

O.A.Nos.3611 to 3614 of 2019

PUSHPA SATHYANARAYANA, J.

These applications have been filed by the applicant seeking for permission of this Court to sell the vehicles which are morefully described in the schedule appended to the Judges Summons and appropriate the sale proceeds towards the amount due under the loan agreements pending arbitral proceedings.

2. The applicant is the Finance Service Provider extending financial assistance for the purchase of commercial vehicles, including trucks. The first respondent, which is engaged in the business of Logistics by road, purchased these commercial vehicles / trucks during September, 2015 and subsequently. The second respondent is the Managing Partner of the first respondents (for the sake of convenience, they are collectively referred to as "respondent" hereafter). The respondent had availed financial facility for the purchase of vehicles mentioned in the schedules appended to these applications by executing various Loan Agreement-cum-Deed of Hypothecation, for the said vehicles.

3. As the respondent defaulted in payment of the Equated Monthly Installments (EMIs) and the cheques issued by them were

dishonoured for insufficiency of funds and the act of the respondent was against the terms of the agreements dated 29.09.2015, etc., the applicant recalled the loans under all the agreements and called upon the respondent to pay the total outstanding in the sum of Rs.6,34,88,335.43 as on 29.07.2017, vide legal notice dated 03.08.2017. On receipt of the legal notice, the respondent either should have cleared the outstanding dues or surrendered the hypothecated vehicles. Since the respondent failed to either clear the dues or surrender the vehicles, the applicant was constrained to repossess all the vehicles, by exercising its rights under Clause 67 of the Agreement, which provides as follows :

"67. The Borrower(s) shall promptly notify the Lender in writing upon becoming aware of any default and any event which constitutes (or, with the giving of notice, lapse of time, determination of materiality or satisfaction of other conditions, would be likely to constitute) an Event of Default and the steps, if any, being taken to remedy it. The decision of the Lender as to whether or not an Event of Default has occurred shall be final and binding upon the Borrower(s)."

4. The rights and remedies of the Lender are provided for under Clause 68. Clause 68.1 reads as follows :

"68.1. To enter upon and take possession of the Asset(s) in accordance with the provisions of the Loan Agreement and as per the guidelines issued by the RBI and Apex Court while doing

the repossession of the vehicle.”

5. Following the procedure enumerated in Clause 68, the applicant had issued legal notice. Earlier on 20.04.2018 in A.No.3503 of 2018, this Court had appointed one Mr.B.Chandra, as the Authorized agent of the applicant, as Receiver to seize and take possession of the vehicle morefully described in the schedules and the vehicles were repossessed and consequently, pre-sale notices were also issued.

6. While so, the respondent had filed A.No.4407 of 2018 seeking to set aside the order passed on 20.04.2018 and also seeking for a direction to the applicant herein not to sell the repossessed vehicles and also for redelivery of the vehicles. In the said application, on 20.11.2018, this Court had restrained the Receiver appointed from selling the repossessed vehicles and directed the respondent herein to regularize the default and clear all the outstanding dues. In such event, it was further directed that the applicant would reschedule the repayment of the balance amount payable by the respondent.

7. Dispute arose on account of the breach of agreement committed by the respondent due to failure in adhering the repayment schedule. Hence, the arbitration provided under Clause 85 was invoked

by the applicant and the disputes were referred to the sole Arbitrator Ms.Meera Gnanasekar as per the terms of the agreement. The sole Arbitrator also assumed jurisdiction, by accepting the nomination vide letter dated 23.05.2018. The respondent also submitted to the jurisdiction of the Arbitrator and had been taking adjournment several times. At one stage, the respondent filed petition under Section 12 of the Arbitration and Conciliation Act, 1996 (in short, "the Act") expressing their concern on the independence and impartiality of the Arbitrator. The respondent had filed an application under Section 17 of the Act, including the above challenge to the Arbitrator. The learned Arbitrator not only disputed the contentions raised by the respondent, but also resigned as an Arbitrator on 22.04.2019.

8. After the withdrawal of the sole Arbitrator appointed, left with no other alternative, these applications under Section 9 of the Act seeking permission for sale of the vehicles, which are already repossessed by the applicant prior to the appointment of the Arbitrator, have been instituted.

9. It is stated in the affidavits that the applicant has also initiated action for the appointment of a substituted arbitrator, as per the terms

of the agreement. As it is stated that the value of the vehicles would diminish drastically, since they are lying in the yard for more than an year, permission is sought for to sell the vehicles.

