

Vidya Amin

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

ARBITRATION PETITION NO. 6 OF 2022

WITH

ARBITRATION PETITION NO. 10 OF 2022

WITH

ARBITRATION PETITION NO. 12 OF 2022

WITH

COMMERCIAL ARBITRATION PETITION NO. 21 OF 2022

Tata Capital Financial Services Ltd.

.. Petitioner

Vs.

Kunal Structure (India) Pvt. Ltd. & Ors.

.. Respondents

Mr. Aseem Naphade a/w. Mr. Nikhil Mehta i/b. KMC Legal Venture for the petitioner.

Mr. Vishwas Shah a/w. Akshay Shah, Mr. Raj Adhia for the respondents.

CORAM : G.S. KULKARNI, J.

DATE : MAY 2, 2022.

ORAL ORDER

1. These are four petitions filed under section 9 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) whereby the petitioner, which is a non-banking financial company and which has granted loans to respondent no. 1 for the purpose of acquiring different construction equipments/vehicles, is before the Court praying for interim measures pending the arbitral proceedings.

2. The facts in relation to these petitions are similar. For convenience and as agreed between the parties, the facts in Arbitration Petition no. 6 of 2022 being the lead matter can be referred. The petitioner is involved in the business of providing financial facilities,

such as Auto loan, personal loan, business loan, home loan, Asset loan etc. Respondent no. 1-company is incorporated under the Companies Act, 1956 and having its place of business at Ahmedabad, as set out in the cause title. Respondent no. 1 as a borrower approached the petitioner for availing a loan facility. The financial requirement as applied by respondent no. 1 was for an amount of Rs.49,00,990/- for acquiring construction equipments/vehicles (for short “the equipments”) namely, HAMM GRW-15 WH ROLLER make WRITGEN INDIA PRIVATE LIMITED bearing Engine No. 12240694 and Chassis No. WGH0H190KHAA03128. The petitioner agreed to finance such requirement of respondent no. 1. Accordingly, a Loan cum Hypothecation Agreement dated 31 May, 2019 (for short “the LHA”) came to be entered between the parties. The loan amount was disbursed. As a consequence of the LHA the said asset stands hypothecated in favour of the petitioner. The agreed rate of interest for such loan was 9.50% p.a. and the repayment schedule was of 48 monthly instalments of Rs.1,25,345/-.

3. The case of the petitioner was that there was default by respondent no. 1 in repayment of the loan installments. This is a common factor in all these petitions. The total amount disbursed and subject matter of all these four petitions is about 21 crores. The petitioner has contended that an amount of about 11 crores is now

required to be recovered from respondent no. 1 as also from the guarantors.

4. The petitioner by its letter dated 9 September, 2021 addressed its advocate to respondent no. 1 informed respondent no. 1 of the defaults in repayment of loan. Respondent no. 1 was also put to a notice that in the event the amounts in default are not being not paid, the loan would stand recalled. As respondent no. 1 failed to regularize the loan amounts and the amounts being substantial, the petitioner has approached the Court in the present proceedings praying for interim measures pending the arbitral proceedings. The petitioner has pressed for a relief that the Court Receiver, High Court be appointed as receiver to take possession of the equipment in question, which is also a relief in terms of what has been agreed between the parties under the LHA The petitioner has prayed for the following relief:

“a. The Court Receiver High Court Bombay be appointed as Receiver and take peaceful physical possession under Order XL, Rule 1 of CPC 1908 in respect of the hypothecated asset being HAMM GRW-15 WH ROLLER make WRITGEN INDIA PRIVATE LIMITED Engine No: 12240694 and Chassis No: WGH0H190KHAA0318 whether in the possession of the Respondents and/or any 3rd party and this Hon'ble Court be pleased to direct the Respondents and/or any 3rd Party (who may be in possession of the hypothecated Asset) to hand over the physical, peaceful and vacant possession of the HAMM GRW-15 WH ROLLER make WRITGEN INDIA PRIVATE LIMITED Engine No: 12240694 and Chassis No: WGH0H190KHAA03128 forthwith accordingly to the Court Receiver. If the Court Receiver is not allowed the physical, peaceful and vacant possession of the hypothecated asset being HAMM GRW-15 WH ROLLER make WRITGEN INDIA PRIVATE LIMITED Engine No: 12240694 and Chassis No: WGH0H190KHAA03128 by the Respondents, the Court Receiver be allowed to take forcible possession of the said hypothecated Asset in the

custody of the Respondents and/or any 3rd Party along with appropriate Police protection of the Local Police Station. The Court Receiver High Court, Bombay be further directed to hand over the aforesaid Asset hereto the Petitioner with liberty to the Petitioner to dispose off the same by private treaty with further liberty to adjust the sale proceeds towards the outstanding dues due to the Petitioner from the Respondents.”

