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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.951 OF 2018
WITH
COMMERCIAL ARBITRATION PETITION NO.963 OF 2018

Tata Motors Finance Solutions
Ltd., ... Petitioner
V/s.
Delhi Baroda Road Carrier
Pvt. Ltd and another ... Respondents

Mr. Cheerag Balsara a/w Mr. Chinmay Gupte, i/by Mohit Gadkari & Co., for the Petitioner.
Mr. Aseem Naphde, a/w Rachit Lakhmani, Mr. S. Roy i/by Vis Legis Law Practice, for respondent

CORAM : G. S. KULKARNI, J.

DATE : 28th MARCH, 2019.

P.C. :

1] Heard Mr. Balsara, learned counsel for the petitioner and Mr. Naphade, learned counsel for the respondent.

2] These petitions are filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "ACA"), whereby the petitioner, a non banking finance company is before the Court seeking interim reliefs pending the arbitral proceedings. The petitioner extends financial facilities to purchasers of vehicles manufactured by Tata Motors Limited.

3] Respondent No.1 is a private limited company engaged in the business of Road Transportation, had approached the petitioner for loan facilities for purchase of trucks in commercial vehicles which came to be granted by the petitioners. Master loan cum hypothecation cum guarantee agreement dated 8.8.2016 was entered between the petitioner and respondent dated 8.8.2016 (in Commercial Arbitration Petition No.951 of 2018) and similar agreement dated 26.11.2016 came to be entered (Commercial Arbitration Petition No.963 of 2018).

4] Mr. Balsara, learned counsel for the petitioner would contend as contained in the Master Loan Agreement, respondent executed 31 Annexures with the petitioner for availing the said loan. According to the petitioner, it was agreed that vehicles in respect of which finance was required and granted by the respondent, stood hypothecated in the petitioner's favour (hereinafter referred to as the "the hypothecated assets"),. A sum of Rs. 4 crores was advanced by the petitioner to the respondent under the said Master Loan agreement.

5] As per the terms and conditions of the loan agreement, respondents were to repay the said amount in periodical installemnts. Respondent failed to pay the installments on the due dates, such failure would constitute an "Event of Default". The case of the petitioner is that the respondent persistently defaulted in fulfilling the obligations under the said agreement. Despite repeated reminders, respondent failed and neglected to repay installments. Accordingly the petitioners acting under the said agreements issued notice dated 9th May, 2018 to the respondent, recalling to the loan facilities. Further the loan agreement was also terminated and respondents were called upon to make payment of outstanding dues within a period of 48 hours. It is the case of the petitioner that some amounts were assured to be paid by the respondents. However, respondent failed and neglected to pay the outstanding amounts to the petitioner. There were negotiations between the parties so that the dispute could be resolved. The petitioner submits that as on 6.8.2018, an aggregate sum of Rs.2,32,53,899 was due and payable by the respondent.

6] In these circumstances, the petitioners have prayed for the following protective reliefs which are similar in both these petitions.

> " (a) That this Hon'ble Court be pleased to direct the Respondents to furnish security to the petitioner for an amount of Rs.2,32,53,899/- which such time as this Hon'ble Court may deem fit and proper;
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> (b) That the Respondent be ordered and directed by this

Hon'ble Court to disclose on oath all their assets and properties movable and immovable, tangible and intangible and all the Respondents right, title and interest therewith with their exact and precise location and addresses.

(c) That in the event of the failure on the part of the Respondents to furnish security as be ordered and directed by this Hon'ble Court, all the Respondents assets and properties and all the Respondents right, title and interest therein including those that may be disclosed on oath by the respondents, be attached by and under the orders of this Hon'ble Court'

(d) This Hon'ble Court be pleased to direct the Respondents to disclose the whereabouts of the Hypothecated Assets, described and listed out more particularly in Exhibit A hereto, to the Court Receiver, High Court, Bombay;

(e) This Hon'ble Court may be pleased to appoint the Court Receiver, High Court, Bombay, as a receiver of the Hypothecated Assets, described and listed out more particularly in Exhibit A hereto, with all the powers under Order XL of the Code of Civil Procedure, 1908 including the power to seize the Hypothecated Assets with the aid of the local police and sell the same either by public auction or by private sale and pay over the proceeds to the petitioner to be appropriated towards the repayment of the amounts due and payable by the Respondents to the Petitioner under the said Agreement red with the Loan Annexures:-

