

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Before:

THE HON'BLE JUSTICE ARINDAM MUKHERJEE

APOT 208 OF 2025

IA NO. GA 1 OF 2025

BEEVEE ENTERPRISES & ORS.

VERSUS

L & T FINANCE LIMITED

For the Appellants	: Ms. Kruti Bhavsar (VC), Mr. Jnanada Prosad Roy, Mr. Nepesh Majhi.	 Advocates
For the Respondent	: Mr. Paritosh Sinha Ms. Shrayashee Das, Mr. Rohan Kr. Thakur,	 Advocate
Heard on	: 11.09.2025	
Judgement On	: 11th September, 2025	

ARINDAM MUKHERJEE, J.:

1. This is an appeal under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') arising out of an order dated 23rd May, 2025 passed by the Learned Arbitral

Tribunal granting an order of attachment before judgment under Section 17 of the said Act.

2. The arbitration agreement in the instant case is contained as Clause 8 of the SME Business Loan Agreement dated 22nd June, 2024 (hereinafter referred to as the said “agreement”) a copy whereof is annexed at page 15 of the stay application. The arbitration clause (hereinafter referred to as the “Arbitration agreement”) does not provide for any named Arbitrator but says that “All disputes, differences and/or claims arising out of or in relation to this Agreement shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and the same shall be referred to arbitration by a sole arbitrator to be nominated/appointed by the Lender”. The lender in the instant case means the respondent.
3. The appellants by referring the arbitration agreement say that the Arbitrator has been appointed unilaterally by the respondent which is impermissible in view of the amendment to the 1996 Act brought into effect in 2015 and the subsequent pronouncements of the Supreme Court in respect thereof. The Learned Arbitrator was ineligible to act in view of the ratio laid down in the judgments reported in **2017 (8) SCC 377 [TRF Ltd. v. Energo Engg. Projects Ltd.]** and **2020(20) SCC 760 [Perkins Eastman Architects DPC v. HSCC (India) Ltd. & Anr.]** The ratio laid down wherein has been consistently followed even thereafter.

4. On a perusal of grounds contained in the Memorandum of Appeal, it appears that the appellants have challenged the order impugned mainly on the grounds that the Arbitrator who had passed the said order was not validly appointed. Although, there is no direct assertion in any one of the grounds that the order impugned is without jurisdiction yet on a conjoint reading of these grounds, the normal corollary is that the order impugned is without jurisdiction. The appellants, however, in the stay application have admitted to have received the notice under Section 21 of the 1996 Act, the Statement of Claim, the Section 17 application, the evidence on behalf of the respondent and the order impugned which are either annexed to the stay application or to the Memorandum of Appeal. The only substantive challenge to the order impugned on merit is that the learned Arbitrator did not give an opportunity of hearing to the appellants.
5. At this juncture several recourse were open to the appellants. The appellants could have filed an application under Section 16 of the 1996 Act to challenge the jurisdiction of the Arbitrator. This course, probably was not followed as the appellants had to participate in the arbitration proceedings if the Arbitrator hold in favour of his jurisdiction leaving the appellants to challenge the award on such ground at the Section 34 stage in the event an award was made and published. It was also open to the appellants to file an application under Section 11(6) or an application under Section 14 of the 1996 Act. The appellants without adopting any

of the aforesaid course filed the appeal under Section 37 (2) (b) of the 1996 Act. The appellants, however, did not participate in the arbitration proceedings for which it can be contended that the appellants have waived their right to challenge.

6. It is apparent from the aforesaid arbitration agreement that the appointment of an arbitrator has to be exclusively by the Lender (respondent) and does not provide for any window for the borrower (appellants) to take part in the appointment procedure. The arbitration agreement has no named Arbitrator to be appointed from the side of the respondent (Lender) that gives it absolute authority to appoint an arbitrator. The appointment, therefore, has to be made by any Principal Officer of the respondent duly authorized for such purpose. In view of the provisions of Section 12(5) of the 1996 Act read with the fifth schedule thereto read in the light of the judgments in **TRF (supra)** and **Perkins (supra)** clearly demonstrate that any Principal Officer of the respondent company who had appointed the present Arbitrator had become ineligible to appoint being directly related to a party. The appointment of the Arbitrator is, therefore, void.
7. Once it is held that the appointment of the Arbitrator is void, all subsequent proceedings before the Arbitrator is nullity. The order impugned also suffers from the same invalidity.
8. Posed with this question, the respondent (lender) says that the lender is willing to go before any Arbitrator to be appointed by this Court upon

terminating the mandate of present Arbitrator. The appellants (borrowers) are also agreeable to go before an Arbitrator that may be appointed by the Court. The respondent, however, prays for an interim protection, till the arbitrator who may be appointed enters into reference particularly in view of the ensuing puja vacation.