As noted above, except for the nature of the equipment, the prayer are identical in all the other petitions.

5. Mr. Naphade along with Mr. Mehta, learned counsel for the petitioner have made submissions in support of the above relief. Mr. Naphade has placed reliance on different clauses of the LHA which are discussed. Mr. Naphade referring to Clause 8.1(a) and 8.1(c) contends that the liability of respondent no. 1 to repay the loan was absolute and unconditional regardless of any circumstances and disputes, and time being of the essence of the contract. It is submitted that the borrower's liability is also joint and several. Relying on Clause 12 it is submitted that the liability of the guarantor is co-extensive with that of the principal borrower. The Court's attention is also drawn to Clause 17 under which the parties have agreed on the “Events of default”. Clause 18 being a “Consequence of event of default”. In Clause 18.1 the parties have agreed that if one or more of the events specified in Clause 17 occurs, the loan shall become immediately due and payable and the lender/petitioner may forthwith recall the loan together with the interests and other monies payable by Obligors/respondent no. 1

pursuant to the agreement, and in default of such payment, enforce the charge created in terms of the LHA and further the lender shall be entitled to, at all times, to take possession, seize, recover, appoint a receiver/manager, remove the assets from its place of standing. The Court's attention is also drawn to the arbitration agreement between the parties as contained in Clause 23 of the said agreement. Clause 24 would be the jurisdiction clause where the parties have agreed to confer jurisdiction on the Courts at Mumbai. It is also pointed out at bar that although there is a clause for repossession notice in Clause 18.4, in fairness and considering the position in law, the petitioner did not issue a repossession notice and it was thought appropriate that the petitioner approaches this Court for seeking such relief. It is submitted that these being the clear terms and conditions, the petitioner would be entitled for the reliefs as prayed for.

6. A reply affidavit has been filed on behalf of respondent no. 1 opposing the petition. The principal contention in the reply affidavit is that such relief ought not be granted inasmuch as the petitioner already has a mortgage of immovable property in its favour of certain properties of the respondent, the value of which is much more than the claim. Respondent no. 1 has contended that the petitioner has failed to invoke arbitration agreement as contained in Clause 23 of the said agreement. Referring to the decision of the Supreme Court in **Sundaram Finance**

Ltd. vs. NEPC India Ltd., 1999 2 SCC 479, it is contended that there is no manifest interest on the part of the petitioner to take recourse to arbitral proceedings, hence the petitioner would not be entitled to any interim measures. It is next contended that the petitioner has failed to invoke the guarantee clause as contained in the LHA. It is next contended that the petitioner's claim as alleged in the petition is vague and unsubstantiated. It is contended that so far an amount of Rs.7.93 crores has already been paid on these borrowings as also there is no material before the Court which proves that the alleged amounts are due and payable by respondent no. 1 as also the Statement of accounts/ledger accounts in support of their alleged claim is not produced or annexed by the petitioner. It is next contended that the notice dated 9 September, 2021 cannot be considered, as loan recall notice as seen from its contents, as it merely records that the petitioner shall be constrained to recall/terminate the loan facility. Such vague notice cannot form any basis for the present proceedings to be filed. It is next contended that the documents, sanction letter and other relevant documents are also not placed on record. In paragraph 21 of the reply affidavit, it is contended that the LHA as placed on record does not reflect proper stamping and hence is inadmissible in evidence. It is next contended that once the valuation of the mortgaged properties is sufficient to cater to the claim of the petitioner, the petitioner need not have any apprehension that even if the petitioner succeeds in the

arbitral proceedings, the award would remain as a paper decree. It is, hence contended that Section 9 proceedings are filed only to pressurize respondent no. 1 to repay the amounts. It is contended that respondent no. 1 is ready and willing for adjudication of the disputes before the arbitral tribunal. It is on these contentions the reliefs in the petition are opposed.

7. Rejoinder affidavit dated 9 April, 2022 is filed on behalf of the petitioner to the additional affidavit filed on behalf of respondent no. 1 disputing the case of respondent no. 1 in the reply affidavits *inter alia* contending that the reply affidavit is absolutely an after thought, as respondent no. 1 has failed to regularize the loan as assured on behalf of respondent no. 1, as recorded in the order dated 17 February, 2022 passed by this Court. It is contended by Mr. Naphade that in pursuance of such order, a meeting was held between the petitioner and respondent no. 1 on 19 February, 2022 wherein all possible attempts have been made by the petitioner to enable the respondents to regularize the subject loan accounts. Also respondent no. 1 was furnished all necessary details of the accounts, so that respondents can regularize the loan accounts. However, the respondents failed to regularize the loan accounts despite repeated opportunities. It is contended that the respondents have no defence to the claims of the petitioner and are making unwarranted allegations and are taking

untenable defences only with a view to delay the hearing of the Section 9 petitions. It is next stated that respondent no. 1 already has a huge exposure of 250 crores, that respondent no. 1 owes in the market. The petitioner has also learnt that the respondents have defaulted loans availed in more than 46 contracts from the petitioner's sister concern, namely, M/s. Tata Motors Finance Ltd. It is, hence, contended that there is no likelihood that respondent no. 1 can regularize the loan accounts in question and make good the defaults.

