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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 9th November, 2020

+ **CM (M) 553/2020 & CM APPL.28266/2020**

NEW MORNING STAR TRAVELS Petitioner

Through: Mr. Sushant Mahajan, Advocate.

versus

VOLKSWAGEN FINANCE PRIVATE LIMITED Respondent

Through: Mr. Birender Singh, AR
(M-8291941009).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.
2. The present petition under Article 227 has been filed under extra-ordinary circumstances wherein the Id. District Judge, (Commercial Court), East District, Karkardooma Courts has disposed of 16 petitions filed by the Respondent under Section 9 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*), vide the impugned orders of various dates i.e., 16th October, 2020, 19th October, 2020, 20th October, 2020, 21st October, 2020, 22nd October, 2020 and 23rd October, 2020. The orders are identical in almost all respects.
3. The said petitions have been disposed of on the very first day of hearing, without issuing notice in the petitions to the Petitioner herein. Further, coercive orders have also been passed, permitting the Respondent to take possession of the vehicles of the Petitioner.
4. The Petitioner is a company, which had purchased 16 vehicles under loan-cum-hypothecation agreements entered into on 28th November, 2018 with the Respondents. The said agreement contained an arbitration clause. There was a default by the Petitioners in payment of certain instalments of

the loan. Thereafter, the Petitioner came to know that 16 petitions under Section 9 were filed by the Respondent, in which the impugned orders have been passed. All the 16 orders have been placed on record.

5. Mr. Mahajan, Id. counsel appearing for the Petitioner submits that the total dues are only to the tune of Rs. 87 lakhs and the taking of possession of all the vehicles in the manner as has been done in this case, would bring the business of the Petitioner to a complete stand still. His grievance is that the Section 9 petitions have been disposed of without notice and coercive orders of possession have been passed, without even hearing the Petitioner.

6. Advance copy of this petition was served upon the Respondent. However, none appeared for the Respondent when the matter was first called. The matter was passed over, directing Id. counsel for the Petitioner to contact Id. counsel for the Respondent. After the Passover – Mr. Birender Singh, Authorised Representative of the Respondent joined the proceedings. Mr. Singh submits that he would have to mark the matter to a panel lawyer, as he is not aware of the facts. He submits that the advance copy of the petition may not have been intimated to him as the office is not functioning.

7. The Petitioner runs a bus service. It had availed of the loan facility for purchasing 16 vehicles. The same was repayable in 54 months. There were some defaults by the Petitioner, which led to filing of the Section 9 petitions.

8. The following are the details of the 16 petitions which were filed:

S. No.	Petition No.	Date of Disposal
1	<i>Volkswagen Finance Private Limited v. New Morning Star Travels</i> - OMP (I) Comm. No. 2409/2020	16.10.2020
2	<i>Volkswagen Finance Private</i>	16.10.2020

	<i>Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2410/2020</i>	
3	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2419/2020</i>	16.10.2020
4	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2420/2020</i>	19.10.2020
5	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2451/2020</i>	19.10.2020
6	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2453/2020 Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2456/2020</i>	19.10.2020
8	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2460/2020</i>	20.10.2020
9	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2470/2020</i>	20.10.2020
10	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2476/2020</i>	21.10.2020
11	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2487/2020</i>	21.10.2020
12	<i>Volkswagen Finance Private Limited v. New Morning Star</i>	21.10.2020

	<i>Travels' - OMP (I) Comm. No. 2498/2020</i>	
13	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2500/2020</i>	22.10.2020
14	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2502/2020</i>	22.10.2020
15	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2504/2020</i>	22.10.2020
16	<i>Volkswagen Finance Private Limited v. New Morning Star Travels' - OMP (I) Comm. No. 2533/2020</i>	23.10.2020

