can continue the receiver even after disposal of the suit depending upon the exigencies of the case. The reason is very clear that during the pendency of the suit, the rights of the parties to the possession of the funds/properties held by the Receiver is not determined. It is only in the final decree that such rights are determined. In the present matter, the suits are pending. The rights to possession of the funds/properties held by the Receiver have not been decided. In the circumstances, it cannot be said that the Court Receiver appointed by this Court stands automatically discharged after 16th July 1999. Till such rights are determined by DRT the property remains custodia-legis. Even after coming into force of the DRT Act and the DRT the said rights to the possession of the funds/properties held by the Receiver remain undecided and, therefore, till DRT appoints its Receiver under the DRT Act, 1993 this Court can certainly issue directions on the reports of the Court Receiver regarding management and protection of the assets which are custodia-legis. The Court Receiver, High Court, Bombay is hereby directed to act in all matters pending before her regarding fixation and recovery of royalties, regarding fixation of sale price, regarding implementation of agency agreements already executed, etc. In other words in all cases where the Court Receiver is seized of the properties and assets she is empowered to take all necessary steps to preserve and manage such properties. I am informed that there are some cases in which the Court Receiver was appointed prior to 16th July 1999. However, before the Court Receiver could take possession, the notification

came to be issued. Such marginal cases are kept for hearing on 10th March 2000."

21. The point that the Court Receiver, High Court, Bombay functions only under the control and supervision of this Court, is again apparent from paragraph 11 (at pages 226-227) of the judgment, which states:

"In this matter, the learned Acting Chief Justice, High Court, Bombay has received a letter from the Hon'ble Finance Minister of India requesting the High Court to lend the services of the Court Receiver to Debt Recovery Tribunal till alternate arrangements are made. The learned Acting Chief Justice, High Court, Bombay, thereafter invited submissions from the Prothonotary and Senior Master, High Court, Bombay. After due deliberation, it has been decided that administratively it would not be possible to lend the services of the Court Receiver to Debt Recovery Tribunal. Detailed reasons in that regard have been given. Some of the reasons have been mentioned hereinabove. It may be once again stated that in the past Court Receiver's services have not been lent to the Small Causes Court. In any event, in the light of this judgment, the question of lending services of the Court Receiver to Debt Recovery Tribunal does not arise."

22. In *Bank of Tokyo-Mitsubishi Ltd. v. M/s. Chembra Estates and others* (*supra*), this Court (R.J. Kochar, J.) once again considered the issue of whether this Court could direct the Court Receiver to sell the suit property in proceedings that

were before the Debt Recovery Tribunal. The Court discussed the aforementioned judgment in *I.C.I.C.I Ltd. v. Patheja Brothers Forgings and Stampings Ltd. (supra)*.

23. While the Court agreed on the first issue that the High Court, Bombay had no jurisdiction in matters that were transferred to Debt Recovery Tribunal after 16th July, 1999, with respect to the second issue, the Court held that the Court Receiver must take orders from the Debt Recovery Tribunal till the Government makes a provision and sets up its own machinery and infrastructure for proceedings initiated prior to 16th July, 1999. Further, the Court was of the view that permitting the Court Receiver to act under instructions of the Debt Recovery Tribunal would prevent multiplicity of suits as the parties would not approach the High Court for enforcement of directions of the Debt Recovery Tribunal to the Court Receiver. Further, the Court opined that there was no legal bar or negative impact if the Office of the Court Receiver was lent to the Debt Recovery Tribunal for a period of 1 (one) year therefrom. However, the Court did clarify that the Debt Recovery Tribunal shall not appoint the Court Receiver, High Court, Bombay, in any other matter, new or pending. In paragraph 14 (at pages 218 –219), the Court observed as follows:

"14. Following the Supreme Court's judgment I am not at all able to agree with the opinion of the learned single judge that this court alone can issue orders and directions to the Court Receiver appointed prior to the cut-off date even though all such matters

have stood transferred to the DRT. I am also not able to agree with the conclusion of the learned judge that the Court Receiver cannot take any orders from the DRT directing the Court Receiver to continue to so function in the pending matters which have been transferred to the DRT. According to me, it does not amount to lending services to any other court such as the Small Causes Court, etc. Since we are more worried about the protection of the properties worth more than Rs. 2,000 crores instead of holding the jurisdiction judicially which is categorically barred by law, we can certainly direct the Court Receiver to take orders from the DRT till the Government make a provision and set up its own infrastructure and machinery. According to me, the Court Receiver does not stand any higher than the DRT so that he or she cannot receive any orders from the Tribunal. In our anxiety to protect the assets worth more than Rs. 2,000 crores it would only be appropriate for this court to show magnanimity to allow the Court Receiver to function so in the pending matters which are transferred from this court to the DRT to take all such appropriate orders from the DRT in respect of such matters. I, therefore, direct the Court Receiver to receive and act upon the orders passed by the DRT or the Appellate Tribunal in the matters where this court had appointed the Court Receiver and which were transferred to the DRT. It is clarified that the DRT shall not appoint the Court Receiver, High Court, Bombay, in any other matters, new or pending. In all such matters where the Court Receiver, High Court, Bombay was not appointed and if need be the DRT will make its own arrangement and shall not issue any such directions in such matters".

