Arbitration Application No.139 of 2022

M.SUNDAR, J.,

Captioned 'Arbitration Application' [hereinafter 'Arb Appln' for the sake of convenience and clarity] has been presented in this Court on 13.07.2022 vide SR.No.73540 of 2022 under Section 9 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter referred to as 'A and C Act' for the sake of convenience, clarity and brevity] read with Order XIV Rule 8 of Madras High Court Original Side Rules 1956. To set out with specificity, captioned application has been presented in this Court under Section 9(ii)(a)(b) and (e) of A and C Act.

2. Mr.KT.Sankar Subramanian, learned counsel for the applicant is before this Court in the Admission Board. Madras High Court in exercise of its powers *inter alia* under Section 82 of A and C Act has made a set of rules captioned 'The Madras High Court (Arbitration) Rules, 2020' [hereinafter 'MHC Arb Rules' for the sake of convenience and clarity]. This MHC Arb Rules kicked in or in other words came into force on and from 17.03.2021 when it was published in Official Gazette. This MHC Arb Rules *inter alia* lays down the hearing procedure when a Section 9

application is before a Court in the Admission Board. Relevant procedure is Rule 6 and the same reads as follows:

> *'6. Procedure in relation to applications under Section 9 of the Act:*
>
> *(i) When an application is made for an interim measure, under Section 9 of the Act, the Court may -*
>
> *(a) issue notice to the respondent; or*
>
> *(b) make an ex-parte interim order that it thinks fit in accordance with the terms of the Code, where applicable; or*
>
> *(c) dismiss it, with or without costs.*
>
> *Provided that, where it is proposed to make an order by way of interim measure without giving notice of the application to the Respondent, the Court shall record the reasons for its opinion that the object of granting the interim measure would be defeated by delay and require the applicant:*
>
> *(a) to deliver to the Respondent, or to send to him by registered, speed post with acknowledgement due, within a day of the order granting the interim measure:*
>
> *(i) a copy of the application;*
>
> *(ii) a copy of the affidavit filed in support of the application; and*
>
> *(iii) a copy of documents filed along with the application.*
>
> *(b) to cause to be filed, within the day immediately following the day on which such interim order is granted, an affidavit stating that Rule 7(1)(a) has been complied with.*

(ii) Where an interim order has been granted without giving notice to the Respondent, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the interim order was granted.

(iii) In an application for interim measure filed before the commencement of the arbitral proceedings, the application shall specifically refer to the steps, if any, already taken to seek arbitration or demonstrate the intent to seek arbitration.'

3. Therefore, the first task before this Court is to examine whether the captioned application passes muster qua issue of notice.

4. Be that as it may, facts are fairly simple and short facts shorn of elaboration / granular particulars or in other words, factual matrix containing the essential facts imperative for appreciating this order will suffice and the same is as follows:

(a) Applicant which is a company has been registered with Reserve Bank of India as a 'Non-Banking Finance Company' [hereinafter 'NBFC' for the sake of convenience and clarity], from hereon and henceforth, the applicant company will be referred to as 'NBFC' for the sake of convenience and clarity;

(b) The first respondent is a limited liability partnership and second respondent (this Court is informed) is a partner in the first respondent firm. In the light of the averment in paragraph No.3 of support affidavit qua captioned application both the respondents 1 and 2 shall hereinafter be collectively referred to as 'borrowers' in plural and 'first borrower' and 'second borrower' respectively wherever necessary;

(c) Applicant-NBFC and borrowers entered into an 'agreement bearing Agreement Number : 10142524 dated 26.10.2020' [hereinafter 'loan agreement' for the sake of clarity, convenience and brevity] and a 'unattested deed of hypothecation dated 26.10.2020' [hereinafter 'hypothecation agreement' for the sake of convenience and clarity];

(d) Aforementioned loan agreement and hypothecation agreement were for the applicant-NBFC to finance the purchase of a car by the respondents. 'The car is manufactured by Mercedes-Benz India Pvt. Ltd., model is GLC 200 with Engine No.26492030276168, Chassis

No.WIN2539806L030090 and color is Paint Cavansite Blue' [hereinafter 'said car' for the sake of convenience and clarity];

(e) The financial assistance provided by NBFC to borrowers is to the tune of Rs.70,36,200/- and the same had to be repaid in 36 'Equated Monthly Instalments' ['EMIs' in plural and 'EMI' in singular for convenience] of Rs.1,88,503/- each. First EMI was payable on 04.11.2020 and last/36th EMI is payable on 04.10.2023. All this is captured in the annexure to the loan agreement and a scanned reproduction of the same is as follows:

13305

Mercedes-Benz Financial

[illegible]

[illegible]	
[illegible]	1 0 1 4 4 5 2 4
[illegible]	06-10-2020
[illegible]	LSK APPLIANCES LLP
[illegible]	
[illegible]	70,36,200
[illegible]	36,200
[illegible]	70,00,000
[illegible]	8.4039 %
[illegible]	36
Applicable Over Due Rate of Interest	[illegible]
[illegible]	36
[illegible]	1,88,503
[illegible]	NIL
[illegible]	NIL
[illegible]	04-11-2020
[illegible]	04-10-2023
[illegible]	ECS
[illegible]	
[illegible]	Rs. 500/-
[illegible]	4% on the outstanding amount
[illegible]	4% on the part payment amount

