

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
22.08.2020	27.08.2020

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.A.Nos.236 & 237 of 2020

1. Mr. Ramu Annamalai
25, 70 feet Road, Kaveri Nagar,
Saidapet, Chennai 600015.

2. Mr.Palaniyappan Ramasamy
25, 70 feet Road, Kaveri Nagar,
Saidapet, Chennai 600015.

3. GI Retail Pvt. Ltd.
C-9, T.V.K.Industrial Estate,
Guindy, Chennai.

Applicants
[in both O.As.]

Vs

1. M/s. G.I.Technology Private Limited,
Unit No.301 & 302, 3rd Floor, Campus 3B,
RMZ Millenia Business Park,
11, MGR Main Road,
Perungudi, Chennai TN – 600 096 IN.

2. Wirecard Acquiring and Issuing GmbH
Einsteinring 35, 85609 Aschheim,
Germany.

3. Wirecard Sales International Holding GmbH
Einsterinring 35, 85609 Aschheim,
Germany.

4. Hermes i-Tickets Private Limited
Unit No.301 & 302, 3rd Floor,Campus 3B,
RMZ Millenia Business Park,
11, MGR Main Road,
Perungudi, Chennai TN – 600 096 IN. .. Respondents 1-4
5. Karur Vysya Bank, 37, Whites Road,
Chennai – 600 014.
6. ICICI Bank,
No.110, Nungambakkam High Road,
Chennai 600034
7. Axis Bank,
144, Moore Street,
Georgetown, Chennai – 600 001.
8. State Bank of India,
66, GST Road, Guindy,
Chennai – 600 032.
9. RBL Bank,
56, GN Chetty Road,
T.Nagar, Chennai – 600 018. ... Respondents 5 – 9 /
Garnishee 1 - 5
[in both O.As.]

Prayer in O.A.No.236 of 2020: Original Application filed under section 9 of the Arbitration Conciliation Act, 1996 to grant an interim injunction restraining the 2nd and 3rd Respondent, their men and agents, servants of persons acting on its behalf from transferring or in any manner dealing with the funds, monies or assets of the first respondent, especially the monies lying in Account No.121972000000061 maintained with Karur Vysya Bank, Whites Road, pending the arbitral proceedings.

Prayer in O.A.No.237 of 2020: Original Application filed under section 9 of the Arbitration Conciliation Act, 1996 to issue Garnishee Order and direct

the 5th to 9th respondents (Garnishees 1 to 5 herein) to transfer the sum of Rs.54.72 Crores or more, transferred from the 1st respondents Bank Account as Loans and held in the 4th respondents Accounts provided in the schedule to the judges summons back to the 1st respondent pending the arbitral proceedings and interim injunction against the second and third respondents and their men from acting on its behalf from transferring or in any manner dealing with the funds, monies, assets of the 1st respondent, especially, the monies lying in Account No.121927000000061 maintained with Karur Vysya Bank, white Road, Branch pending the above arbitral proceedings.

For Applicants : Mr.Srinath Sridevan
for Mr.R.Udhayakumar

For respondents : Mr.Samudra Sarangi for R4
Mr.S.L. Rajesh for R5
Mr.Shivakumar for
M/s. Shivakumar & Suresh for R6
Mr.O.R.Santhanakrishnan for R7

No appearance for
R1, R2, R3, R8 and R9

COMMON ORDER

These Original Applications are filed under section 9 of the Arbitration Conciliation Act, 1996 to issue Garnishee Order and direct the 5th to 9th respondents (Garnishees 1 to 5 herein) to transfer the sum of Rs.54.72

Crores or more, transferred from the 1st respondents Bank Account as Loans

and held in the 4th respondents Accounts provided in the schedule to the judges summons back to the 1st respondent pending the arbitral proceedings and interim injunction against the second and third respondents and their men from acting on its behalf from transferring or in any manner dealing with the funds, monies, assets of the 1st respondent, especially, the monies lying in Account No.121927000000061 maintained with Karur Vysya Bank, white Road, Branch pending the above arbitral proceedings.

2.Brief facts of the Applicants' case is as follows:

2.a The 1st Respondent company was incorporated under the Companies Act, 1956 and is engaged in the business of providing services related to digital payments and settlements systems and pre-paid instruments. Applicants 1 and 2 were the promoter directors in the 1st Respondent Company. In the year 2014, the 1st Respondent company was looking for investments. The 2nd Respondent was interested in investing into the company, raised money with security premium on rights issue basis to the extent of Rs.105 Crores. As a result Investors Agreement dated 27.10.2015 and Shareholders Agreement dated 27.10.2015 came into existence. Applicants together holding 40% of the share in the company. The Shareholders' Agreement (SHA) provides for Reserve Matters in Clause 9

and it contemplates decision / resolution approved by an affirmative vote of at least one other Shareholder Director and at least by one Investor Director or at least one other Shareholder and the investor in a Board Meeting and Shareholders Meeting respectively. Besides SHA also contains an indemnity clause for cases of a breach. The bank incense was not received from the Reserve Bank of India. Therefore, the 1st Respondent company decided to keep the investment money as deposit with a bank to utilise the funds for obtaining other such licences from RBI in future. Accordingly two FDs worth about Rs.100 Crores were made with the Karur Vysya bank Limited, the 5th Respondent. The same were subsequently renewed on 26.02.2017.