8. On the above backdrop, I have heard learned counsel for the parties. Mr. Naphade, learned counsel for the petitioner has drawn my attention to the relevant clauses of the LHA which are common in all these loan agreements. It would be appropriate to set out the relevant clauses, which reads thus:

8. OBLIGORS' UNDERTAKING AND OBLIGATIONS

8.1 Each of the obligors hereby further agrees and undertakes that:

(a) The Borrower's liability and obligations to repay the amounts of the Loan, interest thereon, Additional Interest, costs, fees charges, expenses and all other monies as may be payable under this Agreement shall be absolute and unconditional and the Borrower shall pay to the Lender the same, regardless of any circumstances and disputes, and with time being of the essence of the contracts;

(c) The liability of the Obligors to repay the said Loan together with interest and all amounts due under the terms of this Agreement and to observe the terms and conditions of this Agreement and any other documents that may have been or may be executed by the Obligors with the Lender in respect of the said Loan is joint and several.

11. SECURITY

11.1 Security by hypothecation of Assets

11.1.1 The Loan together with all interest, costs, fees and expenses and all other monies payable in terms of this Agreement and stipulated herein or any other finance or moneys due from time to time from the Borrower to the Lender in whatsoever capacity, shall be secured by way of a first and exclusive charge by way of hypothecation of the Assets in favour of the Lender and in the form and manner/acceptable to the satisfaction of the Lender.

11.1.2 In pursuance of this Agreement and for the consideration aforesaid Borrower does hereby hypothecate and charge in favour of the Lender the Assets.

11.1.3 The charge/ hypothecation so created shall continue in full force so long as all the amounts due under the terms of this Agreement have been paid by the Borrower to the Lender and until the Lender issues a certificate discharging the security created pursuant to this Agreement and stating that the Loan and the other amounts payable under this Agreement have been discharged and paid in full and the charge shall not be affected, impaired or discharged by the winding up or insolvency (voluntary or otherwise) or by any merger or amalgamation, reconstruction, takeover of the management, dissolution or appropriation of the business or assets or nationalisation (as the case may be) of the Borrower. Any direct or indirect transfer of the Assets would be deemed to be criminal breach of trust and a case of cheating entitling the Lender to file/pursue a First Information Report (“**FIR**”) or a criminal complaint against the Obligors. The Assets shall be in the custody of the Borrower in its capacity as bailees.

17. EVENTS OF DEFAULT:

17.1 At the option of the Lender, and without necessity of any demand upon or notice to the Obligors, all of which are hereby expressly waived by the Obligors, and notwithstanding anything contained herein or in any security documents executed by/to be executed by the Obligors in the Lender’s favour pursuant to this Agreement, all amounts due and payable by the Obligors to the Lender under this Agreement and all of the obligations of the Obligors to the Lender hereunder, shall immediately become due and payable, irrespective of any agreed maturity upon the happening of any of the following events, hereinafter referred to as “The Events of Default”

(a) The Obligors shall commit default in:

(i) Payment of instalments on the respective due date in respect of the assets.

18. CONSEQUENCES OF EVENT DEFAULT

18.1 If one or more of the events specified in Clause 17 above occurs (“**Event of Default**”), the Loan shall become immediately due

and payable and the Lender may forthwith recall the Loan together with all interests and other monies payable by the Obligors pursuant to this Agreement, and in default of such payment enforce the charge created in terms of this Agreement. Further, the Lender shall be entitled to, at all times to, take possession, seize, recover, appoint a receiver/ manager, remove the Assets from its place of standing, and also be entitled, on such terms as may be deemed fit by the Lender, without the intervention of court or authority, to sell the Assets by public auction or by private contract at the best available prices according to the prevailing market condition including as regards repossessed Assets, realize its claim in respect of the Loan, without being bound or being liable for any loss/losses that the Obligors may suffer due to such action and without prejudice to the Lender's other rights and remedies as stated herein or otherwise in law entitled to.

18.2.

