Corporate Office At 8Th Floor vs M/S. Saumya Mining Ltd on 8 July, 2014

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

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1/46 ARBP-290-269-

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 290 OF 2014

L & T Finance Limited
a company registered under the Companies Act, 1956,
having their registered office at L & T House,
Ballard Estate, Mumbai 400 001 and

Corporate office at 8th Floor, Metropolitan,
C-26/C-27, "E" Block, Bandra Kurla Complex,
Bandra (East), Mumbai 400 051 .... Petitioner

Versus

1. M/s. Saumya Mining Ltd.,
   (Borrower),
   having registered office at Nathani Building,
   Shastri Chowk, G.E. Road,
   Raipur, Chattisgarh 492 001

And also at :
M/s. Saumya Mining Limited,
CB-25, Hari Kripa, Sec.I,
Salt Lake City, Kolkat,

West Bengal 700 064

2. Mrs. Pradnya Jain,
w/o. Mr. Ashok Kumar Jain,
(Guarantor),
DL-53, Sec-II, Salt Lake City,

Kolkata, West Bengal 700 091

3. Northern Coalfields Limited,
having its office at
PO. Singrauli Colliery,
District : Singrauli, M.P.

4. Eastern Coalfields Limited,
having its office at Po.Dishergarh,
Burdwan, West Bengal 713 333 .... Respondents

WITH
ARBITRATION PETITION (L) NO. 269 OF 2014

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WITH
ARBITRATION PETITION NO. 341 OF 2014

L & T Finance Limited
a company registered under the Companies Act, 1956,
having their registered office at L & T House,
Ballard Estate, Mumbai 400 001 and
Corporate office at 8th Floor, Metropolitan,
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Mr. Anand Poojary along with Ms. S.I. Joshi along with Nikhita Pawar along with Mani

i/by M/s. S.I. Joshi & Co. for petitioners.

Mr. Ayush Singhvi i/by Rohit Das & Associates for respondent nos. 1 and 2.

CORAM : R.D. DHANUKA,J.
JUD.RESERVED ON : 18TH JUNE, 2014

JUD. PRONOUNCED ON : 8TH JULY, 2014

ORAL JUDGMENT :

Petitioner has filed these four petitions under section 9 of Arbitration and Conciliation Act, 1996 for interim measures. The respondents have raised various issues which are common in all the four matters. By consent of parties, all the four matters are heard together and are hvn 5/46 ARBP-290-269-271-341.2014 being disposed of by a common order.

2. Some of the relevant facts of the above four matters are as under :

Arbitration Petition No. 290 of 2014

(a) Respondent no. 1 is borrower. Respondent no.2 is a guarantor to the loan obtained by respondent no.1. The respondent no. 3 and 4 are the debtors of respondent no. 1 and 2 and have been joined as parties to secure the claim of the petitioner against respondent no. 1 and 2.

(b) On 31st December, 2011 the petitioner and the respondent no. 1 and 2 entered into a loan agreement. Petitioner granted loan of Rs.28,35,000/- to the respondent no. 1 and 2 on the terms and conditions described in the said agreement. Respondent no. 1 executed demand promissory note on 31st December, 2011 in favour of the petitioner promising to pay the said loan to the petitioner for value received with interest. On 31st December, 2011 respondent no. 1 executed a deed of hypothecation in favour of the petitioner. Under the said deed of hypothecation two equipments described in Exh. G to the petition are hypothecated in favour of the petitioner by respondent no. 1. Similarly on 31st December, 2011 respondent no. 2 also executed a deed of guarantee in favour of the petitioner.

(c) The respondent no. 1 and 2 were liable to make repayment of the loan amount with interest in 35 installments. The loan agreement was executed at Kolkata.

