M/S. Sundaram Finance Limited Vs Mr. P.C. Benny

Court: Madras High Court

Date of Decision: April 9, 2013

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 21, 36, 82, 84, 9
Civil Procedure Code, 1908 (CPC) â€" Order 18 Rule 5
Contract Act, 1872 â€" Section 172, 173, 174, 175, 176
Partnership Act, 1932 â€" Section 69(3)

Hon'ble Judges: Vinod K. Sharma, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Vinod K. Sharma, J.
This application under Order 14 Rule 8 of O.S. Rules read with section 9 of Arbitration and Conciliation Act, 1996

has been filed for appointment of an Advocate Commissioner to seize and deliver a 2007 Model TATA INDICA bearing Chassis No.

600142CSZP49776 and Engine No. 475ID105CSZP48351 and Registration No. KL 41 9951 to the custody of the applicant. The prayer is also

made to obtain Police aid and to break open the premises. The question to be determined in this case is ""whether the provision of section 9 of the

Arbitration and Conciliation Act, can be invoked to use the High Court as a Recovery Agent by Finance Companies/Banks to seize the vehicle ex-

parte, without giving an opportunity of hearing to the respondent/ borrower, by seeking appointment of Advocate Commissioner, to seize the

vehicle even without serving notice of petition along with the documents, so as to enable the borrower to know the reason for passing this extreme

order of seizure.

2. Section 9 of the Arbitration and Conciliation Act, 1996 reads as under:

9. Interim measures etc. by Court.-

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

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

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any

question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any

party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for

the purpose of obtaining full information or evidence;

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

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

3. Reading of the Section 9 of the Arbitration and Conciliation Act, 1996, shows that power u/s 9 can be exercised before, during arbitral

proceedings or at any time after passing arbitral award, but before it is enforced in accordance with section 36 of the Arbitration and Conciliation

Act, 1996, the jurisdiction can be exercised for preservation, interim custody or sale of any goods which are subject matter of arbitration.

4. The decision of this Court that jurisdiction u/s 9 cannot be exercised before commencement of arbitral proceedings was set aside by the

Hon''ble Supreme Court in M/s. Sundaram Finance Ltd. vs. M/s. NEPC India Ltd. (AIR 1999 SC 564) wherein the Hon''ble Supreme Court was

pleased to lay down as under:

17. In our opinion this view correctly represents the position in law, namely, that even before the commencement of arbitral proceedings the Court

can grant interim relief. The said provision contains the same principle which underlies Section 9 of the 1996 Act.

18. Our attention was also drawn to the case of (Die Channel Tunnel Group Ltd. and France Manche S.A. v. Balfour Betty Construction Ltd. and

Ors. [1992] 2 Lloyd''s Law Reports) dealing with question of the jurisdiction of the England Court to grant an interim injunction in a case where

the parties have agreed that the disputes shall be settled by arbitration. The Court of Appeal referred to Section 12(6) of the Arbitration Act, 1950

which provided as follows:

The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of - (h) interim injunctions

or the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the High Court....

Construing this Staughton LJ observed as under:

In my view this power can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the

applicant intends to take the dispute to arbitration in due course. Whatever the meaning of ""reference"" to Section 12(6)(h) (and it is not always

easy to determine the precise meaning of the word in arbitration statutes) I would hold that the power of the Court in such a case would be

exercised for the purpose of and in relation to a reference.

We are in respect agreement with the aforesaid observations which are in conformity with the view which we have taken in construing Section 9 of

the 1996 Act.

19. It was submitted by Mr. Subramaniam that even if the Court can exercise jurisdiction u/s 9 before the arbitral proceedings have commenced

the party seeking to invoke Section 9 must express a manifest intention to arbitrate. The learned counsel submitted that this intention can take the

following forms:

(a) In an application u/s 9, the party would have to state that it unequivocally relies on the arbitration agreement and makes an averment that it

would invoke the arbitration Clause;

(b) At the time when the Court passes an interim order u/s 9, an express undertaking is given by the party before the Court that it would invoke the

arbitration clause forthwith and within a fixed period; and

(c) a notice invoking arbitration clause should have been issued to the opposite party. It was contended that mere filing of an application u/s 9 was

not sufficient to establish manifest intention to this extent.

