

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

Dated : 24.06.2021

CORAM

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

**A.Nos.1390 and 1440 of 2017,  
4186, 6327, 7745, 8880 of 2018,  
2474, 2475, 2762, 2765 to 2767, 3063,  
3242, 3244, 3246, 3268, 3325, 4207 and 5190 of 2019**

**A.No.1390 of 2017 :**

M/s.Shriram City Union Finance Limited  
No.123, Angappa Naicken Street,  
Chennai, rep. by its Authorized Signatory,  
Ms.C.Subha

.. Applicant

Vs.

1. M/s.Sambhav Infrastructure Private Limited,  
No.601, Pinnacle, Opp. To Royal Orchid,  
AUDA Garden, Prahlad Nagar,  
Ahmedabad, Gujarat-380 015.

2. Mr.Mihir Pravinchandra Desai,  
A-5, Uplav Cooperative Housing Society Ltd.,  
B/H Jawahar Nagar, Sarkhej Road,  
Ahmedabad, Gujarat-380 007.

3. Mr.Mohanbhai Ranchhodbhai Makwana,  
Flat No.C-1002, 10<sup>th</sup> Floor, Block-C,  
Stavan Avisha, Near Seema Hall,  
Satelite, Ahmedabad,  
Gujarat-380 015.

.. Respondents

\* \* \*

**Prayer :** Application under Order XIV Rule 8 of O.S. Rules read with Section 9(ii)(a)(b) and (e) and (d) of the Arbitration and Conciliation Act, 1996, praying to pass an order directing the first and second respondents to furnish security to the tune of Rs.71,73,884/- or such sum as this Hon'ble Court may direct ; within such time that this Court may stipulate and in case of default to do so, order sale of the property of the respondents morefully described in the schedule to the Judge's summons pending enforcement of the award.

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For Applicant : Mr.R.Umashankar  
in all Applications for M/s.Sri & Shankar Associates

For Respondents-1: Mr.Mothilal  
& 3 in A.No.1390/17 for M/s.Mothilal & Goda

For Respondent in: Mr.Pugazh Gandhi  
A.No.1440/17

For Respondents 1: Mr.R.Ganeshkumar  
& 2 in A.No.2475/19

No appearance for the remaining  
respondents

Mr.S.Ramesh,  
*Amicus Curiae*

### **COMMON ORDER**

Admittedly, all these are applications under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") seeking an order of sale of the immovable properties for securing money claim of the applicant, either pending disposal of

arbitration proceedings or after obtaining awards from the Arbitral Tribunals. Further, the claimant had registered mortgages in its favour and had proceeded for a simple money claim as an unsecured creditor before the Arbitral Tribunal apparently aware of the bar created by virtue of the decision of the Hon'ble Supreme Court in ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others*** reported in **2011 (5) SCC 532**.

2. The applicant - financial institution had lent money to mostly the first respondent under the respective loan agreement which contains a clause to resolve the disputes by way of arbitration. The loan agreements also have been executed along with registered mortgages of properties owned by the borrowers or guarantors, some of whom have been arrayed as the parties to these applications. As stated earlier, the Arbitral claims are only for simple money recovery without touching upon the registered mortgage deeds. Wherever the arbitral awards had quantified the money recoverable, the applicant had filed applications seeking a direction to the concerned respondents to furnish security to the award amount, failing which, to order sale of the secured assets.

2.1. It is to be stated that the applicant earlier filed A.No.5101 of 2017, which was ordered on 03.07.2018 based on the terms appended therein in the said application. The applicant now filed A.No.5190 of 2019 seeking permission to sell the property to the intending buyer, by accepting his offer, which was below the upset price stated in the original terms of sale.

3. Admittedly, the properties, which are sought to be sold by way of public auction, are mortgaged with the applicant-Company. In almost all the cases, the awards have been passed in the absence of the borrowers, the details of which are as follows:-

| Sl. No. | Application No. | Respondents Name                         | Status of Arbitration      | Petition to set aside the award |
|---------|-----------------|------------------------------------------|----------------------------|---------------------------------|
| 1       | 1390/2017       | M/s.Sambhav Infrastructure               | Award Passed on 05.03.2017 | Not filed                       |
| 2       | 1440/2017       | M/s.Bhanu Cosmetics Packaging Pvt. Ltd., | Award passed on 29.08.2017 | Not filed                       |
| 3       | 4186/2018       | Mr.P.Sekar                               | Award Passed on 11.12.2018 | Not filed                       |
| 4       | 6327/2018       | Mrs.S.Swathi                             | Award Passed on 28.08.2018 | Not filed                       |
| 5       | 7745/2018       | M/s.Great Ventures                       | Award Passed on 13.08.2019 | Not filed                       |
| 6       | 8880/2018       | Mr.Sundar G                              | Award Passed on 20.08.2019 | Not filed                       |
| 7       | 2474/2019       | Mr.Selvam M                              | Award Passed on 19.10.2019 | Not filed                       |