(d) It is the case of the petitioner that since the respondent no.1 and 2 committed default in making payment of some of the installments, petitioner through their advocate issued notice on 10th September, 2013 terminating the loan agreement and called upon the respondent no. 1 and 2 to pay outstanding amount of Rs.24,20,542.28 and invoked the arbitration agreement. There is no response to the said notice of demand. It is the case of the petitioner that as on 28 th August, 2013, the petitioner is entitled to recover a sum of Rs.24,20,542.28 with further interest thereon till payment and or realization.

hvn 6/46 ARBP-290-269-271-341.2014 Arbitration Petition (L) No.269 of 2014

(e) Vide loan agreement dated 30th November, 2011 between the petitioner and respondent no.1, petitioner granted loan of Rs.1,92,62,000/- to respondent no.1 on the terms and conditions mentioned therein. The loan was repayable in 34 monthly installments. On 30 th November, 2011 the respondent no.1 executed a demand promissory note in favour of the petitioner promising to pay the loan with interest. On the same date the respondent nos.1 and 2 executed a deed of hypothecation thereby hypothecating equipment in favour of the petitioner which are described in Exh.G to the petition. The respondent no. 2 executed deed of guarantee dated 30 th November, 2011 in favour of the petitioner.

(f) It is the case of the petitioner that since the respondent nos. 1 and 2 committed default in making payment of some of the installments, petitioner issued a notice of demand dated 10 th September, 2013 through their advocate and called upon the respondent nos.1 and 2 to pay a sum of Rs.80,85,435.55 as on 28th August, 2013 and further interest thereon. By the said notice the petitioner terminated the loan agreement and appointed an arbitrator. There was neither any

repayment nor any response to the said notice. According to the petitioner, they are entitled to recover Rs.80,85,435.55 with further interest thereon from respondent nos. 1 and 2 from 29 th August, 2013 till payment and/or realization. Respondent nos. 3 and 4 are the debtors of respondent nos. 1 and 2 and have been joined as parties to secure the claim of the petitioner against respondent nos. 1 and 2.

Arbitration Petition (L) No. 271 of 2014

(g) On 5th July, 2012, vide a loan agreement the petitioner granted loan of Rs.1,25,00,000/-

to respondent no. 1 on the terms and conditions described in the said agreement. Respondent no. 1 executed a demand promissory note on 5 th July 2012 in favour of the petitioner promising hvn 7/46 ARBP-290-269-271-341.2014 to pay the loan with interest to the petitioner. Respondent no. 1 executed deed of hypothecation on 5th July, 2012 hypothecating the equipments described in Exh. G to the petition. On 5 th Luly, 2012 respondent no. 2 executed deed of guarantee in favour of the petitioner.

(h) Under the loan agreement, the respondent no.1 and 2 were liable to repay the entire amount with interest in 34 installments. Respondent no. 3 and 4 are the creditors of respondent no. 1 and 2 and have been impleaded to secure he claim of the petitioner against respondent no.

1 and 2.

(i) It is the case of he petitioner that since the respondent no. 1 and 2 committed default in making payment of some of he installments, petitioner through their advocates notice dated 10 th September, 2013 terminated the loan agreement and called upon the respondent to pay sum of Rs.1,32,95,695.42 with further interest thereon and invoked arbitration agreement and appointed the sole arbitrator. According to the petitioner, respondent no.1 and 2 are liable to pay Rs.1,32,95,695.42 as on 28th August, 2013 and further interest thereon till payment and/or realization from 29th August, 2013.

ARBITRATION PETITION NO. 341 OF 2014

(j) On 5th November, 2011 petitioner granted loan of Rs.31,49,000/- in favour of respondent no. 1 under a loan agreement. Respondent no. 1 executed demand promissory note in favour of the petitioner promising to pay the loan amount with interest. On the same day, respondent no.1 executed a deed of hypothecation in favour of the petitioner hypothecating the equipment described in Exh. H to the petition in favour of the petitioner. Respondent no. 2 executed a deed of guarantee on 5th November, 2011 in favour of the petitioner. Under the said loan agreement, respondent no. 1 and 2 were liable to repay the entire loan amount with interest in 35 installments described in the agreement. Respondent no. 3 and 4 are the creditors of respondent hvn 8/46 ARBP-290-269-271-341.2014 no. 1 and 2 and have been impleaded to secure he claim of the petitioner against respondent no.

1 and 2.

(k) It is the case of the petitioner that since the respondent no. 1 and 2 committed default in making payment of some of the installments, petitioner through their advocate's notice dated 10 th September, 2013 terminated the loan agreement and called upon the respondent to pay Rs.24,58,363.93 as on 28th August, 2013 and further interest thereon and invoked the arbitration agreement. By the said notice, the petitioner appointed the sole arbitrator under the arbitration agreement. According to the petitioner, as on 28 th August, 2013, the respondent no. 1 and 2 were liable to pay to the petitioner, sum of Rs.24,58,363.93 with further interest at the rate of 36% p.a. on Rs.24,58,363.93 from 29th August, 2013 till payment and/or realization.