9. The respondent says that in the instant case the petitioners had admittedly availed a loan from the respondent. There has been according to the respondent a default on the part of the appellants which resulted in the arbitration proceeding and the filing of the application under Section 17 of the 1996 Act wherein the order impugned has been passed being one for attachment before judgment based on the materials placed on record before Arbitrator. Even if, the mandate of the Arbitrator is terminated, the materials placed before the Arbitrator is on record before this Court as annexure to the stay application on considering which an interim protection can be given to the respondent. The appellants have deliberately not changed the order on merits to avoid the rigours of the finding of the Arbitrator after considering the materials on record.

The appeal is, therefore, against an order granting an interim measure under Section 17 of the 1996 Act. Under Section 17 of the 1996 Act, a party as in the instant case, the respondent applied before the Arbitrator for an interim measure for securing the amount in dispute in arbitration. This provision is *pari materia* to the provisions of Section 9 of the 1996 Act where for the same relief a party has the right to

approach the principal Civil Court of Original Jurisdiction. It is also settled position of law that a respondent can support a decree even without preferring an appeal under Order 41 Rule 22 of CPC.

10. The respondent says that a sum in excess of Rs. 10,03,656/- is due and payable by the appellants to the respondent only against defaulted installments. There is a further claim for future installments since the loan has been called of. Additional amounts thereto has accrued under the terms of the agreement. A chart in this regard with a copy to the appellants is placed before the Court and is taken on record. The appellant should secure at least a portion thereof and the parties can agitate their respective claim and counter claim before the newly appointed Arbitrator.
11. The appellant, however, says that they are not liable to secure any part of the claim in the facts of the case since the order was without jurisdiction and in any event the appellants are not in a position to pay any installment.
12. The respondent says in view of the default and the stand taken by the appellants that they are not in a position to pay any installment, this Court being the principal Civil Court applying the provisions of Section 9 of the 1996 Act should direct the appellants not to operate their bank accounts without leaving a substantial balance.

The Court while exercising jurisdiction under Section 37 and Section 9 are the same. Even if, the order of the arbitrator is held to be without

jurisdiction as he did not have the jurisdiction to enter into reference and pass the order of attachment before judgment under Section 17 of the 1996 Act yet under Section 9 of the 1996 Act, this Court can grant an interim protection till the parties agitate their respective claim and counter claim before the Arbitrator.

The provision of Order 41 of CPC allows the Appellate Court to direct security.

13. Despite pronouncement of the judgments as aforesaid holding the appointment of the Arbitrator to be void, the arbitration agreement between the parties in any event remains in subsistence. If the authority of appointment by the lender gets withdrawn then the Court becomes entitled to appoint an Arbitrator. This appointment ordinarily takes place under the provisions of Section 11(b) of the 1996 Act on an application being made by any of the parties. However, in a case where the Arbitrator has already been appointed and the Court is invited to decide upon the mandate of the Arbitrator, the Arbitrator shall be substituted by another Arbitrator in the event his mandate is terminated. This is done under Section 14 of the 1996 Act when the Arbitrator is *de jure* or *de facto* unable to perform his functions. The Court under Section 14 can appoint a substitute Arbitrator without even sending the parties to file a formal application under Section 11(b) for appointment of an Arbitrator after terminating the mandate of the Arbitrator already appointed.

14. In the instant case, the parties have agreed to the termination of the mandate and as such under Section 15, this Court is empowered to appoint a substitute arbitrator without relegating the parties to file an application under Section 11 (6) of the 1996 Act for appointment of arbitrator. This is also more acceptable proposition as the whole object of the 1996 Act is for a resolution of dispute with minimum interference of the Court. In any event, this Bench is competent to appoint an arbitrator under Section 11(6) of the 1996 Act as the delegate of the Hon'ble the Chief Justice of this Court. In view of the aforesaid, the mandate of the Arbitrator Mr. Shyam Bihari Sharma stands terminated under the provisions of Section 14 and 15 of the 1996 Act. Mr. Raj Ratna Sen, a barrister and an advocate being a member of the Bar Library Club is appointed as the Sole Arbitrator invoking the provisions of Section 15 of the 1996 Act in his place and stead to enter into reference afresh and adjudicate all disputes arising out of the agreement dated 22nd June, 2024. The arbitration proceedings shall commence de novo and the Arbitrator shall have to comply with all other requirement under the 1996 Act. The learned Arbitrator so appointed shall be entitled to a lump sum remuneration Rs.2,000,00/- in view of the ratio laid down in **2024 (4) SCC 481 [ONGC Ltd. v. Afcons Gunanusa JV.]** The remuneration shall be shared equally by the appellants and the respondent. The Arbitrator shall be entitled to secretarial assistance which along with all other

expenses in conducting the arbitration shall be borne by the parties in equal share. The venue of the Arbitration shall be at Kolkata.