24. Due to the conflict between the Judgments in *ICICI Ltd. (supra)*, and *Bank of Tokyo —Mitsubishi Ltd.(supra)*, as to whether this Court can continue to issue directions to the Court Receiver appointed by it, in bank suits transferred to the Debt Recovery Tribunal, the matter was referred to a larger bench of this Court.

25. The decision of the Division Bench (Larger Bench) (Coram: B.N. Srikrishna and S.D. Gundewar, JJ.) was by an Order dated 23rd July, 2001 in *The Bank of Tokyo-Mitsubishi Ltd. v. M/s. Chembra Estates and others and Court Receiver, High Court, Bombay (supra)*. The Division Bench (in paragraphs 14 and 15) agreed with the view taken by the Court in *Bank of Tokyo —Mitsubishi Ltd. (supra)*. For reasons of practical expediency, the Division Bench also recommended to the Chief Justice of this Court that the Court Receiver's services be made available to the Debts Recovery Tribunal/Appellate Tribunal for a period commencing from 23rd July 2001 until the completion of 1 (one) year therefrom, unless discharged by the Debt Recovery Tribunal either suo moto or on application by the parties. The Division Bench held that the Debt Recovery Tribunal or its Appellate Tribunal would have jurisdiction to issue all appropriate directions to the Court Receiver which were hitherto given by this Court, where the Court Receiver had been appointed in respect of proceedings pending before the Debt Recovery Tribunal. The relevant conclusions of the Division Bench at paragraph 15 are as follows:

“Hence, we answer the reference as under:

(a) *After the coming into effect of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the establishment of the Debts Recovery Tribunal with effect from 19th July, 1999, this Court ceased to have any jurisdiction to issue directions to the Court Receiver, High Court, Bombay appointed in Suits or other proceedings pending on the said date.*

(b) *In all such cases which were pending before this Court on the Original Side on 16th July, 1999 and stood transferred to the Debts Recovery Tribunal by reason of Section 31 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Court Receiver, High Court, already appointed would continue to act as Court Receiver, but subject to the directions to be issued by the Debts Recovery Tribunal/Appellate Tribunal.*

(c) *The Court Receiver, High Court, Bombay **being an employee of the High Court is subject to administrative control of the learned Chief Justice.** We would recommend to the Chief Justice that the Court Receiver's services may be made available to the Debts Recovery Tribunal/Appellate Tribunal for a period of one year from today. During the aforesaid period, it would be open to the Tribunal/Appellate Tribunal under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, suo moto, or at the instance of any party to the Suit or other proceedings, to discharge the Court Receiver of the High Court and appoint **any other fit person as Receiver of the properties.***

(d) The Court Receiver, High Court, Bombay, shall function as Court Receiver in respect of all matters transferred to the Debts Recovery Tribunal in which he/she has been appointed as Receiver and obtain directions from the Debts Recovery Tribunal or Appellate Tribunal with regard to his/her functioning. Such directions may be obtained either by a report made by the Court Receiver to the Debts Recovery Tribunal or the Appellate Tribunal or by applications moved by the parties before the Debts Recovery Tribunal or the Appellate Tribunal.

(e) The Court Receiver, High Court, Bombay shall be at liberty to apply for discharge from all or any of the proceedings now pending before the Debts Recovery Tribunal or the Appellate Tribunal under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, either at the expiry of one year from today or at any earlier point of time, if so directed by the Hon'ble the Chief Justice.

(f) The Debts Recovery Tribunal or the Appellate Tribunal has jurisdiction to issue all appropriate directions to the Court Receiver.”
(Emphasis Supplied)

26. In *ICICI Bank Ltd. v. J.K. Synthetics Ltd. & Anr. (supra)*, this Court (Coram: S.U. Kamdar, J.) also had an occasion to comment on the status of the Court Receiver, High Court, Bombay. The question before the Court related to the powers of the Chamber Judge to vary the charges/fees for services rendered by the

Court Receiver, fixed by the Bombay High Court (Original Side) Rules. In this context, it was observed that:

"10. I have considered the rival submissions between the parties. There are two factors which are required to be set out at the outset before I deal with the issue at hand. Firstly, on the Original Side of High Court of Mumbai, the office of the Court Receiver is maintained by the High Court in its regular discharge of function. On the Original Side in almost all the matters where the Receiver is appointed it is the Receiver of the High Court who takes charge and under the control and direction of the Court supervises and also manages the property and affairs thereof. The office of the Court Receiver, High Court, Bombay has staff regularly employed on the basis of permanent employment by the High Court and the office is maintained by the Court. The second significant factor which is also required to be considered is that as and by way of usual features and regular guidelines, r. 591 specifically prescribes the rates of charges and commission which has to be paid in each of the matters on the percentage basis. These provisions are provided for under the High Court (Original Side) Rules with an intention that there is a non-arbitrary yard stick in respect of the amount to be recovered by the Court Receiver for the services rendered by him. The High Court (Original Side) Rules are framed in exercise of power conferred on the High Court under the provisions of the Civil Procedure Code. On the Original Side of the High Court it is not the case like in the other cases where private receivers are appointed as the Court Receiver and thus his

remuneration of the amount charged by him for fees and commission is to be regulated by the Court. It is undoubtedly true that even under r. 591 ultimate control is vested with the Court and under the Rules a discretion is conferred on the Chamber Judge to reduce the amount chargeable by the Court Receiver. However, the issue which is to be determined is whether the case has been made out by the defendant No. 1 for reduction of charges and/or deviation from the fees prescribed under r. 591 of the Original Side Rules".

