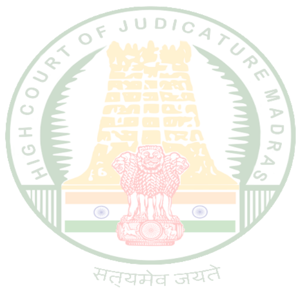

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.02.2022

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

Arb.Appln.Nos.40, 41, 42, 43, 44, 49, 50,
51, 52, 53, 59, 61, 62 and 63 of 2022

Arb.Appln.No.40 of 2022

M/s.Cholamandalam Investment and Finance Company Limited,
No.45, Justice Basheer Ahmed Sayeed Building,
IInd Floor, 2nd Line Beach, Moore Street,
Parrys, Chennai-600 001.
Represented by its Authorised Signatory ...Applicant

vs.

Mr.Harkhabhai Amarshibhai Vaghadiya

... Respondent

Prayer:

Arbitration Original Petition filed under Order XIV Rule 8 of Original Side Rules read with Section 9(ii)(a)(b)(d) & (e) of the Arbitration and Conciliation Act, 1996, to appoint employee of the Applicant viz. Mr.Makwana Mehulkumar Hasubhai, Branch Receivables Manager, as Receiver to seize and take possession of the vehicle which is

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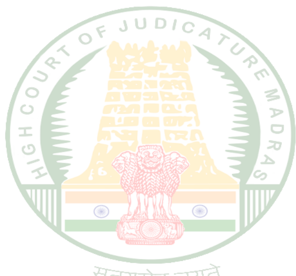
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more fully described in the schedule to the Judges Summons which is lying in the custody of respondent or respondent's men, agents, servants from respondent premises or wherever found with Police aid and break open of premises if necessary.

For applicant : Mr.M.S.Krishnan,
Senior Advocate
for Mr.D.Pradeep Kumar
in all applications

COMMON ORDER

This common order will govern the captioned 14 applications, all of which have been presented in this court under Sections 9(ii)(a)(b)(d) and (e) of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity].

2. Mr.M.S.Krishnan, learned Senior advocate appearing on behalf of Mr.D.Pradeep Kumar, counsel on record for applicant in the captioned 14 applications submits that the issue, central theme and factual matrix (with the exception of some dates and numbers) are the same in the captioned 14 applications. It was also submitted that the applicant company is the same in all 14 captioned applications and only the Respondent is different. Therefore, with consent of learned senior counsel, all the 14 applications were taken up together.

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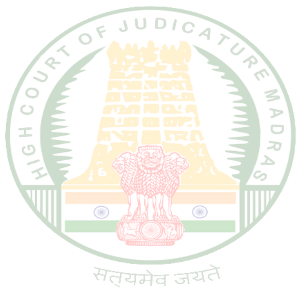
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3. The hearing also proceeded on the understanding that factual matrix in first of the captioned 14 applications namely, Arb.Appln.No.40 of 2022 can be set out / captured in this common order and that will suffice for appreciating this order as only some dates and quantum/numbers are different in the other 13 applications.

4. To be noted, in the 14 captioned applications, applicant is the same (as already alluded to supra) and it is a 'Non-Banking Financial Company' [hereinafter 'said NBFC' for the sake of convenience and clarity] but lone respondent is different.

5. Factual matrix in Arb.Appln.No.40 of 2022 is as follows:

(a) Respondent took a loan from applicant, i.e., said NBFC for purchase of an automobile and a printed agreement captioned 'LOAN AGREEMENT - VEHICLE/EQUIPMENT FINANCE' [hereinafter 'said loan agreement' for the sake of convenience and clarity] was signed;

(b) In this case, said loan agreement is dated

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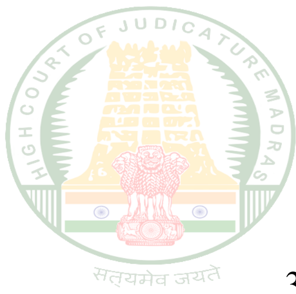
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31.03.2019, vital commercials are either handwritten in blanks provided in printed agreement template and / or appended;

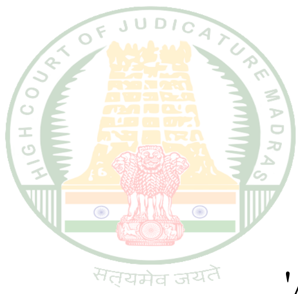
(c) The automobile which was financed qua said loan agreement is a four wheeler, make is 'EECO' and model is 'TOUR V 5 STR' [hereinafter 'said vehicle' for the sake of convenience and clarity];

(d) Loan amount is Rs.4,21,757/- and loan tenure as set out in said loan agreement is 60 months;

(e) Though said loan agreement placed before the Court says that the tenure is 60 months, it was submitted at the Bar on instructions that the loan is repayable in 71 'Equated Monthly Instalments' ['EMIs' in plural and 'EMI' in singular for convenience] of Rs.9,820/-. This Court is further informed that 70 EMIs are of Rs.9,820/- each and last EMI (71st EMI) is Rs.8,899/-;

(f) This Court is also informed that first EMI was payable on 28.04.2019 and last EMI (71st EMI) is payable on 28.02.2025;

(g) Clause 29 of said loan agreement captioned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'ARBITRATION' serves as an arbitration agreement between the parties being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act;

(h) As already alluded to in the opening paragraph, the captioned applications have been presented in this Court under Sections 9(ii)(a)(b)(d)&(e) of A and C Act. To be noted, Judge's Summons placed before this Court talks about these Sections. On instructions, it was submitted that a typographical error has crept in qua Judge's summons and all the 14 applications may please be treated as applications under Section 9(1)(ii)(d) of A and C Act for appointment of a Receiver. This submission is recorded. All captioned applications are treated as applications under Section 9(1)(ii)(d) of A and C Act;

(i) This Court is informed that while the principal amount is Rs.4,21,757/-, interest component is Rs.2,15,622/- totalling Rs.6,37,379/-;

(j) A total sum of Rs.89,197/- has been paid by respondent so far is learned Senior counsel's say (on

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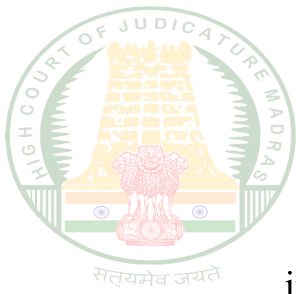
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instructions);

(k) Last payment was made on 15.01.2020. To be noted, this is an *ad hoc* payment, *ad hoc* payment is Rs.20,000/- and this submission is made by referring to the typed set of papers which contains what is described as Accounts Statement maintained by applicant, i.e., said NBFC for said loan agreement;

(l) After 15.01.2020, no payment has been made is the categoric say of learned Senior counsel;

(m) Captioned application (Arb.Appln.No.40 of 2022 in this case) has been presented in this Court on 02.02.2022;