18.3 The Lender may further deal with all or any part of the | Assets, to enforce, realize, settle, and compromise with any rights or claims relating thereto. It shall not be bound to exercise any of these powers or be liable for any losses arising there from. Without prejudice to the Lender's rights and remedies of legal action or otherwise and notwithstanding any pending proceedings, the Borrower undertakes to give immediate possession to the nominee/s of the Lender on demand of the Assets, and transfer and deliver all relative bills, contracts, securities and documents (including all registrations, policies, certificates and documents relating to the said Assets) to the Lender. The Obligors hereby also agree, to accept the Lender's account of sales and realization as sufficient proof of amounts realized and relative expenses incurred, and to pay on demand by the Lender, any deficiency shown in the accounts, provided however, that the Lender shall not be liable or responsible for any loss, damage or depreciation that the Assets may suffer or sustain in the course of seeking repossession and/or while the same is in possession of the Lender or its nominees or by reasons of exercise of non-exercise of rights and remedies available to the Lender as aforesaid.

19. INSPECTION RIGHTS

19.1 The Obligors agree that any nominee of the Lender shall, without any notice and at the risk and expense of the Borrower, be entitled at all times to enter any place where the Assets may be kept and inspect, value, insure, superintend the disposal of and/or take particulars of all or any part of the Assets and check and all documents, statements, accounts, reports, information in relation to the Assets.

9. Mr. Naphade has also drawn the Court's attention to an order dated 18 April, 2022 passed by this Court in Commercial Arbitration

Petition (L) No. 5854 of 2022 (Tata Motors Finance Ltd. vs. Kunal Structure Pvt. Ltd. (Borrower) & Anr., which was being the case against respondent no.1 in which this Court had considered similar contentions as urged on behalf of respondent no. 1 and had granted interim measures in favour of the petitioner therein. Mr. Naphade has pointed out that such order was assailed before the Appeal Court in Commercial Arbitration Appeal No. 14083 of 2022 wherein the Division Bench has passed the following order:

“1. Receiver’s representative, we are informed, have reached the locations where 45 vehicles which is subject matter of hypothecation are located. The Receiver’s representative shall take symbolic possession.

2. This order will be operational till 5.00 p.m. on 4 May, 2022.

3. We have granted this indulgence only because Mr. Pratap, on suggestions made by the Court stated that he will take instructions on how to regularize the account subject to respondent being agreeable.

4. Stand over to 4th May, 2022.”

10. In these circumstances, Mr. Naphade would submit that even the appeal court had not stayed the orders passed by this Court, except for the above modification, as an ad-interim measure upto 4 May, 2022. Mr. Naphade hence would submit that the interim measures as prayed for be granted, failing which, there will be substantial deterioration of equipment as also the specific clause in the agreement to enable the petitioner to take possession of the hypothecated assets itself stand nullified.

11. On the other hand, Mr. Shah, learned counsel for the respondents has limited submissions. The first submission is that the LHA is not properly stamped and hence on the basis of such documents referring to the decision of the Supreme Court in **Garware Wall Ropes Ltd. vs. Coastal Marine Constructions and Engineering Ltd., (2019) 9 SCC 209**, the petitioner cannot seek an interim relief under section 9 of the Act. The second submission is to the effect that the petitioner is adequately secured inasmuch as there are properties of respondent no. 1 which are mortgaged with the petitioner and valuation of which is sufficient to take care of the amounts which are being demanded by the petitioner. It is next contended that if the interim orders as prayed for are granted, the business of respondent no. 1 would come to a standstill. It is submitted by Mr. Shah that there are arbitral awards which are obtained by respondent no. 1 against Rajkot Municipal Corporation and NHAI which are subject matter of execution proceedings before appropriate Court's and once such amounts are received, the re-payments/regularization of the loans in question can be made by respondent no. 1, hence the petitioner need to wait and ought not to show haste to seek reliefs. It is his next contention that the petitioner has not acted fairly inasmuch as the documents in relation to the amounts which are actually payable are not furnished as also the ledger accounts were not shared with the respondents. Mr. Shah would next submit that there is no inclination on the part of the petitioner to take recourse to the

arbitral proceedings. Referring to the decision of the Supreme Court in **Sundaram Finance Ltd.** (supra) it is contended that once it is clear that there is no inclination to take recourse to arbitration, the petitioner would not be entitled to any relief. Mr. Shah has, accordingly, prayed for dismissal of these petitions.

12. Having heard learned counsel for the parties and having perused the record, it appears that respondent no. 1 has indisputedly availed loans to purchase the equipments in question. There also appears to be no dispute in regard to the LHA (Loan cum Hypothecation cum Guarantee Agreement(s)) as entered between the parties. It is also not in dispute that there was default on the part of the respondents in making repayment of the loans and in this situation, today the liability of the respondents towards the petitioner on such loans is of almost 11 crores. The proceedings before the Court are pending for quite sometime. In 4 cases there is also an invocation of the arbitration agreement by the petitioners.