(f) This Hon'ble Court be pleased to pass an order and injunction restraining the Respondents, their employees, servants and/or agents or otherwise from, in any manner, either directly or indirectly damaging, dealing with disposing of, alienating, encumbering and/or creating any third party rights of whatsoever nature in respect of the Hypothecated Assets;

(g) This Hon'ble Court be pleased to direct the Respondents to deliver the Hypothecated Assets to such locations as may be determined by the Court Receiver, High Court, Bombay".

7] This Court on 12th October, 2018 has granted ad-interim reliefs in terms of prayer clauses (b), (d) and (f) as noted above. Similar order came to be passed in connected petition

8] Thereafter these petitions were heard by this Court (S. J. Kathawala, J.) on 16th November, 2018. The parties placed on record Consent Minutes of the order whereby respondents undertook to deposit an amount of Rs.1 crore, to prove their bonafides, which was to be paid in installments of Rs.50,00,000/- each. The first installment was to be deposited on or before 30.11.2018 and the second installment on or before 14.12.2018, failing which the Court Receiver will be handed over possession of all 45 trucks described in Exhibit "A" of the petitions, with the power of sale of the said trucks and to hand over the sale proceeds to the petitioner towards part satisfaction of the petitioner's outstanding amounts. The Court accepted the consent terms keeping these petitions pending for further orders. The clauses of the Consent Minutes of the Order are of some significance, which reads thus :-

> "1. The Petitioners have filed the present petition under Section 9 of the Arbitration Act, seeking inter alia the protection of their hypothecated assets being 31 trucks under the Master Loan Agreement dated 8th August, 2016 (1st Agreement) and 14 trucks under the Master Loan Agreement dated 28th November, 2016 (2nd Agreement). According to the Petitioners the value of their security is much lower than the outstanding amount as on 14th November 2018 which is

Rs.2,42,10,558.69 under the 1st Agreement and Rs.1,49,38,002.24 under the 2nd Agreement. The Petitioner submitted that the Receiver be appointed forthwith in respect of the aforesaid 45 vehicles and the petitioners also be permitted to press for additional reliefs in respect of the other assets of the respondents.

2. Despite the order dated 12th October 2018 requiring the respondents to file affidavits of disclosure of assets, no affidavit is filed till date. The authorized representative of the Respondents Mr. Darshan Baweja, states that the affidavit is ready and the same will be affirmed by him, served on the petitioner's advocate and filed in Court on the cause of the day.

3. The Respondents representative present in Court has suggested that in order to prove respondent's bonafides, the respondents are willing to deposit an amount of Rs.1 crore. The said amount according to the respondents will be passed in two installments of Rs.50 lakhs each, the first installment on or before 30.11.2018 and the second installment on or before 14.12.2018 failing which the Court Receiver will be handed over possession of all the 45 trucks described in Exhibit "A" to both the petitioners with the power of sale of the said trucks and to hand over the sale proceeds to the petitioners towards part satisfaction of the Petitioners outstanding amounts.

4. Accordingly the respondents undertake that they shall pay to the petitioners an amount of Rs.50,00,000/- on or before 30th November, 2018 and an additional amount of Rs.50,00,000/- on or before 14th December, 2018.

5. In the event of a single default any default to pay the aforesaid

amounts on their respective dates, the respondents themselves will handover all the 45 trucks to the Court Receiver. The Respondents undertake not to seek for any extension of time for making the aforesaid payments. The respondents further consent for sale of the said vehicles by the Court Receiver and for the Court Receiver to pay the sale proceeds to the Petitioner outstanding amount.

6. The Petitioners will be entitled to apply for additional vehicles to secure their outstanding amounts on the next date.

7. The parties have agreed to the present petition being treated as part heard before this Couirt.

8. The undertakings of the respondents given on behalf of their representative, one Mr. Darshan Baweja Adhar Card No.50288779666, Mobile No.9311459222 are accepted by this Court.