(n) Adverting to Clause 11 and more particularly, Clause 11(a) of said loan agreement, it was submitted that events of default within the meaning of Clause 10, more particularly Clause 10(a) have occurred and therefore the applicant is entitled to repossess said vehicle. It was submitted that the prayer for appointment of receiver is predicated and posited on such events of default;

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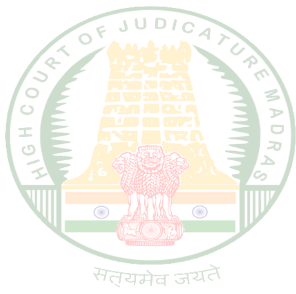
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6. This Court carefully considered the factual matrix and arguments advanced by learned Senior counsel at the Bar. This Court also carefully examined the case file and on an analysis of the same, comes to the conclusion that the prayer in the captioned applications cannot be acceded to. The discussion and dispositive reasoning or in other words, reasons {capturing the arguments} for such considered view of this Court that prayers in the captioned applications cannot be acceded to are as follows:

> (i) Captioned applications are under Section 9 of A and C Act. Section 9 of A and C Act can be invoked before, during or after commencement of arbitral proceedings. Different parameters and determinants apply / come into play depending on whether a A and C Act Section 9 application is before, during or after arbitral proceedings. In the cases on hand, captioned applications have been filed before commencement of arbitral proceedings;
>
> (ii) Whenever an application under Section 9 of A and C Act is filed before commencement of arbitral proceedings, it is imperative that the protagonist of the application should be

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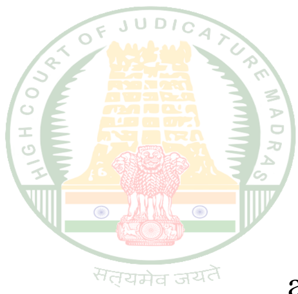
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able to demonstrate manifest intention to arbitrate;

(iii) In the cases on hand, intention to arbitrate much less manifest intention to arbitrate is not demonstrated. The reason is, as already alluded to supra in capturing factual matrix, last payment was made on 15.01.2020 which is more than two years prior to the date of presentation of Arb.Application 40 of 2022 as the same was presented in this Court on 02.02.2022 and said NBFC has not moved its little finger during this period. There are neither documents nor averments in support affidavit in this regard. The inevitable sequitur is, said NBFC was in deep slumber.

(iv) Arb. Application No.40 of 2022 was first listed before this Court on 07.02.2022 and the proceedings made on that day is as follows:

> *'Mr.D.Pradeep Kumar, learned counsel on record for the applicant is physically present before this Court.*
>
> *2. Learned counsel requests for an adjournment stating that a Senior counsel has to be briefed.*
>
> *3. A perusal of case file brings to light that the*

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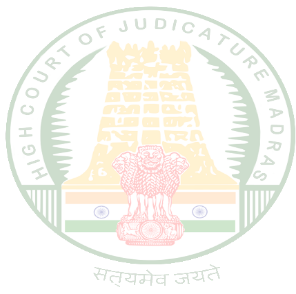

captioned matter has been filed on 02.02.2022. Ideally, such requests in the Admission Board should be avoided. The reason is, case files are circulated in advance, work and effort goes into the matter qua Registry and Bench. To be noted, this admission list was published on Friday i.e., 04.02.2022.

4. Be that as it may, as learned counsel makes a fervent plea for a short accommodation, list this matter in the Admission Board i.e., Motion List on Friday. This request is acceded to in the hope that such requests do not recur in the days to come.

5. List in the Admission Board on 11.02.2022.'

(v) Second listing was on 11.02.2022 and the proceedings made on that day is as follows:

'Mr.D.Pradeep Kumar, learned counsel on record for the applicant is physically present before this Court.

2. Learned counsel requests for an adjournment stating that a Senior counsel has to be briefed.

3. A perusal of case file brings to light that the captioned matter has been filed on 02.02.2022. Ideally, such requests in the Admission Board should be avoided. The reason is, case files are circulated in advance, work and effort goes into the matter qua Registry and Bench. To be noted, this admission list was published on Thursday i.e., 10.02.2022.

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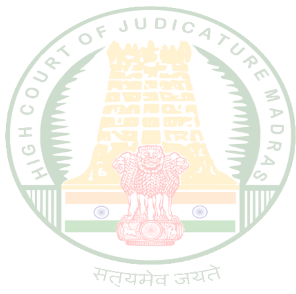
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4. Be that as it may, as learned counsel makes a fervent plea for a short accommodation, list this matter in the Admission Board i.e., Motion List on Wednesday. This request is acceded to in the hope that such requests do not recur in the days to come.

5. List in the Admission Board on 16.02.2022.'

(vi) The above proceedings are telltale and they speak for themselves;

(vii) After taking two adjournments in the Admission Board, now an additional typed set of papers has been filed on 15.02.2022, yesterday, enclosing only one document which is a letter dated 14.02.2022. This letter is said to be invocation of arbitration clause. To be noted, this letter dated 14.02.2022 is addressed to a member of the Bar (arbitrator nominated by said NBFC) and copies appear to have been marked *inter alia* to lone respondent. Only the postal receipt demonstrating dispatch on 14.02.2022 at 14.54 hours has been placed before this Court. This therefore is clearly an afterthought;

(viii) In the additional typed set of papers regarding notices dated 14.02.2022, only postal receipts evidencing

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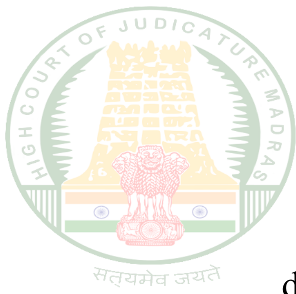
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despatch of notices have been enclosed. The consignment track report has not been enclosed. Therefore, this Court took it upon itself to examine the consignment track report in the official website of Postal Department. It is seen that it has not been served on any of the noticees (as of today). This means that kicking in of Sub-section (3) of section 9 is in the anvil. The reason is on the date of receipt of these notices by the respondent, by operation of section 21 of A and C Act, the arbitral proceedings will commence. Once arbitral proceedings commence, this Court shall not entertain an application under sub-section (1) of section 9 unless the protagonist of section 9 application is able to demonstrate that the remedy provided under section 17 is not efficacious. Though there is a faint averment in the support affidavit that remedy is not efficacious, there is nothing to say as to why and how it is not efficacious.