9. A perusal of the impugned orders shows that the said orders have been passed in almost identical terms. As per the said orders, the petitions under Section 9 of the Act were accompanied with an application for interim ex-parte relief till the arbitration proceedings are concluded. The orders record that the loan-cum-hypothecation agreement was executed. Loan recall notices were issued by the Respondent and the Petitioner was called upon to pay the total outstanding of Rs. 71,39,808/-. On the ground that the Petitioner did not pay the said amount and expressing an apprehension that the vehicles may be disposed of, the Trial Court appointed a Receiver to take possession of the vehicles in terms of an order of this court dated 23rd December, 2015 in ***Kotak Mahindra Prime Ltd vs. Kamal Chauhan & Anr., [O.M.P (I No 540/2015 & I.A. No. 25026/2015]***. The Trial Court thereafter directs the Respondent to initiate arbitration proceedings within 90

days, failing which the interim order would be automatically vacated. The main petitions under Section 9 of the Act were disposed off.

10. Thus, while dealing with the application for ad-interim ex-parte relief, the main petition under Section 9 of the Act was disposed off, without calling upon the Petitioner to even file a reply. No hearing was afforded to the Petitioner.

11. Section 9 petitions cannot be disposed of *ex-parte*, without giving notice to the respondent therein, especially when coercive orders are being passed. The power to pass ad-interim orders under Section 9 of the Act are not in doubt. However, disposal of the petitions, without issuing notice and hearing the respondent as well as directing coercive orders of possession would be violative of the principles of natural justice.

12. The standards to be adopted for grant of interim measures under Section 9 of the Act are akin to the standards that are applied for grant of interim injunction under Order XXXIX Rules 1 and 2 CPC and for appointment of a Receiver under Order XL CPC. The disposal of Section 9 petitions without even hearing the Respondent is contrary to all settled tenets. Moreover, the grant of *ex-parte* injunctions, *ex-parte* interim measures or appointment of Receivers at the *ex-parte* stage would be governed by principles akin to Order XL CPC wherein there has to be a grave and imminent apprehension that the property would not be able to be retrieved if notice is issued. The appointment of Receivers at the *ex-parte* stage in matters such as vehicle loans ought to satisfy the test of imminent threat. The Court also ought to come to a conclusion that there was a deliberate intention not to repay the loan. Thus, out of the total instalments due and payable, the Court has to see the conduct of the borrower including the irregularity of payment,

the total amounts paid till date, any other extenuating or other factors such as the present pandemic which could justify non-payment etc. The appointment of a Receiver to take possession at the *ad-interim* stage could lead to the buses which are being used for the everyday business of the Petitioner being seized by the finance company, thereby causing the Petitioner's business activities to come to a grinding halt. The standard that would be required to be satisfied for such an extreme measure should be high. Moreover, disposal of a Section 9 petition on the first date itself would be contrary to the basic principles that govern the adjudication of such petitions.

13. A Full Bench of the Telangana and Andhra Pradesh High Court in *East India Udyog Limited v. Maytas Infra Ltd. & Ors.* [AIR 2015 AP 118], has answered the question as to whether a Court can dispose of a Section 9 petition even before initiation of arbitral proceedings under Section 21 of the Act in view of the judgments of the Supreme Court in *Sundaram Finance Ltd., V. NEPC India Ltd.* [(1999) 2 SCC 479] and *Firm Ashok Traders and another V. Gurumukh Das Saluja and Ors.*, [(2004) 3 SCC 155], as following:

*"the Court as defined under Section 2(e) of the Act, is undoubtedly entitled to dispose of the application filed under Section 9 of the Act even before initiation of the arbitral proceedings under Section 21 of the Act. **The Court, however, cannot dispose of such application ex parte without giving notice to the respondents, but Court can pass ex parte ad interim order pending the application filed under Section 9 of the Act.**"*

14. Further a Id. Division Bench of the Madras High Court in the judgment of *Cholamandalam DBS Finance Ltd. v. Sudhees Kumar* [2010 (1) CTC 481] has expressly laid down guidelines that ought to be followed

while dealing with applications under Section 9, with respect to seizure of vehicles. The relevant extract is as under: -