(f) As can be culled out from the support affidavit, the borrowers were not regular in repayment, they allegedly defaulted in paying EMIs, on 01.12.2021, the applicant-NBFC issued notice to the borrowers recalling the loan. This 01.12.2021 notice shall hereinafter be referred to as 'loan recall notice' for the sake of convenience and clarity. This loan recall notice dated 01.12.2021 has been mailed by speed post with acknowledgment due on 03.12.2021 to each of the borrowers (to be noted, respondent No.1/first borrower is noticee No.1 and respondent No.2 /second borrower is noticee No.2 in this notice). On instructions, learned counsel for the applicant-NBFC submits that both the borrowers i.e., both noticees have been duly served with this loan recall notice;

(g) In the loan agreement, there is an arbitration clause and the same is sub-clause No.66 and it is slotted under clause No.9 captioned 'Rights and Remedies of the Lender'. A scanned reproduction of sub-clause No.66 captioned 'Dispute Resolution' is as follows:

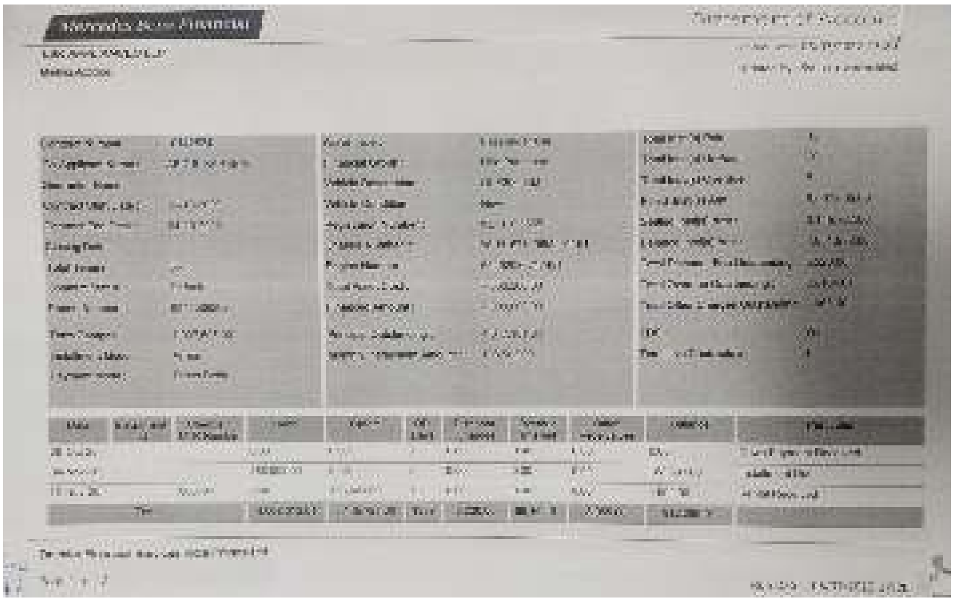
66. Dispute Resolution: All claims and disputes arising under or relating to this Loan Agreement are to be settled by binding arbitration in the state of Tamil Nadu, specifically Chennai or another location as desired by the lender. The arbitration shall be conducted on a confidential basis and shall be subject to the Arbitration and Conciliation Act, 1996 of India. Any decision or award as a result of any such arbitration proceeding shall be in writing and shall provide an explanation for all conclusions of law and fact and shall include the assessment of costs, expenses, and reasonable attorneys' fees. Any such arbitration shall be conducted by single arbitrator appointed by the Lender. The arbitration proceeds shall include a written record of the arbitration hearing. An award of arbitration may be confirmed in a court of competent jurisdiction.

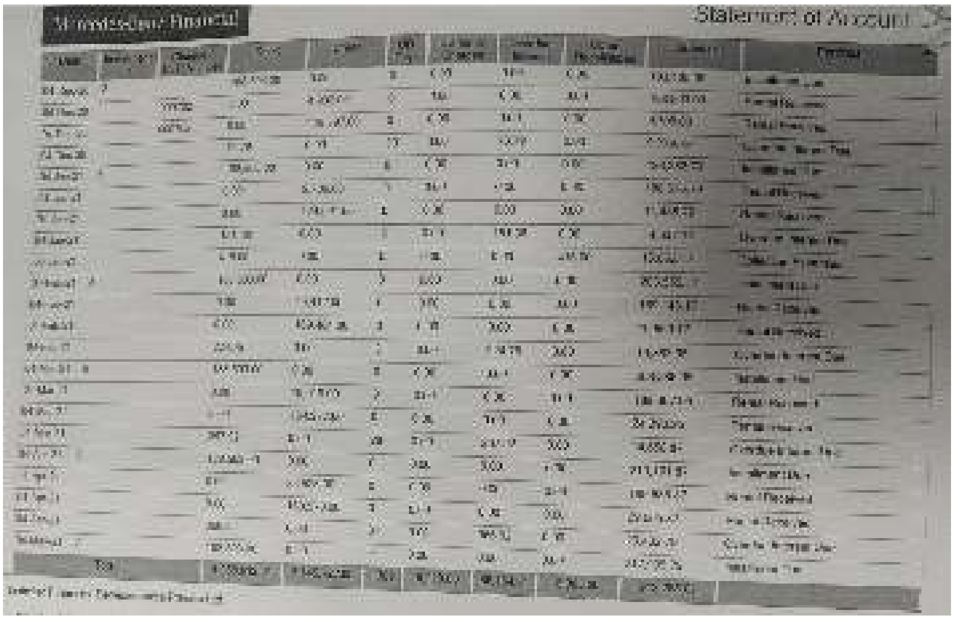
(h) It is also necessary to extract and reproduce sub-clause No.67 captioned 'Governing Law' which is as follows:

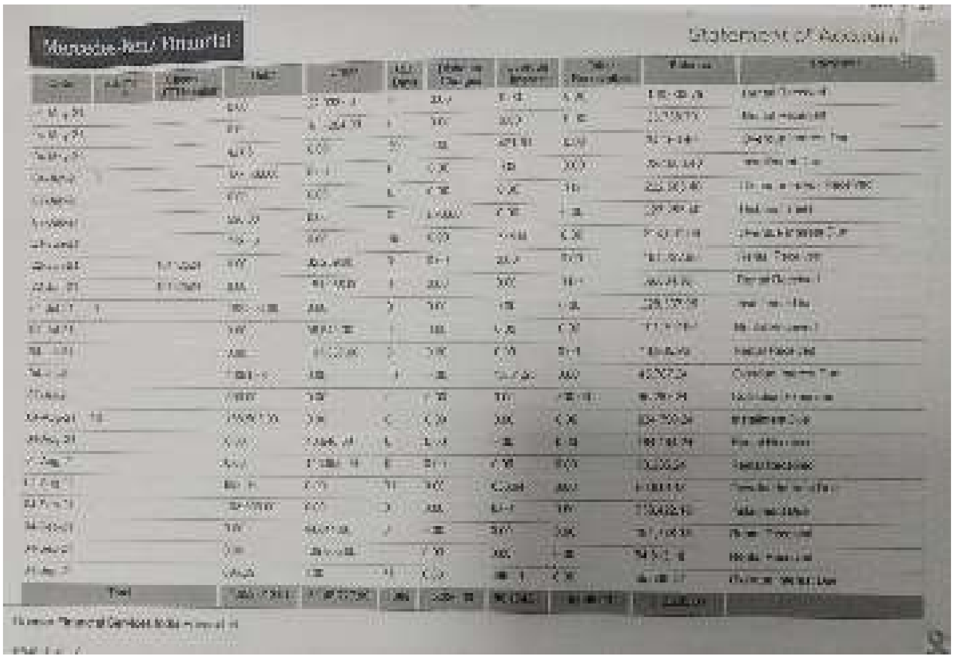
67. Governing Law: The Loan, Loan Agreement and the other Transaction Documents shall (unless otherwise specified in the Application or any such Transaction Document) be governed by and construed in accordance with the laws of India.

(i) Aforementioned sub-clauses 66 and 67 under clause 9 together constitute Arbitration Agreement between the applicant-NBFC and borrowers i.e., 'Arbitration Agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act;

(j) Learned counsel drew the attention of this Court to what according to him is statement of accounts, the same has been annexed as part of typed set of papers and a scanned reproduction of the same is as follows:

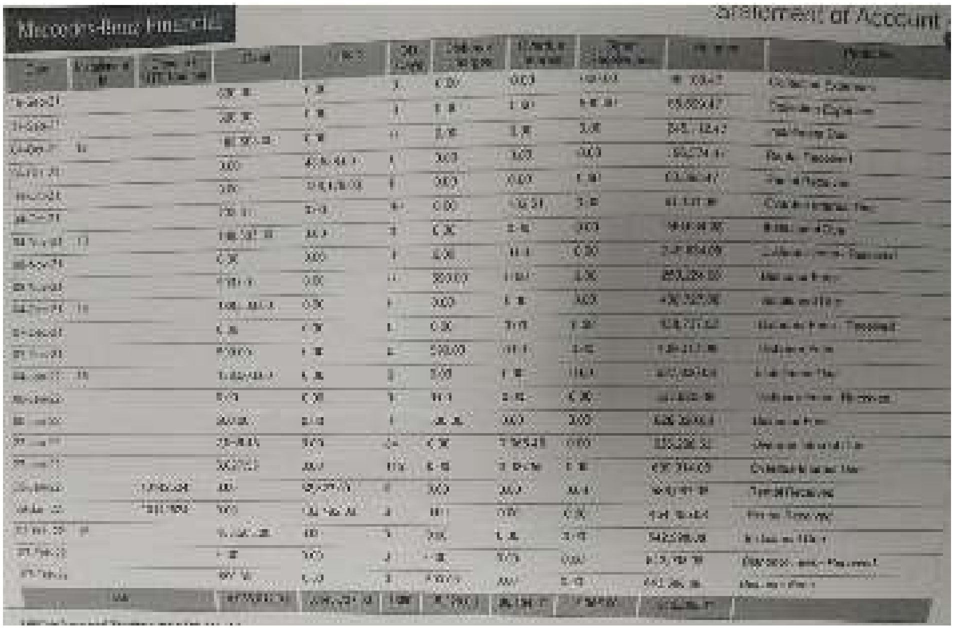

Mercedes-Benz Financial
Statement of Account


Mercedes-Benz Financial
Statement of Account



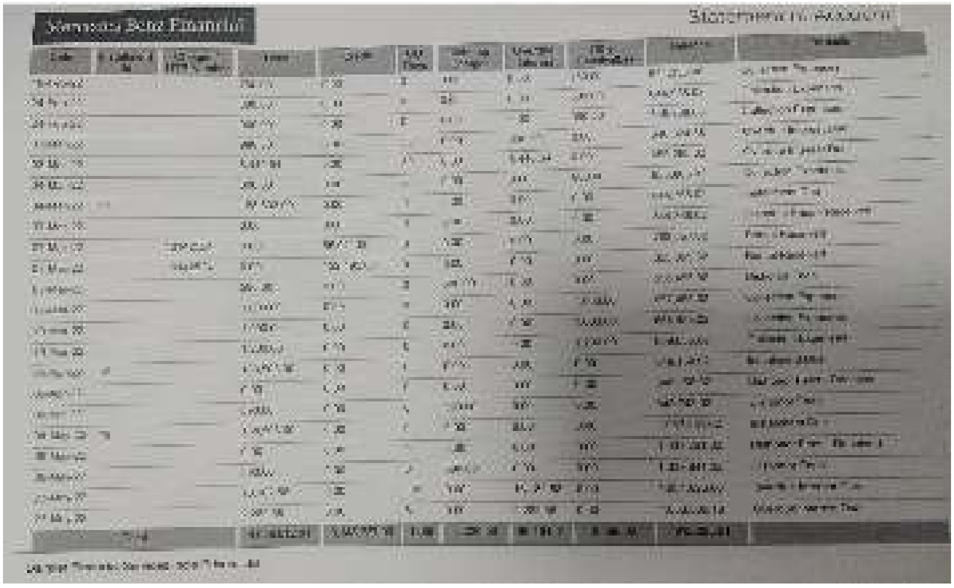
Mercedes-Benz Financial

Statement of Account

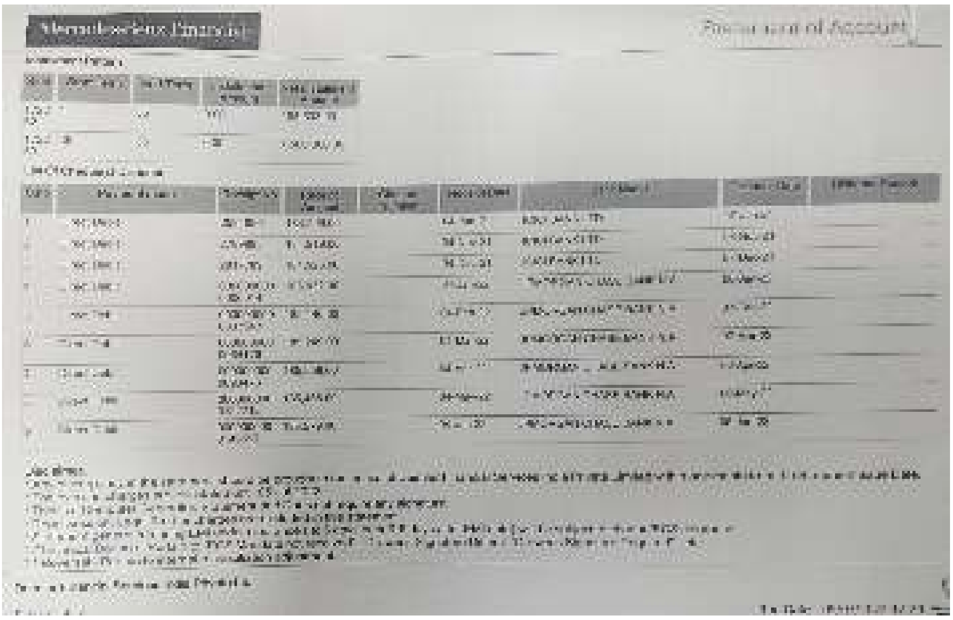


Mercedes-Benz Financial

Statement of Account




Mercedes-Benz Financial
Statement of Account



Mercedes-Benz Financial

Statement of Account

(k) Adverting to hypothecation agreement and more particularly clause 2 (iii) thereat, learned counsel submits that the applicant-NBFC is entitled to repossess said car on breach of loan agreement. This clause 2 (iii) reads as follows:

DFS India.

ii) In the event of occurrence of any breach or default by the Borrower in the performance of its obligations hereunder or any of the terms, covenants, obligations and conditions stipulated in the Loan Terms and / or the other Transaction Documents or in the event of the charge on the Assets having become enforceable for any reason whatsoever including upon the occurrence of an Event of Default, DFS India or its nominees or authorized persons shall, in case such breach or Event of Default is not remedied by the Borrower to the satisfaction of DFS India, without any notice and without assigning any reason and at the risk and expense of the Borrower and if necessary as attorney for and in the name of the Borrower, be entitled (without prejudice to any other rights and remedies) exercise such rights and remedies, including (but not limited to): (i) to enter into and upon the premises of the Borrower and/or any other person who then has possession of the Assets, (ii) to seize, recover, collect, withdraw, receive the Assets and/or any income, profits and benefits thereof without interruption or hindrance by the Borrower and/or by any person(s), (iii) to remove, and/or sell by public auction or by private contract, despatch or consign for realisation or otherwise dispose of or deal with all or any part of the Assets and enforce, realise, settle, compromise and deal with any rights or claims relating thereto without being bound to exercise any of these powers or be liable for any losses in the exercise or non-exercise thereof, (iv) to be freed and discharged and well and sufficiently saved and kept harmless and indemnified of, from and against all former and other estates, titles, claims, demands, charges and encumbrances whatsoever, or to direct the Borrower and/or other concerned person to sell, assign or otherwise liquidate, any or all of the Assets, (v) to claim the proceeds of any such sale or liquidation, (vi) to retain all amounts and/or other proceeds received or receivable by DFS India in respect of the Assets and use them, in whole or part, towards repayment / payment of all amounts in respect of the Facilities, (vii) to direct the Borrower and/or other concerned person in writing to deliver the Assets to DFS India on a date and time indicated by DFS India, in which event the Borrower shall, at its own expense:

(l) The prayer in the captioned application now is for appointment of a named employee of the applicant-NBFC i.e., one V.Senthil Kumar as receiver *inter alia* to seize and take possession of said car;

(m) As already alluded to in the opening paragraph, the captioned application has been presented in this Court under Sections 9(ii)(a)(b) and (e) of A and C Act. To be noted, Judge's Summon placed before this Court talks about these Sections. On instructions, it was submitted that a typographical error has crept in qua Judge's summon and the application may please be treated as application under Section 9(1)(ii)(d) of A and C Act for appointment of a Receiver. This submission is recorded. Captioned application is treated as application under Section 9(1)(ii)(d) of A and C Act;

5. On the above factual matrix, learned counsel for the applicant-NBFC in support of the prayer in the captioned application made submissions which are as follows:

(i) As already alluded to supra, as per clause 2 (iii) of hypothecation agreement, the applicant is entitled to repossess said car in the event of breach;

(ii) The statement of accounts placed before this Court would show that out of 36 EMIs, the borrowers have paid only 16 EMIs, that too, irregularly with delay/default and therefore, there is a clear breach;

(iii) That it is necessary to repossess said car owing to breach on the part of the respondents/borrowers;

(iv) It is necessary to appoint a named employee (V.Senthil Kumar) of the applicant-NBFC as receiver for this repossession exercise;

6. I carefully considered the factual matrix, case file and the submissions made by the learned counsel for the applicant-NBFC, I am of the considered view that the prayer in the captioned application cannot be acceded to. The reasons i.e., dispositive reasoning together with discussion are as follows:

(i) Captioned application is a pre-arbitration application.

A Section 9 application can be filed 'before, during or after' arbitration. Different parameters and determinants apply depending on when a Section 9 application is filed i.e., as to whether it is before, during or after arbitration. In cases where a Section 9 application is filed before arbitration proceedings one of the important determinants is the protagonist of the Section 9 application should be able to demonstrate manifest intention to arbitrate. This principle was first laid down by Hon'ble Supreme Court in the oft-quoted ***Firm Ashok Traders*** principle [***Firm Ashok Traders and Another Vs. Gurumukh Das Saluja and others*** reported in ***(2004) 3 SCC 155***] which was rendered by Hon'ble Supreme Court on 09.01.2004. Relevant paragraphs in ***Firm Ashok Traders*** case law are Paragraph Nos.13, 17 and 18 and the same read as follows:

> *'13. A & C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of A & C Act is to a suit. Undoubtedly, such*

application results in initiation of civil proceedings but can it be said that a party filling an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of sub- Section (1) of Section 2 of A & C Act to mean 'a party to an arbitration agreement'. So, the right conferred by Section 9 is on' a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceeding, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in M/s Sundarum Finance Ltd. v. M/s NEPC India Ltd., AIR (1999) SC 565 the doubts stand cleared and set at rest and it is not necessary that arbitral proceeding must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say 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 A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has 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 reliefs which the Court may allow to a *party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the arbitral tribunal. Under the scheme of A & C Act, the arbitration clause is separable from other clauses of the Partnership Deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application under Section 9 of A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of A & C Act.*

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17.There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in M/ s. Sundaram Finance Ltd an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In M/s. Sundaram Finance Ltd., itself the Court has said-"It is true that when an application under Section 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings". Section 9 permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word 'before' means inter alia, 'ahead of; in presence or sight of; under the consideration or cognizance of. The two events sought to be interconnected by use of the term 'before' must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or 'within sight' certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended (as M/s Sundaram Finance Ltd. puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of *each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purposes of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide 'interim measures of protection'. The order passed by the Court should fall within the meaning of the expression 'an interim measure of protection' as distinguished from an all-time or permanent protection.*

18. Under the A & C Act 1996, unlike the predecessor Act of 1940, the arbitral tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the arbitral tribunal and its being functional. During that period, the power conferred on the arbitral tribunal under Section 17 and the power conferred by the Court under Section 9 may overlap to some extent but so far as the period pre and post the arbitral proceedings is concerned the party requiring an interim measure of protection shall have to approach only the Court. The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the 'proximately contemplated' or 'manifesty intended' arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship *between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made 'before' i.e. in contemplation of arbitral proceedings. The Court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the Court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the Court to do so. The Court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms.'*

(Underlining and double underlining made by this Court to supply emphasis and highlight)

(ii) Post ***Firm Ashok Traders*** case law rendered by Hon'ble Supreme Court on 09.01.2004, large scale amendments were brought in qua A and C act on 23.10.2015 *inter alia* vide amending Act No.3 of 2016. To be noted, Act No.3 of 2016 being an amending Act was preceded by an Ordinance dated 23.10.2015 and vide the amending Act, the amendments took retrospective effect on and from 23.10.2015. For the purpose of completion of the trajectory of amendments to A and C Act, it is pertinent to mention that there was a further amendment to A and C Act by way of another amending Act being amending Act No.33 of 2019 and many provisions of amending Act No.33 of 2019 came to be notified on 30.08.2019 but we are not concerned with second amending Act viz., Act No.33 of 2019. As already mentioned, this is noticed only for the purpose of completing the narrative qua course and trajectory of the amendments to A and C Act have taken. In other words, suffice to say that in instant cases on hand, we are concerned with Section 9 of A and C Act, as it now stands post 23.10.2015;