9. The orders dated 12/10/2019 and 1/11/2018, to continue till further orders.

10. Arbitration Petition to be listed on 4th December,2018.
Dated this 16th day of November, 2018".

9] The petitions were thereafter listed for hearing on 14.3.2019. This Court, in it's order dated 14th March, 2019 recorded a statement as made on behalf of respondents that the respondents are desirous of settling the issues amicably. Accordingly, the hearing of the petition was adjourned to 26.3.2019. Thereafter on 26th March, 2019 this Court passed the following order:-

> "Learned counsel for the respondent is permitted to file affidavit in the office.
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> 2. To enable learned counsel for the respondents to take instructions on the offer letter dated 12 March 2019 as forwarded by learned Counsel for the petitioner, stand over to 27 March 2019. F.O.B.
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> 3. In the event the respondents are not agreeable to the offer as made on behalf of the petitioner, the Court shall proceed to hear the petitions and pass an appropriate order as per law.
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> 4. In the meantime, learned Counsel for the respondents shall also inform his clients that in case the Court proceeds to pass further order and appoint a Court Receiver, the respondents shall make all arrangement to bring the vehicles at the depot of the petitioner i.e. at Rajnish Godara Yard, 166/1, Behind Giyan Devi, Public School, Nr. 17 Sector, Gurgaon. The said address is already furnished by the Advocate for the petitioner to the Advocate for the respondents".

10] Learned counsel for the respondents, on instructions, submits that amicable settlement of the disputes is not possible. Accordingly an affidavit-in-reply on behalf of the the respondents is placed on record of Mr.Darshan Baweja, authorized signatory of the respondents affirmed on 26th February, 2019. Though affirmed in February, 2019 it was placed on record one month thereafter.

11] I have accordingly heard Mr. Balsara, learned Counsel for the petitioner and Mr. Naphade, learned counsel for the respondents.

12] Learned counsel for the petitioner drew my attention to the additional affidavit of the petitioner to contend that it is not in dispute that the respondents are in default in making repayment of the loan amount and to comply their obligations under the Master Loan Agreement. He has also drawn my attention to the averments as made in the additional affidavit and more particularly in paragraph Nos. 7 to 11. Mr. Balsara would submit that the hypothecated assets are being used for commercial purposes by the respondent and the value of these assets will diminish with the passage of time and it would be thus difficult to recover the amounts due and payable by the respondents to the petitioners. Mr. Balsara would contend that it is imperative on the facts of the case that the reliefs as prayed by the petitioner are required to be granted.

13] On the other hand, learned counsel for respondent would contend the assets are hypothecated to the petitioner and are being used by the respondent for its day to day business. His submission is that respondents are already facing financial difficulties as 8 vehicles are already surrendered by respondent to Tata Finance It is his submission that even in the consent terms respondent had agreed to hand over the possession of all 45 buses to Court Receiver, if the respondents were not able to make payment as agreed in the consent terms. It is his submission that amounts due and payable by the respondents to the petitioner shall be paid if a longer duration of repayment is available which is not acceptable to the petitioner.

14] On the above backdrop, the Court is required to consider the specific terms and condition of the agreement as arrived between the parties as contained in the Master loan agreement. Clause Nos. 18, 19 and 20 which reads thus :-

> "18. EVENT OF DEFAULT
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> 18.1 Without necessity of any demand upon or notice to the Obligors, all of which are hereby expressly waived by the obligors, and notwithstanding anything contained herein in any security documents executed by/to be executed by the Obligors in the Lender's favour pursuant to this agreement, all amounts due and payable by the Obligors to the Lender under any and all of the Loans/Facility and all of the Obligations of the obligors to the lender hereunder, shall immediately become due and payable, notwithstanding any agreed maturity upon the happening of any of the following events (herein referred to as the "Events of Default")
> (a) If the obligors shall commit default in
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> i) Payment of any of the installments in respect of any of the loans on any of the respective due dates, or
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> ii) Payment of any other amount(s) payable by the Obligors to the Lender pursuant to this Loan agreement on any of the respective Due dates, or
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> (iii) The performance of any of the terms and conditions or covenants or undertakings under this Loan Agreement, or the terms and conditions applicable to any of the Loans, or
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> (iv) Creation or perfection of Security or any part thereof including compliance with and fulfillment of any requirements under law for and towards and in relation to creation of charge and hypothecation on the Assets and/or recording/registering the same with the Relevant Authority, filing necessary forms, obtaining necessary

endorsements including on the RC book, etc. or

(v) Handing over the proof of the compliance as aforesaid (iv) to the Lender to its satisfaction within the time stipulated in the Agreement, or

(vi) Taking delivery of the Assets within a period of 30 (thirty) days of the date of disbursement of relevant loans as well as obtaining endorsement of the hypothecation in favour of the Lender in the registration certificate book and insurance policy to express the fact that Assets stand hypothecated to the Lender) within the above referred period.