3. Mr. Poojari learned counsel appearing for the petitioner in all the aforesaid petitions, invited my attention to various documents executed by and between the the petitioner and respondent nos. 1 and 2. He submits that in view of the default committed by the respondent no.

1 and 2 of the payment of installments, petitioner is entitled to terminate the loan agreement, recover from the borrower the arrears of amount due and unpaid upto the date of termination and other future installments for the unexpired period, initiate legal action under applicable laws, repossess and sell the assets without any order from court. It is submitted that the respondent no.1 and 2 have not made any payment in response to the notice of demand, nor have even responded to the said notice. Learned counsel submits that petitioner apprehends that the respondent no. 1 and 2 may create third party rights in respect of the hypothecated equipments with an intension to defeat and frustrate the award which may be passed in favour of the petitioner by the learned arbitrator. It is submitted that petitioner is entitled for interim measures for protection, preservation, interim custody and sale of equipment which are subject matter of hvn 9/46 ARBP-290-269-271-341.2014 arbitration agreement and to secure and protect the dues of the petitioner from the respondent no.

1 and 2, otherwise the award which may be passed in favour of the petitioner, and against the respondent no. 1 and 2 would become infructuous and there would be a paper decree in favour of the petitioner. None appeared for the respondent no. 3 and 4 in the above matters. No affidavit in reply is filed by respondent no. 3 and 4. Respondent no.1 and 2 have filed affidavit in reply and have raised various issues which are common in all the four matters.

4. Mr. Aayush Singhvi learned counsel appearing for respondent no. 1 and 2 submits that the loan agreement between the parties is executed at Kolkata (West Bengal), the registered office of respondent no. 1 and its corporate office is situated at Kolkata. Respondent no. 2 is also staying at Kolkata. Respondent no. 1 and 2 do not have residence, office or place of business within the jurisdiction of this court. This court has no jurisdiction since petitioner has not obtained leave under clause 12 of Letters Patent.

5. Learned counsel then submits that the petitioner having brought the purported copy of the loan agreement into the state of Maharashtra is subject to stamp duty in Maharashtra under the provisions of section 3(b) of the Bombay Stamp Act, 1958 and since the petitioner has not paid the stamp duty payable on such document, in view of section 34 of the Bombay Stamp Act, 1958, such

document cannot be admitted in evidence in the present proceedings. It is submitted that the stamp duty liable to be paid on the loan agreement was more than Rs.5970/- whereas only of Rs.100/- has been paid on the said instrument as stamp duty. The document is thus liable to be impounded by this court under section 33 of the Maharashtra Stamp Act, 1958. Similar objection is also raised in respect of hypothecation deed.

6. Learned counsel submits that purported letter of offer dated 3rd January, 2012 annexed at hvn 10/46 ARBP-290-269-271-341.2014 Exh.A amounts to a unilateral subsequent variation by the petitioner of the terms of the purported loan and therefore, the guarantor is released of all its obligations under the deed of guarantee dated 31st January, 2011.

7. It is submitted by the learned counsel that since the letter of offer had been issued by the petitioner from its office at Kolkata to the respondent no. 1 who has corporate office situated at Kolkata, loan agreement and the deed of hypothecation having been entered into at Kolkata, petitioner having regular place of business at Kolkata, the loan advanced to the respondent no. 1 is accordingly covered by the provisions of Bengal Money Lenders Act, 1940. It is submitted that since the petitioner had not obtained any licence under section 8 of the Bengal Money Lenders Act, 1940, in view of section 13 of the said Act, there is an express bar against courts passing any order or decree in a suit unless conditions therein are satisfied. It is submitted that the proceedings filed under section 9 by the petitioner is thus liable to be stayed till petitioner obtains licence for money lending business under section 8 of the Bengal Money Lenders Act, 1940. It is submitted that the petitioner has not complied with section 24 and 25 of the Bengal Money Lender Act by not regularly furnishing and/or keeping statement of account in the matter set out therein. It is submitted that the rate of interest claimed in arbitration petition in inordinately high and usurious and contrary to the provisions of Bengal Money Lenders Act, 1940.