10. The above applications were vehemently opposed by the respondent contending that till November, 2016, the respondent was repaying the amount regularly. The business of the respondent was crippled due to (i) demonetization ; (ii) introduction of Goods and Services Tax ; (iii) constant price escalation on daily basis in fuel rates; and (iv) the deficiency in the internal control systems leading to seepages and leakages in transport business. The respondent claimed to have made all earnest attempts and appealed to the applicant to grant time for settling the loan dues. The respondent had represented that they had made arrangements to take loan outside to settle the dues of the applicant. Since suddenly the entire loan amount of Rs.6,34,88,335/- was recalled, to overcome the unexpected financial crisis, which crippled the business of the respondent, the respondent claimed to have approached the Canara Bank and made arrangements for getting the funds released. While the Canara Bank was about to release the funds, it had verified the CIBIL status of the respondent's firm, wherein, the applicant had created the status of the respondent,

as "wilful defaulter". The said status of the respondent in the CIBIL report as "wilful defaulter" had prompted the Canara Bank to abruptly stop the disbursal of the loan facility. The respondent also sought clarification for declaring and classifying the respondent as "wilful defaulter" from the applicant. The applicant also had replied that as there was a huge outstanding on the side of the respondent and there were no receivables and in spite of the follow up, the respondent had been classified as wilful defaulter. Though the respondent had claimed that the said act of the applicant is against the mechanism laid down by the Reserve Bank of India (RBI) and in violation of the procedure laid down in the Master Circular, it is not relevant at this point of time. Only at that stage, the applicant had sought for appointment of Receiver to seize and take possession of the vehicles, as all the vehicles were lying on the road, 12 of them were seized by the applicant and 18 vehicles were surrendered voluntarily by the respondent. After the pre-sale notices were issued, the same was stopped by virtue of the order of this Court dated 20.11.2018. Thereafter, the Arbitrator was appointed and the Arbitrator also later resigned. Thus, the respondent attributed the business loss to the economic conditions prevalent and the applicant's CIBIL report classifying the respondent as willful defaulter for not clearing the dues.

It is stated that since the respondent themselves have counter claim against the applicant, they sought for dismissal of the applications.

11. The admitted facts are that on 20.04.2018 in A.No.3503 of 2018, the Receiver was appointed to seize and take possession of the vehicles and accordingly, the vehicles were repossessed and pre-sale notices were issued. On 20.11.2018 in A.No.4407 of 2018, the Receiver was directed not to sell the vehicles repossessed and the Arbitrator was appointed and the dispute was referred to her. The respondent also submitted to the jurisdiction after the claim statement was filed by the applicant. The application under Section 17 was filed by the applicant before the Arbitrator for sale of the repossessed vehicles. While so, the application under Section 13 read with Section 12 challenging the appointment of the Arbitrator was filed by the respondent. While denying the allegation levelled against her, the Arbitrator withdrew herself from the arbitration on 22.04.2019. The fact remains that the liability is admitted by the respondent, as the same is not disputed.

12. The applications are filed under Section 9(2)(a)(b) and (e) of the Act and the relief sought for is to permit the applicant to sell the

vehicles, which were repossessed and appropriate the sale proceeds towards the amount due to the loan agreements. The objection of the respondent is that similar application was filed under Section 17 of the Act before the Arbitral Tribunal and therefore, the second application before this Court is not maintainable. The said argument is countenanced by the applicant contending that though the application under Section 17 of the Act for the same and similar relief was filed before the Arbitral Tribunal, as on date there is no Tribunal in existence, as the sole Arbitrator had resigned and therefore, there is no Tribunal to proceed with the application filed earlier and thus, these applications are maintainable.

13. The learned counsel for the respondent relied on the judgment of the Calcutta High Court in **Tufan Chatterjee V. Rangan Dhar, AIR 2016 Calcutta 213**, wherein, it has been held as follows :

"43. Even though an earlier application for interim relief may have been filed in Court, once arbitral proceedings have commenced and an arbitral tribunal has been appointed, interim relief would have to be sought before the learned Arbitrator. The Court would be denuded of its power to grant interim relief unless the Court is satisfied that circumstances exist, which may not render the remedy provided under Section 17 efficacious.

44. In this case there are no such circumstances. However, considering that the application for interim relief had

been entertained long before the amendment and an interim order had been in force, the Court might have passed limited interim relief and remitted the parties to proceedings under Section 17 before the Arbitral Tribunal.”

Even applying the principle laid down in the judgement referred to as above, the remedy provided under Section 17 of the Act cannot be exercised or proceeded with as on date, in the absence of the Arbitrator and thus, the circumstances warrant that an order for sale of the vehicles has to be granted, for which, these applications filed under Section 9(2) of the Act are maintainable.