15. This brings us to the next issue as to whether a Court while exercising jurisdiction in an appeal under Section 37(2)(b) of the 1996 Act which arises out of an order under Section 17 of the 1996 Act can pass an order directing security as an interim measure as prayed for by the respondent.
16. In the instant case the appeal has been preferred under the provisions of Section 37(2)(b) of the 1996 Act against an interim order passed by the Arbitrator under the provisions of Section 17(ii)(b) and (d) of the said Act. The provisions of Section 17(ii)(b) and (d) of the 1996 Act are *pari materia* with the provisions of Section 9(ii) (b) and (d) of the said Act. There are only two striking difference between the said two provisions. Application under Section 9 of the 1996 Act has to be filed before the Principal Civil Court of Original Jurisdiction which includes the high Court in exercise of Ordinary Original Jurisdiction while that under Section 17 of the said Act has to be filed before the Arbitrator. An application under Section 9 of the 1996 Act can be filed till such time an award is not put into execution under Section 36 of the said Act while an application under Section 17 of the said Act can be filed till the Arbitrator does not become functus officio. Similarly, an appeal under Section 37 lies to a Court authorized by law to hear appeals from original decree of the Court passing the order. In the instant case going by the provisions of Section 2(e)(i) of the 1996 Act, the suit could have been filed before the City Civil Court at Calcutta having

both territorial and pecuniary jurisdiction going by the provision of Sections 9 and 15 of CPC. An appeal from order or decree passed by the City Civil Court at Calcutta lies to this Court. The appellants have accepted the jurisdiction of this Court to be the appellate forum which incidentally is also the forum having jurisdiction to entertain an application under Section 9 of the 1996 Act having the territorial and concurrent pecuniary jurisdiction with the City Civil Court at Calcutta going by the facts of the instant case.

17. An issue as to lack of jurisdiction of a Court has to be taken at the threshold, as such an issue can even be waived. This is the precise reason as to why the Appellate or the Revisional Court under Section 21 of the Code of Civil Procedure, 1908 (in short 'CPC') does not entertain an objection to jurisdiction being raised for the first time before it.

In the instant case the jurisdiction of the Arbitrator has fallen for consideration in the instant appeal filed under Section 37(2)(b) of the 1996 Act due to change in law as discussed hereinabove. As discussed above, the appellants have neither invoked the jurisdiction of this Court under Section 14 or 15 of the 1996 Act nor have challenged the order of the Arbitrator on merits.

18. An appeal before a Civil Court in absence of any other procedure laid down is governed by the provisions of CPC. The power and authority subscribed to an appellate Court under CPC is very wide as provided

under order 41 Rule 24 may determine the case finally where evidence on record is found to be sufficient.

The Appellate Court under the normal situation going by the provisions of CPC can do the following depending upon the nature of the order appealed against:-

- i) If the appeal is against a final order disposing of an application the Appellate Court can-
 - a)** Set aside the order and remand back the matter for hearing.
 - b)** Set aside the order and take up to itself the responsibility to dispose of the appeal and the application wherefrom the order under appeal emanates.
 - c)** Modify the order under appeal and can relegate the outstanding issues to the Court or forum against the order of which the appeal has arisen or can by modifying the order dispose of the appeal and the application the order wherein is assailed in the appeal.
- ii) If the appeal arises out of an interim order passed in an application then the Court can-
 - a)** Set aside the order as a whole and send the parties to the Court/forum against whose order the appeal arises for final adjudication.

b) Modify the order and relegate the parties to the Court/forum against whose order the appeal has been preferred for final decision on the outstanding issues.

iii) In a case where the final or the interim order is challenged on the ground of jurisdiction of the Court/forum from the order whereof the appeal emanates, then the Court can set aside the order and relegate the parties to proceed before the appropriate forum. If the appeal is against an interim order, then the Appellate Court in an appropriate case after considering the factual aspect of the matter can pass certain order or direction exercising its inherent power to strike a balance between the parties till they finally agitate the matter before the Competent Court/forum. This power has to be, however, examined with great caution.