8. Learned counsel then submits that the demand promissory note annexed at Exh. D does not state the principal amount of the purported loan and the date and place of loan transaction or the time within which the principal amount is to be paid by the purported borrower. The demand promissory note is in contravention of provisions of section 40 of Bengal Money Lenders Act, 1940.

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9. Learned counsel for respondent no. 1 and 2 then submits that the notice invoking arbitration agreement dated 10th September, 2013 does not clearly state that in case of which particular dispute the petitioner has invoked which arbitration agreement and which dispute the petitioner propose to

refer for sole arbitration of the arbitrator appointed by the petitioner. It is submitted that there is misjoinder of causes of action against two different parties arising under separate arbitration agreement entered into by the petitioner.

10. Learned counsel submits that respondent no.1 has no intension of alienating or disposing of the vehicles which is forming subject matter of arbitration petition and the same are maintained in a good condition only with the wear and tear of regular usage.

11. Learned counsel placed reliance on section 2(2), 2(4), 2(8), 2,(9), 2(13), 2(14), 2(19), 2(21) and 2(22) of Bengal Moneylending Act, 1940 which provides for definitions of various terms read thus :

> "2. Definitions.--In this Act, unless there is anything repugnant in the subject or context,--
>
> (2) "borrower" means a person to whom a loan is advanced and includes a successor-in interest or surety ;
>
> (4) "commercial loan" means a loan advanced to any person to be used by such person loosely for the purposes of any business of concern relating to trade, commerce, industry, mining, planting, insurance, transport, banking or entertainment, or to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature, whether as proprietor or principal or agent or guarantor;

Explanation.--Notwithstanding anything contained in any agreement relating thereto, a loan shall not be deemed to be a commercial loan unless it is in subtance a loan to be used solely for any of the purposes referred to this clause:

> (8) "interest" includes any sum by whatsoever name called, in excess of the principal paid or payable to a lender in consideration of, or otherwise hvn 12/46 ARBP-290-269-271-341.2014 in respect of a loan whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum lawfully charged by a lender in accordance with the provisions of this Act or any other law for the time being in force for or on account of costs, charges or expenses:
>
> (9) "lender" means a person who advances a loan and includes a moneylender ;
>
> (13) "money-lender" means a person who carries on the business of money-lending in West Bengal or who has a place of such business in West Bengal, and includes a payee as defined in section 172 of the Indian Contract Act, 1872 (9 of 1872).
>
> (14) "money-lending business" and "business of money-lending" means the business of advancing loans either solely or in conjunction with any other business;

(19) "register" means a register of money-lenders maintained under section 7 ;

(21) "suit" includes an appeal (2of 1934) ;

(22) "suit to which this Act applies" means any suit or proceeding instituted or filed on or after the 1st day of January, 1939 or pending on that date and includes a proceeding in execution--

(a) for the recovery of a loan advanced before or after the commencement of this Act :

(b) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken, in respect of any loan advanced whether before or after the commencement of this Act; or

(c) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act."

12. Reliance is also placed on section 12, 13, 27, 33 of the Bengal Money Lenders Act, 1940 in support of the submission that the petitioner carrying out money lending business in Kolkata, transactions between the parties are governed by the Bengal Money Lenders Act, 1940. Sections 12, 13, 27 and 33 of the Bengal Money Lenders Act, 1940 read thus :

"12. Entry in register and grant of licences.--On receipt of an application under section 11 and on payment in the prescribed manner of the licence fee specified in section 10, the Sub-Registrar shall, subject to the provisions of section 16, enter the name of the applicant in the register and grant the applicant a licence in such form as may be prescribed.

13. Stay of suit when money-lender does not hold licence.--(1) No Court shall pass a decree or order in favour of a money-lender in any suit instituted by a money- lender for the recovery of a loan advanced after the date notified under section 8, or in any suit instituted by a money-lender for the enforcement of an agreement entered into or security taken, or for the recovery of any security given, in respect of such loan, unless the Court is satisfied that, at the time or times when the loan or any part

thereof was advanced, the money-lender held an effective licence.

(2) If during the trial of a suit to which sub-section (1) applies, the Court finds that the money-lender did not hold such licence, the Court shall, before proceeding with the suit, require the money-lender to pay in the prescribed manner and within the period to be fixed by the Court such penalty as the Court thinks fit, not exceeding three times the amount of the licence fee specified in section 10.