(ix) As it would be evident from the narrative of the trajectory thus far, it is clear that the applicant-said NBFC has taken not one but two adjournments in the Admission Board, i.e., Motion List. It is thereafter as an afterthought that a notice

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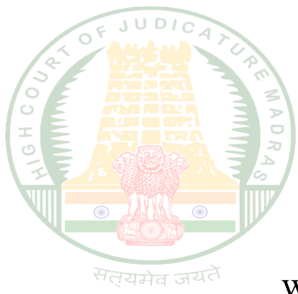

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which is said to be invocation of the arbitration clause has been issued in an obvious attempt to get past the manifest intention to arbitrate hurdle. This itself shows complete lack of intention to arbitrate much less manifest intention to arbitrate. This also demonstrates the leisure and casual approach post slumber and silence for over two years (as alluded to supra);

(x) Last payment was made on 15.01.2020, thereafter there is nothing on record to show that there was termination of said loan agreement and there is nothing to show that efforts were taken to invoke the arbitration clause but the captioned Arb.Appln.No.40 of 2022 was filed on 02.02.2022 and after taking two adjournments in the Admission Board on 07.02.2022 and 11.02.2022, the aforementioned letter dated 14.02.2022 has been issued and placed before this Court by way of an additional typed-set of papers. This is clearly an afterthought as already alluded to supra and an attempt to make it appear that there is manifest intention to arbitrate. It is an intended make believe affair;

(xi) In the considered view of this Court, manifest

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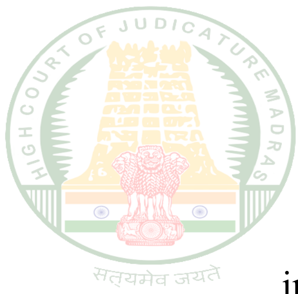
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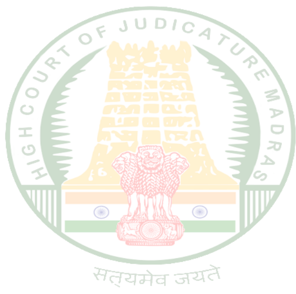
intention to arbitrate is a jurisdictional fact when an application under Section 9 of A and C Act is presented in this Court before commencement of arbitral proceedings. Jurisdictional facts should always precede the presentation of applications, it cannot be *ex post facto* i.e., post presentation; No elucidation is required in this regard, as the law is well settled that a jurisdictional fact should precede the proceedings and should exist on the date of presentation. Learned Senior counsel also does not enter upon any disputation on this obtaining legal position;

(xii) Therefore, purported invocation of arbitration clause does not save the day for the applicant-said NBFC;

(xiii) Clause 29 of said loan agreement which serves as arbitration agreement between the parties reads as follows:

> *'29.ARBITRATION: All disputes, differences and/or claims arising out of this Agreement whether during its subsistence or there after shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the Sole Arbitration of an*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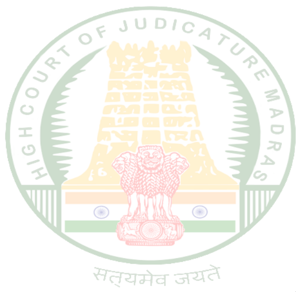
Arbitrator nominated by the Company. The award given by such Arbitrator shall be final and binding on all parties to this Agreement. In the event of an appointed arbitrator dying or being unable or unwilling to act as arbitrator for any reason, the Company or death of the arbitrator or his inability or unwillingness to act as arbitrator, shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference from the left by his predecessor. The venue of arbitration proceedings shall be at Chennai or such other place/location/city which the company at its discretion may decide from time to time.'

(xiv) A careful perusal of the aforementioned Arbitration Agreement brings to light that arbitration is to be constituted by a sole arbitrator appointed by applicant-said NBFC in this application;

(xv) On a demurer, a perusal of affidavit does not set out what the arbitral disputes are;

(xvi) If said vehicle is repossessed under said loan agreement, applicant-said NBFC in captioned applications has



a right to sell the said vehicle and to adjust profits towards loan dues. In this regard, this Court deems it appropriate to scan and reproduce Clauses 10 and 11 of said loan agreement and the same are as follows:

10. EVENTS OF DEFAULT:

The following events shall constitute an "Event of Default": -

a) The Borrower or the Guarantor failing to perform obligations, repay the Loan or any installment, fee, charges, or costs or any other amount due to the Company in the manner herein contained as and when it becomes due whether demanded by the Company or not; or
b) If in the opinion of the Company, the Borrower has withheld any critical information in relation to the Loan; or
c) Insolvency, winding up, voluntary or otherwise, failure in business, commission of an act of bankruptcy, general assignment for the benefit of creditors of the Borrower/Guarantor, or if the Borrower/Guarantor suspends payment to any creditors or threatens to do so, appointment of receiver/trustee or similar officer on its assets more particularly hypothecated assets under this agreement, filing of any petition in bankruptcy of by, or against the Borrower/Guarantor or filing of any petition for winding up of the Borrower/Guarantor-and not being withdrawn within 30 days of being admitted; or
d) If the Borrower/Guarantor (being a Company) goes into liquidation for the purpose of amalgamation or reconstruction, except with prior written approval of the Company; or
e) If the Borrower/Guarantor ceases or threatens to cease its business; or
f) If it is certified by an Accountant or a Firm of Accountants appointed by the Company (which the Company is entitled and hereby authorized to do so at any time) that the liabilities of the Borrower exceed the Borrower's assets or that the Borrower is carrying on business at a loss; or
g) If the Borrower sells, encumbers or transfers or seeks to sell, transfer, create encumbrance, pledge on the hypothecated Asset, in any manner whatsoever without the express consent in writing of the Company; or
h) If the Borrower fails to pay any insurance premium for the hypothecated Asset; or
i) The hypothecated Asset being confiscated or attached, taken into custody by any authority or is subjected to any execution proceeding; or
j) If the Borrower fails to pay any tax, impost, duty or other imposition or charges/outgoings or to comply with any other law, regulation, formalities required to be completed in respect of the hypothecated Asset under law from time to time; or
k) The hypothecated Asset being stolen or untraceable for any reason whatsoever; or
l) The hypothecated Asset suffers distraint or is endangered or damaged in any manner or rendered unfit for use or bodily injury is caused to the third party by accident with the Asset; or
m) Any of the PDCs delivered or to be delivered by the Borrower to the Company in terms and conditions hereof is not honoured / en-cashed for any reason whatsoever on presentation; or
n) If any instruction being given by the Borrower for stop payment of any PDC/ECS mandate for any reason whatsoever or if any Post Dated Cheques/ECS mandate issued by the Borrower to the Company is dishonored; or
o) The Borrower failing to supply a copy of the registration certificate of the hypothecated Asset being the vehicle to the Company; or
p) The Borrower failing to file the particulars of the Asset (both old and new vehicle/equipment) as provided in this Agreement; or
q) If any circumstance or event occurs which is prejudicial to or impairs or imperils or jeopardize or is likely to prejudice, impair, imperil, depreciate or jeopardise the interest of the Company or any security given by the Borrower/Guarantor of any part thereof; or
r) The Borrower/Guarantor committing breach of any of the terms, covenants and conditions herein contained or any information given or if any of the representations under this Agreement or any other document submitted is found to be false, inaccurate or misleading; or
s) If subsequent to the grant of the Loan the Borrower and/or the Guarantor/s (when spouse) is/are divorced or any proceeding is taken or commenced or initiated in any family court for the same or otherwise; or
t) On the death/lunacy or other disability of the Borrower or any Guarantor(s); or
u) Upon happening of any substantial change in the constitution or management of the Borrower or reorganization of the Borrower without previous written consent of the Company or upon the management of the Borrower ceasing to enjoy the confidence of the Company; or
v) The Borrower/Guarantor is in breach of any other loan/facility/any agreement with any other person; or
w) The Borrower/Guarantor commits any default under any other agreements with the Company in which the Borrower/Guarantor is either himself a Borrower/Guarantor; or
x) Any defect/infirmity in the guarantee provided by the Guarantor/s rendering the guarantee ineffective/inoperative; or
y) If it becomes unlawful for the Borrower to perform any of its obligations under this Agreement or any other related document or it becomes unlawful for the Guarantor or any other person (includes the Borrower) to perform any of its obligations under this Agreement; or