(b) If, any, attachment or restraint has been levied on the Assets or the Assets are confiscated by any authority and/or the properties hereby agreed to be charged and/or any proceedings have been taken or commenced for recovery of any dues from the Borrower by any person or persons including the Lender.

(c) Any of the Obligors dies or any action or other steps are taken or legal proceedings are initiated for winding up, insolvency, dissolution, or reconstitution of any of the obligors or for the appointment of a liquidator, receiver, and trustee or similar officer on its properties or assets (including the Assets) of the of the Obligors or any of the Obligors otherwise becomes incapacitated to enter into a contract under the applicable laws:

(d) Any of the PDCs and /or cheques delivered by the Borrower to the Lender in terms and conditions hereof/any other instruments are dishonoured for any reason whatsoever on presentation including due to instructions given by the Borrower for stop payment.

(e) Any of the Assets is confiscated, attached, taken into custody by any authority or subject to any execution proceeding;

(f) Any of the Assets is endangered or badly damaged due to accident or any other reason whatever causing the same to be a total loss in the opinion of the Lender or caused bodily injury to any person due to any accident or otherwise;

(g) any distraint or seizure order is levied on the Assets:-

(h) Any of the Obligors fails to pay any tax, , impost, duty or other imposition or comply with any other formalities required for the Assets under law from time to time:

(j) The Borrower fails to adhere to the time frames specified in this Agreement (including time frame as to supply of a copy of the Registration Certificate and Insurance Certificate);

(k) any of the Assets is destroyed or damaged for any reason whatsoever and/or is incapable of being used for any permissible use under any law or regulation or is used or alleged to be used for any illegal purpose or ion illegal manner.

(l) Any information or representation or warranty given by any of the Obligors under this Loan Agreement is found to be misleading or incorrect in any respect; the Obligors to fully discharge any of their obligations in respect of any of the Loan Facilities.

19. **CONSEQUENCES OF EVENTS OF DEFAULT:**
19.1 If one or more of the events specified in Clause 18 above occurs, the Lender shall be entitled to declare the Facility to be immediately cancelled and withdrawn and all the loans/s due and payable (whereupon the same shall become due and payable together) and forthwith recall the Loan/s together with all interest and other monies payable by the obligors thereon, and initiate such proceedings/actions for recovery of dues as necessary and/or enforce the Security or any part thereof and/or Security referred to in 12.2.(a) to (d) Clause at its discretion. Further, the Lender shall be entitled to, at all times to take possession, seize, recover, appoint a receiver/manager, remove the Assets from their place of standing, and also be entitled, on such terms as may be deemed fit by the Lender, without the intervention of Court or authority, to sell the Assets or any of them by public auction or by private contract/treaty or otherwise and realise its claims in respect of the Loans, without being bound or being liable for any loss/losses that the Obligors may suffer due to such action and without prejudice to the Lender's other rights and remedies as stated herein or otherwise in law entitled to. The Lender shall be entitled to hand over all the originals pertaining to any Assets of the purchasers thereof including the registration certificate, forms etc.

19.2 If the Obligors fail to comply with the said demand notice, the Obligors shall be bound to surrender the Assets to the Lender at the cost of the Obligors and at such location as the Lender my designate. Int he same condition in which it was originally delivered to the Borrower with normal wear and tear excepted, failing which the Lender will be entitle to seize the Assets wherever it is without further notice. The Obligors shall not prevent or obstruct the Lender from taking possession of the Assets. The Lender's authorized representatives, employees, officers and agents will have unrestricted right of entry and shall be entitled to enter upon the premises, garage, or godown or any place where the Assets shall be lying or kept and seize the Assets.