(3) If the money-lender fails to pay the penalty within the period fixed under sub-section (2) or within such further time as the Court may allow, the Court shall dismiss the suit: if the money-lender pays he penalty within such period, the Court shall proceed with the suit.

The provisions of this section shall apply to a claim for a set-off or on behalf of a money-lender.

(5) In this section, the expression "money-lender" includes an assignee of a money- lender, if the Court is satisfied that the assignment was made for the purposes of avoiding the payment of licnece fee and penalty which may be ordered to be paid under this section.

27. Procedure in suits relating to loans by money-lenders.--Notwithstanding anything contained in any law for the time being in force, in any suit to which this Act applies--

(a) a Court shall, before deciding the claim on its merits, frame and decide the issue whether the money-lender has in respect of the claim in suit complied with the provisions of sections 24 and 25 ; and

(b) if the Court finds that the provisions of either of the said sections have not been so complied with, it may, if the plaintiff's claim is established either wholly or in part, disallow the whole or such portion of the interest found due as may, in the circumstances of the case, appear reasonable to the Court, and may also disallow costs, or in computing the amount of interest due upon the loan, the Court may exclude any period for which the money-lender omitted to comply with the provisions of either of the said sections :

Provided that if the money-lender has, after the time specified in the said sections, given the receipt or furnished the statement, as the case may be, and if he satisfies the Court that he had sufficient cause for not doing so earlier, the Court may include any such period in computing the interest.

Explanation.--A money-lender who has given a receipt or furnished a statement in the prescribed form shall be held to have complied with the provisions of section 24 or section 25, as the case may be, in spite of any errors and omissions in such receipt or statement, if the Court finds that such errors and omissions are neither hvn 14/46 ARBP-290-269-271-341.2014 material nor made fraudulently.

33. Prohibition of charges for expenses of loans.--Any agreement between a lender and a borrower or intending borrower for the payment to the lender of any sum on account of costs, charges or expenses incidental or relating to the negotiations for, or the granting of, the loan or proposed loan, shall be illegal, and if any sum is paid to a lender by the borrower or intending borrower as, for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly :

Provided that nothing in this section shall debtor a lender from recovering the costs of investigation title, of stamp duty and registration of documents and other necessary and incidental expenses in cases where the agreement includes a stipulation that property is to be given as security or by way of mortgage, of the costs of stamp duty and registration of documents in the case of unsecured loans, if both parties have agreed to such expenditure and the reimbursement thereof, nor from recovering such costs, charges or expenses as are leviable under the provisions of the Transfer of Property Act, 1882 (4 of 1882) of any other law for the time being in force.
"

13. It is submitted that the proceedings filed under section 9 are liable to be stayed in the absence of money lending licence obtained under the provisions of the Bengal Money Lenders Act, 1940 by the petitioner. Learned counsel placed reliance on the judgment of Kolkata High Court in the case of Angel's Consultants Pvt. Ltd. And another Vs. Anand Mehta and Company, 2005 (1) CHN 357 and in particular paragraphs 20 to 24 which read thus :

"20. The learned Advocates for the plaintiffs have also referred to the ratio decided in the case of Shiv Kumar Tody v.Amolak Chand Champalal, and it is submitted that probably the defendants had proceeded on the basis of the ratio decided in that case by the learned Single Bench of this Court. But, it is further pointed out that the said judgment was overruled by the decision of the Division Bench of this Court in the case of Swaika Vanaspati Products Ltd. v. Canbank Financial Services Ltd. (supra), with the following observations :

"Even though a plain reading of sub-section (1) of Section 13 clearly suggests that no Court can pass a decree or order in favour of a money-lender in any suit instituted by such a money-lender for recovery of a loan unless the Court is satisfied that at the time when the loan was advanced, the money- lender held an effective licence. There is, thus, a clear embargo upon the Court passing a decree or order in a suit in favour of a money-lender/plaintiff who at the time the loan was advanced did not hold an effective licence. What is noteworthy is that the embargo that relates to the passing of the decree has, in point of time, relation to the period when the loan is hvn 15/46 ARBP-290-269-271-341.2014 advanced. Sub-section (2) of Section 13 then creates an

