IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 25th DAY OF OCTOBER 2017

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. No.769 of 2017

In the matter of Arbitration & Conciliation Act, 1996
and
In the matter of Arbitration of dispute between M/s. STL Extrusion Private Limited Loan Agreement No:CDINDTF1410250001 Dated 27.10.2014

M/s. Shriram City Union Finance Limited,
having its registered office at
No.123, Angappa Naicken Street
Chennai
rep.by its authorized signatory
Mr.P.Nawin ...Applicant

-vs-

Mr.STL Extrusion Private Limited,
Rep.by its Director,
Mr.Jigna Sanghvi,
No:15-16, Old IDA Building,
3rd Floor, Jawahar Marg,
Indore (MP) 452 007 ...Respondent

Application praying that this Hon'ble Court be pleased to pass an order directing the respondents to furnish security to the tune of Rs.2,48,90,172/- or such sum as this Hon'ble Court may direct: within such time that this

Hon'ble Court may stipulate and in case of default to do so, order sale of the property of the respondents more fully described in the schedule to the Judges summons pending disposal of the Arbitration Proceeding and the enforcement of the award.

This application coming on this day before this court for hearing the court made the following order:

This application is filed in terms of Section 9 of the Arbitration and Conciliation Act (in short 'the Act') and prays for a direction to the respondent to furnish security to the tune of Rs.2,48,90,172/- and in case of default, order sale of the schedule asset pending disposal of the proceedings for arbitration.

2.Mr.R.Uma Shankar, learned counsel appearing for the applicant would outline the facts as follows:

(i)The parties herein entered into an Enterprise Finance Loan Agreement dated 27.10.2014 in Indore and pursuant thereto, a loan of Rs.3,00,00,000/- repayable with finance charge of an amount of Rs.79,69,596/- was availed of by the respondent. A sum of Rs.3,79,69,596/- was disbursed, to be repaid in 36 monthly instalments of Rs.10,54,711/- each, the instalments commencing from 05.12.2014 and ending on 05.11.2017.

(ii)The loan was secured by the deposit of the title deeds of immovable property situated at Pitampura, Dhar District and the Memorandum of Deposit of Title Deeds executed on 27.10.2014.

(iii)15 instalments were paid, but there were defaults from the 16th instalment onwards and the cheques issued by the respondent were dishonoured. As a result, proceedings have been initiated in terms of Section 138 of the Negotiable Instruments Act that are pending parallelly.

(iv) In view of the continued defaults despite repeated reminders from the applicant, the agreement was terminated by notice dated 16.07.2016 and the borrower and guarantors called upon to settle the contract. There was no response from either.

(v) Article 17 of the agreement between the parties provides for the arbitration of disputes and differences inter se the parties and the arbitration clause was invoked by the applicant vide letter dated 29.08.2016. An Arbitrator has been nominated and a reference letter sent. However, the respondent, upon receipt of the reference has objected to the seat of arbitration as fixed by the Arbitrator at Chennai. The Arbitrator however has chosen to proceed with the matter and issued a notice dated 24.01.2017 directing all parties to appear before him on 28.02.2017.

(vi) Notwithstanding that the respondent has offered its property as security, the claim of the applicant is unsecured since it is not in a position to enforce the security in the proceedings for arbitration. Thus, the present application in terms of Section 9 of the Act praying for appropriate orders for securing the claim, pending arbitration.

(vii) The present application is, Mr.Umashankar would state, maintainable in view of the cause of action arising partly at Madras, within the jurisdiction of this Court. He would draw attention to Schedule 2 of Agreement dated 27.10.2014 wherein *'Chennai'* is mentioned as the place of arbitration.

3.Ms.Jyotsana, learned counsel appearing for the respondent would seriously object to the maintainability of the present application, relying upon and circulating a copy of the loan agreement dated 27.10.2014 as available with the respondents. Upon a comparison of the agreements as circulated by the applicant and the respondent, several variations are noted. They are:

(i) The seal of the applicant company has not been affixed in the respondents' copy in any of the pages.