| Sl. No. | Application No. | Respondents Name                          | Status of Arbitration      | Petition to set aside the award |
|---------|-----------------|-------------------------------------------|----------------------------|---------------------------------|
| 8       | 2475/2019       | Mr.R.Sakthivel                            | Arbitration Pending        | Not applicable                  |
| 9       | 2762/2019       | Mr.R.Bharathidasan                        | Award Passed on 20.08.2019 | Not filed                       |
| 10      | 2765/2019       | Mr.V.Satish                               | Award Passed on 19.10.2019 | Not filed                       |
| 11      | 2766/2019       | Mr.A. Bala Subramanian                    | Award Passed on 19.10.2019 | Not filed                       |
| 12      | 2767/2019       | M/s.Amman Traders                         | Arbitration pending        | Not applicable                  |
| 13      | 3063/2019       | Mr.D.Vasanth                              | Arbitration pending        | Not applicable                  |
| 14      | 3242/2019       | Mr.K.Baskar                               | Award Passed on 07.09.2019 | Not filed                       |
| 15      | 3244/2019       | Mr.M.Arumugam                             | Award Passed on 19.10.2019 | Not filed                       |
| 16      | 3246/2019       | Mr.P.K.Bharani                            | Award Passed on 01.10.2019 | Not filed                       |
| 17      | 3268/2019       | Mr.Bala Murali                            | Award Passed on 19.10.2019 | Not filed                       |
| 18      | 3325/2019       | Mr.A.R.Suresh                             | Award Passed on 01.10.2019 | Not filed                       |
| 19      | 4207/2019       | Mr.R.Rekha                                | Award Passed on 16.10.2019 | Not filed                       |
| 20      | 5190/2019       | M/s.Dani Aviation Service Private Limited | Award Passed on 14.09.2017 | Not filed                       |

4. In the above said backdrop of the facts, the scope and maintainability of the second limb of the prayer made in these applications arise for consideration.

5. Mr.R.Umashankar, the learned counsel for the applicant would contend that,

(i) the applicant had filed its claim only for recovery of money due under the contracts cited supra and no relief of enforcing the mortgage was prayed before the Arbitral Tribunals, as the Arbitral Tribunals have no jurisdiction to pass awards touching the properties mortgaged. Hence, the award is only with respect to recovery of money. Therefore, the applicant could not enjoy the benefits of mortgage created by the respondents in its favour. However, as per the scheme of mortgage, the right of the applicant to proceed against the mortgaged property is not curtailed merely because the applicant has only filed the money claim before the Arbitral Tribunal and the applicant is entitled to approach this Court for sale of the mortgaged property so as to secure the claim of the applicant under the mortgage, which according to the applicant, is now crystallized in view of the arbitral awards.

(ii) It is next submitted that even in execution proceedings too, the applicant is bound to seek the relief only for attachment and sale of the mortgaged property in view of the simple money award passed by the learned Arbitrators. In that event, the applicant will only be considered as an unsecured creditor and the sale proceeds from and

out of the sale of the properties will be distributed rateably amongst the creditors irrespective of the fact that the properties are mortgaged in favour of the applicant.

(iii) The applicant having selected the right of adjudication of the claim under the loan agreement through arbitral proceedings and obtained the above awards, would be estopped from filing a suit, based on the mortgage deed. A suit, even if filed, would be hit by the provisions of Order VII Rule 11 of the Code of Civil Procedure (in short, "C.P.C.") and Section 8 of the Arbitration Act.

(iv) As in all these cases, the claim is less than one crore, the applicant cannot invoke the provisions of the SARFAESI Act, though there are mortgage deeds and secured assets available.

(v) Though the applicant is entitled to invoke the provisions of the Transfer of Property Act and sell the mortgaged property, in all the cases, the properties which are the subject matter of the respective applications are situate outside the limits of Chennai Metropolitan. Hence, the sale of the mortgaged property without the intervention of the Courts is not possible.

6. The learned counsel for the applicant endeavoured to submit that Section 9 of the Arbitration Act is akin to the proceedings under Section 94 of the C.P.C, which is supplementary proceedings and that a comparative reading of Section 94 of C.P.C with Section 9 of the Arbitration Act would prove that the powers of the Court to grant appropriate relief as may appear to the Court to be "Just and Convenient".

7. Therefore, the learned counsel for the applicant contended that Section 9 of the Arbitration Act being an independent proceedings and not an extension of proceedings before the Arbitral Tribunal, this Court is empowered to grant appropriate relief except the powers to arrest and detain or initiate contempt proceedings.

8. Heard the learned counsels appearing on behalf of the respondents in A.Nos.1390 and 1440 of 2017 and 2475 of 2019.

8.1. In respect of the other cases, since the respondents did not appear, this Court appointed Mr.S.Ramesh, Advocate, as Amicus Curiae to assist the Court.

9.The learned Amicus Curiae submitted that the distinction between the disputes which are capable of being decided by the

Arbitration and those which are not, is brought out in the decisions of the Hon'ble Supreme Court in ***Haryana Telecom Ltd. vs Sterlite Industries (India) Ltd. [1999 (3) SCR 861]*** and ***Olympus Superstructures (P) Ltd vs Meena Vijay Khetan [1999 (5) SCC 651]***. The above decisions distinctly clarified that matters like criminal offences and matrimonial disputes may not be the subject matter of resolution by arbitration. In a later decision in ***2011 (5) SCC 532 [Booz Allen and Hamilton Inc. -vs- SBI Home Finance Limited and others]***, the Hon'ble Supreme Court had made distinction between an agreement to sell or an agreement to mortgage and a mortgage deed. It is also held that a mortgage suit for sale of the mortgaged property is an action in rem, i.e., an enforcement of a right in rem. As the suit for enforcement of a mortgage being the enforcement of a right in rem, it has to be necessarily decided by the Courts of law and not by Arbitral Tribunals. For the purpose of reference, paragraphs 47 to 51 and 53 are extracted below:

**"47.** *The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of the Transfer of Property Act, 1882 relating to suits on mortgages (Sections 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Sections 92 to 94 and 96). Order 34 of the*

*Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security.*

**48.** *The provisions of the Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion.*

**48.1.** *Rule 1 of Order 34 provides that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this Rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right of redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, cannot get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration,*

thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with the likelihood of divergent results.