20. When a party applies u/s 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is

also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking

place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application u/s 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 if, at the time

when the application u/s 9 is filed, the proceedings have not commenced u/s 21 of the 1996 Act. In order to give full effect to the words ""before or

during arbitral proceedings"" occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the

opposite party before an application u/s 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention

to have the dispute referred to arbitral tribunal, but a situation may so demand that a party may choose to apply u/s 9 for an interim measure even

before issuing a notice contemplated by Section 21 of the said Act. If an application is so made the Court will first have to be satisfied that there

exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the

jurisdiction to pass orders u/s 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to

ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction u/s 9 can pass conditional order

to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral

proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application u/s 9 merely because no notice has

been issued u/s 21 of the 1996 Act.

21. There is another aspect which calls for our attention. Section 82 of the 1996 Act gives the High Court power to make rules consistent with the

Act. We were informed that all the High Courts have not so far made rules. Whereas the Section 84 gives the Central Government power to make

rules to carry out the provisions of the Act, the High Court should also, wherever necessary, make rules. It would be helpful if such rules deal with

the procedure to be followed by the Courts while exercising jurisdiction u/s 9 of the Act. The rules may provide for the manner in which the

application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the

Courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory

disposal of arbitration cases.

The Hon''ble Supreme Court held that while passing an order, Court should ensure that effective steps are taken to commence the arbitral

proceedings, the Court while exercising jurisdiction u/s 9 of the Act, can pass conditional order to put the applicant to such terms. The intention of

Hon''ble Supreme Court therefore was that this jurisdiction should be used sparingly that too with conditions.

5. The Hon''ble Delhi High Court in National Building Construction Corporation Ltd. vs. IRCON International Ltd. (1997 (Suppl.) Arb. L.R. 516)

was pleased to lay down as under:

16. Besides, Section 9 of the Act is discretionary. This discretion cannot be exercised as a matter of course. The petitioner as also the respondent

are both public sector undertakings. It is not even shown, though averred in the petition, how a fraud in connection with the bank guarantees in

question, of which the bank was or is aware, has been played and how the encashment of bank guarantees would result in irretrievable loss or

injustice to the petitioner in case the bank guarantees are allowed to be encashed on the terms stipulated in them. No case of fraud, let alone of

egregious nature'''', has been made out. Learned counsel for the petitioner has also failed to satisfy me that there would be no possibility

whatsoever of the recovery of the amount from the respondent/beneficiary by way of restitution.

6. The Hon''ble Division Bench of Andhra Pradesh High Court in Sai Priya Construction Company vs. K. Anantha Kumari Satya Raju and

another (2006(1) Arb. L.R. 569 (AP) (DB) was pleased to lay down that any application filed u/s 9 of Arbitration and Conciliation Act, 1996, no

orders of permanent in nature can be passed and for this purpose, had placed reliance on the judgment of the Hon''ble Supreme Court in the case

of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., and further held as under:

21. That a part, the Court below had made a reference of the decision rendered by the apex Court in Firm Ashok Traders v. Gurumukh Das

Saluja. In the said decision, Their Lordships of the apex Court, while dealing with the scope of Section 9 of the Act, held that the expression

interim relief"" that is sought for by a party, or granted by the Court, shall fall within the meaning of the expression ""an interim measure of

protection."" Their Lordships clarified that there is clear distinction between ''permanent protection'' and ''interim protection.''

22. Their Lordships of the apex Court further observed:

...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 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.

23. It was further observed by Their Lordships, with caution:

If arbitral proceedings are not commenced within a reasonable time of an order u/s 9, the relationship between the order u/s 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.

24. From the above, it is abundantly clear that the relief, which was granted, as an interim protection, shall remain as an interim measure only but

shall not be allowed to continue to an unreasonable extent and as such, the arbitral proceedings shall commence within a reasonable period from

the date of the order passed u/s 9 of the Act. it is further obvious that if the said arbitral proceedings, as contemplated under the agreement, did not

commence within a reasonable period from the date of the interim order passed u/s 9 of the Act, the relationship between the order passed u/s 9 of

the Act and the actual arbitral proceedings would cease and the order can no longer be treated as the one passed ''before'' the arbitral

proceedings. What is the reasonable period for the commencement of arbitral proceedings from the date of passing of interim order u/s 9 of the

Act would depend upon the facts and circumstances of each case.