2.b The 2nd and 3rd Respondents though their nominee Directors had represented to the Board of the 1st Respondent Company that the company required an overdraft of Rs.99 Crores from the banks. Believing that the 2nd and 3rd Respondents intended to borrow the monies for genuine corporate purposes, the Applicants did not object to availing of an overdraft facility from a reputed bank. In furthererence to the same, the FDs mentioned above were used as collateral to avail the overdraft facility. After availing such overdraft of Rs.99 Croes, the said sum was available for drawal in the bank account of the 1st Respondent company Account No.121927000000061 in 5th

Respondent Bank. Applicants being the minority shareholders, trusted the 2nd and 3rd Respondent to use this facility for benefit of the 1st Respondent company. In the Board Meeting dated 26.09.2019, the 1st Applicant raised their concerns about the improper utilisation of company funds. Thereafter, they came to know that without the knowledge of the Applicants, the 2nd and 3rd Respondents had caused a transfer of Rs.54,72,00,000/- from the account of the 1st Respondent company to the 4th Respondent herein. The 4th Respondent is a wholly owned subsidiary of Wire Card AG, the parent company of 2nd and 3rd Respondents and this therefore an Affiliate as per the definition under the SHA.

2.c Thereafter, despite the request made by the applicant to give the particulars which has not been given. Hence, it is the contention of the Applicant that as per the Agreement the 1st Respondent could not have entered into any transaction with a related party of a value in excess of 5 Crores unless the prior written affirmative vote of the Applicants was obtained. Out of Rs.99,57,88,071/- borrowed as over draft facility a sum of Rs.54,75,19,715/- has been advanced to the 4th Respondent. Such advance was an impermissible. It is further stated that 2nd and 3rd respondents were making clandestine attempts to move the remaining cash out of the 1st

Respondent. The reason for the clandestine activity became clear when a series of events occurred immediately thereafter in June 2020.

i. The ultimate holding company of the 2nd and 3rd Respondent herein namely M/s. Wirecard AG came under increased scrutiny about the finances.

ii. On 22.06.2020 its COO, Jan Marsalek was dismissed for financial impropriety.

iii. The CEO and single largest shareholder Mr.Karkus Braun claimed that all of the missing funds totally to USD 2 billion was safe in twobanks in Philippines.

iv. The said two Philippines banks gave a public statement, denying the allegation and stating that the documents relied upon by the above mentioned Wirecard Senior Executives were forgeries.

v. On 25.06.2020 M/s.Wirecard AG filed a petition for bankruptcy before the Munich Court and also declared that it would consider insolvency against the subsidiaries also.

2.d Hence, it is the contention that the funds of the 1st Respondent be retrieved from the 4th Respondent and any further financial dealing by the 2nd and 3rd Respondents. The applicants being the 40% of the shareholders their enormous investment will become worthless unless the assets of the 1st Respondent are protected and retrieved. The Applicants also initiated arbitral process by issuing notice dated 27.06.2020. Hence, these applications are filed.

3. Respondents 1 to 3 despite service of notice have not appeared and filed any counter. The 4th Respondent filed counter. The Applicant has also filed rejoinder to the counter filed by the 4th Respondent. The 5th and 7th Respondents/Banks also filed their counter.

4.a. It is the contention of the 4th Respondent that the application is not maintainable. The Applicants have moved these applications on false

claims without verifying the facts. These applications are nothing but a fraudulent attempt to secure an unsecured debt amount, which is not even due and payable as on date. It is the contention that the 4th Respondent is an indirect subsidiary of Wirecard AG, Germany, though the said company does not have any direct shareholding in Hermes. Wirecard AG, declared bankruptcy on 25 June 2020. The 1st Respondent was incorporated in 2005 and is another ultimate subsidiary of Wirecard AG. Respondent No.1 has a continuing exclusively arrangement with Hermes such that it has exclusive access to Hermes' agent network in India to sell its own "pre-payment" instrument products or any other payment licence products. Thus, the business of Hermes and GI Technology are co-dependant to the extent that GI Technology relies on Hermes for its extensive agent network. The business of the two entities are inextricably linked and the two entities have historically conducted a significant amount of business together through a symbiotic and mutually beneficial arrangement. The business of the two entities has always been bona fide and there has been a significant amount of business which the two entities have conducted in mutual interest, which the applicants are themselves aware of.