(ii) Several fields in Schedule 1 of the Agreement are blank in the respondents' copy such as the loan agreement number, the date, address of the lender, the choice of option in the column marked *'EMI Advance/Arrears'*, the marks in the fields relating to EMI and *'others'* column in schedule 2 and for the purposes of this application, the field *'place of arbitration'* in schedule 2. The page containing schedules 3 and 4 is unsigned.

4.The respondent would rely on Articles 17 and 18 of the agreement, Article 17 specifically stipulating that the venue of arbitration shall be as specified in schedule 1 of the agreement and Article 18 vesting jurisdiction in the courts situated in the place as specified in schedule 1 of the Agreement. Article 17 and 18 are extracted below:

> *'17. Arbitration and Dispute Settlement*
> *a. All disputes, differences and/or claims, arising out of this Agreement, whether during its subsistence or thereafter, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment for the time being in force and shall be conducted by a sole arbitrator to be appointed by the Lender under the provisions of the Arbitration and Conciliation Act, 1996. The applicable law shall be Indian laws. In the even of incapacity or resignation or death of the sole arbitrator so appointed, the Lender shall be entitled to appoint another arbitrator in place of the earlier arbitrator, and the*

proceedings shall continue from the stage at which the predecessor had left.
b. The award given by such an arbitrator shall be final and binding on the parties to this Agreement. The cost of the Arbitration shall be borne with by the Party/ies, in accordance with the Award passed by the Arbitrator.
<u>The Venue of Arbitration shall be as specified in Schedule 1 hereto and the proceedings shall be conducted in English language.</u>
<u>18.Jurisdiction and Governing Law</u>
<u>Subject to the Arbitration Clause mentioned above, this Agreement shall be governed and construed in accordance with the substantive laws of India and the parties hereto submit to the jurisdiction of the Courts situated at the place as specified in schedule 1 hereto.'</u>

(emphasised by underlining)

Schedule 1 and 2 as per the respondents' agreement reads as under: Schedule 1

Loan Agreement No.		**Date** DDMMYYYY	
Name & Address of Lender	Shriram City Union Finance Limited		
Name and address of the Borrower (in case of the company/ Partnership Firm. Represented by)	STL Extrusion Pvt.Ltd. Dir.Jigna Sanghvi. 15-16, old IDA Building, Jawahar Marg, Indore, MP.		
Nature of Business	Manufacturing	**Purpose of Loan**	Working Capital

Name and address of the Guarantor (S)	1. STL Exports Ltd. (Dir-Aruna Sangavi) 15-16 Old IDA Building, 3rd floor, Jawahar Marg, Indore. 2.Shrepati Steel Tubes Pvt.Ltd. (Dir. Pranav Sanghvi) 15-16 Old IDA Building, 3rd floor, Jawahar Marg, Indore. 3.Jigna Sanghvi H.No.21 Pragati Vihar Colony Indore - 16. 4.Pranav Sanghvi H.No.21 Pragati Vihar Colony Indore - 16.

Loan Amount Rs. 3,00,00,000	**Rate of Interest** 16% Flat **Rate of Interest** % p.a.	**Tenor:** 36 Months	**EMI frequency (Please tick one)**	**Monthly/Q**uarterly

Repayment Terms			
EMI-Advance/Arrears	Advance EMI (Nos.)	Advance EMI Amount Rs.	
EMI Start Date	05.12.2014	EMI End Date	05.11.2017

EMI From 05/12/2014 to 05/11/2017	EMI Amount Rs. 10,54,711/- each
EMI From to	EMI Amount Rs. each
EMI From to	EMI Amount Rs. each

Schedule 2

Schedule of Fees

Processing Charges	Rs. 206423
Stamp Duty	Rs. 100
Pre EMI interest	Rs. 118356
Credit Shield/Insurance for one year (optional)	Rs.
Others (please Specify)	Rs.