(iii) This ***Firm Ashok Traders*** principle has now been codified and it has found statutory expression by way of sub-section (2) of Section 9 of A and C Act which kicked on and from 23.10.2015 which reads as follows:

> *'(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.'*

(iv) Some time frame has to be necessarily fixed when a contracting party comes to the Court under Section 9 of A and C Act before arbitration. Time frame has been fixed at 90 days. This is predicated not only on manifest intention to arbitrate principle it is also based on the principle that proximate cause snaps and interim order will become an order in perpetuity nullifying arbitration and ADR Mechanism {Alternate Dispute Resolution Mechanism} if no such time frame is fixed. I carefully considered the chronicle in this perspective in the case on hand. As already alluded to supra, the first EMI became payable on 04.11.2020. A perusal of statement of accounts (scanned and reproduced supra) makes it clear that over due interest became payable as early as on 04.12.2020. It may not be necessary to examine the statement of accounts in great detail. It will suffice to look at loan recall notice. As already alluded to supra, in the factual matrix i.e., paragraph where the facts have been captured, loan recall notice is dated 01.12.2021 and a scanned reproduction of the same is as follows:

16

M.ARUNACHALAM
M.NAGALAKSHMI
Advocates

Shri Venkatesh Bhavan,
1st Floor, Old No.35, New No.71,
Armenian Street, Chennai 600001
Phone:044-42041876

BY R.P.A.D.

01.12.2021

1. JSK APPLIANCES LLP
REPRESENTED BY ITS PARTNER,
DOOR NO 73A, FATHIMA
BUILDING, BEHIND SBI,
POOVATHUPARAMBU,CALICUT,
KOZHIKODE – 673008, KERALA.

2. ABDUL KAREEM
KANNIPPOYIL HOUSE,
KAKALAM PO, KOZHIKODE,
KOZHIKODE - 673661, KERALA.

Sir,

Ref:Loan Recall Notice issued on behalf of M/s. Daimler Financial Services India Private Limited for termination of Loan Agreement/Contract bearing No. 10142524 dated 26.10.2020

Sub:Payment of the entire outstanding dues of Rs. 56,49,763/- (Rupees Fifty Six Lakhs Forty Nine Thousand Seven Hundred and Sixty Three Only) as on 26.11.2021 in respect of the loan agreement under reference.

Under instructions from our Client M/s. Daimler Financial Services India Private Limited having its registered office at 5th Floor, Plot 8, Bashyam Willow Square, 9 &10, First Street, Thiruvika Industrial Estate, Guindy, Chennai - 600032, Tamil Nadu,we do hereby issue the following Loan Recall Notice to both of you:

1. Our Client states that both of you approached our Client and intended to avail financial assistance to purchase Mercedes Benz GLE30064M Passenger Car. Our Client explained entire terms and conditions of the loan agreement, which was duly read, understood and accepted by both of you. Subsequently the first of you as borrower, second of you as Co-borrower, entered into the loan cum hypothecation agreement No. 10142524 dated 26.10.2020 for Mercedes-Benz GLE30064M Passenger Car and the said loan amount has to be repaid as per the terms and conditions of the said agreement, the loan amount is Rs. 70,00,000/- and the payment details are as follows :

S.NO	CONTRACT NO.	RENTAL AMT IN RS.	TENURE	CHASSIS NUMBER	ENGINE NUMBER
1	10142524	1,88,903	35	W1N2671196M0 01161	65492080717 481

2. You addresser No.1 being the Borrower, addressee No.2 being the Co borrower are jointly and severally liable to repay the loan amount together with interest and all other dues arising of the loan agreement and your liability is co-extensive with each other.

3. However, contrary to the terms and conditions contained in the said agreement, both of you have constantly defaulted in payment of the EMIs and in spite of repeated requests, reminders and demands and despite sufficient opportunities granted to both of you to regularise your account, both of you have failed, neglected and refused to do so in spite of being fully/well aware that timely and regular payment of the EMIs is the essence of the contract. Both of you thereby failed to adhere to the financial discipline enshrined in the said loan agreement.