4.b. As per the terms of SHA any related party transaction more than Rs.5 Crores are to be approved by at least one other shareholder Director and an Investor Director, if such transaction was approved at a Board Meeting or at least one other Shareholder and the Investor in a shareholders Meeting. The above conditions were satisfied in this case. It is further contention that on 11th August 2017, board irresolution was passed by the Board of Directors of 1st Respondent securing the consent for availing the OD facility. Accordingly, they availed OD facility and there is also inter-corporate loan agreement with the 4th Respondent entered on 1st December 2017. As per the said loan amount the maximum facility amount granted by the borrower at any point of time shall not exceed to the extent of Rs.90 Crores. This facility shall be provided until 31st March 2021. The borrower will pay 92.5% of the interest cost. The date of repayment of of the Inter-Corporate Loan to the 1st Respondent was 31st March 2021. Hermes further agreed to pay an initial rate of interest at 92.5% p.a. On the amounts extended to Hermes pursuant to the said agreement. 4th Respondent accordingly has paid a sum of Rs.5,99,59,483/- of the total interest liability of the 1st Respondent. Thereafter, the Inter-Corporate Loan was amended by way of letter dated 1st April 2018 pursuant to which the rate of interest payable to the 1st Respondent by 4th Respondent is 9.5%. Agreement is still valid and the 4th

Respondent is still making payment to GI technology as on date.

4.c. As on date out of total amount of Rs.72,27,00,000/- which had been received by the 4th Respondent, only Rs.20,98,00,000/- remains outstanding towards GI Technology. It is further contention that Inter-Corporate Loan Agreement had been duly ratified by a subsequent board resolution of GI Technology Limited dated 30.1.2018. The said meeting was attended by Applicant No.2. It is further contended that even in the notice sent for arbitration what was sought is only an indemnity, the applicants and 3rd Respondent and not more than that. Hence it is the contention of the 4th Respondent that they are not a party to the Share Purchase Agreement. These applications are not maintainable before this Court in view of the bar pertains to Section 4 of the Companies Act. The Applicants have not come to the court with clean hands. There is no prima facie case and balance of convenience in favour of the applicants and the alleged irreparable injury also. The facilities borrowed by the 4th Respondent are only payable by 31st March 2021. It is further stated that as on 13th July 2020 only Rs.20,98,00,000 remains outstanding towards GI Technology and rest of the amount have already paid. In such a view of the matter these applications are not maintainable. Hence, prayed for dismissal.

5.a. It is the contention of the 5th Respondent that the 1st Respondent is maintaining the Current Account bearing No.12191935000001331 besides 4th Respondent is also maintaining Current Account bearing No.1219135000001284 with them. The first respondent have availed overdraft facility for Rs.72 Crores bearing Account No.1219270000000061 with margin amount of Rs.8 Crores with the Respondent bank. Over Draft loan against the Fixed Deposit availed by the 1st Respondent had been closed on 01.07.2020 and the balance of Rs.7,49,22,199.94 in the Fixed Deposit account has been transferred to the Current A/c No.1219135000001331 of the 1st Respondent and thus the 1st Respondent was having the balance amount of Rs.8,15,82,940.23 as on 02.07.2020. It is the further contention that ultimate holding company of the 1st Respondent viz., Wirecard Sales International Holding GmbH, the 3rd Respondent since facing insolvency proceedings in Germany and based on the same, the Reserve Bank of India, being the regulatory authority had advised the 1st Respondent not to issue further prepaid payment instrument and had advised to allow existing customers to utilise the balance in their PPI accounts and not to issue any new PPI's whether under own or co-branding arrangements.

5.b. 5th Respondent also issued letter to the 1st Respondent on 29.06.2020 itself, even before the issuance of the letter issued by RBI, citing the above aspect of the insolvency proceedings initiated against the 3rd Respondent.

6. The 7th Respondent has filed counter stating that as per the accounts maintained by their bank as on 28.07.2020 a total sum of Rs.63,50,06.954.76 is available in the applicants' accounts.

7.a. Mr.Srinath Sridevan, learned counsel appearing for the Applicants submitted that the applicants are holding 40% share in the 1st Respondent company. Remaining 60% of the shares held by Wirecard AG. Respondents 2 to 4 are the subsidiaries of Wirecard AG. It is his contention that as per the Articles of Association if any amount more than Rs.5 Crores to be dealt by the 1st Respondent Company, same required a written consent of the applicants. 1st Respondent company availed OD for more than Rs.99 Crores with the 5th Respondent Bank as against Fixed Deposit lying with them. His contention is that the Fixed Deposits were made since bank licence could not be obtained from the Reserve Bank. In the meanwhile the OD for a sum of Rs.99 Crores availed by the 1st Respondent as per the request of the nominee

directors 2nd and 3rd Respondent. After availing such OD of Rs.99 Crores, the said sum was available for drawal in the bank account of 1st Respondent. From the above amount a sum of Rs.54,72,00,000/- was transferred to the 4th Respondent account from the 1st Respondent's account. According to him which was done without the consent of the applicants. Only in order to make loss to the minority shareholders, the amount has been transferred to the 4th Respondent account, which is the subsidiary of the ultimate holding company Wirecard. Wirecard AG declared bankruptcy in a Court in German. Hence, it is his contention that in order to safeguard the interest of the applicants that the amount is admittedly drawn by the 4th Respondent who is a subsidiary. As the applicants raised a dispute and the share purchase agreement is provide for arbitration, the applicants issued notice of invocation that the money drawn by the 4th Respondent should be retrieved to the 1st Respondent. Otherwise the minority shareholders will be put into irreparable injury. Hence his submission that the amount transferred to the account of 4th Respondent has to be retrieved and safeguarded.