25. In other words, the orders passed u/s 9 of the Act being temporary in nature would remain as temporary and wither away by lapse of time, if it

is unreasonable.

26. In this regard. Their Lordships of the apex Court further observed as under:

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.

27. Their Lordships of the apex Court further observed:

The Court may also while passing an order u/s 9 put the party on terms and may recall the order if the party commits breach of the terms.

7. The Hon''ble Delhi High Court in the case of Uppal Eng. Co. (P) Ltd. vs. Cimmco Birla Ltd. (2005(2) Arb. L.R. 404 (Delhi) was pleased to lay

down as under:

13. It is well led that an order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution

as it may be likely to ruin the reputation of the parties against whom the power is exercised. The Court must act with utmost circumspection before

issuing an order of attachment and unless it is clearly established that the defendant, with intent to obstruct or delay the execution of the decree that

my be passed against him, is about to dispose of whole or any part of his property. An attachment before judgment is not a process to be adopted

as a matter of course because the suit is yet to be tried and the defense of the defendant is yet to be tested. At that juncture the relief which is

extraordinary, could be granted only if the conditions for its grant stands satisfied.

8. The Hon''ble Supreme Court in Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others, was pleased to lay down as

under:

12. The effect of the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991 admittedly executed between the parties and the

rights and obligations flowing therefrom are really matters for decision by the Arbitral Tribunal. We do not think that it is for us, at this interlocutory

stage, to consider or decide the validity of the argument raised on behalf of the appellant-company that the agreement between the parties was co-

terminus with the mining leases and the respondent firm could not terminate the agreement so long as the mining leases in its favour continued to be

in force. Nor do we think it proper to decide the sustainability of the argument on behalf of the respondent firm that it was mainly an agency

agreement for a fixed term and on the expiry of the term, no right survives in the appellant-company unless of course the respondent firm agreed to

an extension of the period. We leave that question open for decision by the Arbitral Tribunal.

13. Prima facie, it is seen that the mining lessee had entered into an agreement with the appellant-company for the purpose of raising the iron ore

from the area covered by the mining lease. The term of the original agreement expired and this was followed by two extensions for three years

each. Thereafter, the respondent firm had refused to extend the agreement and claims that it wants to do the mining itself. Prima facie, it is not

possible to say that the High Court was wrong in thinking that it may be a case where an injunction could not be granted in view of the provisions

of the Specific Relief Act. Here again, we do not think that we should pronounce on that question since that again will be a question for the

arbitrator to pronounce upon. Suffice it to say that the position is not clear enough for us to assume for the purpose of this interlocutory proceeding

that the appellant is entitled to specifically enforce the agreement dated 14.3.1991 read in the light of the Power of Attorney dated 25.3.1991. Of

course, this aspect will be again subject to the contention raised by the appellant-company that the agreement created in his favour was co-

terminus with the mining lease itself. But, as we have stated, these are the aspects to be considered by the Arbitral Tribunal. We refrain from

pronouncing on them at this stage.

14. We think that adequate grounds are not made out by the appellant at this interlocutory stage for interfering with the order of the High Court. In

that view alone, we consider it proper to decline to interfere with the order of the High Court and leave the parties to have their disputes resolved

in terms of the arbitration agreement between the parties.

15. The argument that the power u/s 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act

cannot control the exercise of power u/s 9 of the Act cannot prima facie be accepted. The reliance placed on Firm Ashok Traders and Another

etc. Vs. Gurumukh Das Saluja and Others etc.,] in that behalf does not also help much, since this Court in that case did not answer that question

finally but prima facie felt that the objection based on Section 69 (3) of the Partnership Act may not stand in the way of a party to an arbitration

agreement moving the court u/s 9 of the Act. The power u/s 9 is conferred on the District Court. No special procedure is prescribed by the Act in

that behalf. It is also clarified that the Court entertaining an application u/s 9 of the Act shall have the same power for making orders as it has for

the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the

grant of an interim injunction at the threshold are attracted even while dealing with an application u/s 9 of the Act. There is also the principle that

when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition

for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the

provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power u/s 9 of the Act is not controlled by the Specific

Relief Act has been taken by the Madhya Pradesh High Court. The power u/s 9 of the Act is not controlled by Order XVIII Rule 5 of the CPC is

a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to

say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are

prima facie inclined to the view that exercise of power u/s 9 of the Act must be based on well recognized principles governing the grant of interim

injunctions and other orders of interim protection or the appointment of a receiver.