**48.2.** In passing a preliminary decree and final decree, the court adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction-purchasers, persons in possession. An Arbitral Tribunal will not be able to do so.

**48.3.** The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to the defendant/mortgagor or other persons entitled to receive the same. An Arbitral Tribunal will not be able to do so.

**48.4.** Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under

Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Forms 9, 10 and 11 of Appendix 'D' to the Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit or any other party interested in the mortgage security or the right of redemption, pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an Arbitral Tribunal will not be able to do so.

**48.5.** The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time to time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, charges, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power.

**49.** A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an Arbitral Tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.

**50.** The appellant contended that the suit ultimately raises the following core issues, which can be decided by a private forum: (i) Whether there is a valid mortgage or

charge in favour of SBI? (ii) What is the amount due to SBI? and (iii) Whether SBI could seek eviction of the appellant from the flat, even if it is entitled to enforce the mortgage/charge? It was submitted that merely because mortgage suits involve passing of preliminary decrees and final decrees, they do not get excluded from arbitrable disputes. It is pointed out that the Arbitral Tribunals can also make interim awards deciding certain aspects of the disputes finally which can be equated to preliminary decrees granted by courts, and the final award made by the arbitrator, after detailed accounting, etc. could be compared to the final decree passed by courts. It is therefore contended that there is no impediment for the parties to mortgage suits being referred to arbitration under Section 8 of the Act.

**51.** If the three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 48.2 above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-à-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided.

#### Conclusion

**53.** Having regard to our finding on Question (iv) it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by

*an Arbitral Tribunal. Therefore we uphold the dismissal of the application under Section 8 of the Act, though for different reasons."*

10. The above decision having created a bar that only a suit is maintained for enforcement of mortgage by sale and the power of Arbitral Tribunal is ousted, whether the Court dealing with an interim relief under Section 9 of the Arbitration Act, can grant the same?

11. In the light of the above position, so far as the grant of relief under Section 9 of the Arbitration Act for sale of immovable property as an interim measure through a court, based on an arbitral award without involving the said secured asset is not possible.

12. The mortgage is created by transferring the interest in immovable property as a security for a loan which is a right in rem. Therefore in a mortgage there is conveyance of legal interest in a property with a provision for redemption. The right of redemption is the most important, basic and fundamental right possessed by the mortgagor. The said right is not a contractual right, but a legal/statutory right given to the mortgagor under under Section 60 of the Transfer of Property Act. The said right of redemption can be extinguished only by a process known to law. The well settled

principle 'once a mortgage always a mortgage' recognises the right of the mortgagor to redeem the property as fundamental to the transaction of a mortgage. If the said right is denied to the mortgagor, it would tantamount to infringement of the right of the mortgagor and would frustrate the transaction.

13. It is admitted that in all the applications the subject properties that are mortgaged are situate outside the territorial jurisdiction of this court, hence, this court cannot have jurisdiction. As all the applications are for sale of the immovable properties mortgaged i.e. enforcement of mortgage, which would involve adjudication of rights and obligations of several classes of persons who are not before this court, no order can be passed under Section 9 of the Arbitration and Conciliation Act.

14. In this context, it is relevant to consider ***Bharat Aluminium Co (BALCO) V. Kaiser Aluminium Technical Services Inc.*** case, reported in **2012 (9) SCC 552**. While dealing with the question as to whether an inter party suit for interim relief is maintainable, the Hon'ble Supreme Court has observed that no interim relief can be granted unless it is in aid of and ancillary to the main relief in the suit that may be available to the party on final

determination of rights in the suit placing reliance on a decision in ***Siskina (Owners of cargo) V. Distos Compania Naviera S.A.*** reported in **1977 (3) All ER 803 (HL)**. The relevant paragraphs in the said judgment are extracted hereunder:

"175. In our opinion, pendency of the arbitration proceedings outside India would not provide a cause of action for a suit where the main prayer is for injunction. Mr. Sundaram has rightly pointed out that the entire suit would be based on the pendency of arbitration proceedings in a foreign country. Therefore, it would not be open to a party to file a suit touching on the merits of the arbitration. If such a suit was to be filed, it would in all probabilities be stayed in view of Sections 8 and 45 of the Arbitration Act, 1996. It must also be noticed that such a suit, if at all, can only be framed as a suit to "inter alia restrain the defendant from parting with property." Now, if the right to such property could possibly arise, only if the future arbitration award could possibly be in favour of the plaintiff, no suit for a declaration could obviously be filed, based purely only on such a contingency. All that could then be filed would, therefore, be a bare suit for injunction restraining the other party from parting with property. The interlocutory relief would also be identical. In our view, such a suit would not be maintainable, because an interlocutory injunction can only be granted during the pendency of a civil suit claiming a relief which is likely to result in a final decision upon the subject in dispute. The suit would be maintainable only on the existence of a cause of action, which would entitle the plaintiff for the substantive relief claimed in the suit. The interim injunction itself must be a part of the substantive relief to

which the plaintiff's cause of action entitled him. In our opinion, most of the aforesaid ingredients are missing in a suit claiming injunction restraining a party from dealing with the assets during the pendency of arbitration proceedings outside India. Since the dispute is to be decided by the Arbitrator, no substantive relief concerning the merits of the arbitration could be claimed in the suit. The only relief that could be asked for would be to safeguard the property which the plaintiff may or may not be entitled to proceed against. In fact the plaintiff's only claim would depend on the outcome of the arbitration proceeding in a foreign country over which the courts in India would have no jurisdiction. The cause of action would clearly be contingent/speculative. There would be no existing cause of action. The plaint itself would be liable to be rejected under Order VII Rule 11(a). In any event, as noticed above, no interim relief could be granted unless it is in aid of and ancillary to the main relief that may be available to a party on final determination of rights in a suit. This view will find support from a number of judgments of this Court.