7.b. It is the further contention of the learned counsel for the Applicants that Order XXI Rule 46 of CPC can be invoked to safeguard the huge money transferred to the 4th Respondent. It is his further contention that

the alleged repayment of most of the loans and the alleged ratification by the applicants were denied. The documents cannot be admitted in evidence, in fact, those documents were obtained from the 1st Respondent. The alleged minutes of 13th Meeting of the year 2017-2018 to prove the alleged so called ratifications were also produced by the 4th Respondent. These facts clearly indicate that the Respondents 1 to 4 have colluded together to siphon of the entire amount of the 1st Respondent company. Hence it is his submission that unless the admitted loan amount borrowed by the 4th Respondent is attached the applicants will be put into irreparable injury. It is his further submission that that the application for appointment of Arbitrator is also pending.

7.c. In support of his contention he relied upon the following judgments:

1. *Tata Capital Vs. Rani [2010 (1) CTC 176]*
2. *M/s. Value Advisory Services vs. M/s.ZTE Corporation and Ors. [2009 SCC Online Delhi 1961]*
3. *Cravel Shipping Services (P) Ltd. v. Shamim Darya Arya [2011 SCC Online Madras 1699]*

**4. *Welspun Infratech Limited v. Ashok Khurana*
[2014 SCC Online Bombay 39]**

**5. *Seskaria Biswan Sugar Factory vs.*
Commissioner of Income Tax [AIR 1950
*Bombay 200]***

8.a. Mr. Samudra Sarangi, learned counsel appearing for the 4th Respondents mainly contended that the 4th Respondent is not a garnishee. Even the award is passed, the award can be passed only as against the 2nd and 3rd Respondents. As long as the Respondents 1 to 3 have not compelled the 4th Respondent to deposit the monies in the Court. The applicant have no superior right against the 4th Respondent. It is his contention that the 4th Respondent is a third party to the arbitral agreement. Therefore, no orders can be passed against him. There is exclusivity arrangement between the 1st Respondent and 4th Respondent and their business are co-dependant inextricably linked. Even share purchase agreement provides that any amount more than Rs.5 Crores could be dealt by the company with the approval of at least one other shareholder and the investor director. The transactions are approved at the Board Meeting. Hence it is his contention that there is an exclusivity arrangement between the 1st Respondent and 4th Respondent and the loan availed by the 4th Respondent from the 1st

Respondent was approved by the applicants also in the Board Meeting. Besides, there is inter-corporate loan agreement entered between the 4th Respondent and 1st Respondent wherein the 4th Respondent has agreed to pay interest of 92.5% payable by the 1st Respondent to the bank overdraft facilities. Hence it is his contention that the applicants were aware of the drawal of the amount and the resolution of the year 2019 December itself. Their conduct keeping silent for more than six months clearly indicate that these applications are nothing but frivolous and result of earlier litigations which went against applicants.

8.b. It is the contention of the learned counsel for the 4th Respondent that the Memorandum of the Association provides for to invest and deal with surplus money of the company not immediately required for such a manner determined by the company. The alleged emails relied upon by the applicants are bereft of details and no minutes were attached with that. All other emails would show as if the applicants objected for such transfer of fund cannot be relied upon and all the documents filed without any attachment of so called minutes. The alleged email relied by the applicant is not authenticated one. Hence it is his contention that the 4th respondent have validly entered into a loan agreement with the 1st Respondent and there is

exclusivity arrangement between them. 4th Respondent never be considered as garnishee and further he is totally a third party as per the arbitration agreement concerned. Therefore, the applicants cannot press for any orders in these applications. These applications have to be dismissed. There is no *prima facie* case made out and the balance of convenience is not in favour of the application.

8.c. In support of his contention he relied upon the following judgments:

1. *M/s. L&T Finance Limited vs. CT Ramanathan Infra Private Limited [2013 SCC Online Madras 123]*

2. *Jatin Keshruwala vs. Dag Creative Media Private Limited and Ors. [2019 SCC Online Bombay 1346]*

3. *Kris Heavy Engineering vs. PNHB Lanco KHEC [2013 SCC Online Madras 1413]*

4. *Color Chemicals vs. Dhanalakshmi and Ors. [2017 SCC Online Madras 18293]*

5. *Lakshmi Ratan Cotton Mills Co. Ltd., vs.
J.K.Jute Mills Co. Ltd., [AIR 1957 All
311]*

9. From the pleadings and submissions the following are the undisputed facts. The applicants are holding 40% of the shares in the 1st Respondent company. Remaining 60% share is held by Wirecard AG. Respondent Nos.2 to 4 are the subsidiaries of Wirecard AG. The 4th Respondent in the counter in para 5.2 is also admitted that it is an indirect subsidiary of Wirecard AG, Germany. Before going to the merits of the case, it is relevant to record the previous litigations between the parties, particularly between the applicants and Wirecard AG, Germany company. In respect of the company affairs the minority shareholders have filed a suit before the UK High Court. Though these facts are outside scope of the pleadings of these present applications, the above litigations also have some relevance to decide the issue between the parties. Originally some people claiming to be minority shareholders, sued the Applicants 1 and 2 for the alleged wrongful gains in the sale of Hermes I-Ticket before the UK Court. To prevent such suit, relief of Anti-suit was sought in C.S.No.192 of 2018 before this Court. Division Bench of this Court dismissed the Anti-suit and SLP filed against the same is also dismissed. Thereafter, the Applicants 1 and

2 filed C.S.No.194 of 2019 for damages against Wirecard and other parties. The leave originally granted by this Court was revoked. These two matters in fact, decided by this Court. Now the present applications also come before this Court. Therefore, now those litigations also have some relevance in these applications.