9. Again, the Hon''ble Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.,) has held as under:

10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation,

interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may

appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by

well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de

hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the

Section itself brings in, the concept of ''just and convenient'' while speaking of passing any interim measure of protection. The concluding words of

the Section, ""and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it"" also

suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a

party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the

ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out

the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures

u/s 9 of the Act.

10. The Hon''ble Division Bench of this Court in In In House Productions Pvt. Ltd. Vs. Meediya Plus and Ms. Sri Priya, held that grant of

injunction was a discretionary relief and while granting such injunction, the Court is required to satisfy itself that there is a prima facie case in favour

of the party asking for injunction and irreparable injury or damage would be caused if injunction is not granted and balance of convenience lies in

favour of the applicant.

11. This Court in NEPC India Ltd., formerly NEPC Micon Ltd. Vs. Sundaram Finance Ltd., was pleased to lay down as under:

A reading of Sec. 9 of the Arbitration and Conciliation Act shows that no substantial relief could be granted under Sec. 9 of the Act and this

section could be used only in cases where protection orders are to be passed pending arbitral proceedings. So long as there is no proceedings

under the Act to resolve the case, Sec. 9 of the Act cannot be invoked. For getting an interim measure, there must be a substantial relief, atleast for

appointment of an arbitrator or some other substantial relief contemplated under the Act. The relief sought for by the respondent is that he wanted

to restore the custody of the machinery. That cannot be the relief that could be granted under Sec. 9 of the Act. It is also clear from the other

averment in the original petition before the lower court that what the respondent wanted was to exercise his right of ownership under the Hire

Purchase Agreement and not a relief that is contemplated under Sec. 9 of the Act.

12. It may be mentioned here that though finding of the Hon''ble Single Judge that Sec. 9 cannot be invoked as long as there are no proceedings

under the Act to resolve the case, stands overruled, but the view that no substantial relief can be granted u/s 9 of the Act, still holds good.

13. The Hon''ble Division Bench of this Court in Cholamandalam DBS Finance Ltd. Vs. Sudheesh Kumar, was pleased to lay down following

guidelines for exercise of power u/s 9 of the Arbitration and Conciliation Act.

25. The guidelines are:

(a) If the pleadings in the affidavit make out that it is just and convenient to grant interim orders, and if, prima facie, the balance of convenience is in

favour of the applicant, then an ex parte order appointing an advocate commissioner may be passed, but simultaneously notice shall be ordered to

go to the respondent indicating the date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the

Court to also serve private notice on the respondents personally at the time when the vehicle is seized. But, an affidavit must be sworn to by the

Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was

not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

(b) After the advocate commissioner reports to the Court that the vehicle has been seized, it shall be in the custody of the applicant. This custody is

on behalf of the Court, i.e., the applicant will be holding it in custodial egis.

(c) Of course, if even after notice, the borrower does not appear or if it appears to the Court that the borrower is deliberately evading notice, then

it is open to the applicant to pray for such reliefs as are necessary, which may even include the sale of vehicle and the matter may be heard ex parte

and orders passed in exercise of discretion of Court.

(d) The application shall not be closed without hearing the other side after notice is served. Before closing the application, the Court shall also

ascertain whether the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then orders shall be passed

putting the applicant on terms as laid down in Sundaram Finance''s case (cited supra), because section 9 depends on a close nexus with the

initiation of arbitral proceedings;

(e) As regards the expenditure incurred for keeping the vehicle in custody, the applicant shall bear it until the respondent is served and appears.

After that, the Court shall hear the parties and pass orders.

(f) The remuneration for advocate commissioners appointed by this Court shall be commensurate with the work done, since the financiers will shift

this burden only on the already beleaguered borrower. One other advantage in hearing the respondent before the closing of application is the clue

that we get from Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., cited supra, where the Supreme Court

encouraged the parties to suggest a solution. If that is really possible, then even at the initial stage, the entire matter will come to a happy resolution.