182. Interpreting Order 11 Rule 1(i), it was held that the word used in sub- rule (i) are terms of legal art. The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. This pre-supposes the existence of a cause of action on which to found "the action". A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is

*amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre- existing cause of action. It is granted to preserve the status quo pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.*

*183. As noticed earlier, the position is no different in India. Therefore it appears that under the law, as it stands today, an inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable."*

15. It is also relevant to advert to a decision of the Hon'ble Apex Court in **Cotton Corporation of India -vs- United Industrial Bank Limited and Others** reported in **1983 (4) SCC 625**. For better appreciation, paragraph 10 of the said judgment is extracted below:

**"10.** Mr Sen, learned counsel for the respondent Bank, contended that Section 41(b) is not at all attracted because it deals with perpetual injunction and the temporary or interim injunction is regulated by the Code of Civil Procedure specially so provided in Section 37 of the Act. Expression 'injunction' in Section 41(b) is not qualified by an adjective and therefore, it would comprehend both interim and perpetual injunction. It is, however, true that Section 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the court are regulated by the Code of Civil

Procedure. But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of the Code of Civil Procedure being confined to temporary injunction, an unnecessary grey area will develop. It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In *State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12, a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding'. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted. To illustrate this point, let us take the relief which the Bank seeks in its suit. The prayer is that the Corporation be restrained by an injunction of the court from presenting a windingup petition under the Companies Act, 1956 or under the Banking Regulation Act, 1949. In other words, the Bank seeks to restrain the Corporation by an injunction of the court from instituting a proceeding for winding up of the Bank. There is

*a clear bar in Section 41(b) against granting this relief. The court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, ipso facto temporary relief cannot be granted in the same terms The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings."*

16. The above said decision followed the case in **AIR 1952 SC 12, State of Orissa V. Madan Gopal** to hold that if final relief as sought for cannot be granted, temporary relief in the same terms cannot be granted.

17. Viewed from the said angle of interpretation, in the instant case, the applicant is seeking to enforce the mortgage and consequently sale of mortgaged property before the Arbitral Tribunal. However, a specific bar has been created by virtue of the decision of the Hon'ble Supreme Court. As per **Booz Allen's** case, when the main relief before the Arbitral Tribunal itself is barred whether the applicant would be entitled to interim relief in the nature of sale of mortgaged property. In most of the cases, awards have been passed by the Arbitral Tribunals which have become final in favour of the

applicant. The Booz Allen's case has discussed the power of the Arbitral Tribunal to entertain a claim of mortgage alone but has not specifically discussed whether Section 9 application for sale in the light of the claim made under the mortgage deed or otherwise is possible.

18. It was pointedly argued by the learned counsel for the applicant that the provision of the Civil Procedure Code which is applicable to the mortgage suits, i.e., Order 34, is not applicable to the proceedings under Section 9 of the Arbitration Act. It was submitted that Order 34 CPC is applicable only to the suits which are filed by the creditor touching upon the mortgaged property and not to the applications under Section 9 of the Arbitration Act. According to the learned counsel, the Legislature has neither intent nor imported the provisions of the Code of Civil Procedure, 1908 into the proceedings under the Arbitration Act. This principle is evident from the fact that the legislature while importing the provisions of the Civil Procedure Code to the proceedings under Section 36 of the Arbitration Act, has not whispered either about the applicability or importing of the provisions of the Civil Procedure Code into any other provisions of the Arbitration Act. Section 36 of the Arbitration Act would substantiate that the award passed by the Arbitral Tribunal is

enforceable as a decree passed by the court under the Code of Civil Procedure. Only under the provision for enforcement of the award passed by the Arbitrator, the legislature has imported the provisions of the Code of Civil Procedure, that too only Order XXI in execution proceedings before the competent civil court. Therefore, it was urged that the provisions of the Civil Procedure Code is not applicable to the proceedings under Section 9 of the Arbitration Act.

19. Admittedly, the Arbitral Tribunals have proceeded only on the basis of the loan agreements which contained an arbitration clause whereas the mortgage deeds have not been invoked. Even in the Code of Civil Procedure, supplemental and incidental proceedings are dealt with separately, as they are not part of the main proceedings. Section 94 deals with supplemental proceedings and incidental proceedings which arise out of the main proceedings. The distinction between the main proceedings and the supplemental proceedings are discussed in ***Food Corporation of India -vs- Yadav Engineer and Contractor*** reported in **1982 (2) SCC 499**. In the said decision, the Hon'ble Apex Court at paragraph Nos.12 and 31 held as follows:

*"12. Arbitration agreement generally provides for resolution of disputes either present or future by a forum of the choice of the parties. Ordinarily, arbitration agreement*