10. The above two litigations decided by this Court, there was serious allegations for making wrongful gain in handling the shares of the company, particularly, Wirecard and others. These applications are filed under Section 9 of the Arbitration and Conciliation Act, particularly, with reference to the alleged siphoning the money of 1st Respondent Company by its subsidiaries viz. Respondents 2 to 4. Therefore, this Court has forced to record the earlier proceedings in these applications. As far as the facts of the case is concerned, it is not disputed by either side that the applicants in this case are holding 40% of the shares in the 1st Respondent company. Remaining 60% of the shares is held by Wirecard, German company and the Respondents 2 to 4 are the subsidiaries of Wirecard AG. It is also the admitted by the learned counsels appearing on both sides that as the 1st Respondent could not obtain from the Reserve Bank for banking business, they decided to invest the money in the Fixed Deposit with the 5th Respondent. Accordingly a sum of

Rs.100 Crores were invested with the Bank. These facts are not disputed by either side.

11. It is also admitted that the Over Draft facilities availed by the 1st Respondent with 5th Respondent for a tune of Rs.99,57,88,071/-. It is admitted that the excess amount were deposited in the FD. However, the 5th Respondent in their counter took a stand that the 1st Respondent invested Rs.80 Crores in the Fixed Deposit with them. It is the specific case of the applicants that a sum of Rs.99,57,88,071/- has drawn as over draft facilities. Though it is not denied by the other side, whereas the bank took a stand that only a sum of Rs.72 Crores availed as Over Draft facility as against the Fixed Deposit.

12. Be that as it may. The fact remains that the bank sanctioned the Over Draft facility to the 1st Respondent company for the huge amount is not in dispute. The allegation of the applicants that out of the Over Draft facilities availed by the 1st Respondent, a sum of Rs.54,75,19,715/- were transferred to the 4th Respondent by the 1st Respondent. It is further contention that the Respondents 2 to 4 are the subsidiaries of Wirecard AG. Therefore, it is the contention of the applicants that in order to siphon the

amount, the said amount has been transferred to the 4th Respondent. Whereas it is the specific contention of the 4th Respondent that there was Inter-Corporate Loan Agreement between the 4th Respondent and 1st Respondent, therefore the 1st Respondent agreed to extend the facility with a limit of Rs.90 Crores and the above facility shall be provided till 31st March 2021. It is also their case that the above loan amount is also approved by the applicants in the resolution passed on 30.01.2018 from 10.00 a.m. to 11.00 a.m. A xerox copy of the resolution also filed by the 4th Respondent. This court is unable to comprehend as to how this alleged resolution came into the possession of the 4th Respondent.

13. Be that as it may. The applicants also filed the resolution of the same date and time. Page No.153 of the typed set indicates as if meeting said to have been convened on the same date and time i.e., 30.01.2018 from 10.00 a.m. to 11.00 a.m. wherein the same indicate that one Ramu Annamalai and Palaniappan Ramasamy and Manoj Kumar Sahu were physically present and the above document do not refer anything about the approval of the loan said to have advanced to the 4th Respondent. Whereas the resolution of the even date relied by the 4th Respondent available in page No.494 of the typed set would show as if one Manoj Kumar Sahu and Palaniappan Ramasamy alone

physically present and instead of Ramu Annamalai some one George Peter Egon Rainer Freiherr Von Waldenfels said to have present thorough electronic mode. These two documents relied upon by the parties create serious doubt about the nature of the resolution itself, whereas it is the specific case of the applicants that they have never approved any such approval. Whereas the 4th respondent have produced the resolution of the same date with different persons attended to show that the loan was approved. These two resolutions are in fact only xerox copies. The genuineness of the documents have not been established. Both the documents are xerox copies. Therefore, these documents cannot be given much importance in these applications unless these documents are proved in the manner known to law.

14. Similarly, it is the contention of the applicants that a sum of Rs.54,72,00,000/- has been transferred to 4th Respondent, to substantiate this, xerox copy of the accounts were filed. It is to be noted that the above documents are computer print out. There is no mention about from where these print outs taken. Similarly, the respondents also produced so called bank statements to show that they have paid substantial amount. These statements cannot be looked into at this stage as evidence, particularly in the light of the fact that compliance of mandatory provisions with record to print

outs as contemplated under Section 65 (B) of the Evidence Act. Further it is only a xerox copies, neither certified under Section 65 (B) of the Evidence Act nor under the Bankers Book Evidence Act. Therefore, the so called the bank statements relied upon by both sides cannot be given any importance, which require complete proof of these documents. Unless these documents are proved in the manner known to law, the entries found in the bank statements cannot given much credence. But none has taken any steps to prove the entries as per law except their submissions. Therefore, this Court is not able to appreciate the entries found in the inadmissible documents.

