

Dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act, 1996 or any amendment or re-enactment thereof by a single Arbitrator to be appointed by the Lender. The Venue, of Arbitration shall be as decided by the Lender and the arbitration shall be conducted in English language. The award passed by the Arbitrator will be binding on all the parties".

2] Despite due service of the section 9 petition the respondent had failed to appear in the said proceedings. On 11th October, 2018, this court (S.J. Kathawala, J.), passed the following order granting interim protection to the petitioner in terms of para 5 of the order which reads thus :-

5. As the Respondents have defaulted in the repayment of the outstanding dues. It is just and necessary to safeguard the interests of the petitioner. The claim of the petitioner is over Rs.1.66 crores (approximately) and unless adequately protected, the petitioner may suffer irreparable harm and injury. Balance of convenience also warrants the grant of reliefs. Hence, the following order is passed.

i) The Court Receiver, High Court, Bombay is appointed as Receiver in respect of the said hypothecated asset being Commercial Vehicle namely 1] SCANIA METRO LINK HD 410 bearing Registration NO.MH 07 F 6786, Engine No.6870061YS2, Chassis No.K6X2JOF1894063 AND 2] SCANIA METRO LINK HD 410 bearing Registration No.MH 07 F 5786, Engine No.6870053YS2, Chasis No.K6X2JOF1894062, with direction to take symbolic possession of the said hypothecated asset and appoint the Respondents as their agents in respect of the said

hypothecated asset on usual terms, conditions and payment of royalty as may be fixed by the Court Receiver and on furnishing security having regard to the terms and conditions of the Loan-cum hypothecation Agreement (Exhibit 'C' to the Petition)

ii. In the event the respondents failing to accept or refusing to accept the agency within two weeks from the date of such offer by the Court Receiver, the Court Receiver shall take forcible possession of the said hypothecated asset with the help of police assistance if required and without any further notice to the respondents. Thereafter, it would be open to the petition to apply to the Court for further orders including sale of the said hypothecated asset by private treaty.

iii. Further, it is found that the said hypothecated asset is in the custody of any third party, i.e. other than the respondents, then the Court Receiver shall take symbolic possession of the said hypothecated asset and make a report to this Court.

iv. The respondents shall disclose on oath the details of their movable and immovable (un-encumbered and encumbered) asset/properties.

v. The Respondents, their agents and/or any person/s claiming through or under them are restrained by an order of injunction from in any manner selling, transferring disposing of, and/or alienating, encumbering or parting with possession of, or creating any rights in respect of Commercial Vehicle namely 1] SCANIA METRO LINK HD 410 bearing Registration No.MH 07 F 6786, Engine No.6870061YS2, Chassis No.K6X2JOF1894063 AND 2]

SCANIA METRO LINK HD 410 bearing Registration No.MH 07 F5786, Engine No.6870053YS2, Chassis No.K6X2JOF1894062".

3] The petition however had remained pending final hearing. The above ad-interim orders are operating against respondents. The Court Receiver, High Court, is present. The Court Receiver has placed on record his report dated 16th April, 2019, inter alia stating that information was received by the Court Receiver from the advocate of the petitioner that the hypothecated vehicles were found in possession of Mr. Sameer S. Raizada. The Court Receiver accordingly fixed an appointment on 10th April, 2019 at 3.00 p.m. to proceed at the site of Sai Garage for the purpose of taking symbolic possession of the hypothecated assets.

4] On 10th April, 2019 at 1.30 p.m, the Court Receiver alongwith the representative of the petitioner and representative of the respondent, visited Sai Garage as per the Court order and symbolic possession of the two vehicles was taken and accordingly Court's order was executed and the vehicles are now kept at the site of Sai Garage on as is whereas basis. The said report was prepared, which was read over and confirmed by the parties who were present.

5] This Court in the order dated 11th October, 2018 had directed

the Court Receiver to take symbolic possession of the said hypothecated assets and appoint the respondents as their agents in respect of the said hypothecated assets on usual terms, conditions and on payment of royalty as may be fixed by the Court Receiver and on furnishing security having regard to the terms and conditions of the Loan cum hypothecation Agreement.

6] It is informed that respondents till date have not come forward to execute an agency agreement as permitted by this Court, in its order dated 11th October, 2018 which was in fact to be executed within two weeks of the said order. The consequence of such action was set out by the Court in paragraph 5(ii) of the order that the Court Receiver was permitted to take forcible possession of the said hypothecated asset with the help of police assistance if required and without any further notice to the respondents and thereafter, it would be open to the petitioner to apply to the Court for further orders.

7] Respondents in the above circumstances have moved Notice of Motion (L) No.1042 of 2019 inter alia praying for the modification of the order dated 11th October, 2018 passed by this Court praying that the Court Receiver be prevented from taking forcible possession of the hypothecated assets being commercial vehicle. Respondents have also prayed that the

Court Receiver be discharged as receiver of the said two hypothecated vehicles.

8] I have heard the learned counsel for the petitioner and learned counsel for the respondents on this petition as also in the Notice of Motion. Learned counsel for the petitioner submits that in the intervening period, as per terms and conditions of the loan agreement, the disputes and differences as arisen between the parties are already referred for arbitration of a sole arbitrator. Learned counsel for the petitioner has also made a reference to the arbitral tribunal dated 11th March, 2019 to point out that the respondents have appeared before the learned arbitrator.

9) Learned counsel for the respondent on instructions is also agreeable that the disputes and differences between the parties be adjudicated by an arbitral tribunal and the parties agree to the appointment of Adv. Sultana Sonawane, as the sole Arbitrator to adjudicate the disputes and differences between the parties, arising under the loan cum hypothecation agreement dated 30th November, 2017. As an arbitral tribunal is already appointed, in my opinion further adjudication of this petition is not called and more particularly considering the provisions of Section 9 sub section (3) of the ACA.

10] As regards the prayers as made in the Notice of Motion, having heard the learned counsel for the parties and having considered the submissions, it needs to be observed that learned counsel for the respondent is fair in her submission that the reliefs which are prayed in this Notice of Motion can now be sought before the arbitral tribunal as and when necessary. Learned counsel for respondent would also submit that the respondents are now willing to comply with the orders passed by this Court and time to enter into agency agreement with the Court Receiver as directed by this Court in the order dated 11th October, 2018 however time be extended for a period of four weeks from today to execute the said agreements. Accordingly in furtherance of order passed on 11th October, 2018, time for the respondent to enter into agency agreement is extended by four weeks from today.

11] Parties being already before the arbitral tribunal would appear before the arbitral tribunal and co-operate in the disposal of the arbitral proceedings.

12] All contentions of the parties on merits of the disputes as urged in both their proceedings are expressly kept open.

13] It is clarified that the respondent shall not be granted any further extension to enter into agency agreement. Subject to these orders the Court Receiver shall take further steps as per the order dated 11th October, 2018 passed by this Court.

14) The petition and the notice of motion are accordingly disposed of in terms of the above observations. No costs.

[G. S. KULKARNI, J]