*finds its place in contracts. Apprehending that while performing contract some disputes may arise, care is taken to incorporate an arbitration agreement in the contract itself prescribing the forum for resolution of such disputes. To illustrate, partnership contracts incorporate arbitration agreement for resolution of disputes arising out of the contract of partnership. Building contracts these days incorporate arbitration agreements. International commercial transactions also incorporate arbitration agreements. The purpose underlying entering into arbitration agreement is to provide for resolution of disputes arising from the contract between the parties. Now, if a party to an arbitration agreement files a suit seeking relief in respect of disputes arising from the contract the other party to the agreement can either waive the benefit of the arbitration agreement and acquiesce in the suit or enforce the arbitration agreement. Such conduct has specifically to be in relation to disputes covered by arbitration agreement. But if a party to an arbitration agreement files a suit and simultaneously moves an interlocutory application such as an application for appointment of Receiver, usually to be found in suits for dissolution of partnership and rendering accounts, or for an interim injunction to ward off a threatened or continuing breach of contract, irreparable harm would be suffered by the other party to the arbitration agreement if it cannot contest the interlocutory application on the pain of abandoning the benefit of arbitration agreement. A concrete illustration would be both illuminating and convincing. In a suit for dissolution of partnership and accounts an application for appointment of Receiver as also an application for interim injunction restraining the defendant from using the partnership goods or assets for continuing the business are filed. The court passes ex parte*

interim order and issues notice calling upon the defendant to show cause why the same should not be made absolute. In a running business appointment of a Receiver would thoroughly dislocate the business and an injunction would bring to standstill the flourishing business. If the defendant appears and contests the application for appointment of Receiver as also the application for injunction, could he be said to display an unequivocal intention to give up the benefit of the arbitration agreement and to acquiesce in the suit? The dispute between the parties is whether the partnership should be dissolved as per the contract of partnership. Interim injunction application or application for appointment of Receiver have nothing to do directly or substantially with the terms of the partnership. The main or substantial dispute will be covered by the plaint filed in the suit. Incidental proceedings for appointment of Receiver or for interim injunction are for the protection either of the property or the interests of the parties. Now, when ex parte orders are obtained on ex parte averments the other party cannot be precluded from coming and pointing out that no case is made out for granting interim relief. It would be too cumbersome to expect the party first to apply for stay and then invite the court under Section 41(b) of the Act to vacate the injunction or to discharge the Receiver. Giving the expression "taking any other steps in the proceedings" such wide connotation as making an application for any purpose in the suit such as vacating stay, discharge of the Receiver or even modifying the interim orders would work hardship and would be inequitable to the party who is willing to abide by the arbitration agreement and yet be forced to suffer the inequity of ex parte orders. Therefore, the expression "taking any other steps in the proceedings" must be given a narrow meaning in that the step must be taken in

*the main proceeding of the suit and it must be such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Interlocutory proceedings are incidental to the main proceedings. They have a life till the disposal of the main proceeding. As the suit or the proceeding is likely to take some time before the dispute in the suit is finally adjudicated, more often interim orders have to be made for the protection of the rights of the parties. Such interlocutory proceedings stand independent and aloof of the main dispute between the parties involved in the suit. They are steps taken for facilitating the just and fair disposal of the main dispute. When these interlocutory proceedings are contested it cannot be said that the party contesting such proceedings has displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it has submitted to the jurisdiction of the court. When ex parte orders are made at the back of the party the other party is forced to come to the court to vindicate its right. Such compulsion cannot disclose an unambiguous intention to give up the benefit of the arbitration agreement. Therefore, taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial dispute in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to acquiesce in the suit and to waive the benefit of the arbitration agreement. Any other view would both be harsh and inequitable and contrary to the underlying intendment of the Act. The first party which approaches the court and seeks an ex parte interim order has obviously come to the court in breach of the arbitration agreement. By obtaining an ex parte order if it*

*forces the other party to the agreement to suffer the order, or by merely contesting be imputed the intention of waiving the benefit of arbitration agreement, it would enjoy an undeserved advantage. Such could not be the underlying purpose of Section 34. Therefore, in our opinion, to effectuate the purpose underlying Section 34 the narrow construction of the expression "taking any other steps in the proceedings" as hereinabove set out appears to advance the object and purpose underlying Section 34 and the purpose for which the Act was enacted.*

*31. Having thus critically examined both on principle and precedent the meaning to be given to the expression "taking steps in the proceedings", we are clearly of the view that unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration, any other step would not disentitle the party from seeking relief under Section 34. It may be clearly emphasized that contesting the application for interim injunction or for appointment of a Receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order under Section 34 of the Act."*

20. A proceeding under Section 9 of the Arbitration Act is an independent proceeding akin to that of supplemental proceedings under Section 94 of C.P.C. Section 9 deals with interim measures, for

which a party may, before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36, can apply to a court. Thus, a very clear demarcation has been made in respect of the scope of the Court to grant interim relief.

21. Section 9 of the Arbitration Act deals with interim measures, etc. by court. For better appreciation, the same is extracted hereunder:

*"9. Interim measures, etc., by Court.*

*(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*

*(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*

*(ii) for an interim measure of protection in respect of any of the following matters, namely:—*

*(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*

*(b) securing the amount in dispute in the arbitration;*

*(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any*

*party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*

*(d) interim injunction or the appointment of a receiver;*

*(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*

*(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.*

*(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."*

22. A plain reading of Section 9(1)(ii)(a) would disclose that the same pertains to goods/movables. The present case relates to immovable property. Therefore, the above provision is irrelevant.