15. In the light of the above, now it has to be seen from the conduct of the parties and respective pleadings alone. Admittedly, some amount has been drawn by the 4th Respondent from 1st Respondent. According to 4th Respondent it is only loan as per the exclusively arrangement between the 1st Respondent and 4th Respondent, i.e., Inter-corporate Loan Agreement entered between them on 1.12.2017. According to them this loan was approved by the applicant by the resolution as stated above. The resolution relied upon by them have not been proved before this Court. The Article of Association makes it clear that if the amount of More than Rs.5 Crores, it should be approved by the affirmative vote of at least one other shareholder director; or

at least by one investor director. Now the main issue whether such approval has been done or not, has not been proved. Though Clause 39 of memorandum of Association provides for investment of the surplus money of the company as decided by the company, the fact remains that whether or not huge loan amount sanctioned by the company has not been proved. Respondents 1 to 3 were remained absent the allegation that they are subsidiaries of the Wirecard AG is also not disputed. The 4th Respondent is also admitted that he is an indirect subsidiary of Wirecard AG. In view of the serious dispute already pending before the parties and amount of the minority shareholders is allowed to be transferred will have serious impact and lead to irreparable injury to the applicants. Now in the light of the above, it has to be seen whether the 4th Respondent is not a party to the agreement between the Applicants and Respondents 2 and 3 and whether the order can be passed under Section 9 of the Arbitration Conciliation Act as against the 4th Respondent.

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16. In ***Mackinnon Mackenzie and Company Pvt. Ltd., vs. Anil Kumar Sen and another [AIR 1975 CAL 150]*** the Calcutta High court has held as follows:

*“17. Keeping in mind the decisions discussed above,
we have no hesitation in holding that where there is a real*

dispute with regard to the debts sought to be attached the Court instead of making an order for attachment and payment in a summary proceeding ought to raise an issue on the question of liability of the garnishee to the judgment debtor. Where on the other hand a debt is admitted or there is no dispute with regard to the debt except on questions of law or where a dispute appears to be frivolous or has no substance, the Court is entitled to direct payment of the debt by the garnishee. This seems to me to be the result of various judicial pronouncements to which I have referred earlier. The question is whether in this case the dispute raised by the garnishee and its denial of the claim is such that an issue should have been raised and tried on evidence."

17. In ***M. Saraswathi Achi vs. M/s. Chitralaya Pictures (P) Ltd., [1979 LW 209]*** this Court has held that when the garnishee disputes the liability an enquiry as contemplated under Order 21 Rule 46-C of C.P.C. has to be held by the Executing Court.

18. In ***Seksaria Biswan Sugar Factory Ltd., vs. Commissioner of Income Tax, Bombay [AIR 1950 Bombay 200]*** the Bombay High Court has held as follows:

5. It is perfectly true that in the case of the company

before us, one of its objects is money-lending; it could have carried on the business of money-lending. But what we have to determine is whether the company has been pursuing that object and carrying on that business or not, and it is impossible to hold on the facts of this case that by a solitary transaction of an advance of Rs. 6,00,000 to Agrawal and Co., it could be said that in doing so it was pursuing one of its. objects and carrying out that business. Therefore, in my opinion, even if we assume that the question referred to us is a question of law, on the facts and circumstances of this case the Tribunal was right in coming to the conclusion that the moneys lent by the company to Agarwal and Co., were not in the ordinary course of business, that that transaction did not constitute part of the business of the company, and therefore the company was not entitled to rely on Rule 1 (1) (b) of Schedule II Excess Profits Tax Act.

The above judgments are not helpful to the applicants case. Admittedly, in this case the issue is whether so called loan availed by 4th Respondent is approved by Applicants or not .

19. In ***Tata Capital Ltd., by its Asst. Vice President vs. Ran and others [2010(1)CTC 176]*** this Court has held that a garnishee can be made as a party in section 9 petition, such petition is maintainable.

20. In *M/s. Valu Advisory Services vs. M/s.ZTE Corporation and Ors.* [2009 SCC Online Delhi 1961] it is held that interim measure can be ordered against the third parties under Section 9 of the Arbitration and Conciliation Act.

21. In *Welspun Infratech Limited vs. Ashok Khurana* [2014 SCC Online Bombay 39] the Bombay High Court has granted interim injunction as interim measures in a respect between promoters and shareholders.

22. In *M/s. L&T Finance Limited Vs.C.T.Ramanathan infra Private Limited* [2013 SCC Online Madras 1123] this Court that Court can pass order against third party only in exceptional cases in the interest of justice to protect the property from being transferred or becoming vested with third party illegally.

23. In *Kris Heavy Engineering vs. PNHB LANCO KHEC* [2013 SCC Online Madras 141] it is held that when garnishee dispute liability, the Court may order that any issue or question necessary for determination of liability shall be tried as if it were an issue in a suit.

24. In *M/s. Color Chemicals vs. M. Dhanalakshmi* [2017 SCC Online Madras 18293] this Court has held that the power under Order 38 Rule 5, C.P.C., is drastic and extraordinary power, the same cannot be passed mechanically.