Place of Arbitration	Jurisdiction of Court

5. Schedule 1 refers to the address of the borrower and the guarantor, both of whom are in Indore. Also, and for the sake of clarity, the page of the document containing schedules 1 and 2 as circulated by the applicant have been duly executed by the applicant as well and there is thus no doubt that the contents thereof are well within the knowledge of the applicant. The *'place of arbitration'* is blank in the respondents' copy and the field *'jurisdiction of court'* is blank in both copies.

6. Mr.Umashankar files a note in relation to the manner of execution of the agreements, extracted below:

> *'NOTE REGARDING MANNER OF EXECUTION OF THE AGREEMENTS*

1. The interested customer will approach the lender (Applicant) for availing financial facility for various purposes;
2.Along with the Letter of Request, they are asked to submit necessary documents to prove their Official and Residential Address, Nature of Business along with licenses from the Appropriate Authority; Tax Returns filed along with Balance Sheet if any and the Security documents (in case of secured loans) for scrutiny;
3.Field verification will be conducted based on the documents submitted by the customer.
4.If the proposal is viable and the customer satisfies the necessary condition, a draft Agreement will be made available for his consent.
5.On acceptance of the terms of the Agreement, duly filled agreements will be signed between the Lender and the customer in the branch office of the Lender or at the customer's place of business and a copy will be provided to the customer.
6.On execution of the Agreement by both parties, payments will be disbursed from the Corporate Office at Santhome, Mylapore, Chennai and the Original Agreement will be forwarded to the head office for safe custody.'

7. Clause 5 extracted above is important. According to Mr.Uma Shankar, the agreement, duly filled in will be signed by the applicant and the respondent in either the branch office of the lender or the customer's place of business and a copy will be provided to the customer. Both parties agree that the loan agreement was signed in Indore at the premises of the respondent but

the document as handed over to the respondent contained the gaps as aforesaid including specifically, the place of arbitration in schedule 2.

8. The case of the respondent is to the effect that the field as regards the 'place of arbitration' as well as 'jurisdiction of courts' were blank at the time when the document was signed by the respondent and the place of arbitration has been filled in later by the applicant.

9. In defence Mr.Uma Shankar would point out the following clause in the agreement, emphasising upon the portion underlined:

> *'22.Notices.*
> *Every notice, request, demand or other communication under this Agreement shall:*
> *a. be in writing, delivered by hand, or by registered post/Speed post, acknowledgment due, or by Courier or any other mode as decided by the Lender:*
> *b. be deemed to have been received when delivered by hand, at the time so delivered if during business hours on a business day for the recipient, and if given by registered post acknowledgement due, 72 hours after it has been put into post: and*
> *c. be sent to the Borrower to the address mentioned in Schedule 1 hereto and to the Lender and its office address first hereinabove mentioned, or to such other address as either party may in writing hereafter notify to the other party.*
> *d.The Lender may (but not obliged to) send*

short message service (sms) to the Borrower intimating him on the dues payable by him.
e. The Borrower hereby agrees to pay the postal and other charges as mentioned in Schedule 3 here to for each of the notices being sent to him/them.
The Borrower and the Guarantor(s) have read the entire Agreement, constituting the above clauses including the Loan details and the terms of repayment, the fees and charges payable as clearly enumerated in the schedule to this Agreement. The Borrower and the Guarantor(s) further confirm that the entire Agreement is filled in their presence and that the contents provided herein is explained in the language understood by the Borrower and/or Guarantor(s), and the contents have been clearly understood by the Borrower and the Guarantor(s). The Borrower further confirms having executed the Agreement and agrees to remit the bills dues in terms of the schedule hereunder.'