27. In *Girish M. Joshi v. Jagat Manubhai Parikh (supra)*, this Court was considering the issue regarding appointment of the Court Receiver, High Court, Bombay by the City Civil Court and the Small Causes Court, Mumbai. This Court, after noticing the Larger/Division Bench decision in *Bank of Tokyo-Mistubishi Ltd., (supra)*, by its Judgement and Order dated 11th September, 2009, stated in paragraphs 4 and 5, pages 2 –3, that:

The Order of the Division Bench Notes that:

"the Court Receiver, High Court, Bombay is an employee of the High Court who is subject to the administrative control of the Hon'ble Chief Justice. There is no provision either in the Original Side Rules or in the Rules framed under the City Civil Courts Act which empowers the City Civil Court to appoint the Court Receiver, High Court, Bombay as a Receiver in the suits and proceedings filed in the City Civil Court at Bombay....

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5. In the report of the Court Receiver various orders passed by the City Civil Court have been pointed out. The office of the Court Receiver is already under enormous pressure as by virtue of orders passed by this Court in various suits and proceedings including the arbitration petitions under section 9 of the Arbitration and Conciliation Act, 1946, the Court Receiver is required to look after very large and valuable immovable properties in the City of Bombay and at other places. In fact, by virtue of appointment as of the Court Receiver in suits filed in this Court, the Receiver has to look after properties which are situated even outside the State of Maharashtra. Considering the enormous pressure on the office of the Court Receiver, High Court, Bombay, and the lack adequate infrastructure, the said office cannot be burdened any further. There is no provision of law under which any Court subordinate to this Court can appoint the Court Receiver, High Court, Bombay, as a Receiver. Therefore, necessary directions may be required to be issued on the administrative side. It is, therefore, directed that a copy of this order shall be placed before the the Hon'ble the Chief Justice for considering the matter on the administrative side."

28. The Report of the Court Receiver filed in the proceedings explains, in paragraph 11, that after the Order in *Girish M. Joshi (supra)*, the matter was in fact placed before the Hon'ble Chief Justice and thereafter before the relevant Administrative Committee, which decided to appoint two Judges of this Court to consider the matter of appointment of Court Receiver by the City Civil Court. The

constitution of the Committee of Judges to consider this matter then changed. However, the Report of the Court Receiver notes that no further record of the matter is available.

29. From a reading and consideration of the above Judgments, I am of the view that it has been clearly held that the Court Receiver, High Court, Bombay, is an employee or a Department of the Bombay High Court and that it is this Court that has the powers to direct its duties and responsibilities. Even where another Tribunal, such as the Debt Recovery Tribunal, was allowed to give directions to the Court Receiver, it was for a limited transitory period of one year and only in those cases where the Court Receiver had already been appointed by this Court. What is of much significance is that this was permitted to be done by an Order of this Court on its judicial side (speaking through the Larger Bench/Division Bench, as indicated above). This was necessitated by the fact that as this Court lost its jurisdiction over bank suits, it would have been anomalous for this Court to continue to issue directions to the Court Receiver.

30. Apart from this, the Larger Bench/Division Bench made a recommendation to the Chief Justice for the services of the Court Receiver to be made available to the Debt Recovery Tribunal for a period of one year. Importantly, even the decision of the Larger Bench recognizes that the Court Receiver, High Court, Bombay, is subject to the administrative control of the Learned Chief Justice. Significantly,

none of the judgments contemplate a situation of the appointment of the Court Receiver, High Court, Bombay, being made by the Debt Recovery Tribunal, in new or pending matters. The appointment of the Court Receiver, High Court, Bombay, was only by this Court and not by virtue of an order of the Debt Recovery Tribunal.