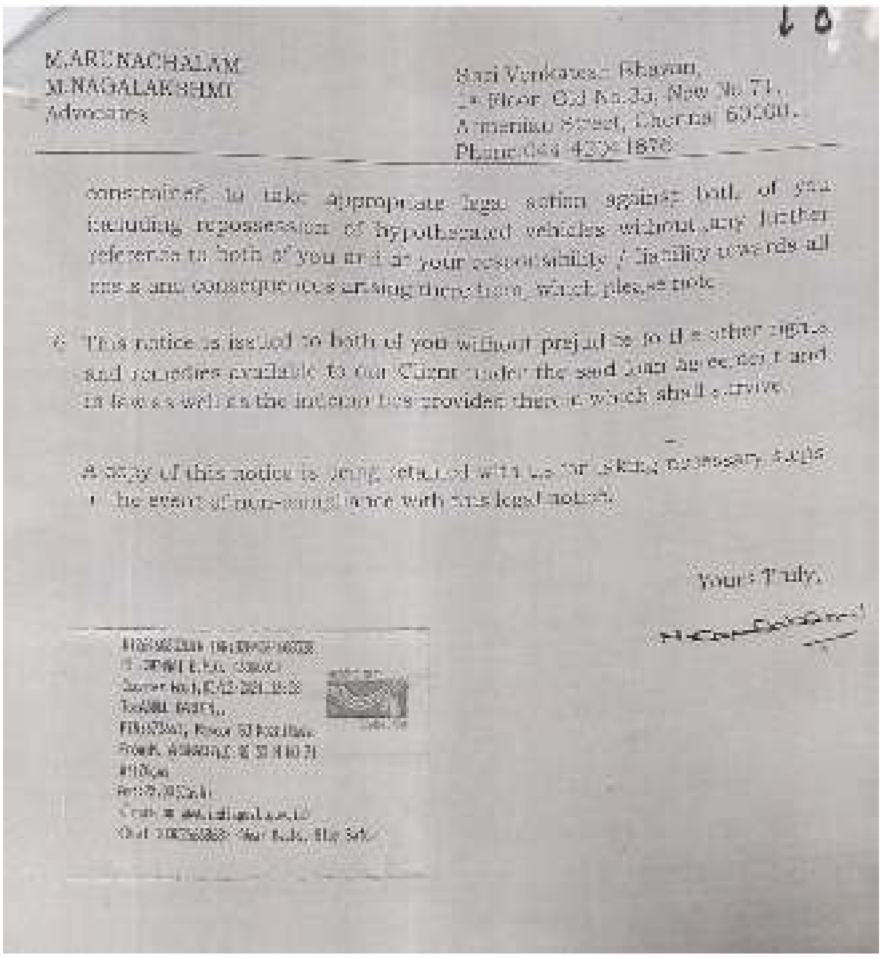
4. Hence pursuant to our Client's rights vested under the loan agreement under reference, our Client hereby terminates and rescinds the loan agreement under reference and demand the refund of entire outstanding dues (including future installments) and the outstanding payment details are as follows

SL.NO.	CONTRACT.NO.	CONTRACT DATE	OUTSTANDING AMT IN RS.	AS ON DATE
1	10142524	26.10.2020	55,19,081	26.11.2021

That as on 26.11.2021 totally a sum of Rs. 56,49,763 /-(Rupees Fifty Six Lakhs Forty Nine Thousand Seven Hundred and Sixty Three Only) is due and payable by both of you under the said loan agreement.

5. Both of you are therefore, requested and called upon to make a total payment of Rs. 56,49,763 /-(Rupees Fifty Six Lakhs Forty Nine Thousand Seven Hundred and Sixty Three Only) due, outstanding and payable as on 26.11.2021 together with accrued interest and expenses till the date of realisation within 7 days from the receipt of this notice and to comply with such requisition, failing which our Client shall be

34



M.ARUNACHALAM
M.NAGALAKSHMI
Advocates

Sri Venkatesa Bhavan,
1st Floor, Old No.35, New No.71,
Armenian Street, Chennai 600001.
Phone: 044 4239 1870

constrained to take appropriate legal action against both of you including repossession of hypothecated vehicles without any further reference to both of you and at your responsibility / liability towards all costs and consequences arising therefrom, which please note.

This notice is issued to both of you without prejudice to the other rights and remedies available to our Client under the said loan agreement and as laws as well as the indemnities provided therein which shall survive.

A copy of this notice is being retained with us for taking necessary steps in the event of non-compliance with this legal notice.

Yours Truly,

(v) The above has been mailed on 03.12.2021 (as already alluded to supra), learned counsel, on instructions, submits that it has been duly served on both the borrowers. Assuming it was served on 05.12.2021, three months therefrom elapsed in the first week of March 2022. In other words, 90 days therefrom elapsed in the first week of March 2022. Interestingly/intriguingly, a careful perusal of loan recall notice makes it clear that there is no mention about invocation of arbitration agreement;

(vi) Another interesting and intriguing event is the support affidavit which has been filed on 13.07.2022, there is no mention about invocation of arbitration agreement, mention about arbitration occurs in two places in paragraph Nos.6, 7 of support affidavit and the relevant portions read as follows:

> *'6. .... Since clause 66 of the Loan Agreement provides for Arbitration in case of dispute between the Applicant and the Respondents, the Applicant is constrained to file this Application under Section 9 of Arbitration and Conciliation Act, 1996 for appointment of Receiver to seize the subject vehicle.*
>
> *7. .... Since the respondents have defaulted to pay the installments, a dispute has arisen and the Applicant is entitled to invoke arbitration Clause 66 of the Agreement. Accordingly, the Applicant submits that it undertakes to initiate Arbitration proceedings.'*

(vii) Therefore, even now there is no invocation of arbitration agreement. Therefore, I have no hesitation in coming to the conclusion that the applicant-NBFC has not demonstrated manifest intention to arbitrate. This by itself draws the curtains on the captioned matter as it is a Section 9 the application filed before arbitration;

(viii) For the purpose of clarity and specificity, I make it clear that it is not the view of this Court that the trigger notice traceable to Section 21 of A and C Act is imperative, all that this Court's view means is that there should be something to demonstrate manifest intention to arbitrate. Otherwise, the contracting party can get an interim order of the kind sought for, seize the said car through a person said to be its employee, sell the same without referring to arbitration. Arbitration will become a complete empty formality and there may be no arbitration at all. This by itself militates against the very scope and scheme of arbitration as ADR mechanism and A and C Act. A mere vague / bald averment in the affidavit after 7 1/2 long months that the applicant-NBFC undertakes to initiate arbitration agreement (to be noted, relevant portion in paragraph Nos.6 and 7 of support affidavit have been extracted and reproduced supra is of no avail) is completely in vain. This is obviously a make believe affair. Assuming that the prayer is acceded to, thereafter what would remain for arbitration is a million dollar question. Section 9 is an aid to arbitration (before, during or after) and cannot be made a substitute to entire arbitration as an ADR mechanism;