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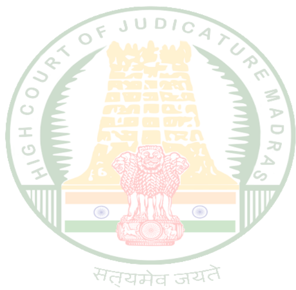

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z) This Agreement or any other related document; whether executed by the Guarantor or any other person (includes the Borrower) is not effective or becomes unlawful or is declared void or is alleged by the Borrower or Guarantor or any other person be ineffective, unlawful or void for any reason; or

aa) The Borrower/Guarantor repudiates or evidences an intention to repudiate this Agreement or any other related document; or

bb) In the event of happening of natural calamities/force majeure conditions, causing deterioration in the value of Asset (judgment over which the Company shall have an absolute discretion); or

cc) If the Loan or any part thereof is utilized for any purpose other than the purpose for which it is applied by the Borrower and sanctioned by the Company; or

dd) Any event or series of events occurs which, in the opinion of the Company, is reasonably likely to have a material adverse effect on the repayment ability of the Borrower; or ee) The status of the Borrower/Guarantor changes from resident to non resident; or

ff) If any attachment, distress, execution or other process against the Borrower/Guarantor, or any of the hypothecated Asset/s is enforced or levied upon; or

gg) if the Borrower or the Guarantor is charged or convicted by any Court of law or Government authorities for any offence; or

hh) If the Borrower/Guarantor dispute any of the terms under this or any other agreement entered into with the Company or its affiliates; or

ii) If any event of default or any event which, after the notice or lapse of time or both would constitute an event of default shall have happened, the Borrower shall forthwith give the Company notice thereof in writing specifying such event of default has occurred. The Borrower/Guarantor shall also promptly inform the Company if and when any statutory notice of winding up under the provisions of the Companies Act, 2013 or any other law or of any suit or legal process intended to be filed/initiated against the Borrower/Guarantor is received by the Borrower/Guarantor; or

On the question whether any of the above events/circumstances has occurred, the decision of the Company shall be final, conclusive and binding on the Borrower/Guarantor; or

11. REPOSSESSION, TERMINATION AND COMPANY'S OTHER RIGHTS:

a) On the occurrence of any of the aforesaid Events of Default contained in Article 10, the rights of the Borrower over the Asset shall stand determined void ipso facto without any notice and the Borrower shall be bound to deliver forthwith the Asset to the Company in the same condition in which it was originally received by him with all accessories/modifications done by Borrower whatsoever, ordinary wear and tear excepted and if the Asset is a vehicle, original Certificate of Registration with applicable Forms as prescribed in the statutes and/ or Rules made thereunder shall also be delivered to the Company along with the Asset. Failure or refusal of the Borrower to surrender the Asset shall constitute unlawful retention for which the Company shall be entitled to initiate legal action, without prejudice to other rights/ legal remedies available to the Company.

i) **Notice:** In case of any default in repayment including an occurrence of any of the aforesaid Events of Default and/or failure to surrender the Asset as mentioned herein above, the Company shall cause a 7 day notice to be issued to the Borrower at his address as registered with the Company. The notice shall be deemed to be served on the Borrower within 24 hours of posting, the notice by the Company even if the notice so served returns unserved for whatever reason and the confirmation from any authorized officer of the Company for having posted the notice to the Borrower shall be final and binding in this regard.

ii) **Repossession:** In case the Borrower fails to make payment of the dues or surrender the asset to the Company and/or rectify the breach of the terms of the contract in compliance with the notice mentioned above, to the satisfaction of the Company, without prejudice to its other rights available under the Agreement, the Company may be entitled to take possession of the Asset (referred to as" repossession") and for the said purpose, enter any place or places where the Asset may then be or is likely to be, remove or take possession of the same. The Borrower agrees and undertakes not to prevent or obstruct the Company from exercising its right of repossession of the Asset in the event of default by the Borrower. It shall be the sole responsibility of the Borrower to remove any goods (perishable, non-perishable) available in the Asset at the time of its repossession by the Company and the Borrower shall make his/their own arrangements to transfer such goods from the said Asset to and transport it back at his own cost and expenses and the Company shall not be liable to the Borrower for any damage, depreciation value, loss in transit etc. or for any damages arising on account of non-delivery of the same to anyone during or after such repossession.

iii) **Post Repossession:** Upon taking possession of the Asset, as a final chance to rectify the default, a 7 days notice shall be caused by the Company to the Borrower to repay the termination price (which includes the charges and expenses incurred for taking possession of the Asset including the legal expenses). The notice shall be deemed to be served on the Borrower within 24 hours of posting the notice by the Company even if the notice so served returns unserved for whatever reason and the confirmation from any authorized officer of the Company for having posted the notice to the Borrower shall be final and binding in this regard.

iv) **Waiver of Notice:** The said notice(before and after taking possession of the Asset) mentioned here in above can be waived at the discretion of the Company, in case the Company is of opinion that such action is likely to jeopardize the Asset or the interest of the Company.

v) On payment of the termination price within the time and manner stipulated in the notice mentioned above, the Company shall return the repossessed Asset to the Borrower or his authorized representative to be specified in writing by the Borrower. In case of failure on the part of the Borrower to make payment of the termination price within the time and manner stipulated in the notice mentioned above, the Company shall sell, dispose of the asset in the manner it may deem fit without any further notice to the Borrower notwithstanding exercising any other legal remedy or right against the Borrower available to it.

vi) The Borrower hereby irrevocably authorizes the Company to sell/transfer/assign the Asset without the intervention of Court either by private treaty or public auction or in such other manner as the Company may deem fit. The Borrower shall not be entitled to raise any objection regarding the regularity of the sale and/or actions taken by the Company nor shall the Company be liable/responsible for any loss that may occasion by the exercise of such power and/or may arise from any act or default on the part of any broker or auctioneer or other person or body engaged by the Company for the said purpose.

vii) The Borrower shall forthwith deliver to the Company all original certificates and policies of insurance including Certificate of Registration (where the Asset is a vehicle), keys and all other documents relating to the Asset. In the event of the failure of the Borrower to do so, the Company shall be entitled to immediately apply to the concerned authorities and obtain the documents afresh, expenses for which shall be charged to the account of the Borrower and shall form part of the amount payable on the determination of this Agreement. The Borrower agrees and undertakes that he shall not raise any objection for such application by the Company.

viii) Upon sale of the Asset and adjustment of the sale proceeds towards the Loan dues (which includes the expenses/charges incurred for parking, sale of Asset, in addition to the termination price), if there is any shortfall amount due and payable, the same shall be made good by the Borrower and/or the Guarantor. If there is any surplus amount available after such adjustment, the Company shall, subject to the right of lien and Set-off against the Borrower and Guarantor, refund the balance, if any to the Borrower.

b) **Termination:**

On the surrender of the Asset by the Borrower or repossession thereof by the Company, notwithstanding the Term of Loan specified in the Schedule, the Agreement shall stand terminated without any notice.