25. From the above judgment it can be seen that whether or not the relief of interim protection has been passed against the third party depends upon the factual background of each cases. Similarly, the garnishee disputes the liability, it has to be determined by the Court, the same shall be tried as issue in the suit. Absolutely there is no dispute with regard to above preposition. As already discussed, admittedly both sides has disputed the nature of the amount borrowed and repayment. The main allegation of the applicant is that amount were transferred to the 4th Respondent only in order to siphon the company's fund. Whereas it is the contention of the 4th Respondent, contesting respondent that the above loan have been transferred in a regular business transaction in a exclusively arrangement between the 1st Respondent and repaid the substantial amount, though both sides have placed entries of the accounts, this Court has already held that those entries cannot be looked into without proof. In such a view of the matter, admittedly, the Article of Association state that if amount of above Rs.5 Crores to be dealt it

has to be approved. Whether or not there was an approval, except the xerox copies no evidence is available. Therefore, at this stage, it cannot be taken that those entries as proved to substantiate the rival contentions. But the fact remains that Over Draft facilities availed by the 1st Respondent in which the applicants are the minority shareholder of about 40%. This aspect has not disputed. Similarly, Wirecard AG which held 60% is also gone for insolvency proceedings and Respondents 2 to 4 are the sister concerns of Wirecard AG. Though the 4th Respondent is not a party to the agreement between the applicant and 2nd and 3rd Respondents, the fact remains that they are also subsidiaries of the ultimate holding Wirecard AG.

26. Taking note of the above facts, particularly previous litigations between the parties which went upto the Honourable Apex Court, thereafter, even in the English Courts, the apprehension of the applicants that siphoning of the fund of the 1st Respondent by the subsidiaries companies of Wirecard AG is reasonable. The same is fortified by the fact that the Respondents 1 to 3 conveniently remained absent in these proceedings and Respondent No.4 espousing the case of the Respondent No.1. The so called resolution and other documents which naturally must be with the possession of Respondent No.1 came into possession of 4th Respondent and filed before this. These

facts also cannot be ignored altogether. Though the 4th Respondent strictly cannot be construed as Garnishee, this Court taking note of the nature of the litigations will not be powerless to secure the amount of the 1st Respondent which is lying with the 4th Respondent. In fact Order 21 Rule 46 provide for attachment of debt or share and other property not in the possession of the judgment debtor. Though the 1st Respondent said to be the creditor has not compelled the 4th Respondent so far to deposit the amount or taking any steps to secure the amount, the applicants being the minority shareholders, Respondents 1 to 4 action give rise only to oppression of minority shareholder and mismanagement of the company. Therefore, this Court is of the view that though strictly, the 4th Respondent cannot be construed as garnishee taking note of the fact that they are subsidiaries of Wirecard AG and Respondents 2 and 3 transferred the amount and the 1st Respondent also transferred the amount to the shareholders, this Court can invoke the powers under Section 9 of the Arbitration and Conciliation Act to pass order for preservation or securing the amount which is subject matter of dispute in arbitration. Admittedly, the applicants have invoked the arbitration and the applications appear to be pending for appointment of arbitrator in the Honorable Supreme Court. In such a view of the matter, though the 4th Respondent not a party to the arbitral agreement, since the money has been

transferred from the 1st Respondent company to the subsidiaries, this Court is of the view that amount as admitted by the 4th Respondent shall be secured till the proceedings of the Arbitration completed.

27. The applicant has claimed dispute amount as Rs.54,72,00,000/-. As already discussed statement of accounts produced by both sides cannot be taken as such in the absence of proof. In such a view of the matter, the applicants contention for entire amount cannot be secured. However, taking note of the admission of the 4th Respondent as to the nature of the amount payable to the 1st Respondent which was received from over draft facilities, admitted amount has to be secured for the interest of justice for both sides. Accordingly, as per the admission of the 4th Respondent a sum of Rs.20,98,00,000/- still payable by them to the 1st Respondent. **Such a view of the admission the above amount of Rs.20,98,00,000/- has to be secured from the account of the 4th Respondent maintaining the account in the 7th Respondent bank viz., Axis Bank.**

28. Further, **the 1st Respondent is also restrained from transferring any othe amount hereafter in favour of the 4th Respondent till the arbitration proceedings concluded.**