23. As per Section 9(1)(ii)(b), the Court is empowered to pass such orders for securing the amount in dispute in the arbitration. The

applications are filed for sale of the property as an interim measure for the purpose of securing the amount.

24. Section 9(1)(ii)(d) pertains to grant of interim injunction or appointment of a receiver which has bearing on the issue involved in the present proceedings in the light of power of Court appointed Receiver to sell a property under the provisions of C.P.C. No such prayer is sought for in these applications to appoint a Receiver.

25. Section 9(1)(iii)(e) is more in the nature of Sections 151 and 94(e) of C.P.C which also aids in defining the power of Court to grant the relief as sought for in the present proceedings.

26. The power of the Court under Section 9 of the Arbitration Act has been explained by the Hon'ble Supreme Court in the decision reported in **2007 (7) SCC 125 [Adhunik Steels Ltd -vs- Orissa Manganese and Minerals (P) Ltd.** It has been held that the grant of interim injunction or interim mandatory injunction has to be necessarily based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law governing the subject. For better understanding, Sections 16, 17 and 19 of the Specific Relief Act, 1963 are extracted hereunder :

**"16. Personal bars to relief.—**Specific performance of a contract cannot be enforced in favour of a person— 2 [(a) who has obtained substituted performance of contract under section 20; or] (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or (c) 3 [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant. *Explanation.—*For the purposes of clause (c),— (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; (ii) the plaintiff 4 [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.

**17. Contract to sell or let property by one who has no title, not specifically enforceable.—**(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor— (a) who, knowing himself not to have any title to the property, has contracted to sell or let the property; (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt. (2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

**19. Relief against parties and persons claiming under them by subsequent title.—**Except as otherwise provided by

*this Chapter, specific performance of a contract may be enforced against— (a) either party thereto; (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract; (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant; 1 [(ca) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.] (d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation; (e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."*

27. In terms of Section 28 of the Arbitration Act, even the Arbitral Tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India. Therefore, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to the interim reliefs.

28. Similar views have been expressed in ***Firm Ashok Traders & Another vs. Gurumukh Das Saluja and others*** reported in ***2004 (3) SCC 155***, ***Percept D'Mark (India) (P) Ltd. vs. Zaheer Khan and Another*** reported in ***2006 (4) SCC 227*** and ***Arvind Constructions Co. (P) Ltd vs. Kalinga Mining Corporation and Others*** reported in ***2007 (6) SCC 798***.

29. In ***Arvind Constructions Co. (P) Ltd. vs. Kalinga Mining Corporation and Others*** reported in ***(2007) 6 SCC 798***, the Hon'ble Apex Court at paragraph No.15 held as follows:

"15. The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. The reliance placed on *Firm Ashok Traders v. Gurumukh Das Saluja* [(2004) 3 SCC 155] in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court

while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order 18 Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognised principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver."

30. Following the decision of the Hon'ble Supreme Court in **ITI Ltd. vs. M/s.Siemens Public Communications Network Ltd.,** reported in **2002 (5) SCC 510**, this Court has also held in several cases that there is no express provision against application of Code of Civil Procedure in relation to the proceedings arising under the

Arbitration Act. It is held that, if a Civil Court has power to do certain things in terms of specific provisions of the Act, those powers, can, well be exercised by the Court, while dealing with the application under Section 9 of the Arbitration Act. A Division bench of this Court in ***Om Sakthi Renergies Ltd. vs. Megatech Control Ltd*** reported in ***2006-2-LW-118***, also has observed that the Code of Civil Procedure shall be a guiding factor for exercise of powers by the Court under Section 9(ii)(b) of the Arbitration Act to determine whether such order deserves to be passed for justice to the cause following the judgment in ***Siemens case (supra)***. All these decisions clearly establish the basic principle, namely, guidelines or principles as contained in Code of Civil Procedure under Orders 38 to 40 would essentially guide the Court for granting a relief under Section 9 of the Arbitration Act.

31. As referred supra, Section 28 of the Arbitration Act mandates that the Arbitral Tribunal should decide the dispute submitted to arbitration in accordance with the substantive law for the time being enforced in India. Based on the same, the Courts have held that the substantive law of the State would govern the powers of the Court or Tribunal in respect of matters coming within the realm of the Arbitration Act.

32. In **Tata Capital Finance Services Limited v. Deccan Chronicle Holdings Limited** reported in **2013 SCC Online Bom 307**, the High Court of Bombay at paragraph Nos.35 and 41 held as under:

*"35.....If the petitioner choses not to apply for enforcement of mortgage and files a simplicitor suit for recovery of money or for enforcement of any other properties which were not mortgaged by the respondents in favour of the petitioners, such proceedings would be the proceedings in personam and not in rem which obviously would be within the jurisdiction of the arbitral tribunal to adjudicate upon. In my view, even if any such relief by way of enforcement of mortgage is claimed before the arbitral tribunal, petitioner would always have liberty to decide whether to withdraw such claims and/or seek amendment for moulding its reliefs, which would be within the jurisdiction of the arbitral tribunal. In my view, if any such reliefs are claimed which are beyond the jurisdiction of the arbitral tribunal and cannot be adjudicated upon, mechanism under Section 16 is provided by the legislature to raise issue of jurisdiction by the respondents before the arbitral tribunal. On hearing such application under Section 16, an arbitral tribunal can always decide whether any of the claims made by the claimants were within its jurisdiction to adjudicate upon. In my view, proceedings under Section 9 filed in this Court by the petitioner for interim measures, cannot be equated with the proceedings filed in a pending suit for referring the parties to arbitration under Section 8 of the*

Act of 1996. Thus, in my view, reliance placed by the respondents on the Judgment of Supreme Court in case of *Booz Allen2 (supra)* is of no assistance to the respondents while opposing application under Section 9 of the Act of 1996.