Without prejudice to the foregoing and/or any of the terms contained in this Agreement on termination, this Agreement may also stand terminated:

i) by efflux of time on expiry of the Term of Loan specified in Agreement; or

ii) earlier by a notice in writing from the Company to the Borrower and Guarantor, of its decision to do so.

On such termination, the Company shall have like powers of repossession of the Asset as in a case where any Event of Default had occurred.

On termination in any manner as above:

iii) The Borrower and Guarantor shall not thereafter be entitled to the benefit of payment by installments of the amounts remaining payable which shall fall due immediately together with amount already in arrears, whether by way of installments, additional interest or on any other account whatsoever.

iv) The Borrower shall be liable to pay Additional Interest on the termination price at the rate mentioned in the Schedule, calculated from date of termination until realisation of the payment in full.

c) **Company's Other Rights:**

i) It is specifically agreed between the parties that the charge created by the Borrower and/or the Guarantor as the case may be, with the Company under any other agreement shall be continuous regardless of all the dues under the said agreement being paid and the Company shall be at liberty to withhold the No Objection Certificate (NOC) on even completed agreements and to repossess and sell the Asset/s, without intervention of courts, given to the Borrower/Guarantor, under any other agreements towards realization of dues payable under this Agreement.

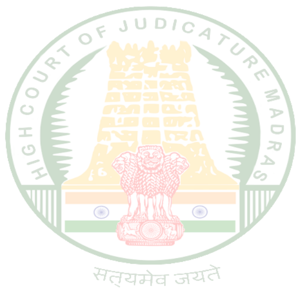
ii) In the event of sale of the Asset hypothecated under this Agreement or in the agreements connected hereto or enforcement of any other Security provided by the Borrower/ Guarantor, in pursuance of this Agreement, the Company shall not be liable for any loss or deficiency in the amount realized or answerable for any decrease in the value of the Asset/Security. Such sale shall be done by the Company without any accountability to the Borrower and the Guarantor and the Company shall not be liable for loss/ damage/ diminution in value of Asset/Security on account of exercise or non exercise of rights by the Company and the Borrower/Guarantor shall not be entitled to raise any claim against the Company on the grounds that a larger sum or amount might or ought to have been received or dispute their liability for the remaining dues under this Agreement.

iii) Without prejudice to the rights of the Company to initiate any legal proceedings for recovery of the outstanding, the Borrower and the Guarantor expressly accept that the Company shall be entitled to appoint third parties as it may deem fit and such third parties can carry out all or any of its functions, rights and powers under this agreement including the authority to collect dues by the Borrower, without any prior consent of the borrower.

iv) It is expressly agreed and understood that the repossession and/or sale of the Asset on occurrence of any Event of Default shall not be a condition precedent for the enforcement of claim for any amount due under this Agreement by the Company against the Borrower and/or Guarantor personally.

v) Any inability, failure or omission on the part of the Company to repossess the Asset shall not affect its right to terminate the Agreement at any time if it so decides, nor shall constitute condonation of the default or waiver thereof or affect the right of recovery of all amounts due under the Agreement personally from the Borrower and or Guarantor.

vi) Not withstanding anything stated elsewhere in this agreement, the continuation of the loan after such termination, shall be at the sole and absolute discretion of the Company and the Borrower's outstanding shall be payable to the Company, as decided by the Company at the relevant time. The Company may, at any time, at its sole discretion and without assigning any reason whatsoever, call upon the Borrower to repay the Borrower's outstanding and thereupon the Borrower shall, immediately on being so called upon, pay the whole of the Borrower's outstanding to the Company without any delay whatsoever. The amount of dues stated to be payable by the Borrower shall be final and binding on the Borrower.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(xvii) Aforementioned Clauses (covenants) in the printed said loan agreement which are in fine print bring to light that tenor and terms of repayment are relevant as it talks about the borrower failing to pay installment when it becomes due to applicant-said NBFC. Likewise, it also talks about dishonour of post dated cheques [PDCs]. In the case on hand, default has occurred prior to 15.01.2020 itself and this Court is informed that it has also occurred on 29.08.2019. This is evident from what is being placed before this Court as Accounts Statement of said loan agreement maintained by applicant-said NBFC. 29.08.2019 entry is at page 17 of typed set of papers and 15.01.2020 entry is at page 19 of typed set of papers. Thereafter, there is a complete lull and therefore, this Court is unable to persuade itself to believe that applicant-said NBFC has demonstrated even intention to arbitrate, much less manifest intention to arbitrate;

(xviii) The applicant-said NBFC could have terminated said loan agreement and/or taken any other steps in the direction of invocation of arbitration, not having done anything for two

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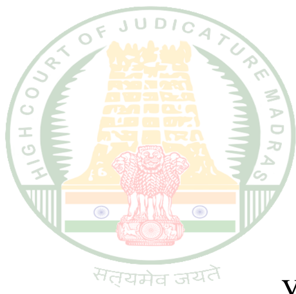
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years, this Court is unable to persuade itself to believe that there is manifest intention to arbitrate;

(xix). The above view of this Court is fortified by sub-section (2) of Section 9 which was by way of amendment which was brought into A and C Act on and from 23.10.2015 wherein it has been mandated that the arbitral proceedings should be commenced within a period of 90 days when a party comes to the Court under Section 9 of A and C Act before commencement of arbitral proceedings. No doubt, there is also a provision for this Court to grant further time at the discretion of this Court but in the case on hand, from the earliest date on which applicant-said NBFC got the right to invoke the arbitration clause namely, on 29.08.2019 nothing has happened till presentation of captioned application in this Court on 02.02.2022. Therefore, it is not 90 days, it is nearly two years as even if the last payment on 15.01.2020 is taken as reckoning date, nothing has happened for next two years which is well and truly beyond 90 days. This reason becomes a clear clincher as what the arbitral disputes are have not been set out in the

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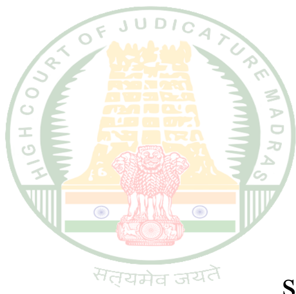
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support affidavit with specificity. If the applicant-said NBFC had repossessed said vehicle, sold the same and appropriated the balance, nothing may have remained as arbitral disputes, i.e., nothing to arbitrate. Therefore this is clearly an attempt to use Section 9 as a substitute for the entire arbitration;