exception to the aforesaid embargo by providing that if during the trial of a suit to which sub-section (1) applies, the Court finds that the money-lender/ plaintiff does not have a licence, the Court shall, before proceeding with the suit, require the money- lender/plaintiff to pay penalty which may be three times the licence fee as specified in Section 10 of the Act. As per sub-section (3) of Section 13, if the plaintiff/money-lender, thus pays the penalty, the Court shall proceed with the suit. This is the plain meaning as we can call out by a combined reading of sub- sections (1), (2) and (3) of Section 13. In sum and substance, therefore, the position of law as emerges from a combined reading of these three provisions is that even though there is no embargo or prohibition as such about the maintainability or the filing of a suit with respect to a loan by an unlicensed money-lender, the Court in such a suit is precluded from passing a decree, or an order in favour of such a money-lender with respect to such a loan if the money-lender does not hold a valid licence as per the Act, If, however, during the course of the trial, the Court finds that the money-lender does not have a licence, an obligation is cast upon the Court to call upon the plaintiff/money- lender to pay penalty which cannot be more than three times the licence fee, as prescribed in Section 10 of the Act. The expression 'the Court shall, before proceeding with the suit, require the money-lender to pay' clearly suggests that the legislature intended that in every case where the suit has been instituted by an unlicensed money-lender, it shall be mandatory for the Court to give an opportunity to the money- lender/plaintiff to pay the penalty and, as per the provisions contained in sub-section (3) of the Act, if the money- lender avails of this opportunity and pays the penalty, the Court shall proceed with the suit. Undoubtedly, however, if the money-

lender fails to pay the penalty the Court shall dismiss the suit."

On scrutiny it appears from the said judgment of the Division Bench as quoted above that the consideration of Their Lordships was whether the provisions of Section 13 of the B.M.L. Act will come to play when an unlicensed money-lender had advanced loan and filed suit for recovery of the same from the debtor. It is understood from the abovequoted portion of the judgment that it is always mandatory for the Court to give an opportunity to the money-lender/plaintiff to pay the penalty under sub-section (3) of Section 13 of the B.M.L. Act. The ratio decided in the case of Swaika Vanaspati Products Ltd. (supra), as quoted above has no scope to deal with the R.B.I. Act and as such the said ratio does not come to guide us in the context of the present matter as regards the possession of the certificate under the R.B.I. Act is sufficient to exonerate the plaintiff to obtain in the licence under the B.M.L. Act.

21. Now after having considered the submissions made by the learned Advocates for both the parties and the different provisions of the Acts as discussed above the ratio decided in the case of Mayavaram Financial Corporation Ltd. (supra) stands as a beacon light for arriving at the correct destination. In the said case the purport of the overlapping of different lists in the Schedules to the Constitution were discussed and it was also shown there bow the money-lending and money-borrowing differs with each other. In doing that the decision of the Privy Council in the case

of Prafulta Kumar v. Bank of hvn 16/46 ARBP-290-269-271-341.2014 Commerce MANU/PR/0075/1947: AIR 1947 PC 60was referred to by the learned Counsel of one of the parties. In the said judgment the Hon'ble Privy Council observed that the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act is also an important matter. It was also observed by the Privy Council as below :

> "Its provisions may advance so far into federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money- lending but promissory notes or banking ? Once that question is determined, the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

Our Hon'ble Judge of the Supreme Court came to the conclusion after considering the various case laws that the legislation on forward contracts must be held to fall within the exclusive competence of the Union under Entry 48 in List I. In the said judgment of Mayavaram Financial Corporation Ltd. (supra) the decision made in the case of State of Bombay v. Narottamdas, MANU/SC/0011/1950: [1951]2SCR51 was referred wherein the doctrine of pith and substance was described as follows :

> "The doctrine of pith and substance postulates, for its application, that the impugned law is substantially within the legislative competence of the particular legislature that made it, but only incidentally encroached upon the legislative field of another legislature. The doctrine saves this incidental encroachment if only the law is in pith and substance within the legislative field of the particular legislature which made it."

The Hon'ble Supreme Court thus observed that the contract entered into by the foreman of a chit fund with the subscriber was a special contract falling under the Entry 7 of List III of the Seventh Schedule and the President's assent to the Act confirms the view of the Supreme Court.