13. On 27 January, 2022 when this petition was listed before this Court, the Court had recorded Mr. Shah's statement on behalf of the respondents that there were certain subsequent developments that certain amounts were paid by the respondents to the petitioner in the intervening period. The Court passed an order observing that the

subsequent developments be placed on record by the respondents by filing an additional affidavit. At the subsequent hearing of the proceedings held on 8 February, 2022 it was pointed out to the Court that Section 11 applications have also been filed along with these petitions. In the meantime, the respondent no. 1 was permitted to furnish to the petitioner the whereabouts of all the vehicles and their locations. On the backdrop of the earlier hearing of the present proceedings held on 10 February, 2022, the Court after hearing learned counsel for the parties in its order passed at such hearing observed that a last opportunity needs to be made available to the respondent to work out for settlement with the petitioner. The said order reads thus:

“1. After having heard learned counsel for the parties, in my opinion, a last opportunity needs to be made available to the respondents to work out a settlement with the petitioners so that the parties can discuss the manner and method in which the accounts which are defaulted can be regularized substantially. Both the learned counsel for the parties agree that a meeting can be held between their respective clients and the advocates so that an endeavour can be made to resolve the disputes.

2. Mr. Naphade, learned counsel for the petitioners has pointed out that by an order dated 08 February, 2022 passed by this Court the respondent was directed to furnish to the petitioners the whereabouts of all vehicles and their locations, however, such order has not been complied.

3. Mr. Shah, learned counsel for the respondent makes a statement that his client shall during the course of the day inform the whereabouts of the vehicles in question to the petitioners. Let such directions of the Court be complied during the course of the day. There shall not be any further extension in this regard.

4. Accordingly, stand over to **17 February, 2022**. To be listed on the supplementary board.

5. In the meantime, the respondent shall not deal with the mortgaged property.

6. It is clarified that in the event a settlement between the parties is not brought, the Court would hear the parties and pass appropriate orders on the adjourned date of hearing.”

14. Thereafter, on 17 February, 2022, the Court considering that the parties need to make an attempt to resolve the disputes and to enable them to have a meeting in that regard, passed the following order:

“ 1. After hearing learned counsel for the parties for some time, on this batch of the proceedings, which are Section 9 petitions filed by Tata Capital Financial Services Limited (the lender) as also the Section 11 proceedings filed by Kunal Structure (India) Pvt. Ltd. (the borrower), in my opinion, it would be appropriate that the parties exchange necessary information and make an attempt to resolve the disputes and come to an overall settlement. Let the first meeting between both the parties be convened on 19 February, 2022 at the time and venue the parties may mutually fix.

2. The entire information and the documents in relation to the pending accounts be brought by the parties in such meeting and all issues/disputes be discussed point-wise and an attempt be made to resolve the disputes.

3. Also let minutes of such meeting be drawn so as to point out the final conclusion and in the event of non-resolution to set out the points of differences. Depending on the outcome of the said meeting, these proceedings would be taken up and appropriate orders would be passed.

4. The parties have agreed that venue of the meeting would be the respondent's office at Ahmedabad. Mr. Shah, learned counsel for the respondent has readily agreed for the same.

5. Mr. Shah has assured that the intention of his client is to regularize the accounts. If that be so, certainly the petitioner-lenders should not be averse to regularize the account, as it is informed that the term of the loan would come to an end sometime in 2023.

6. Parties are put to notice that if by the adjourned date of hearing an amicable resolution of disputes is not possible, the learned counsel for the parties shall accordingly inform the Court, so that the proceedings can be heard and appropriate orders passed.

7. Ad-interim reliefs granted earlier shall continue to operate till the adjourned date of hearing.

8. Stand over to **01 March, 2022.**

9. Parties are at liberty to have a second settlement meeting, if so necessary.”

15. Thereafter the proceedings were listed from time to time and the

parties were making efforts to settle the disputes and unfortunately, the disputes could not be settled and hence they were so listed today.

16. On the above backdrop, I have extensively heard learned counsel for the parties. I have also perused the record. It clearly appears that the respondents had defaulted in complying their obligations under Loan cum Hypothecation Agreements. It would not be acceptable, considering the terms and conditions of the LHA that respondent no. 1 would continue to remain in gross default in making repayment of the loans and continue to use the machinery to the disadvantage of the petitioner. The LHA permits the petitioner to take the possession of the construction equipments/vehicles as expressly agreed between the parties in Clause 18.1. Mr. Naphade would be correct in his contention that if such a course of action is not adopted, there would be substantial deterioration in the value of the machinery/vehicles thereby frustrating the terms and conditions of the LHA (Loan cum Hypothecation Agreement). He would also be correct in his contention that the respondents cannot oppose the petitioner seeking a relief in terms of the agreement, when such express conditions to surrender the equipments on default are not being complied by the respondents. Thus, there appears to be immense substance in the contentions as urged on behalf of the petitioner that this is a case in which interim measures need to be granted.