“16. The principles based on which an order under Section 9 is passed are not very different from the principles based on which interim injunction under Order 39 Rule 1 of Code of Civil Procedure is granted. The person applying should show prima facie case and should also establish the irreparable injury and also the balance of convenience and in case, where a vehicle is to be emergently seized, there should be averments to show why it is just and convenient to seize the vehicle. It is also well settled that the mere recitals of the words in the section is not sufficient. The application should make out a case for the Court to grant the interim measure of protection. Without these, the applicant may not be entitled to an ex parte order and the Court shall exercise its discretion while granting such an order. The party invoking Section 9 must also be able to satisfy the Court that the arbitral proceedings are actually contemplated or about to be initiated.

...

24. The basic principle of natural justice is to hear the other side. Our system of jurisprudence stands on that. We cannot ignore that while rendering justice. Therefore, some guidelines shall be followed while dealing with application under Section 9. This applies to seizure of vehicles alone, since we have not heard the submissions with regard to any other cases falling under Section 9. This is strictly with regard to cases where the advocate commissioners are appointed to seize the vehicles and report to Court.

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 custodia legis.

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.”

Thus, detailed guidelines have been issued for seizure of vehicles. Notice to the Respondent is mandatory and disposal of the petition without notice is not permissible.

15. In ***Kotak Mahindra (supra)*** as well, the respondents therein were issued notice on 21st September, 2015 and thereafter on 17th December, 2015. It was only after the respondents did not appear despite service, that the Court proceeded *ex-parte* and directed appointment of receiver. Thus, the said judgment could not have formed the basis for the Trial Court to pass coercive orders on the first date of hearing and also dispose of the petitions *ex-parte*.

16. There cannot be any doubt that the Trial Court has the power to pass orders under Section 9. However, one has to bear in mind the principles for grant of interlocutory injunctions as also for appointment of receivers, that too at the *ex-parte* stage. The vehicles involved herein are luxury buses. Directing 16 buses to be taken possession of by the Receiver is a direction that ought to be passed under extraordinary circumstances, when the default by the company availing loan is not capable of being made good. In these cases, since no notice was issued, the Trial Court could not have presumed that the Petitioner would not be willing to make the payments. Defaults in few instalments cannot lead to such extreme directions especially during the pandemic situation. The Trial Court ought to have issued notice to the Petitioner, afforded a hearing and then passed appropriate orders in accordance with law.

17. Under these facts and circumstances, this Court is inclined to set aside

the impugned orders and remand the matter back to the Commercial Court. The Petitioner undertakes to pay to the Respondent a sum of Rs.25 lakhs within one week. The payment to be made shall be made through regular channel. Mr. Birender Singh submits that he would have no objection if the matter is remanded back to Karkardooma Courts.

18. Accordingly, the impugned orders are set aside. All the matters shall be taken up for hearing before the Id. District Judge (Commercial Court), East District on 7th December, 2020. The Petitioner shall ensure that the payment of Rs. 25 lakhs is made and replies to the petitions are also filed before the next date.

19. The matters shall be heard on merits, after completion of pleadings. If any other instalments are due under the loan agreement, the Id. District Judge shall pass orders, in accordance with law after hearing the petitioner. Broadly speaking, the guidelines set out in *Cholamandalam (supra)* may be followed in case of Section 9 petitions relating to vehicle loans.

20. With these observations, the present petition, along with all pending applications, is disposed of. Copy of this order be communicated to the Id. District Judge, (Commercial Court), East District, Karkardooma Courts. The present order be also circulated by the worthy Registrar Generals to all the District Judges for onward circulation to the Judges presiding over Commercial Courts.

**PRAITHIBA M. SINGH
JUDGE**

NOVEMBER 9, 2020
Rahul / A