19.3 The Lender may further deal with all or any part of the Assets to enforce, realize, settle and compromise with any rights or claims relating thereto. It shall not be bound to exercise any of these powers or be liable for any losses arising therefrom. Without prejudice to the Lender's rights and remedies of legal action or otherwise and notwithstanding any pending proceeding/s, the Obligors undertake to give immediate possession to the

> nominee/s of the Lender on demand of the Assets and transfer and deliver all relative bills, contracts, securities and documents (including all registrations, policies, certificates and documents relating to the said Assets) to the Lender. The Obligors hereby also agree, to accept the Lender's account of sales and realisation as sufficient proof of amounts realised and relative expenses incurred, and to pay on demand by the Lender, any deficiency shown in the accounts, provided however, that the Lender shall not be liable or responsible for any l loss, damage or depreciation that the Assets may suffer or sustain in the course of seeking repossession or while the same is in possession of the Lender or its nominee/s or by reason of exercise or non-exercise of rights and remedies available to the Lender as aforesaid.
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> 19.4 The Lender shall have a right to refurbish ;the Assets at the cost of the Obligors in order to make them marketable for the 0purpose of sale.
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> 20. **Repossession**
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> 20.1 Without prejudice to(i) anything contained in clause 19 above (ii) the remedies of the Lender which it may pursue before an Arbitrator/Tribunal /Court and procedure thereunder, the Lender may upon occurrence of any Event of Default give the Borrower a notice of 48 hours, informing the Borrower of the lender's intention to repossess without intervention of Court the Asset(s) (hereinafter collectively referred to as the "Repossession Notice") Provided however, that where the Lender has specifically informed the Obligors of decision to take possession of the Assets in any notice issued to the Obligors for any reason whatsoever such notice shall be deemed to be the Repossession Notice as defined in this Clause and no separate notice shall be necessary in relation to the same. Further the Lender shall not be required to send the Repossession Notice and the Obligors agree to waive such right to receive notice.

15] It is submitted by the learned counsel for the petitioner that thus, by no stretch of imagination respondents could contend that the respondents are not under any obligation under the specified conditions to hand over the possession of the hypothecated vehicles to the petitioner.

16] In this regard learned counsel for respondents would oppose the reliefs as prayed by the petitioner. The first contention of Mr. Naphade, learned counsel for the respondents is that the Master loan agreement is not adequately stamped. Mr. Naphade drew my attention to paragraph

No.6 of the consent terms to contend that the petitioner was entitled to apply for additional vehicles to secure their outstanding amounts on the next date. Learned counsel for the respondent would contend that there is no change of circumstances and thus, the petitioner is not entitled to seek any further reliefs. Learned counsel for the respondent drew my attention to the additional affidavit filed on behalf of the petitioner, disputing that hypothecated assets are in any manner are being depreciated.

17] It is also submitted on behalf of the respondents that the petitioner has failed to make out any case for appointment of a Court Receiver. In this regard reliance is placed on the judgment in the case of **Parmanand Patel (dead) by Lrs and anr -vs- Sudha A. Chowgule and others[1].** Learned counsel respondent would accordingly submit that the petition is required to be dismissed.

18] Having heard the learned counsel for the parties and having perused the record, at the outset, it needs to be noted that as per the master loan agreement as entered between the parties, the conditions, in the event of default and as regards the condition for repossession of the vehicles is clearly set out in clauses 18, 19 and 20 of the master loan agreement as noted above. It is not in dispute that as on date, an amount of Rs.3.35 Crores is due and payable under both these agreements in regard to the

1 (2009) 11 SCC 127

financial facilities extended to the respondents.

19] It clearly appears from the arguments as advanced on behalf of the respondents that the respondents are not in a position to make payment of the amounts due and payable to the petitioner under the loan agreement in question. The respondents are also not in any manner agreeable to offer any security for the amount due and payable to the petitioner. The settlement talks in that regard have also failed. The respondents have given a schedule which is a long term schedule to make the payment which is not acceptable to the petitioner. It is also not in dispute that the respondent is commercially exploiting the vehicles.