14. It is curious to note that in this case, the Arbitrator has recused herself from the proceedings rendering the remedy provided under Section 17 of the Act no efficacious. Even otherwise after the claim petition was filed, it is alleged that there were several adjournments taken by the respondent and an application under Section 12 expressing concern on the independence and impartiality of the Arbitrator. The only reason assigned by the respondent was that the Arbitrator appointed was an in-house Arbitrator and had been engaged by the applicant as the Arbitrator in many of the arbitration proceedings. However, that question need not be gone into, as the Arbitrator has recused herself from the proceedings. The recusal of

the Arbitrator was on 22.04.2019 and the present applications have been filed on 08.05.2019 and the vehicles were repossessed by surrender of the same during April/May 2018. It is, at the instance of the respondent, the Receiver appointed to seize the vehicles was directed not to sell the vehicles by this Court. Having obtained such an order, it was expected of the respondent to settle the dues to the applicant. That has not happened. However, the respondent stated that due to unexpected financial crisis, they could not repay the installments without default. Their efforts to get release of funds from the Canara Bank and other Non-Banking Financial Corporations (NBFC) had also been allegedly sabotaged by the applicant by reporting the CIBIL status as "wilful defaulter". Thus, the respondent is blaming the applicant for crippling their activities by classifying them as willful defaulter disintitling them from getting any loan from other banking and NBFCs. It is the consistent case of the respondent that the applicant grossly failed to adhere to the mechanism laid down by the RBI and failed to follow the procedure laid down in Master Circular.

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15. But the question remains is whether the hypothecated vehicles in the hands of the applicant to be sold and the sale proceeds

to be adjusted for the dues of the respondent ?

16. The respondent also relied on the judgment of the Delhi High Court in **MANU/DE/2541/2016** in **TRF Ltd. V. Energo Engineering Projects Limited**, wherein, in paragraph 20, it is held thus :

"20. There is no impediment or a situation where the remedy provided under Section 17 of the Act is not efficacious. Thus, let these petitions be treated as applications under Section 17 of the Act which may be decided by the Arbitral Tribunal at an early date once the Arbitral Tribunal shall commence the first hearing. Till the said petitions are decided, the interim directions which are issued by way of statement not to take any steps for invocation shall continue, subject to the condition that the petitioner shall keep the bank guarantee alive till the decision of application under Section 17 of the Act. The Tribunal at the time of deciding the said application would pass the appropriate orders in this regard. All pleadings of these petitions shall be filed by the petitioner once the Arbitral Tribunal will commence the proceedings."

17. The above decision will not have direct application to the present facts of the case, as admittedly, the hypothecated vehicles seized are lying in the yard from March/April 2018. It is also pointed out by the learned Senior Counsel for the applicant that the yard charges till now had crossed a sum of Rs.25,00,000/-, which is also an

unnecessary expenditure for the applicant, besides the fact that preserving the vehicles for longer would only depreciate the value, which is neither beneficial for the applicant nor the respondent.

18. It was pointed out by the learned counsel for the respondent that there was an offer for One Time Settlement (OTS), however, the same was not agreeable for the applicant, as the offer was to protract the proceedings. Even during the course of the arguments before this Court, opportunities were granted to the respondent to come up with an offer acceptable to the applicant and get the vehicles released, whereby, they can be re-hypothecated to the applicant. Unfortunately, it was not possible, as the respondent could not make an offer acceptable to the applicant.

19. From the above facts and circumstances, it is very clear and evident that the respondent, who is the owner of the vehicles and is in the business of Logistics, is seems to be not concerned with the value of the vehicle being depreciated, as they are kept idle in the yard. It is more than an year, since the vehicles have been repossessed and the respondent had sufficiently longer time to resolve the dispute by making substantial payment. However, the respondent has not taken

any efforts to utilize the opportunity.

20. Learned counsel for the applicant placed his reliance on the order of this Court in **L & T Finance Ltd. V. G.G.Granites, 2013 (6) CTC 654**, in which, it was observed that the Division Bench judgment of this Court in **Cholamandalam DBS Finance Ltd., V. Sudheesh Kumar, 2010 (1) CTC 481 (DB)**, wherein, it was held that there is no total embargo upon the power of this Court to appoint an Advocate Commissioner for seizing and taking possession of the hypothecated vehicles and as regards the expenditure incurred for keeping the vehicle in custody, it was held that the applicant shall bear it until the respondent is served and appears and after that, the Court shall hear the parties and pass orders, still holds the field.

21. Learned counsel for the applicant also relied on the judgment of the Delhi High Court in **Benara Bearings and Pistons Limited V. Mahle Engine Components India Pvt. Ltd.**, wherein in paragraphs 25 and 26, it was held as follows :

"25. We may also note that there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted. It could also be argued that if the submission made

by the learned counsel for the appellant were to be accepted that the learned Single Judge ought not to have delivered the impugned judgment under Section 9 of the said Act, then the application itself ought to have been dismissed which would, in any event, leave the appellant without an interim order.

26. Therefore, for all these reasons, we are not inclined to agree with the learned counsel for the appellant on his submissions with regard to the powers of the Court under Section 9(3) of the said Act."

22. In view of the above discussion, this Court is of the view that the applicant is entitled for the relief sought for and it would be appropriate to allow these applications.

23. Accordingly, these applications are allowed. The applicant is permitted to sell the vehicles morefully described in the schedules appended to the Judges Summons strictly in accordance with the guidelines stipulated by the RBI and appropriate the sale proceeds towards the amount due under the loan agreements pending arbitral proceedings.

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Speaking Order

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PUSHPA SATHYANARAYANA, J.

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