Therefore, it is not only in the interest of natural justice and fairness, but also as a pragmatic measure that we have laid down these guidelines.

14. The settled law referred to above, is that power u/s 9 of the Arbitration and Conciliation Act, 1996 can be exercised by a party to arbitration

agreement, before arbitration, during arbitration or even after passing of an award. Such interim measures are governed by the settled principle of

law for grant of interim injunction, appointment of Receiver or attachment of the property etc.

15. The object of Sec. 9 of the Arbitration and Conciliation Act is only an interim measure pending commencement of proceedings or in the course

of proceedings and the relief becomes executable only after the award. It is intended to protect the subject matter of the proceedings and to secure

the interest of the party claiming such relief. It is not to give substantial relief, because such relief can be allowed only as a decree or final relief.

16. From the above, it is clear that provisions of section 9 of the Arbitration and Conciliation Act can be invoked for:-

(i) detention, preservation or inspection of property which is subject matter of dispute in arbitration. It also authorises Court to pass an order for

preservation and interim custody. This interim custody therefore has to be a judicial custody. Therefore, Receiver can be appointed to retain the

custody of the vehicle pending arbitration proceedings.

and

(ii) At the time of passing order under Sec. 9, an express undertaking is required to be given by the party before the Court that it would invoke

arbitration clause forthwith within a fixed period.

(iii) Notice invoking arbitration class should have been issued to the opposite party, as mere filing of section 9 application is not sufficient to

establish manifest intention to this extent.

(iv) The Court before ordering interim direction, has to be satisfied that their exist arbitration agreement and the applicant intends to take dispute to

arbitration. It is thereafter, the Court can pass orders u/s 9 of the Act by giving such interim protection as facts and circumstances so warrants

meaning thereby that the applicant has to seek interim relief leaving it to the Court to pass appropriate orders on application for interim measures.

(v) That the respective High Court should make rules consistent with the Arbitration and Conciliation Act to deal with the procedure to be

followed by the Courts while exercising jurisdiction u/s 9 of the Act.

(vi) That order of attachment or appointment of Receiver before judgment is a drastic remedy and power has to be exercised with utmost care and

caution, as it is likely suffer reputation of the party against whom power is exercised.

(vii) That the grant of interim prohibitory injunction or interim mandatory injunction are governed by well known rules and therefore, section 9

cannot be read de-hores the accepted principles that governed grant of interim measures.

17. The party therefore is required to approach this Court by filing appropriate application for grant of relief like interim custody of the vehicle or

sale of any goods and, it is left to the discretion of the Court, in a given circumstances as to whether the Court should order the respondent to

surrender the vehicle, appoint a Receiver, who may even be an Officer of the Company, to recover the vehicle with the help of the police or even

direct the respondent to furnish security for the amount in dispute or surrender the vehicle.

18. The practice of the Finance Companies/Banks to seek appointment of an Advocate Commissioner to seize the vehicle cannot be said to be

remedy envisaged under the Act. Though in the given circumstances, it is left to the discretion of the Court to appoint an Advocate Commissioner

to seize the vehicle with the police help, as the custody of the vehicle is to be ""legal custody"". The procedure adopted in seeking appointment of

Advocate Commissioner without issuing any notice to the respondent, to seize the vehicle amounts to misusing the jurisdiction of this High Court to

act as Recovery Agent, on behalf of the Finance Companies/Banks.

19. It may be noticed here that earlier, to enforce the terms of the agreement, private bank/finance companies used to appoint recovery Agents to

seize the vehicle on default in payment of monthly instalments, without opportunity to the borrower to contest the right by placing their side of story.

20. This action of the bank was disapproved by the Hon''ble Supreme Court in Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others, , laying

down as under:

16. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the

vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be

discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have

committed default in payment of the instalments instead of taking resort to strong-arm tactics.

28. In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans or seizure of vehicles could be done only

through legal means. The banks cannot employ goondas to take possession by force.

21. The Hon''ble Supreme Court in Citicorp. Maruti Finance Ltd. Vs. S. Vijayalaxmi, was pleased to lay down as under:

27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not

entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by

Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in

violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down.