31. The judgment of *ICICI Ltd. v. Patheja Brothers* (Coram: S.H. Kapadia, J.) (*supra*), though disagreed in its conclusion as to the power of this Court to continue to give directions to a Court Receiver, makes several relevant observations about the Court Receiver, High Court, Bombay, being an employee of this Court alone, and subject to the control and supervision of this Court alone. It recognises that the services of the Court Receiver have never been lent to any other Court. Although this observation may not be entirely accurate in view of the fact that the City Civil Court at Bombay does appoint a Court Receiver, High Court, Bombay, (a practice that was questioned in the Judgment of Girish M. Joshi (*supra*), the observations on this point in the Judgment of *ICICI Ltd. v. Patheja Brothers* (*supra*), were not at all disputed or disagreed with in the judgments that followed it. The Judgment describes the Office of the Court Receiver as ‘*an establishment of the High Court ‘and’ a permanent department of the High Court.*’ As the making of the Office of the Court Receiver available to the Debt Recovery Tribunal would require additional resources, the Learned Judge observed that the Central Government should take immediate steps to set up an independent machinery to assist the Debt

Recovery Tribunal. Even the Judgment in *ICICI Bank Ltd. vs. J.K.Synthetics Ltd. (supra)*, reiterates that the Office of the Court Receiver is maintained by the High Court, Bombay, and its staff are employed by the High Court, Bombay.

32. As already mentioned, in an entirely different context of the matter where the Court Receiver was already appointed, the Larger Bench allowed the Debt Recovery Tribunal to give appropriate directions to the Court Receiver for a transitory period of one year. It follows that in those matters where there was no appointment of the Court Receiver, High Court, Bombay, or in proceedings instituted by banks after the Recovery of Debts Due to Banks and Financial Institutions Act came into force, no appointment of the Court Receiver, High Court, Bombay, could be made by the Debt Recovery Tribunal at all.

33. The categorical view that it is only this Court that can appoint the Court Receiver, High Court, Bombay, also finds mention in the Judgment of *Girish M. Joshi (supra)*. Whilst it is true that the City Civil Court, Mumbai does appoint the Court Receiver, High Court, Bombay, it is that very practice, the origins of which are indeed difficult to trace, that was questioned by this Court in *Girish M. Joshi*. The practice followed by the City Civil Court, the correctness of which was questioned by this Court, cannot form a legal basis for allowing an arbitral tribunal to appoint the Court Receiver, High Court, Bombay, thereby overlooking the position as it emerges from the aforementioned Judgments.

34. Taking into consideration all of the above, I am of the view that an arbitral tribunal cannot appoint the Court Receiver, High Court, Bombay, to act as a Receiver, under Section 17 of the Amended Act. This follows from the nature of the office and position of the Court Receiver, High Court, Bombay, as explained above. As discussed below, the language of Section 17 of the Amended Act does not alter this conclusion at all.

35. In reaching the above conclusion, I am also supported by the Judgment of *Iridium India Telecom Ltd. v. Motorola Inc.*¹¹ which recognises (at paragraphs 27 and 28, page 156) the distinct position of the Bombay High Court in framing its own Rules. The relevant portion of the said Judgment states:

“27. The learned counsel for the respondent, however justifiably contends that the purpose of retaining Section 129 in the present form is exactly the purpose for which it was inserted, in the first place, in CPC of 1882 by amending Act 13 of 1895, namely, “to recognise the practical expediency of leaving such High Courts some latitude in the direction of adapting the provisions of the ordinary law to meet their requirements” and further, “it had been found by experience that these provisions were not in all respects convenient in the case of original proceedings in those courts.” The amendment, therefore, became necessary “to bring the Code into

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perfect harmony with the provisions of the Letters Patent and to enable the High Courts referred to, to regulate the exercise of their original civil jurisdiction accordingly.

28. It appears to us that this was the real reason why a distinction was drawn between the proceedings in original jurisdiction before the chartered High Courts and those in other courts. For historical reason this distinction was maintained right from the time the Letters Patent was issued, and has not been disturbed by the Code of Civil Procedure, 1908, despite the amendments made in the Code of Civil Procedure from 1976 to 2002.” (Emphasis Supplied)

36. This Judgment explains that for historical reasons a distinction was maintained between Chartered High Court and other courts in the matter of making rules. In my view, one such distinction is in the existence and functioning of the Office of the Court Receiver, High Court, Bombay, as an employee or Department of the Bombay High Court itself. The appointment, functioning and discharge of the Court Receiver is governed by Chapter XXX of the Bombay High Court (Original Side) Rules in addition to the provisions of Order XL of the CPC. These rules further establish that the Office of the Court Receiver, High Court, Bombay, functions only under the supervision and control of this Court. These Rules institutionalise the manner of functioning of the Office of the Court Receiver, High Court, Bombay.

37. It cannot, therefore be said that the Court Receiver, High Court, Bombay is capable of being appointed by an arbitral tribunal. As to the submission that such appointment is subject to the approval from the administrative side of this Court and the interpretation of Section 17 of the Amended Act, I will consider that submission separately.

INTERPRETATION OF SECTION 17 OF THE AMENDED ACT

38. Prior to dealing with the submissions relating to the interpretation of Section 17 of the Amended Act, it is necessary to set out Section 17 of the Arbitration and Conciliation Act of 1996 (“the 1996 Act”) and of the Amended Act, as also Section 9 of the 1996 Act and the Amended Act. It would also be relevant to consider the definition of the expression “Court” in Section 2(1)(e) of the 1996 Act.

39. Section 17 of the 1996 Act read as under:

“Interim measures ordered by arbitral tribunal.—(1) Unless otherwise agreed by the parties, 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).”