10. He would argue that the respondents cannot raise the issue of maintainability at this juncture in view of the clause above pointing out other similar agreements between the same parties where no such objection has been taken. I disagree. The above clause loses its meaning in the light of the admitted and apparent position that the agreement in the possession of the respondent is blank as regards the 'place of arbitration'. As regards the argument relating to other contracts between the parties, I can only say that the present order is solely in relation to the Agreement

dated 27.10.2014 that is before me. Even if I were to keep aside for a minute the allegation of the respondents that several fields have been filled in by the applicant later, both the venue for the arbitration as well as the jurisdiction of courts as provided for in the agreement is as per the place specified in schedule 1 to the agreement, being Indore, MP. Both, the page of the agreement containing clauses 17 and 18 as well the page containing Schedules 1 and 2 have been duly executed by both parties in both versions of the agreements. The inference I thus draw is that the proper venue for arbitration as well as the jurisdiction of courts is Indore, MP as agreed to by the parties.

11. It is also pointed out by the respondent that the relief sought is only for a direction to furnish security or order sale of the property in case of default and that such a prayer does not amount to an interim measure of protection, but for all intents and purposes to a permanent injunction that cannot be granted. Reliance was placed on the decision of the Madras High Court in the case of *M/s.Mill Merin Gas Agencies and another vs. M/s.TVS Finance and Services Ltd. and*

another (2008-3-L.W. 599) (para 7). Yet another argument is that since the property sought to be ordered for sale is at Indore, leave to sue ought to have been obtained that had not been done in the present case. Mr.Uma Shankar, in this context, refer to a judgment of the Division Bench of this Court in M/s.Dynasty Developers Private Limited vs. Jumbo World Holdings Limited and others dated 10.01.2008 and the observations of this Court at para 19 onwards.

12. The maintainability or otherwise of an application under Section 9 is wholly dependant on the existence of a valid arbitration agreement between the parties as set out in section 7 of the Act. Section 20 deals with the place of Arbitration and provides that the parties are free to agree on the place of arbitration. In the present case, the parties have agreed upon the place mentioned in schedule 1, being Indore. Liberty is given to the Arbitral Tribunal to determine the place of Arbitration only in the absence of an agreement between the parties.

13. The Supreme Court, *in Indus Mobile Distribution Private Limited V. Datawind Innovations Private Limited & Ors.* (Civil Appeal Nos.5370-71 of 2017

dated 19.04.2017) holds thus:

'The preceding discussion has been on the basis that there is only one 'place' of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or 'seat' of the arbitration.

....

14.This Court reiterated that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration. (See: paragraph 138).

....

20. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

14. In the present case, the loan agreement as executed between the parties vests jurisdiction in the courts specified in schedule 1 which is Indore. It also provides for the venue for the arbitration being the place specified in schedule 1, again being Indore. This much is unambiguous. Much has been made of the fact that Chennai is stated to be the place of arbitration as per schedule 2 to the agreement. It however appears to me that this position is unilateral vis-a-vis the applicant alone since schedule 2 in the copy of the document filed by the respondent does not contain a reference to Chennai. I also reject the reliance of Mr.Uma Shankar on the clause in the agreement to the effect that the borrower and the guarantors have read the entire agreement and confirm that the entire agreement was filled in in their presence. Nothing turns on this clause when clearly the specification of 'chennai' is contrary to the terms of the agreement.

15.There is no doubt in my mind that documents under which a loan of Rs.3,00,00,000/- has been extended have been executed in a rather casual manner. Perhaps the respondent, in its anxiety to receive the loan has been remiss in executing the same in haste but it was incumbent upon the applicant to have completed and filled in the same in accordance with the clauses in the agreement.

16. I may also mention here that the maintainability or otherwise of an application under section 9 and the existence of a valid Arbitration agreement has to be determined at this stage as the premise on which an application under section 9 proceeds is a valid Arbitration agreement between the parties. This is reinforced by section 9(2) inserted by Act 3 of 2016 with retrospective effect from 23.10.2015, which makes it mandatory for proceedings for Arbitration to be commenced within a period of 90 days from the date when an order is passed under section 9 or within such further time as the Court may determine.

17.For the aforesaid reasons, I hold that there is no valid arbitration agreement between the parties and consequently, this application is not maintainable. In the light of my opinion on the existance of a valid arbitration agreement between the parties, I refrain from dealing with the other issues raised by the respondent.

sd/.A.S.M.J

25.10.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/23.11.2017 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.