17. Insofar as Shah's contentions are concerned, none of the contentions would persuade me to take a different view than what has been canvassed on behalf of the petitioner. Insofar as Mr. Shah's contention that the LHA (Loan cum Hypothecation Agreement) is not appropriately stamped as per law, hence no relief under Section 9 be granted, considering the decision of the Supreme Court in Garware Wall Ropes Ltd. (supra), in my opinion, cannot be accepted for two reasons. Firstly, the averments as made in the reply affidavit are absolutely vague. Such an assertion is not substantiated in any manner whatsoever much less referring to any article under the Stamp Act under which the stamp duty would be required to be paid. Thus, such averments even if are of any relevance in no manner can persuade the Court to come to an conclusion that there was any deficit with the stamp duty. In any event, such a contention is untenable when the proceedings before the Court are proceedings under section 9 of the Arbitration and Conciliation Act. The contention of Mr. Shah relying on the decision of the Supreme Court in Garware Wall Ropes (supra) cannot be a contention which would apply to the proceedings under section 9 of the Act. The decision in Garware Wall Ropes (supra) was rendered in the context of proceedings under section 11. This Court in **Saifee Developers Pvt. Ltd. vs. M/s. Shanklesha Constructions & Ors.**¹ had an

1 2019 SCC Online Bom 13047

occasion to deal with such contention. Considering the decision of the Supreme Court in *Garware Wall Ropes* (supra) as also the decision of Full Bench in **Gautam Landscapes Pvt. Ltd. vs. Shailesh S. Shah and Anr.**,² the Court had come to a conclusion that the decision of the Supreme Court in *Garware Wall Ropes* being rendered in the context of Section 11 of the Act and not in a proceeding under section 9 and hence the same would not be applicable to the proceedings under section 9 of the Act. The relevant observations are in paragraphs 10 and 11, which reads thus:

10] Having considered the submissions advanced at bar as also having perused the documents as placed on record, I am not persuaded to accept the respondents' contention that the Court at this stage of the proceedings cannot consider grant of any ad-interim relief in the proceeding filed under Section 9 of the Act, on the ground that the document is not sufficiently stamped. This for the reason that Full Bench of this Court in ***Gautam Landscapes Pvt. Ltd vs. Shailesh S.Shah and anr.***³ has held that it is permissible for the Court in proceedings under Section 9 of the Act, to grant ad-interim/interim reliefs even when the document in question on the basis of which a relief is sought, is not sufficiently stamped. The Full Bench in this context has observed thus:

“75. In the case of *Firm Ashok Traders and anr.* (Supra), the Supreme Court has held that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court under Section 9 must possess, is of being a party to an arbitration agreement. This is nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The arbitration clause constitutes an agreement by itself.

76. It is, therefore, held that the arbitration clause being a separate agreement from the main contract and accordingly it is only the arbitration agreement which would have relevancy for the purpose of an application under Section 9 of the ACA. In our view, the judgment of the Supreme Court in the case of *Firm Ashok Traders* (supra) would squarely apply to the facts and situation at hand.

77. The respondents pressed into service the bar under Section 34 of the Maharashtra Stamp Act while entertaining an application under

2 (2019) 3 Mah L.J. 231

3 (2019) 3 Mah LJ 231

Section 9 of the ACA. We are inclined to accept the submission of Dr.Sathe, the learned Senior Counsel, that for the purpose of granting interim measures, whether by way of interim or adinterim, under Section 9, the said relief is not arising out of a contract containing an arbitration agreement. We are, therefore, of the view that even if the main agreement containing arbitration agreement is not stamped insufficiently stamped, there could not be any bar against the court hearing the application under Section 9 of the ACA for interim measures to grant ad-interim or interim relief to a party.

78. We are not inclined to accept the submission of Mr. Dani, learned Senior Counsel appearing for respondent in Arbitration Application No.246 of 2016 that for the purpose of interim measures, the court has to act upon the main agreement containing arbitration agreement and,thus till such time, such an agreement is stamped in accordance with the provisions of the Maharashtra Stamp Act, 1958, irrespective of the urgency and though case is made out for grant of ad-interim or interim relief, the court does not have power to grant any such relief. This clearly for the reason that the court in considering a relief under Section 9 is acting upon the arbitration agreement only, and not the main contract. An arbitration agreement would not require any stamping.