19. The applicability of CPC to an arbitration case before the Court is although not excluded like a proceeding before the Arbitral Tribunal as provided in Section 19 of the 1996 Act but there remains a doubt as to which provisions are applicable since the reference by a Bench of the Hon'ble Supreme Court as in the case reported in **2017(2) SCC 37 [Mahanagar Telephone Nigam Ltd. v. Applied Electronics Ltd.]** upon hearing disagreed with the ratio laid down in **2002 (5) SCC 510 [ITI Ltd. v. Siemens Public Communications Network Ltd.]** wherein it was held that provisions of CPC are applicable to arbitration proceedings before the

Court to a Larger Bench is still pending. This has also cast a doubt about the view expressed by the Hon'ble Supreme Court in the judgment reported in **2007(6) SCC 798 [Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation & Ors.]** holding that principle of Order 39 Rule 1 and 2 are applicable where a party is seeking injunction under Section 9 of the 1996 Act in accordance with the provisions of Specific Relief Act, 1963. The applicability of the provisions of CPC to arbitration proceedings before the Court during the pendency of the above reference again fell for consideration in the judgment reported in **2019 (8) SCC 112 [Pam Developments (P) Ltd. v. State of West Bengal]** wherein it has been laid down that the provisions of CPC will be followed as a guidance whereas the provisions of the Arbitration Act are essentially to be applied first and the Court is also to see that the provisions of the Arbitration Act is not rendered inapplicable. This is more so, as the Arbitration Act is a self-contained Code but no procedure for hearing of the appeal arising from orders or awards have laid down in the said Act.

The ratio laid down in **Pam Development (supra)** has been considered and appeared even in the judgment reported in **2025(4) SCC 641 [Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)]**. The provisions of CPC are applicable to arbitration proceeding before Court to the extent as held in **Pam Development (supra)**.

20. Thus, even though the reference as to applicability of the provisions of CPC to arbitration proceedings before Court is pending in the reference but for the ratio laid down in Pam Development (supra) and ECI SPIC (supra) it can be said that provisions of CPC can be used as a guidance without rendering the provisions of 1996 Act inapplicable and there is no inconsistency between the two provisions.

21. This gives rise to an ancillary question as to whether in absence of an application under Section 9 of the 1996 Act, this Court whether in an appeal under Section 37(2)(b) of the said Act pass an order directing the appellant to secure any amount. The answer to this question lies in the nature of the order appealed against. It has one part which relates to jurisdiction of the Arbitrator to pass such order, the other part relates to the merits of the order based on facts of the case. It is correct as discussed above that ordinarily Court while setting aside the order in appeal on jurisdiction issue does not pass any further order except in an appropriate case. The appellants are all either residing or working for gain or carries on business outside the jurisdiction of this Court. The said agreement clearly provides in Clause 3.2(d) that the respondent can call upon the appellants to provide for security to secure the loan. The appellants have asked for stay of the order impugned. Even if the order is set aside on the ground of jurisdiction the Court while disposing the appeal impose condition in exercise of powers under Order 41 of CPC which is not inconsistent with any of the provisions of 1996 Act or the materials on

record. The respondent is a Non-Banking Financial Company which operates on the basis of the license issued by the Reserve Bank of India (RBI) under Section 45JA of the Reserve Bank of India Act, 1949. In case of default of any loan, the respondent is accountable to several statutory authorities and banks. The Court, therefore, even in the absence of any application under Section 9 of the 1996 Act can pass necessary direction to the appellants to furnish security.

22. Applying the provisions of Section 9 of the 1996 Act when the order under appeal relates to money claim and substantial material are on record, I am inclined to direct the appellants not to operate the bank accounts, the details whereof are provided in the order under appeal, without leaving a balance sum of Rs.2,50,000/- until further orders being passed by the Arbitral Tribunal by holding that the respondent has been able to make out a prima facie case and the balance of convenience and inconvenience is in favour of the respondent.

23. In applying the provisions of Section 9 of the 1996 Act, the rigours of Order 38 Rule 5 or Order 39 Rule 1 and 2 of CPC will not come in the way as Section 9 of 1996 Act provides for interim measure, the 1996 Act is a self-contained Code and that the provisions of the 1996 Act are to be applied first as held in Pam Development (supra). There is also no jurisdictional issue as this Court has the competence to hear an application under Section 9 of the 1996 Act on considering the territorial jurisdiction and pecuniary limit involved in the case.

24. In the aforesaid facts and circumstances, the appellants and each one of them are restrained by an order of injunction from operating its bank accounts, the particulars whereof are provided at Page 11 of the Memorandum of Appeal without leaving an aggregate balance of Rs. 2,50,000/-. The appellants may choose to keep the said sum of Rs. 2,50,000/- in one single account or in part in different accounts to aggregate value of which is Rs.2,50,000/- until further orders passed by the Learned Arbitrator.
25. The appeal and the connected application accordingly stand disposed of.
26. Urgent photostat certified copy of this judgment be supplied to the parties, if applied for, upon compliance of all requisite formalities.

(ARINDAM MUKHERJEE, J.)