40. In contrast, Section 17 of the Amended Act, reads as under:

“(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal-

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

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

(a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

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

(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.”

41. Section 9 of the 1996 Act reads as under:

“A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-

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

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

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

*(e) such other interim measure of protection as may appear to the Court to be just and convenient,
and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”*

42. Section 9 of the Amended Act reads as under:

“9. Interim measures, etc., by Court.-

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-

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

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

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
 - (b) securing the amount in dispute in the arbitration;*
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or an observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
 - (d) interim injunction or the appointment of a receiver;*
 - (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*
- (1) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.*

(2) *Once the arbitral tribunal has been constituted the Court shall not entertain an application under sub-section (1), unless the Court finds the circumstances exist which may not render the remedy provided under section 17 efficacious.”*

43. Section 2(1)(e) of the Amended Act, which defines “Court” reads as under:

“*Court means-*

(i) *in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions following the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior of such principal Civil Court, or any Court of Small Causes;*

(ii) *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, have jurisdiction to decide the questions forming the subject-matter of the arbitration if he same had been the subject-matter of a suit, and in other case, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court.”*

44. It is the accepted position in the submissions of all the parties that Section 17 of the Act as amended, confers much wider powers on the arbitral tribunal than before the amendment. Before considering the language of Section 17 of the

Amended Act, it may be relevant to consider some decisions on the powers or absence of powers of arbitral tribunals to grant interim reliefs at various points of time and under the different arbitration regimes.

45. Under the Arbitration Act, 1940, (“the 1940 Act”) the Hon’ble Supreme Court noted in *MD, Army Welfare Housing Organization v. Sumangal Services (P) Ltd. (supra)*, at paragraphs 42 —43, page 646 and paragraphs 47 —48, pages 647 - 648, that an arbitrator had no powers to pass interim orders of protection in the absence of an agreement to the contrary. As regards the powers of the arbitrator the Hon’ble Supreme Court observed as follows:

“42. An arbitrator in a situation of this nature had no jurisdiction to pass the interim order under the Arbitration Act, 1940, in absence of any specific agreement in relation thereto. The learned arbitrator by an interim order could not have placed the parties in a situation which would travel beyond the subject of disputes and differences referred to for arbitration. As no claim and counter-claim had been filed before the arbitrator, the arbitrator was not even aware of the nature of claims of the parties. He neither found any prima facie case nor balance of convenience for passing the said interim order. Furthermore, an arbitrator is bound by the terms of reference.

43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot

exercise its powers ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

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47. In the absence of an agreement to the contrary, in terms of the provisions of the Arbitration Act, 1940, an arbitrator can pass only an interim award or a final award. Such awards are enforceable in law. The award of an arbitrator, whether interim or final, is capable of being made a rule of court, decree, prepared and drawn up in terms thereof and put to execution.

48. It is well settled that for the purpose of obtaining an interim order a party to the arbitration proceeding during pendency of an arbitral tribunal can only approach a court of law in terms of Section 41 (b) of the Arbitration Act, 1940 and not otherwise.” (Emphasis Supplied)

46. The Hon’ble Supreme Court then went on to consider the position under the 1996 Act, in paragraph 58 at page 649, and observed as follows:

“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 referred 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....” (Emphasis Supplied)

47. Before the 1940 Act, the position was that matters relating to the grant of an injunction and appointment of a receiver could not even be considered by an arbitrator. In this regard, the Judgment of *Surendra Kumar Roy Chowdhury v. Sushil Kumar Roy Chowdhury* (*supra*) is relevant. The Court held at paragraphs 8 and 9 on pages 258-259, as follows:

“8. ...There is authority for the proposition that where on account of the arbitration clause in a partnership agreement or lease or the like, by which the parties agreed to refer all their disputes to arbitration, the Court stays proceedings pending itself, it retains jurisdiction to deal with a prayer for injunction or for a receiver: Law v. Garret; Compagnie du Senegal v. Woods; Hasky v. Windham; and Piri v. Roncoroni. In the case of Willesford v. Watson, Lord Selborne expressed the view that, if since the passing of the Common Law Procedure Act, parties chose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a prima facie duty is cast upon the Courts to act upon such arrangement. That the plaintiff’s right to a receiver and

injunction is not a matter to refer can hardly be disputed. As regards injunction, there is clear authority, see Willesford v. Watson, where Lord Selborne says: It is said that the arbitrator could not grant an injunction. No doubt he could not grant an injunction; but he might say that the thing was not to be done and there being liberty to apply to this Court, this Court would then grant the injunction.

9. As regards receiver the appointment of a receiver made by an arbitrator will not only be difficult of being enforced as between the parties themselves but would be utterly ineffectual as regards third parties. Of course, it is open to the arbitrator to say that some person should be put in charge or management of the properties, and the Court may then proceed to make the order appointing a receiver. There may be cases where the parties having agreed to refer all their disputes to arbitration the Court may wait until the questions arising in the action are decided by the arbitrator and then consider whether the prayer for receiver should be granted or not as was pointed out in Zalinof v. Hammond. It being the duty of the Court to act upon the agreement entered into by the parties themselves it will have to be ascertained in each individual case as to what was actually referred. If the Court finds that the question of management interim was also referred it may defer the consideration of the question of appointment of a receiver in the view that the parties by agreement between themselves have disentitled themselves to the auxiliary relief which otherwise they could have from the Court.....”