20] The petitioner is concerned with the limited security namely hypothecated vehicles. The petitioner has a serious concern with regard to the value of these vehicles which would be available to be realised, which according to the petitioner would diminish/depreciate on day to day basis considering the nature of business and the petitioner's experience on how the vehicles can be rendered valueless. The petitioner would thus contend that the reliefs as prayed for in the petition are imperative and necessarily, ought to be granted, failing which there would be no security left to the petitioner.

21] The petitioner would also contend that their concern would be for all the vehicles, this for the reason that much time has lapsed after the vehicles came to be delivered to the respondents under the agreements in question. It is contended that the vehicles for all these years are commercially plying, and as to what is the real value of these vehicles as on day and whether it would be sufficient to meet the dues payable by the respondents to the petitioner can be ascertained only when the value of these vehicles is determined, after the vehicles are made available to the petitioner, as per the clear terms and conditions of the agreement.

22] Learned Counsel for the respondents submits that although the respondents are not in a position to secure the amounts due and payable to the petitioners by depositing the amounts in the Court and/or even by furnishing a bank guarantee to the extent of these amounts, he would not dispute that the vehicles are actually being used for business purpose by the respondents and income is being earned by the respondents from the use of these vehicles on day to day basis.

23] Learned Counsel for the parties are in agreement that these are special vehicles which are used primarily for transporting motor cars from manufacturers to the dealers and contract for such transportation are contracts which would earn substantial income for the respondents. However, from the tenor of the arguments as advanced on behalf of the respondents, it is quite clear that on one hand the respondents intend to commercially exploit the vehicles and earn income and at the same time, not make any the payment of the amounts due and payable to the petitioner under the loans in question.

24] If this be the clear situation which can be seen from record and the arguments as advanced by the learned counsel for the parties, then I see no reason as to why the binding terms and conditions of the agreement as entered between the parties shall not become operational and available to the petitioner for securing the amounts due and payable by the respondents to the petitioner. It may be observed that there are some disputes on the amounts that are due and payable by the respondents to the petitioner. The respondents have contended that the amount of Rs.3.35 Crores is not the exact amount due and payable. However, all this would not be relevant at this stage of the proceeding when the Court would be concerned to protect the substance of the arbitration and the only security which is available to the petitioner as clearly reflected in clauses 18, 19 and 20 of the agreement as noted above.

25] In so far as the argument of the learned Counsel for the respondents, that the document is not adequately stamped which is disputed by the petitioner, in my opinion, such a plea has not been raised in the counter-affidavit as filed in the present petition. Such a plea is required to be specifically taken and then opportunity would be available to the respondents to make the said plea. In the circumstances, considering the urgent reliefs which are sought in this proceeding, in my opinion, such an oral objection is not maintainable. It is not the case, that the respondents had no opportunity to make a specific plea in this regard, thus this submission on behalf of the respondent, at this stage of the proceedings need not detain this court from proceeding to pass orders to protect the arbitral interest of the petitioner. The law in this regard is well settled.

26] In regard to the argument of the learned Counsel for the respondents, that the consent minutes of the order as taken on record by this Court by an order dated 16 November 2018 should be accepted as the conclusive order on this proceeding and that the petitioner is not permitted to raise any plea after such consent order has been passed, in my opinion, this argument is totally untenable. In making this argument, learned Counsel for the respondents is not in a position to demonstrate that the petitioner in any manner was precluded from asserting the prayers as made in this petition in the earlier orders passed by consent of the parties.

27] Even otherwise considering the contents of the consent minutes of the order, to my mind, it clearly appears that it was only an ad-interim workable arrangement namely that part of the amount in two installments would be deposited with the petitioner, however, keeping the proceedings pending. By adopting such course of action, the respondents avoided the court considering the Section 9 petition on merits and passing an order, by considering the prayers as made in the petition. Clearly the ad-interim consent minutes of the order in no manner can be held to be final or conclusive for this Court to accept the submission of learned Counsel for the respondents and dispose of the proceeding in terms of the consent minutes of the order. If that was to be so, parties could have never agreed for these proceedings to remain pending. Such an interpretation of the order cannot be gathered from the reading of clause No.6 of the consent minutes of the order which is required to be read in the context of clause 5 of the consent of the minutes of the order without which clause 6 has no meaning whatsoever. Moreover in the consent terms, the respondents in clause no.5 agreed that in the event of a single default to pay the amount as agreed in clause 4 of the consent terms, the respondent then would hand over all the 45 trucks to the Court Receiver. The respondents also consented for sale of the said vehicles by the Court Receiver and the Court Receiver to pay the sale proceeds to the petitioner for the part satisfaction of the outstanding amounts.