41. On reading of section 9 of the Arbitration & Conciliation Act, 1996, it is clear that the Court can grant interim measures under sub section 2(b), (d) and (e) even if the property or things are not subject matter of the dispute in arbitration. It is clear that for granting interim measures or protection, the Court would not have power to grant such interim measures, if it is for preservation, interim custody or sale of any goods, the detention, preservation or inspection of any property or thing or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried unless such goods or property are subject matter of arbitration. I am, thus, not inclined to accept the submission of the respondent that if the petitioner gives up its claim for enforcement of mortgaged properties, no interim measures can be granted under section 9 by this Court for recovery of money claim simplicitor."

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33. The very same judgment was followed in **Aditya Birla Finance Limited vs. Mr.Carnet Elias Fernandes and Another** reported in **2015 SCC Online Bom 4774**. Paragraph No.44 of the

said judgment reads thus:

*"44. Be that as it may, this court has already taken a view in case of Tata Capital Financial Services Limited v. Deccan Chronicle Holdings Limited (supra) that the proceedings under section 9 for interim measures cannot be equated with the proceedings filed in a pending suit for referring the parties for arbitration under section 8 of the Arbitration Act. In my view, the principles laid down by this court in the said judgment can be extended in the present proceedings under section 9. The reliefs under section 9 for appointment of the Court Receiver in respect of the mortgage property through in respect of which no reliefs are claimed by the petitioner in the statement of claim, can still be granted in respect of the said properties to secure the claims of the petitioner under section 9(ii)(d) of the Arbitration Act. This court has held in the said judgment that the court can grant interim measures under section 9(ii)(b), (d) and (e) even if the property or things are not subject matter of the dispute in arbitration. This court has also held that even if the petitioner gives up its claim for enforcement of mortgaged properties, interim measures can still be granted under section 9, even if the petitioner has made claim for recovery of money claim simplicitor in the statement of claim. I am respectfully bound by the said judgment."*

34. In the above said cases, the petitioners have approached the Court even before the Arbitral proceedings were initiated, seeking for protection of the properties that were mortgaged, whereas the

cases before this court are after passing of the award in the arbitral proceedings and for sale of the properties.

35. In the light of the above view, the next question that has to be examined is, *whether the power of sale is available under the Code of Civil Procedure, prior to decree?*

36. The interim relief for a suit application can be broadly categorised as follows:

- (i) custody;
- (ii) local inspection/collection of evidence, etc.,
- (iii) mandatory injunction,
- (iv) interim injunction/restraint order,
- (v) direction to furnish security failing which attachment of immovable property,
- (vi) Attachment or sale of movables,
- (vii) Appointment of Receiver, and
- (viii) Sale of immovable property.

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In normal circumstances of the above measures existing, the sale is expressly available to a creditor/claimant/plaintiff prior to a decree being passed in a suit. Order 39 Rule 6 CPC provides only for sale of

movable properties prior to the decree. Power of the court for sale of immovable property is not expressly available under CPC prior to the decree.

37. Supplemental proceedings are provided for in Section 94 of CPC which are not part of the main proceedings. Incidental proceedings are interlocutory in nature which arise out of the main proceedings. This court had already given a direction to furnish security which was not responded by the Award debtors. Any supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. The applicant had the option of moving the Civil Court for sale of the mortgaged property. The Arbitral Awards have been passed based on the loan agreements without reference to mortgage. Therefore, the applicant can enforce the awards as provided in Section 36 of the Arbitration Act in accordance with the provision of CPC.

38. In ***Industrial Credit & Investment Corporation of India Ltd. and others vs. Karnataka Ball Bearing Corpn. Ltd. and others*** reported in **(1999) 7 SCC 488**, the Hon'ble Supreme Court has held that a civil court, through appointment of a receiver as per Order 40 Rule 1 of CPC, has power to sell immovable property

pending adjudication of the suit. While holding that under Order 40 Rule 1 of CPC the court has unfettered power in the event the court feels that having due regard to the situation of the matter to appoint a Receiver, it was held as follows:

*"6. Order 40 Rule 1 of the Code of Civil Procedure expressly provides for the appointment of a receiver over a property whether before or after the decree and the court may by an order confer on the receiver all powers of realisation, management, protection, preservation and improvement of the property. Order 40 Rule 1(d) specifically provides for realisation and the words "or such of those powers as the court thinks fit" appearing in Order 40 Rule 1(d) ought to be interpreted in a manner so as to give full effect to the legislative intent in the matter of conferment of powers by the court to preserve and maintain the property through the appointment of a receiver. Needless to record here that there is existing a power which is totally unfettered in terms of the provisions of the statute. Law courts, however, in the matter of appointment of a receiver through a long catena of cases, imposed a self-imposed restriction to the use of discretion in a manner which is in consonance with the concept of justice and to meet the need of the situation — "unfettered" does not and cannot mean unbridled or unrestrictive powers and though exercise of discretion is of the widest possible amplitude, but the same has to be exercised in a manner with care, caution and restraint so as to subserve the ends of justice. The law courts are entrusted with this power under Order 40 Rule 1 so as to bring about a feeling of securedness and to do complete justice between the parties."*

39. Whether the same analogy can be applied to the cases before this court on the strength of the phrase "just and convenient" as found in Section 9(1)(ii)(e) of the Arbitration Act.