48. Even after the enactment of the 1996 Act, as pointed out by Mr. Jagtiani, different Courts took different views and approaches on the scope of the arbitral

tribunals' power to grant interim reliefs or 'interim measures of protection' under Section 17 of the 1996 Act. For instance, in the case of *Intertoll ICS Cecons O & M Co. Pvt. Ltd. v. National Highways Authority of India (supra)*, the Delhi High Court at paragraphs 15-18 on pages 1026-1027 dealt with the scope of powers under Sections 9 and 17 of the Act. In brief, the Court expressed the view that the powers of an arbitral tribunal under Section 17 of the 1996 Act are much narrower than that of a Court under Section 9 of the Act, although there may be some overlap. The Court in *Intertoll (supra)*, held that an arbitral tribunal can only protect the subject matter of the dispute, which must be tangible property, and therefore it cannot order the furnishing of a security for securing a money claim.

49. As against this, this Court in *Baker Hughes Singapore Pte. v. Shiv-Vani Oil and Gas Exploration Services Ltd. (supra)* took a broader view (at paragraphs 40, 50 —51) of the arbitral tribunals powers under Section 17 of the 1996 Act. This Court also distinguished the Judgment in the case of *Intertoll (supra)*. This Court held, in *Baker Hughes (supra)*, that an arbitral tribunal can, in a given case, make an appropriate order of security.

50. A perusal of these decisions is helpful because it brings into focus the reason why Section 17 as amended, was enacted.

51. Under the 1940 Act, the position was, as stated by the Hon'ble Supreme Court in *MD, Army Welfare Housing Organization (supra)*, that an arbitral tribunal is not a Court of law and its orders are not judicial orders and its functions are not judicial functions.

52. This position changed under the 1996 Act, but in relation to Section 17 of the 1996 Act, the same Judgment of *Army Welfare (supra)*, says that the power is a limited one, and that the arbitral tribunal has no power to enforce its own order nor is it made judicially enforceable.

53. Even though different Courts may have taken different views on the scope of the powers under Section 17 of the 1996 Act, it is very clear that the powers were narrower than Section 9 of the 1996 Act. Ex facie, Section 17 of the 1996 Act did not provide for any power for the appointment of a Receiver. Also, as noted by the Hon'ble Supreme Court, there were difficulties in matters relating to the enforcement of order passed by an arbitral tribunal under Section 17 of the Act.

54. Whereas Section 9 of the 1996 Act expressly provided for various interim orders that a Court could pass, Section 17 of the 1996 used the expression '*any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute*'. Therefore, it was always necessary for

a party applying for interim relief before an arbitral tribunal to show that a specific interim orders, covered by the express provisions of Section 9, was also covered by the limited language of Section 17 of the 1996 Act. These challenges and difficulties perhaps led to parties applying for interim measures to a Court under Section 9 of the 1996 Act, even after a tribunal had been constituted.

55. It is in this background that Section 17 of the Amended Act obviously came to be enacted. Section 17 of the Amended Act is now *in para materia* or very similar in content to the provisions of Section 9 of the Amended Act. The powers to make different types of interim orders of protection are now enumerated in Section 17 of the Amended Act, as they are under Section 9 of the Amended Act.

56. The powers, of an arbitral tribunal, to make orders is put on par with that of a court. The language appearing after Section 17(1)(ii)(e) of the Amended Act makes this clear. It states “*and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceeding before it.*”

57. The issue of enforceability of such orders is now expressly addressed by Section 17(2) of the Amended Act, which provides that such orders of the arbitral tribunal, “*... shall be deemed to be an order of the Court for all purposes and shall*

be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

58. In light of the enhanced powers and efficacy of recourse under Section 17 of the Amended Act, there have been corresponding changes to Section 9 of the Amended Act as well. Section 9(3) of the Amended Act states that, “*once the arbitral tribunal has been constituted, 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.*”

59. Whilst all of the above explains the rationale and purpose for amending the provisions of Section 17 of the Amended Act, the question still remains: **whether there is anything in the language of Section 17 of the Amended Act that entitles an arbitral tribunal to function as the High Court, Bombay, so as to enable it to issue orders of appointment, supervision and control over an employee and department being the Court Receiver, High Court, Bombay?**

60. In my view this question must be answered in the negative. In addition to my above findings and conclusion as to the status and Office of the Court Receiver, High Court, Bombay, I am of the opinion that the language of Section 17 of the

Amended Act, does not mean that the arbitral tribunal is itself a Court, or in this case, the High Court, Bombay.

61. There is a clear distinction between an *arbitral tribunal having the same powers as that of a court for making orders*, which expression appears after Section 17(1)(ii)(e) of the Amended Act, and an arbitral tribunal being the Court itself. Mr. Sen's reliance upon this part of the language of Section 17 of the Amended Act to contend that the powers of the arbitral tribunal are unfettered and therefore it can appoint the Court Receiver, High Court, Bombay, is misplaced.