28] The contention of the learned counsel for the respondent that there is no change of circumstances after the Court passed the order dated 16 November 2018 in terms of the consent terms, and for this reason the reliefs as prayed for ought not to be granted, also cannot be accepted. In this regard learned Counsel for the petitioner is correct in his contention that the circumstances which existed on the date of filing of this petition namely of non-compliance of the terms and conditions of the master loan agreement and the default on the part of respondents to make payment of the amounts due and payable, have remained and merely because of the limited circumstances taking place that certain amounts in the intervening period have been paid, would not be in any manner permit the respondents to wriggle out of their obligations under the loan agreement in question. Mr.Balsara, learned Counsel for the petitioner, would thus be right in his contention that the default on the part of respondents subsists and that substantial amounts are due and payable and on the other hand, the vehicles which are used are being deteriorated and depreciated on day to day basis.

29] Mr. Naphade, learned counsel for the respondent has placed reliance on the the decision of the Supreme Court in **Parmanand Patel (dead) by LRs and Anr. vs. Sudha A. Chowgule and Others** (supra) to contend that no case is made out by the petitioner for appointment of a receiver. The principles of law as laid down in the said decision cannot be disputed. However, the question is as to whether learned Counsel for the respondents would be correct in applying the law as laid down in the said decision in the facts of the present case. This is a decision which is rendered by the Court in a dispute which concerned the property of the deceased

Mr.Parmanand Patel. A suit came to be filed by the widow of the deceased inter-alia for a relief of a declaration and for a decree for delivery of certain documents. As set out in paragraph 14 of the said decision an interim application was moved before the trial Court. The trial court passed an order on the interim application and considering the mental and physical health of the plaintiff, certain directions came to be issued. The interim order passed by the learned Single Judge was carried in appeal where the appeal Court considered the directions interacted with the petitioner (since deceased) and further orders came to be passed. In an interim application moved in the appeal in these circumstances, an interim order came to be passed by appointing a receiver in respect of the properties of the plaintiff (since deceased). It is in this context the Court has discussed the applicability of the rules under Order 40 Rule 1. Considering the facts in the present case, one would wonder as to how the decision would be applicable to the facts of the case. It is a well settled principle of law that the decision is an authority for what it decides and a little difference in facts or additional facts may lead to a different conclusion (**See Union of India -vs- Chajjan Ram (2003) 6 SCC 568).** Thus the reliance on this decision on behalf of the respondent, in the facts of the case is wholly unfounded.

30] In any event the Court cannot be oblivious to the fact that these are commercial transactions. The respondents are stated to be major market players in the transport sector. They are completely aware about consequences of the agreement as they have entered into with the petitioner in availing the financial facilities from the petitioner. Moreover the specific clauses of the agreement as entered between the parties provide for a clear and automatic consequence of default. What the petitioner in this proceeding is seeking, is to safeguard its rights and call upon the respondents to partially perform its obligation for a limited purpose of securing the financial interest of the petitioner in the hypothecated goods. This for the reason that today hypothecated vehicles are in the possession of the respondents. As the parties stand in the contractual relations, as on the date when the Court is called upon to intervene, the petitioner is not in a position to assert its contractual rights on these vehicles as envisaged under the specific clause of the contract as noted above. The security interest of the petitioner is, therefore, certainly required to be safeguarded. Today there is nothing placed on record by the respondents to show as to what would be the exact market value of the vehicles and whether it would be sufficient to meet the amounts due and payable or whether the market value of the vehicles would exceed the amounts due and payable to the petitioner. If this be the situation and in any event considering the clear terms and conditions of the agreements in question and the obligations of the respondents as clearly defined, the circumstances permit the petitioner to realize the amounts in the manner as agreed in the said clauses which include sale of the vehicles. Even such course of action cannot be prohibited as being opposed on behalf of the respondents as it would be contrary to the agreement between the parties. The respondents cannot take a position contrary to the clear terms of the agreement, which reflects a clear commercial understanding of the contractual arrangement between the parties. Even at the interim stage of the proceeding, the commercial understanding of the parties as reflected in the contractual terms is required to be recognized. The law in this regard is well settled. Thus, in my opinion, the prima-facie case has been made out by the petitioner for grant of interim reliefs pending the arbitral proceedings more particularly for appointment of a receiver.