(xx). Even prior to coming into force of sub-section (2) of Section 9 of A and C Act, this manifest intention to arbitrate the facet of Section 9 was considered by Hon'ble Supreme Court in ***Firm Ashok Traders*** case [***Firm Ashok Traders and Another Vs. Gurumukh Das Saluja and others*** reported in ***(2004) 3 SCC 155***], most relevant paragraphs are Paragraph Nos.13, 17 and 18 which 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*

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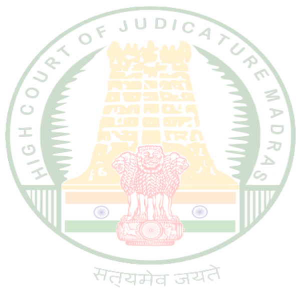

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defined in Clause (h) of sub- Section (1) of Section 2 of A & C Act to mean 'a party to an arbitration agreement'. So, the right conferred by Section 9 is on' a party to an arbitration agreement. The time or the stage for invoking the jurisdiction 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

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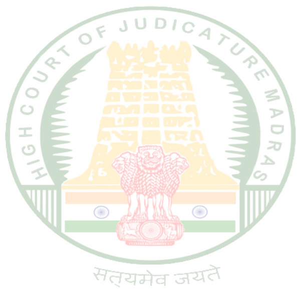
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conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is 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.

14...

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16....

17.There are two other factors which are weighing heavily with us and which we proceed to record. <u>As per the law</u>

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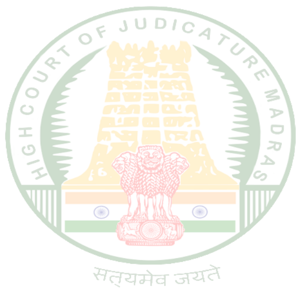

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laid down by this Court in M/ s. Sundaram Finance Ltd an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In M/s. Sundaram Finance Ltd., itself the Court has said-"It 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

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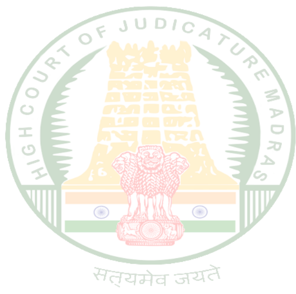
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between which it exists and elapses. The purposes of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide 'interim measures of protection'. The order passed by the Court should fall within the meaning of the expression '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

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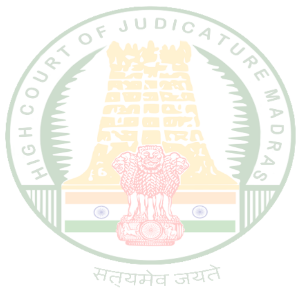
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arbitral proceedings. The Court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the Court proposes to commence the arbitral proceedings. Rather, the scheme 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)

(xxi). 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

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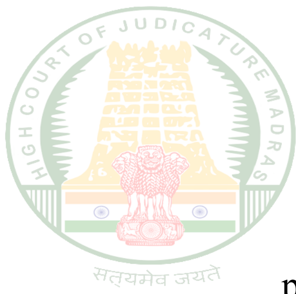

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provisions of amending Act No.33 of 2019 came to be notified on 30.08.2019 but we are not concerned with second amending Act viz., Act No.33 of 2019. As already mentioned, this is noticed only for the purpose of completing the narrative qua course 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;

(xxii). Post 23.10.2015 also, the Statute provides for an application under Section 9, seeking interim measures before commencement of arbitral proceedings but with a caveat. This caveat is in the form of Sub-Section (2) of Section 9, which came into force on and from 23.10.2015 and it 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.'*

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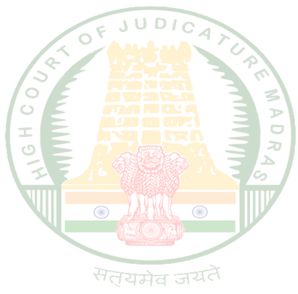
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(xxiii). In the considered view of this Court, sub-Section (2) of Section 9 which came into force on and from 23.10.2015, is a statutory expression of ***Firm Ashok Traders*** principle laid down/rendered by Hon'ble Supreme Court on 09.01.2004. To be noted, the excerpted / relevant paragraphs in ***Firm Ashok Traders*** case law have been extracted and reproduced elsewhere supra in this order;

(xxiv). This leads us to the inevitable obtaining legal position that manifest intention to arbitrate is *sine qua non* for a applicant who approaches a Court under Section 9 of A and C Act. This takes us to the test as to whether the applicant (said NBFC) in the instant case has demonstrated its manifest intention to arbitrate;

(xxv). In response to the question whether the applicant has been able to demonstrate manifest intention to arbitrate in the instant case, learned Senior counsel for applicant drew the attention of this Court to an averment contained in paragraph 10 of the affidavit filed in support of the instant application, which reads as follows:

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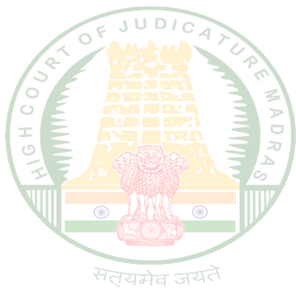

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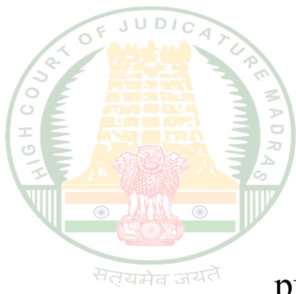
'....................The applicant is taking steps and is in the process of initiating Arbitration proceedings and the applicant will initiate arbitration proceedings within a reasonable period'.

(Underlining made by this Court for supplying emphasis and highlighting)

Affidavit filed in support of captioned Arb.Appln.No.40 of 2022 is dated 02.02.2022 whereas the cause of action occurred on 29.08.2019 when a PDC was dishonoured/bounced and at the highest on 16.01.2020 (admittedly), as last payment (ad-hoc) of Rs.20,000/- was made on 15.01.2020. Therefore, the aforementioned pleading pales into insignificance and 'reasonable period' besides being vague has already elapsed long ago;

(xxvi). Learned Senior counsel went on to submit that interim order can be granted by this Court and the applicant can be put on terms to commence arbitral proceedings within a time frame. This Court is unable to find favour with this submission as such a argument that an order can be granted by this Court by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putting the applicant on terms to commence arbitration within a time frame (in a case of this nature, i.e., factual matrix where there is *inter-alia* deep slumber / unexplained inaction post cause of action) would amount to interpreting sub-section (2) of Section 9 of A and C Act as saying that an applicant is entitled to come to Court, get an interim order under Section 9 and hold on to the same for 89 days, irrespective of whether the applicant is able to demonstrate manifest intention to arbitrate or not. This does not find favour with this Court. To be noted, in this case, it is not only holding on to the interim order if acceded to, it is also a case of seizing said vehicle, as the interim order sought for is for a positive act of seizing and selling said vehicle;