62. As pointed out by Mr. Jagtiani, this same language finds mention after Section 9(ii)(e) of the Amended Act, which deals with the powers of the Court to grant interim relief. Mr. Jagtiani contends that, therefore, this language cannot be construed to mean that an arbitral tribunal is *the Court* because if that was its intended purpose and effect, it would never find mention in Section 9, which deals with the powers of Court itself.

63. I am of the view that the language appearing after Section 17(ii)(e) of the Amended Act, really concerns itself with the powers to make interim orders. It is for the making of such interim orders that the arbitral tribunal's powers are treated as the same as that of a court. One cannot read into this language a conclusion that

an arbitral tribunal is itself a particular court, such as the High Court, Bombay, so as to be able to do everything that the High Court, Bombay could do, such as appoint its employee or officer to function as a Receiver in a given matter.

64. Another aspect to be noted, as contended by Mr. Jagtiani, is that the expression, “*and the arbitral tribunal shall have the same power for making orders, as **the court** has for the purpose of, and in relation to, any proceeding before it...*” uses the word ‘court’ and not ‘Court’. By using the word ‘court’ and not the defined term ‘Court’, the legislature was not intending to refer to a particular ‘Court’ as defined under the Act but was only generally stating that the powers of the arbitral tribunal for the making of interim orders will be that of a court.

65. The use of the expression ‘court’ and not ‘Court’, in my view, militates against the submission that an arbitral tribunal is clothed with all the powers and consequences of a particular Court, such as the High Court, Bombay, to be able to do only what the High Court, Bombay can do in terms of appointment control and supervision of the Court Receiver, High Court, Bombay.

66. In any event, for the other reasons already mentioned, I am of the view that even if we read the particular word as “Court” in the defined sense, it still does not

mean that the arbitral tribunal is entitled to do what only the High Court, Bombay can do, which is to appoint the Court Receiver, High Court, Bombay.

67. So also, the provisions of Section 17(2) of the Amended Act, provide for a deeming fiction as to the order of the arbitral tribunal being deemed to be an order of the Court for all purposes and also for the purpose of enforceability under the CPC. None of this alters the position as expressed above and nor does it enable the arbitral tribunal to appoint officers of the High Court, Bombay, being a Chartered High Court, in exercise of powers under Section 17 of the Amended Act.

68. I am of the view that the power under Section 17(1)(ii)(d) of the Amended Act, to appoint a Receiver, is obviously derived from Order XL of the CPC. This allows the arbitral tribunal to appoint such persons that are capable of being appointed to act as receivers in relation to the dispute. This is how all civil courts—other than court such as this Court that has an established department or office of a Court Receiver—across India exercise this power. Being a Central Legislation applicable to the whole of India, as per Section 1(2) of the Act, it would be reasonable to understand and construe the power under Section 17(1)(ii)(d) of the Amended Act in this consistent manner.

69. Mr. Sen also made a submission that it is for the arbitral tribunal to exercise its unfettered powers to appoint any person that it thinks fit to act as a Receiver, including the Court Receiver, High Court, Bombay, and it is for that person or the Court Receiver to accept or decline to act, by a decision being taken on the administrative side of this High Court.

70. I am of the view that this submission is not correct for various reasons. As I am of the view that the Court Receiver, High Court, Bombay can only be appointed by this Court and that the provisions of Section 17 of the Amended Act cannot be read otherwise, I cannot accept the first part of this submission that the powers of the arbitral tribunal are unfettered so as to make the appointment in the first place.

71. That apart, there is no question of an administrative or policy decision being taken by this Court on its administrative side in response to a specific appointment made by an arbitral tribunal to appoint the Court Receiver, High Court, Bombay in a particular matter. If at all such appointments are made, the Court Receiver upon receiving such an appointment letter would be required to place the matter before the appropriate Bench of this Court, on its judicial side, by way of a Court Receivers Report, as has in fact been done in the present case. If such appointment by an interim order of the arbitral tribunal were to then be subject to a decision or approval on the judicial side of this Court upon a Report being submitted to it, it

would result in a situation where the implementation of the very order of the arbitral tribunal being subject to the approval of this Court. Such a scheme is unknown to Section 17 as amended, and would defeat the very purpose of Section 17 as amended, which was to make the powers of the arbitral tribunal self-contained and exhaustive.

72. Further, the two-tier process submitted above viz. appointment of the Court Receiver by the arbitral tribunal and approval by this Court, would also contravene the scheme under Section 5 of the Act. Section 5 of the Act contemplates intervention by a judicial authority only where expressly provided for in Part I. Clearly, there is no room for any form of 'intervention' by way of this Court approving the appointment of the Court Receiver, High Court, Bombay, as made by an arbitral tribunal. All this indicates that the scheme as contended by the Original Claimant for the manner in which the appointment of the Court Receiver, High Court, Bombay, is to be made by an arbitral tribunal, is not known to the Amended Act. Hence, for this reason also, I am not inclined to accept this submission of Mr. Sen.