79. In our view, the argument of Mr. Dani, if accepted, would be in conflict with the scheme of the legislation and intent of the provisions of Section 9 of the ACA. Under the scheme of the ACA and in view of the judgments cited above and considering the submissions advanced,we are of the considered view that the legislative intent and purpose would be served by providing the efficacious and expeditious relief to a party to an arbitration agreement and that is prescribed under Section9 of the ACA. In case the submissions of Mr. Dani is accepted, the exercise of jurisdiction under Section 9 of the ACA would be completely eclipsed and party would be deprived to approach a forum for any urgent relief of ad-interim or interim nature. This obviously cannot be implication and intent of the statutory interpretation.

80. The entire purpose of granting interim measures is to protect the matters set out specifically under Section 9 (1) (ii)(a) to (e) during the pendency of the arbitral proceedings and even after making of the arbitral award before it is enforced in accordance with Section 36 of the Act, would be defeated if we accept the interpretation placed on the provisions by the learned Senior Counsel Mr. Dani. If an objection about insufficiency of stamp is entertained and accepted at the stage of hearing of the application under Section 9 for interim measures, a party who has good chances of succeeding in the arbitral proceedings finally and if not granted interim measures to protect the subject matter of such proceedings, there would be gross injustice to such party.

81. The Supreme Court in Naina Thakkar (supra), has held that the Judgment of the Supreme Court in the case of SMS Tea Estates (supra),would not be applicable to the proceedings under Section 8 of the Act where party making such an application does not express willingness to pay the deficit stamp duty and the penalty. In our view, the principles laid down by the Supreme Court in the said Judgment can be extended even to an application under Section 11 of the Act for appointment of an arbitrator. An application under Section 8 is

filed in a pending suit before a judicial authority to refer the parties to arbitration.

82. The Supreme Court in *M. Anasuya Devi (supra)*, has held that the question as to whether an arbitral award is required to be stamped and registered would be relevant only when the parties would file the award for its enforcement under Section 36 of the Act. It is at that stage the parties can raise objections regarding its maintainability on account of non-registration and non-stamping under Section 17 of the Registration Act. It is held that the question whether an award requires stamping and registration is within the ambit of Section 47 of the Code of Civil Procedure and not covered by Section 34 of the Act. In our view, the principles laid down by the Supreme Court can be extended to the applications under Section 9 of the Act. The issue of insufficiency of stamp duty, if any, can be raised by the other party at the stage when the instrument containing an arbitration agreement is tendered in evidence before the Arbitral Tribunal.

83. In the light of the above deliberation, we are of the considered opinion that the decision of the Division Bench in *Universal Enterprises(Supra)* takes a correct view that the court can grant an ad-interim reliefs in exercise of its jurisdiction under Section 9 of the ACA even if the document containing the arbitration agreement is not sufficiently stamped. We may thus further observe that the court under Section 9 of the ACA would be empowered to grant ad-interim and interim reliefs even if the document, containing arbitration agreement, is not adequately stamped.

84. Thus, in our view, the question of law i.e. whether a Court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped, is required to be answered in the affirmative"

(emphasis supplied)

11] The decision of the Supreme Court in *Garware Wall Ropes (supra)* is rendered in the context of Section 11 of the Act and not in a proceeding under Section 9 of the Act. The decision of the Full Bench in the context of Section 9 of the Act is subject matter of challenge before the Supreme Court in *"Shailesh S.Shah vs Gautam Landscapes Pvt. Ltd and anr"* in a **Petition for Special leave to Appeal (c) No.10232-10233 of 2019**. By an order dated 29th April, 2019, passed by the Supreme Court, on the said petition, while issuing notice to the respondents, the Supreme Court has not stayed the decision of the Full Bench. The Supreme Court, however, observed that section 9 petition may continue, in the meanwhile judgment delivered thereon shall not be implemented without leave of the Court. Thus, as the judgment of the full bench is binding on this Court, and the same being not stayed by the Supreme Court, it is not possible to accept the contention as urged on behalf of respondent that this Court cannot grant any ad-interim relief."