(ix) However on a demurrer, I proceed to consider the other submissions made by the learned counsel. As would be evident from the prayer, it is for the appointment of a receiver, that too, a named employee of the applicant-NBFC. Receiver appointment is broadly governed by principles ingrained in Order XL Rule 1 of 'Code of Civil Procedure, 1908' [hereinafter 'CPC' for the sake of convenience and clarity]. The applicant-NBFC should be able to demonstrate that the property sought to be protected is under imminent danger of waste. Appointment of receiver and more so, a party receiver would arise only when the property is under imminent danger of waste. The support affidavit is bereft of any pleadings in this regard. This also goes against the applicant-NBFC;

(x) Reverting back to the argument that the applicant - NBFC is entitled to repossess said car on breach of covenant in the loan agreement owing to clause 2 (iii) of hypothecation agreement, a careful perusal of clause 8 of loan agreement more particularly sub-clauses 49.1 and 49.2 thereat makes it clear that the breach/default if any, even according to the applicant-NBFC occurred on 01.12.2021 itself, we are today in mid July of 2022 (19.07.2022) more than 7 1/2 months down the line. Clause 8 of loan agreement is captioned Events of Defaults and clause 49 and sub-clauses 49.1 and 49.2 thereat read as follows:

8. EVENTS OF DEFAULTS

49. The following acts/events, as set out below, shall each constitute an "Event of Default" by the Borrower(s) for the purposes of the Loan Agreement and the Transaction Documents:

49.1 Default (including, but not limited to, any payment default) has occurred in the performance of any covenant, condition or agreement on the part of the Borrower(s) under the Loan Agreement or on the part of any other person.

49.2 Breach of any representation, warranty, declaration or confirmation under the Loan Agreement or any other Transaction Document has occurred/ been committed and/ or the Borrower(s) has/ have committed any fraud/ failed to submit any material information as required under the Application and/ or Annex 1.

(xi) Therefore, admittedly breach occurred atleast on 01.12.2021 if not earlier. The applicant-NBFC has gone into slumber and has come before this Court in a casual and lackadaisical manner with a prayer for appointment of party receiver. This clearly militates against the scheme of A and C Act and more particularly, scheme of Section 9 thereat in the light of the aforementioned ***Firm Ashok Traders*** principle which has now been given codified and given statutory expression by way of sub-section (2) of Section 9 of A and C Act;

(xii) Assuming the applicant-NBFC invokes arbitration clause, if an arbitrator is appointed, such a prayer i.e., prayer in captioned application is well open to be made by the applicant-NBFC before Hon'ble / learned Arbitrator under Section 17 of A and C Act. To be noted, Section 17 of A and C Act also underwent a large scale amendment on and from 23.10.2015 wherein and whereby all the powers under Section 9 of A and C Act now are available to an Arbitral Tribunal. The only exception being those of the prayers where it is inefficacious and it is covered by sub-section (3) of Section 9 of A and C Act;

(xiii) As regards the prayer itself, as already delineated supra, it is for appointment of a named person said to be an employee of the applicant-NBFC as a receiver, this in my considered view militates against the very scope of receiver. Party receiver itself is an exception and it may be in cases of partition suits between coparceners but to have the named person said to be an employee of the applicant-NBFC and make a plea to arm him with an order of this Court is a prayer which I am unable to countenance. Another factor in this regard is that there is no material before this Court about the employment of the individual (qua applicant company) who has been named in the prayer but the applicant-NBFC wants this Court to appoint this individual with powers to seize said car.

7. Before this Court drops the curtains on the captioned matter and writes the concluding paragraph of this order, it is deemed appropriate to make it clear that all the rights of the applicant-NBFC are preserved / left open to have the 'Arbitral Tribunal' [hereinafter 'AT' for the sake of convenience and clarity] constituted, go before AT and make the same prayer under Section 17(1)(ii)(d) of A and C Act as the second limb of Section 17(1)(ii)(d) of A and C Act provides for appointment of a receiver by AT. If such a course is adopted by the applicant-NBFC, it is left open to AT (to be constituted, if it is so constituted) to decide the same on its own merits and in accordance with law uninfluenced by any view or opinion expressed in this order notwithstanding this being a judicial order, as all the views expressed in this order are for the limited purpose of disposal of the captioned application which is a peripheral statutory exercise under Section 9 of A and C Act. To put it differently, it will be open to the applicant-NBFC to invoke arbitration clause, to have the AT constituted and make a similar prayer *inter alia* under Section 17(1)(ii)(d) of A and C Act before the Arbitral Tribunal if so advised and if so desired. Though obvious, it is made clear that all the rights of the respondents/borrowers in the captioned application will also remain intact, uninfluenced by this

order as the captioned matter is being dismissed in the Admission Board qua Rule 8 of MHC Arb Rules.

8. Sum sequitur is, captioned application fails to pass muster in the Admission Board. Further sequitur is, it is dismissed albeit preserving a window for arbitration to the applicant-NBFC in the aforesaid manner. This Court refrains itself from imposing costs in this case.

19.07.2022

mk

M.SUNDAR, J.,

mk

Arbitration Application No.139 of 2022

19.07.2022