31] At this stage it needs to be noted that the respondent in the interim consent terms as extended between the parties had clearly agreed that if an amount of Rs.50 lakhs in two installments is not deposited as agreed in the consent terms, in that event the petitioner would be entitled to sell the vehicles as per the hypothecation agreements in question.

32] In view of the above discussion, these petitions are required to be disposed of by granting the following reliefs to the petitioner pending the arbitral proceeding:-

ORDER

(i) The ad-interim order in terms of prayer clause (f) passed by this Court dated 12 October 2018 shall continue to operate as an interim order pending the arbitral proceeding;

(ii) The Court Receiver, High Court, Bombay, is appointed as a receiver in respect of 31 vehicles + 14 vehicles subject matter of the master loan agreements dated 8 August 2016 and 28 November 2016; with all powers under Order 40 Rule 1 of the Code of Civil Procedure including the power to seize the hypothecated vehicles with the aid of the local police, undertake a valuation of the said vehicles and after ascertaining the value of the vehicles, report to the Court for further orders for the sale of the vehicles in the proportion and to the extent of the amounts due and payable to the petitioner under the said agreements;

(iii) The respondents are directed to surrender all these vehicles to the petitioner by bringing the vehicles at the depot of the petitioner i.e. at Rajnish Godara Yard, 166/1, Behind Giyan Devi, Public School, Nr 17-Sector, Gurgaon, which would be within a period of 20 days from today;

(iv) The Court Receiver shall within one week of these vehicles being brought in the said depot shall take steps to appoint an independent valuer to value these vehicles and thereafter move a report to this Court for further orders to be passed in regard to the said vehicles;

(v) In the event the vehicles are required to be sold, the Court shall hear the parties before passing any orders permitting sale of the vehicles.

(vi) In the meantime the respondents are directed not to further deteriorate the condition of the vehicles and within 10 days from today, inform the petitioners of the condition of the vehicles, registration numbers of vehicles, whereabouts of the vehicles and the date of the vehicles would be brought to Gurgaon Depot, which is one of the facets under the agreement;

(viii) In the meantime, the respondents are not precluded from arriving at an amicable settlement with the petitioner in regard to the amounts due and payable and complying their obligations under the agreement in question.

(ix) The petitions are accordingly disposed of in the above terms with liberty to the parties to apply if so necessary to the Court Receiver;

(x) Copy of this order be forwarded by the petitioner to the Court Receiver as also to the office to do the needful.

(xi) The respondents are not precluded from bringing the vehicles to Gurgaon Depot at an early period within the 20 days as directed;

33] At this stage, learned Counsel for the parties jointly submit that their respective clients are agreeable that the disputes arising under the agreement in question be referred to an arbitral tribunal by appointing a sole arbitrator. This request of the parties in the facts of the case, is required to be accepted even when the proceedings before the Court are under Section 9 of the ACA. Accordingly, by consent of the parties, the following order is passed.

Order

i) Mr.Shyam Kapadia, Advocate of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the master loan agreement dated 8 August, 2016 and 28 November 2016.

ii) The learned sole prospective arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of these petitions with a copy to be forwarded to both the parties;

iii) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

iv) The learned prospective arbitrator shall endeavour to publish an award as expeditiously as possible and within the time limit as prescribed under Section 29-A of the Act;

vi) The parties are at liberty to request the learned arbitrator for earlier disposal of the proceedings.

vii) The parties are also agreeable to bear the costs of arbitration in equal proportion. It is also agreed that the venue of the arbitral proceedings shall be at Mumbai.

viii) All contentions of the parties are expressly kept open;\

ix) The petitions are disposed of in the above terms. No costs.

34) Office to forward a copy of this order to the learned Arbitrator on the following address:-

address: 11-C, Examiner Press Building, Dalal Street,
Fort, Mumbai – 400 001.

Contact No. 9820824262.

[G. S. KULKARNI, J]