22. After the law was laid down of the Hon''ble Supreme Court, Modus Operandi now adopted by the Financial Institution/the banks is to move

an application u/s 9 of the Arbitration and Conciliation Act, to get an interim order for seizure of the vehicle with the help of the Police.

23. In this case, even notice is not served on the respondent, though amount in arbitration is secured by hypothecation of the vehicle, and is

guaranteed by the guarantor.

24. The Hon''ble Madhya Pradesh High Court in Bank of India vs. State of Madhya Pradesh and others (1990(2) BC 321) held that the Bank is

secured creditor, in view of hypothecation. The Hon''ble Madhya Pradesh High Court has laid down as under:

6. In view of the contentions referred earlier, the learned counsel Shri Shard referred to a catena of decisions, which are as follows: The Bank of

Bihar Vs. The State of Bihar and Others, . In this case, after referring to sections 172 to 190 of the Contract Act in paras 7 and 8, their Lordships

held:

In our judgment the High Court is in error in considering that the rights of the pawnee who had parted with money in favour of the pawnor on the

security of the goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other

creditors of the pawnor without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of ordinary

nature on the goods and so long on his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After

the goods had been seized by the Government it was bound to pay the amount due to the plaintiff and the balance could have been made available

to satisfy the claim of other creditors of the pawnor. But by a mere act of lawful seizure.

the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government

resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff in for such amount which the plaintiff

in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt.

The plaintiffs right as a pawnee could not be extinguished by the seizure of the goods in its possession in as much as the pledge of the goods was

not meant to replace the liability under the case credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction

of the liability of the pawnor, the Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was

entitled only to the surplus money after satisfaction of the plaintiffs dues.

(ii) The State Bank of Hyderabad, Secunderabad Branch Vs. Susheela and Others, . This is a Full Bench, decision which supports the same

proposition. Bank of India Vs. Binod Steel Ltd. and Another, The petitioner Bank had advanced loan to respondent company on the

hypothecation of its machinery which under the terms of the contract was allowed to remain with the company. The company later failed to pay

wages of its workers and the payment of wages Inspector having moved the Additional Tahsildar for recovering the amount, the Additional

Tahsildar took steps to attach the machinery and other moveables and to sell the same for recovery of the amounts due. The Bank objected to the

act on taken by the Additional Tahsildar. In this Division Bench decision, placing reliance on the decision in The Bank of Bihar Vs. The State of

Bihar and Others, it was held

The bank stood in the position of secured creditor. ""The possession of the company was for on behalf of the petitioner; that the legal possession

and custody of the machinery must be held to be with the petitioner though physical possession was with the company; that the petitioner was in

the position of secured creditor and that the Authorities has no right to attack and sell the machinery without satisfying petitioner''s debit.

(iii) Still another decision referred in State Bank of Indore Vs. The Additional Tehsildar-Cum-Sales Tax Officer and Others, . There is the question

for consideration was as to construction of section 33-C introduced in the M.P. General Sales tax Act, 1958 from March 1976 by the Amending

Act No. 20 of 1976, namely, whether the charge for arrears of sales tax over the properties of the dealer brought into effect by this section would

affect a mortgage of pledge created by the dealer before 15th March, 1976. On facts of that case, it was held that section 33-C does not affect

the rights created in the petitioner''s favour by mortgage or pledge before 15th March, 1976 and this rights cannot, be sold for recovery of Sales

tax dues of the dealer.

7. In view of the above discussion of facts and law, though the action taken by the N.I.D. u/s 22 of the M.P. M.V. Taxation act was illegal, yet

because of the special lien and hypothecation, the Bank being a secured credit, it has first change and was entitled to sell the bus and appropriate

the sale proceeds first towards its dues since hypothecation lien is dt. 16.12.73, whereas the amended section 22 came into force w.e.f. i.e.,

subsequent transaction. The Civil Court had already decreed, on 23.7.81, the Bank''s claim for Rs. 14,870.35 and interest pendente lite and future

from the date at the rate of 14% per annum. The bus has already been sold and the sale has been confirmed.

The decreetal dues of the Bank are said to be to the tune of Rs. 20,533.03 which is entitled to be reimbursed.