(xxvii). The applicant should necessarily demonstrate manifest intention to arbitrate. In the instant case, there is absolutely nothing and admittedly, nothing to demonstrate intention to commence arbitral proceedings;

(xxviii). The applicant not having moved its little finger towards commencement of arbitral proceedings for more than two years, cannot now be heard to contend that the Court should

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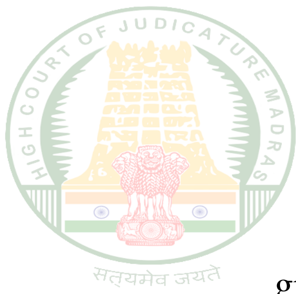
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grant an interim order and thereafter, put the applicant on terms to commence arbitral proceedings within a time frame;

(xxix). With regard to immediacy and imminence, all that this Court is able to discern from the case file which has been placed before this Court and submissions of learned Senior counsel for applicant is that the respondent may secret the said vehicle with the intention of defeating the rights of applicant. There is nothing to demonstrate what prevented the applicant from issuing a notice within the meaning of Section 21 of A and C Act. After all arbitration agreement within the meaning of Section 7, which is in the form of Clause 29 in said loan agreement in the instant case is a creature of contract as between the applicant and the respondent;

(xxx). No case law turning on manifest intention to arbitrate post insertion / inception of sub-Section (2) of Section 9 on 23.10.2015 has been pressed into service before this Court in this case;

(xxxi). One other feature of the matter is Section 17 of A and C Act, which was also amended and made expansive on and

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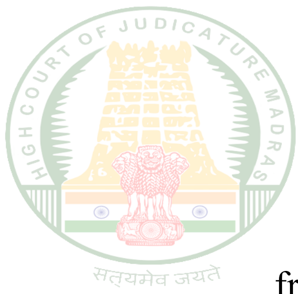
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from 23.10.2015. The prayer which has been sought for in the instant Section 9 application can well be granted by the Arbitral Tribunal (which could have been constituted by now), if only the applicant had manifest intention to arbitrate and commenced arbitration proceedings by issuing notice *inter alia* within the meaning of Section 21 of A and C Act;

(xxxii). To be noted, most of the interim measures, which can be granted under Section 9 of A and C Act, can now be granted under Section 17 by the Arbitral Tribunal. Adumbration of interim measures that can be granted by a Court under section 9(1) of A and C Act and adumbration of interim measures that can be granted by a Arbitral Tribunal under section 17(1) of A and C Act vide clause (i), clause (ii), sub-clauses (a) to (e) in sections 9(1)(ii) and 17(1)(ii) are akin to each other post 23.10.2015;

(xxxiii). One other facet of the matter is, sub-section (3) of Section 9. Sub-Section (3) makes it clear that Court shall not entertain an application of instant nature under sub section (1) of section 9 of A and C Act, the moment arbitral tribunal is

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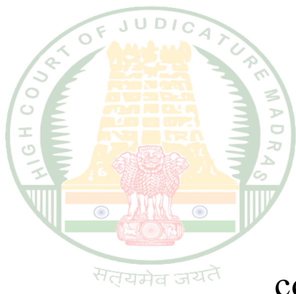
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constituted. Only in cases where there are circumstances which render the remedy provided under Section 17 not efficacious, will an application under sub section (1) of Section 9 be entertained. In the instant case, if the Arbitral Tribunal had been constituted, it could well be open to the applicant to seek the same interim measure before the Arbitral Tribunal;

(xxxiv). It has been averred in the affidavit filed in support of captioned application more particularly, paragraph No.12 thereat, that the remedy provided under Section 17 of A and C Act is not efficacious. Paragraph No.12 of support affidavit reads as follows:

> *'12. I state that Section 9 of the Arbitration and Conciliation Act, 1996 empowers this Hon'ble Court to pass appropriate/suitable directions/orders for securing the amount in dispute, protection of subject vehicle etc., The remedy provided under Section 17 is not efficacious. Hence, this application is filed before this Hon'ble Court.'*

(xxxv). There is no elaboration on how and why measures provided / adumbrated under Section 17 of A and C Act are not efficacious;

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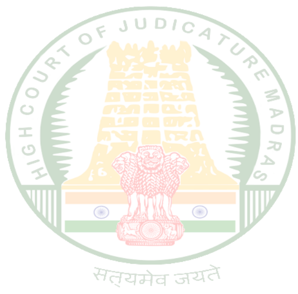
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(xxxvi). In the considered view of this Court, the remedy can certainly be sought under Section 17 of A and C Act before Arbitral Tribunal and prayer has now been made under Section 9(1)(ii)(d) of A and C Act, can be made under Section 17(1)(ii)(d);

(xxxvii). Section 9(1)(ii)(d) of A and C Act reads as follows:

'9.Interim measures etc., by Court-

(1) ....

(i) ....

(ii) ....

(a) ....

(b) ....

(c) ....

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

(xxxviii). Section 17(1)(ii)(d) of A and C Act reads as follows:

'17.Interim measures ordered by arbitral tribunal-

(1) ....

(i) ....

(ii) ....

(a) ....

(b) ....

(c) ....

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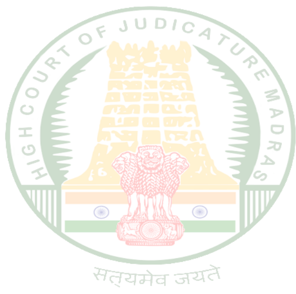
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(d) interim injunction or the appointment of a receiver;'

(xxxix). Another feature of great significance in the captioned 14 applications is admittedly, the *ex post facto* notice which is purportedly invocation of arbitration clause has been issued only in five cases namely, Arb.Appln.No.40 of 2022 to Arb.Appln.No.44 of 2022 and in the remaining nine cases, even this afterthought notice has not been issued. To be noted, this is set out on a demurer. Manifest intention to arbitrate being a jurisdictional fact should precede the applications. In any event, in nine out of captioned 14 applications even that notice post applications i.e., afterthought has not been made;

(xl). This takes this Court to prayers that have been made. The prayers mention the name and designation of an individual and say he is Branch Receivables Manager and applicant wants this Court to appoint this named individual as receiver. If Section 9(1)(ii)(d) of A and C Act is read with Order XL Rule 1 of 'Code of Civil Procedure, 1908' [hereinafter 'CPC' for the sake of convenience and clarity] for appointment of a receiver and more particularly in the light of party receiver concept, a

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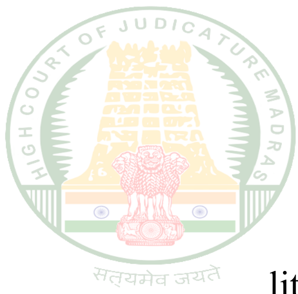
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litigant making such a prayer should be able to demonstrate that the property that is sought to be protected is under imminent danger of waste. The law is well settled in this aspect of the matter. The affidavit filed in support of captioned application is bereft of details / pleadings in this regard.