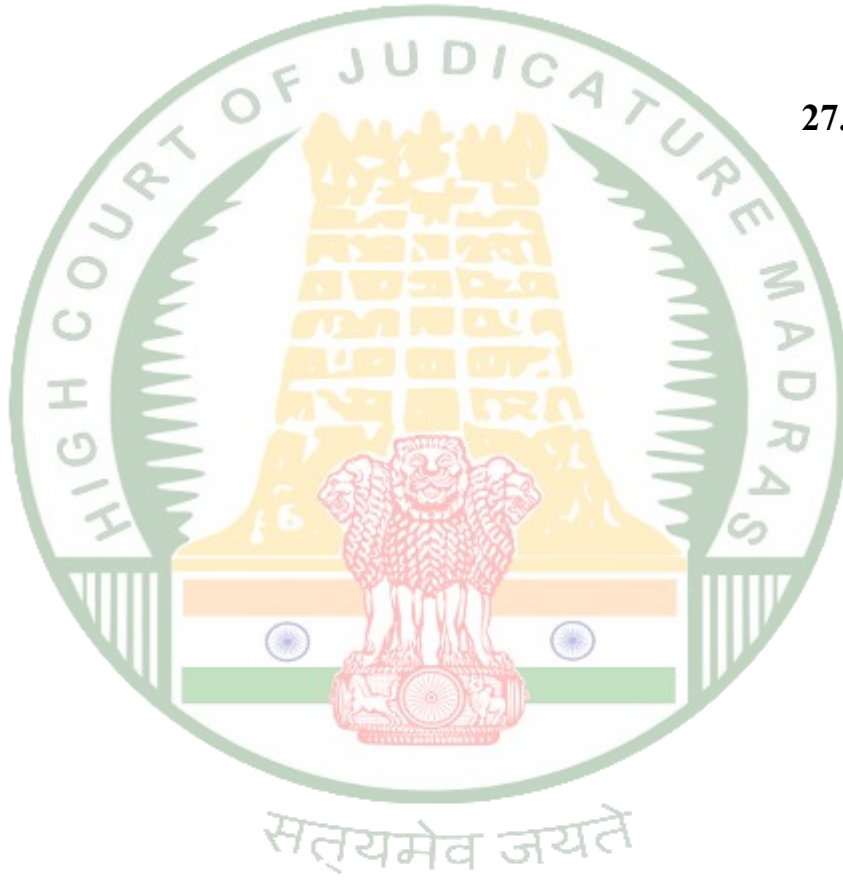
29. When the matter came before this Court on 30.07.2020 on the basis of the submissions of 4th Respondent this Court directed the 7th Respondent Bank, not to release Rs.40 Crores lying with them and release over and above Rs.40 Crores and shall be allowed to be operated by the 4th Respondent. Now in view of the above discussions, the 7th Respondent shall withhold the amount of Rs.20,98,00,000/- from the amount of the 4th Respondent and shall convert the same into the interest bearing fixed deposit, so that it will be beneficial to the parties. Accordingly **7th Respondent is directed to convert a sum of Rs.20,98,00,000/- from the amount lying in the 4th Respondent Account in their bank as interest bearing fixed deposit . The same shall be released subject to the result of the Arbitral proceedings and it is also made clear that after creating such deposit for the the above amount, the 4th Respondent is permitted to operate his bank account in respect of other amounts. The applicants shall expedite proceedings for appointing Arbitrators.**

30. Similarly, **there shall be an order of injunction restraining the 1st Respondent from transferring any money from the 1st Respondent Account to the 4th Respondent account.**

31. With the above observations, both the Original Applications are disposed of.

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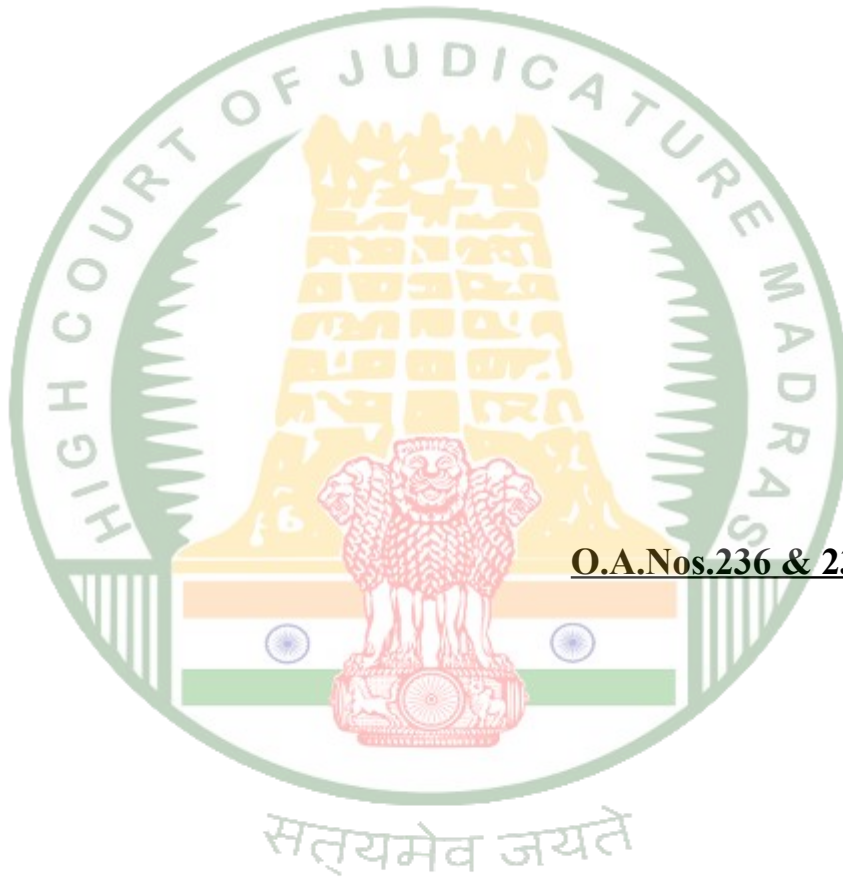
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N.SATHISH KUMAR, J.

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