25. This Court in R. Justin Arulappa Vs. R. Xavier Arulappa and Gerayana Rani, was pleased to lay down that Advocate Commissioner cannot

be appointed mechanically without going into the questions of dispute. For the purpose of taking custody, the proceedings should be normally

governed by the principle of appointment of receiver and such appointment cannot be ordered mere apprehension without there being any other

material on record justifying the action of seizing the vehicle from the custody of the owner, specially when the adjudication of dispute before the

Arbitrator is yet to be commenced or is just commenced where the defence of the other party is yet to be looked into, to form prima facie view

about the merit of contention.

26. In these background of the settled matter, it is necessary to note the facts of this application.

27. It is pleaded case of the applicant that the respondent was advanced loan to purchase a 2007 Model TATA INDICA bearing Chassis No.

600142CSZP49776 and Engine No. 475ID105CSZP48351 and Registration No. KL 41 9951. The parties entered into loan agreement, dated

18.4.2007. The loan was also guaranteed by Ms. Jemy Benny. The total loan advanced to the respondent was Rs. 3,96,000/- (Rupees three lakhs

ninety six thousand only) which was repayable in 48 monthly instalments commencing with effect from 18.4.2007 and ending on 17.3.2011. The

vehicle was hypothecated in favour of the applicant.

28. It is admitted case that the respondent defaulted from 27th instalment which fell due on 17.6.2009 and because of default, the respondent

recalled total loan amount which according to the applicant Rs. 2,42,400/- (Rupees two lakhs forty two thousand and four hundred only) as on

15.4.2011.

29. It is submitted that the applicant was bound to surrender hypothecated vehicle, but the respondent failed to do so. It is pleaded that dispute

between the parties was required to be adjudicated by Arbitrator. The applicant therefore, has approached this Court to seize the vehicle for

handing it over to the applicant. However, it was also mentioned that applicant has initiated arbitration proceedings against the respondent as well

as guarantor.

30. This Court passed an ex-parte interim order for appointment of Advocate Commissioner. Notice was ordered to be issued to the respondent

on 26.9.2011.

31. It may be noticed here that no steps were taken to serve the respondents and only notice was served through an advocate informing about

filing of application for appointment of Advocate Commissioner.

32. Notice served on the respondent reads as under:

S. RAJENI RAMADASS, B.A.B.L., ADVOCATE

Off:

New No. 323, Old No. 157,

Linghi Chetty Street,

George Town,

Chennai 1.

Tel/Fax: 25350606

Off/Res:

New No. 68, Basha Street,

Choolaimedu,

Chennai 94.

Tel: 044-23743035

Cell: 9884335538

29.02.2012

To

Mr. P.C. Benny

Puthenpurayil House,

Erumathala P.O. Aluva,

Ernakulam Dist.,

Kerala 683 105.

Sir,

Sub: A. No. 4026/2011: High Court: Reg:-

M/s. Sundaram Finance Ltd., No. 21, Patullos Road, Chennai 600 002.

Rep. By its Senior Manager (Legal),

Sri. K. Ramanathan

.. Applicant

Vs

Mr. P.C. Benny

.. Respondent

Please take notice that the above Application has been filed by the Applicant to pass an order of appointment of an Advocate Commissioner to

seize and deliver a 2007 Model TATA INDICA bearing Chassis No. 600142CSZP49779 and Engine No. 475IDI05CSZP48351 and

Registration NO. KL 41 9951 to the custody of the applicant, available at the respondent''s premises or wherever found and with whosoever it is

found and permit the Advocate Commissioner to obtain Police aid and to break open the premises and pass such further or other orders as this

Hon''ble court may deem fit and proper.

The above application came up for hearing before the learned Master on 29.2.2012 and the Private notice has been ordered to the respondents

returnable by 19.3.2012. Please arrange to be present before the Hon''ble High Court when the matter is listed, failing which the above application

may be heard in your absence.

33. This cannot be said to be notice of the Court, as even private notice is required to be authenticated by the Court and was to accompanied by

copy of the application along with the affidavit. In absence thereto, it cannot be said to be a valid notice. In this case, no case whatsoever for

interim order was made out, nor service was effected on the respondent. Therefore, in view of the law laid down by the Hon''ble Division Bench of

this Court in O.S.A. No. 246 of 2010, this application is ordered to be dismissed.

No costs.