18. The Division Bench of this Court in **Shanklesha Constructions and**

Ors. vs. Saifee Developers Pvt. Ltd. & Anr.⁴ has also not disturbed the finding of law as made by this Court in **Saifee Developers Pvt. Ltd.** (supra). Further, a learned Single Judge of this Court in **L & T Finance Ltd. vs. Iris Health Services Ltd. & Ors.**,⁵ has accorded an agreement with a view taken by this Court in **Saifee Developers Pvt. Ltd.**

19. Thus, Mr. Shah's objection on the documents of the LHA (Loan cum Hypothecation Agreement(s)) being not sufficiently stamped being an embargo not to entertain any plea under section 9 of the Act cannot be accepted. Insofar as Mr. Shah's contention in regard to the valuation of the mortgage property being insufficient for satisfying the amounts payable by the respondent no. 1 to the petitioner is concerned, in my opinion, the same cannot be accepted as a valid defence when the Court is considering the plea for interim measures and that too considering the specific terms and conditions of the LHA (Loan cum Hypothecation Agreements) wherein respondent no. 1 itself has agreed in no uncertain terms that the petitioner would be entitled to take possession of the hypothecated assets and release the amounts therefrom in the event of default. If such an argument of Mr. Shah is accepted, it would defeat the express terms and conditions of the agreement. The Court cannot accept a contention which is contrary to the very terms and conditions of the LHA (Loan cum Hypothecation Agreement). Mr. Shah's

4 Commercial Appeal No. 411 of 2019 in Commercial Arbitration Petition (L) No. 627 of 2019

5 2019 SCC Online Bom. 12535

submission that if the possession of the equipment is taken over by the petitioner, the business of respondent no. 1 would come to a standstill, is no argument, as it cannot be countenanced that on one hand respondent no. 1 would continue to remain in default and on the other hand continue to deteriorate the value of the construction equipments/vehicles and that too by using it for business purpose and for profits. Such can never be the purport of the agreement as entered between the parties which would amount to defeating and/or nullifying the express terms and conditions of the LHA's.

20. Insofar as the next contention of Mr. Shah that the ledger accounts and other documents were not supplied by the petitioner, this contention also cannot be accepted. Also it is clear from the earlier order that the petitioner was called upon to provide all the information to respondent no. 1 would require under the loan agreement. All such information was provided. Further there were settlement talks between the parties wherein all these issues were discussed across the documents. Thus, such contention appears to be absolutely hollow without there being any material to substantiate that such documents at any point of time were not supplied to the respondent.

21. The last contention of Mr. Shah is that there is no inclination on the part of the petitioner to invoke and refer the disputes to arbitration.

Such contention is also required to be rejected. In respect of five loan accounts, the petitioner has already invoked arbitration which is not disputed by Mr. Shah. As also Mr. Naphade, on instructions, has stated that the petitioner is agreeable for referring the disputes to arbitration qua the present proceedings by appointing an arbitrator for referring the disputes for adjudication. Hence, the Court is certainly satisfied that there is an inclination on the part of the respondents to refer the disputes to arbitration.

22. In the above circumstances, in the facts of the present proceedings, the only conclusion which can be arrived is that the petitioners have become entitled to interim reliefs pending arbitral proceedings. Hence, the following order:

(i) Respondent no. 1 is directed to handover the construction equipments/vehicles to the petitioners within a period of 10 days from the day a copy of this order is available, the details of such construction equipments/vehicles being as set out in prayer clause (a) of each of these petitions. The whereabouts of the equipments/vehicles are also informed by respondent no. 1 to the petitioners.

(ii) In the event respondent no. 1 defaults in complying with the above directions and does not handover the

physical possession of the equipments/vehicles to the petitioner, in that event, the Court Receiver, High Court, Bombay is appointed as a receiver of such equipments/vehicles who shall exercise all powers as available to him under Order 40 Rule 1 of the CPC and take appropriate steps to take physical possession of the equipments/vehicles from respondent no. 1 and hand over the same to the petitioners for utilizing the same for recovery of the loan amounts subject matter of these proceedings.

(iii) The petitioners shall maintain an appropriate account of the amounts recovered from the date of the equipments/vehicles and inform the same to respondent no. 1.

23. As agreed on behalf of the parties as noted above, the parties intend the Court to refer the disputes to arbitration, by appointing a suitable arbitrator. Save and except what has been directed by the Court above, the disputes and differences between the parties under the Loan cum Hypothecation Agreement(s) are referred to arbitration, by appointing an arbitral tribunal. Hence the following order:

ORDER

(i) Mr. Hormaz C. Daruwalla, Advocate is appointed as a sole

arbitrator to adjudicate the disputes between the parties which have arisen under the Loan cum Hypothecation cum Guarantee Agreement dated 31May, 2019.

(ii) The learned sole arbitrator, before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act,1996, to the Prothonotary & Senior Master of this Court by email id – rgpsm-bhc@nic.in, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;

(v) All contentions of the parties are expressly kept open.

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

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

Mr. Hormaz C. Daruwalla, Advocate
Behramji Mansion, 3rd floor,
Sir P.M. Road, Mumbai – 400 001.
Tel. No. 22662506/1582
Mob. no. 9820004743
Email : hormaz@gmail.com

[G.S. KULKARNI, J.]