(xli) There is one another significant aspect of the matter. The applicant was given two options (a) withdrawing the captioned applications and going before the Arbitral Tribunal and (b) relegating captioned applications to the Arbitrator so that it becomes a reference to arbitration within the meaning of section 89 of CPC entitling the applicant for refund of court fee under section 69-A of the Tamil Nadu Court-fees and Suits Valuation Act, 1955 but the applicant persisted and invited an order from this Court. Therefore, this Court has no option other than writing about the prayer that has been sought for in the captioned Section 9 applications. In the considered view of this court, appointment of Receiver more so a party receiver can be only when a protagonist of such an application is able to demonstrate that the property is in imminent danger of waste.

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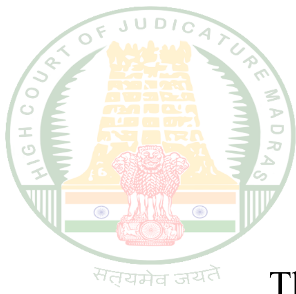
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There is no such averment or nothing demonstrable in the case on hand. On the contrary, the protagonist could have repossessed the said vehicle more than two years ago itself (even without approaching this Court) when the said vehicle would have been in a much better condition. There is no reason as to why this has not been done. If the applicant had repossessed the said vehicle more than two years ago, the applicant has rights under said loan agreement itself to sell the said vehicle and appropriate the proceeds towards balance dues if any. This could have been done without even coming to this Court. The reason is, said loan agreement provides for this. The relevant clause is Clause 11(vi) which reads as follows:

> '(vi)The Borrower hereby irrevocably authorizes the Company to sell/transfer/assign the Asset without the intervention of Court either by private treaty or public auction or in such other manner as the Company may deem fit. The Borrower shall not be entitled to raise any objection regarding the regularity of the sale and/or actions taken by the Company nor shall the Company be liable / responsible for any loss that may occasion by the exercise of such power and /or may arise from any act or default on the part

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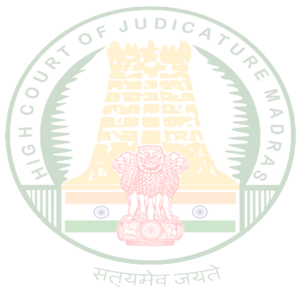
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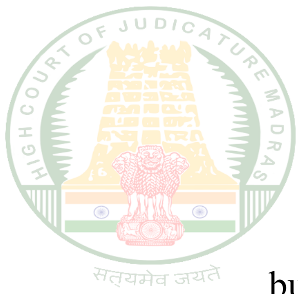
of any broker or auctioneer or other person or body engaged by the Company for the said purpose.'

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

The applicant not having chosen to do this, cannot now come under the garb of Receiver prayer, name an employee of the applicant / said NBFC (said to be employee) with a prayer to arm him with an order of this Court to seize / repossess said vehicle as this tantamounts to using section 9 as a recovery measure. That is not the purpose for which section 9 has been provided under A and C Act. In and by such a prayer, the applicant is virtually converting the section 9 legal drill as a recovery arm of said NBFC. This is not the objective of section 9 that too when it is invoked before commencement of arbitral proceedings. The entire arbitration as an Alternate Disputes Resolution (ADR) mechanism is completely wiped out by resorting to such an application.

(xlii) This Court has no material before it about the credentials of the individual who has been named in the prayer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but the applicant / said NBFC, wants this Court to clothe this individual with powers to go and seize the said vehicle by arming him with judicial order of this Court. This is clearly unacceptable not only because there is no material before this Court about the individual, also because the said loan agreement itself provides for repossession.

(xliii) This Court is not saying that trigger notice under section 21 is imperative. There should have been some notice demanding alleged dues and / or repossession. Nothing of that kind has been done in the last two years prior to presentation of section 9 application and therefore, this Court is constrained to observe that there is complete slumber on the part of the applicant making complete lack of intention to arbitrate (much less manifest intention to arbitrate) indisputable.

(xliv). As already alluded to supra, though said loan agreement talks about tenure as 60, it was submitted at the Bar that it is 71 EMIs. In this regard, paragraph 4 of the affidavit filed in support of captioned application becomes relevant and the same reads as follows:

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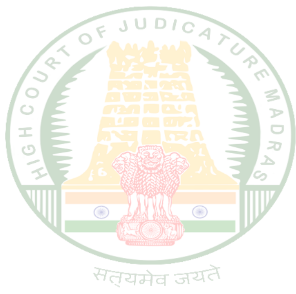

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'4. The amount which the respondent is liable to repay to the applicant as per the Loan Agreement is as follows:-

Principal Amount	*Rs.4,21,757/-*
Finance Charges @ 14.03%	*Rs.2,15,622/-*
Total Sum	*Rs.6,37,379/-*
No. of Installments	*71 Monthly*
Installment Amount	*1st to 11th Installment Rs.9,820/- 12th to 17 Installment Nil, 18th to 70th Installment Rs.9,820/- and 71st Installment Rs.8,899/-*
1st Installment Date	*28.04.2019*
Last Installment Date	*28.02.2025*

7. Before this Court draws the curtains on the captioned matters and writes the concluding part of this common order, it is deemed appropriate to make it clear that all the rights of applicant-said NBFC are left open to have the Arbitral Tribunal constituted, go before the Arbitral Tribunal and make the same prayers under Section 17(1)(ii)(d) of A and C Act, if so advised and if so desirable. If such a course is adopted by applicant-said NBFC, it is left open to the Arbitral Tribunal (to be constituted) to decide the same on its own merits and in accordance with law, uninfluenced by any view or opinion expressed in this order which is for the limited purpose of disposal of the captioned applications. Likewise, though obvious and though axiomatic, it is made clear that all the rights of

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respondent in the captioned applications remain intact more so as they are not even before this Court.

8. Sequitur is, this Court finds no reason to issue notice in the captioned applications. Further sequitur is, captioned applications fail and the same are dismissed. Notwithstanding the manner in which the captioned applications have been moved and notwithstanding the trajectory the matter has taken i.e., *inter alia* two adjournments in the Admission Board, this Court refrains itself from imposing costs.

16.02.2022

Index : Yes/No
mk/nsa /vvk

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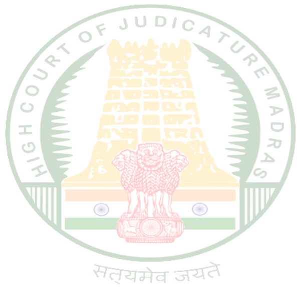

M.SUNDAR, J.,
mk/nsa/vvk

Arb.Appln.Nos.40, 41, 42, 43, 44, 49, 50, 51, 52, 53, 59, 61, 62 and 63 of 2022

16.02.2022