73. I am also of the view that any interpretation that would allow for the Court Receiver, High Court, Bombay, to be appointed, and thereby subjected to the

control and supervision of an arbitral tribunal, would cause considerable difficulty in the functioning of the Office of the Court Receiver.

74. As pointed out to me, the Office of the Court Receiver, High Court, Bombay, has a total working strength of 83 members (Class I to IV), working in different sections. Of them, only the Court Receiver, the Officer on Special Duty and the 1st and 2nd Assistant to the Court Receiver, are the officers who usually attend to matters in Court. The total number of pending matters as on 31st December 2016 is 6683, with the oldest being Suit No. 3415 of 1947. There are 2206 movable properties and 1014 immovable properties that are presently *custodia legis*.

75. The Office of the Court Receiver, High Court, Bombay, already has its hands full in fulfilling its present commitments. If it were appointed to act as a Receiver in arbitrations, there would be no room for supervising such appointments by this Court and such Officers would be answerable only to the arbitral tribunals. Such arbitrations would be held at different locations in Mumbai and sometimes outside Mumbai, at times there would be a clash in the working hours and days of the Bombay High Court and the arbitral tribunals. Such officers and personnel would also have commitments in Court or in relation to Court matters. The situation that may result would be very difficult to manage and streamline. It would undoubtedly

affect the functioning of the Office of the Court Receiver, High Court, Bombay and the present commitments that it has.

76. Whilst this is not the principal reason for taking the view that I have, I do feel that the inconvenience, hardship, absurdity and injustice caused by a particular interpretation are relevant factors to be considered so as to adopt an interpretation that would avoid such consequences. The Judgment in the case of *Tirath Singh v. Bachittar Singh & Ors. (supra)* relied on by Mr. Khandekar, recognises this rule of interpretation and states that in such cases the Court may put such meaning on words to modify their literary or grammatical meaning. Not that the literal or grammatical language of Section 17 as amended, aids the Original Claimant, but even if it did, the Court can always consider the consequences of such interpretation and construe it to avoid the hardship or inconvenience.

77. For this reason, also, I am of the view that the Court Receiver, High Court, Bombay cannot be appointed by an arbitral tribunal.

78. Lastly, Mr. Vivek Patil, Advocate, who appeared in response to the Notice dated 7th January, 2017, made a submission in support of the view that the Court Receiver can be appointed by an arbitral tribunal. He relied upon a Judgment of a

Single Judge of the Kerala High Court in the case of *Pradeep K.N. v. The Station House Officer & Ors.*¹².

79. This Judgment dealt with a common question of law regarding the “... *enforcement of the interim order issued under Section 17 [of the Amended Act]*” as set out in paragraph 1. In paragraph 12, the Court whilst noticing the powers of the arbitral tribunal to make orders of repossessing vehicles, raised the question as to when such orders are not obeyed or honoured by the parties, can the order be enforced like an order of the civil court, by the arbitral tribunal or the party. After analysing the meaning of ‘enforcement’ as being a sovereign or State function, the Court observed:

“13. ... Nevertheless, it confers no power on the Tribunal to enforce its own order. Conferring the power of the Civil Court to the Tribunal for passing an interim order does not mean that the Tribunal is conferred with the power of enforcement. The Tribunal, by its constitution or creation, inherently lacks power to deal with any sovereign function or public law in the sense that their authority is founded in a contract and power is regulated by the statute.

14. The nature of power vested with the Arbitral Tribunal is also discernible from Section 27 of Act 26 of 1996. The Arbitral Tribunal has to apply to the Court for assistance in taking evidence. It is for

¹² *unreported decision in WP(C) No. 38725 of 2015*

the Court to ensure that such request is implemented by passing appropriate orders.

...

17. The interim orders in all the writ petitions are in the nature of appointment of an Advocate Commissioner/Receiver to repossess the vehicle either directly or with the assistance of police.

18. As has been adverted above, the enforcement itself signifies that there must be a force to put the order in motion, to ensure that the party bound by the order is complied with such order. The Arbitral Tribunal's by very nature of its composition cannot exercise any such power vested with the court, which discharges sovereign function."

80. The Judgment thereafter goes on to hold, in paragraph 19 at page 17, that any order of repossession can only be enforced through a civil court. In that case, at paragraph 32 at page 24, the Court directed the Registry to forward the order of repossession to the Director General of Police, for assistance in its implementation.

81. Whilst this Judgment dealt with the somewhat different issue of enforcement of order of an arbitral tribunal, the above observations, in the said Judgment support the view that I have taken above. It recognises that notwithstanding the width of power for making interim orders, the arbitral tribunal has its limitation as it is not a Court and that there are some matters or functions, which can only be done by the Court.

82. For all of these reasons, I am of the view that the question framed in the Court Receiver's Report (as set out in paragraph 1 above) and the issue for consideration as framed by me (as set out in paragraph 2 above), are both answered in the negative.

(S.J.KATHAWALLA, J.)