40. There has been various enactments for realisation of debts by financial institutions. Post 1997, the Law for recovery of debts by Banks and Financial institutions has changed. The first of its change was with the enactment of Recovery of Debts due to Banks and Financial Institutions Act, wherein, claim of the banks beyond certain sum, has to be decided by the Special Tribunals (Debts Recovery Tribunal).

41. When the procedure contemplated, did not produce the desired result or more impetus was needed, SARFAESI Act came into being. A class of creditors, namely, secured creditors were identified and such class of creditors were conferred with the power to liquidate the assets of borrowers/guarantors for NPA/debt without intervention of the court. Now the balance has shifted in favour of the financial institutions for recovery of their debts in a speedy manner with a caveat that such recovery must be by way of due process of law.

42. Similarly, such power is also available with the State Financial Corporation Act. With the advent of Insolvency and Bankruptcy Code further impetus has been given for resolution of debts by all class of creditors in a time bound manner. The direction of successive legislations in this regard pointed out a case for securing the amount in dispute without creditors being entangled in endless legal procedures.

43. In all these applications, the prayer is to direct the respondents to furnish security in favour of the applicant failing which to bring the mortgaged properties to sale. The applicant was granted the orders of directing the respondents to furnish security which were not complied with till today. Section 9 only deals with sale of pledged or hypothecated goods and not about immovable properties. The applicants, besides getting mortgage deed executed, would have obtained personal guarantee, promissory note etc. It is open to the applicants to attach other properties of any of the respondents other than the one mortgaged and bring them to sale.

44. The applicant had consciously not referred to the mortgage in the statement of claim as it would be beyond the jurisdiction of

arbitral tribunal. Therefore, the mortgaged properties cannot be sold without instituting a suit for sale of mortgaged properties subject to Order II Rule 2 of CPC.

45. The applicant financial institution had elected to go before the Arbitral Tribunal, since it had two alternatives of civil court and Arbitral Tribunal. Arbitration is an Adjudicating process. However, Section 9 of the Arbitration Act is not for enforcement of the award but for grant of an interim remedy. Merely because the claims are less than a crore of rupees and that SARFAESI Act will not be made applicable, the applicant cannot seek for sale of mortgaged property under Section 9 of the Arbitration Act.

46. In view of the foregoing discussion, the irresistible conclusion is that the applicant is not entitled for the second limb of the prayer canvassed before this Court and these applications are not maintainable, having no merit and accordingly, these applications are dismissed as not maintainable.

47. Before parting with these applications, this Court places on record its appreciation for the services rendered to this Court by Mr.S.Ramesh, learned Amicus Curiae, by collating the relevant

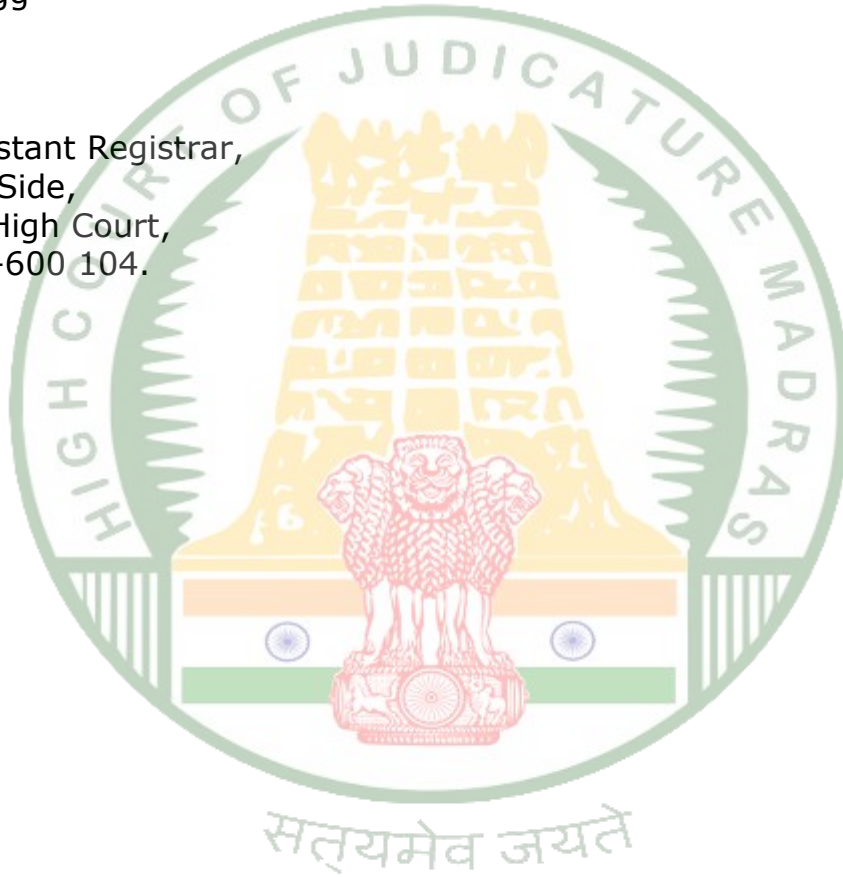
authorities, throwing light on the subject and placing them before this Court.

24.06.2021

Speaking Order/Non-Speaking Order  
Index : Yes / No  
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**PUSHPA SATHYANARAYANA, J.**

Asr



**A.Nos.1390 of 2017 etc. batch**

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