22. The distinction between the banking business and an ordinary money- lender was discussed in the case of Sajjan Bank Pvt. Ltd. v. Reserve Bank Ltd., MANU/TN/0138/1961: AIR1961Mad8 and it is observed there as follows :

> "The essence of a banking business is, therefore, receiving money on current account for deposit from the public repayable on demand and withdrawable by cheque, draft or otherwise.
>
> An ordinary money-lender who does not accept moneys on terms enabling a depositor to draw cheques upon him would not, therefore, be a bank or banker properly so called. The provisions of the Act would, therefore, apply only to the limited class of cases where the bank or banker allows the withdrawal of money by the issue cheques."

hvn 17/46 ARBP-290-269-271-341.2014 The Supreme Court in the case of Mayavaram Financial Corporation Ltd. (supra) thus came to the conclusion which reads as under:

> "We are of opinion that there is a distinction between money- lending and money borrowing and the impugned provisions insofar as they control money borrowing in the state of deposits from third parties and lending the same are valid."

Thus, it is clear that the Supreme Court held the State Act which deals with deposits from third party and lending the same as valid. Further to that it was also held in the case of Mayauaram Financial Corporation Ltd, (supra) that Chapter IIIB containing Sections 45H to 45Q of the R.B.F. Act dealing with non- banking institutions and financial institutions receiving deposits from third parties which has been introduced in the Reserve Bank of India Act, 1934 in pith and substance relates to the control of credit by the Reserve Bank of India by virtue of its position as the central bank of the country and, therefore, falls under Entries 38 (RBI) and 36 (currency) of List I of the Seventh Schedule of the Constitution and does not entrench upon Entry 30 (money-lenders and money-lending) of List II thereof.

23. The scope of Section 45Q of the Reserve Bank Act came for discussion before the Hon'ble Apex Court in the case of Harishankar Bagla v. State of M.P. MANU/SC/0063/1954: 1954CriLJ1322 and it was observed in that case by the Supreme Court that the effect of Section 45Q is not to repeal expressly or impliedly any of the provisions of pre-existing laws. Nor does it abrogate them. What it does is only to make the provisions of Chapter IIIB override the other laws. That being the position both the statutes namely R.B.I. Act and Bengal Money-Lenders Act shall remain in their respective fields and nothing is invalid. As we have seen from the said judgment that money-borrowing in the State in the shape of deposits from the third parties and lending the same are the same thing and valid, the conclusion can be drawn that the plaintiff company though having fortified with the certificate of the Reserve Bank must be treated as money-

lenders under the B.M.L. Act having its business within the State of West Bengal and it does not exonerate the plaintiff company to obtain licence under the B.M.L. Act.

24. Now having followed the ratio decided in the case of Swaika Vanaspati Products Ltd. (supra), the plaintiff company must be given the opportunity to obtain the licence under Section 13 of the B.M.L. Act and to pay statutory penalty under sub-section (3) of the said section. And the plaintiff company is, therefore, directed to avail of that opportunity within a reasonable period of time and after having obtained such certificate on payment of statutory penalty within a period of three months from the date the plaintiff company may proceed with the suit failing which the suit shall stand dismissed."

14. Learned counsel submits that since the petitioner has not paid the sufficient stamp duty on the documents relied upon in the petition, no relief under section 9 of the Arbitration and Conciliation Act, can be granted by this court. Learned counsel made an attempt to distinguish hvn 18/46 ARBP-290-269-271-341.2014 the judgment of this court in case of L & T Finance Limited Versus Damodar Dandekar delivered on 18th December, 2013 in Arbitration Petition No.529 of 2013 on the ground that it is an obligation on the part of the petitioner to pay stamp duty and not the respondent

nos. 1 and 2.

Learned counsel submits that there was no service of valid notice of invoking arbitration by respondent upon respondent no. 1and 2 and no order under section 9 can be passed against respondent no.1 and 2 by this court. It is submitted that since there is no arbitration agreement between petitioner and respondent no. 3 and 4 and since they are not at all concerned with the transaction between the petitioner and respondent no. 1 and 2, no relief can be granted against them in this proceedings.

15. Mr. Poojari learned counsel for the petitioner on the other hand submits that the petitioner is holding licence issued by Reserve Bank of India for carrying on money lending business and is governed by the provisions of the Reserve Bank of India Act, 1934 for all the purposes. It is submitted that the provisions of Bengal Money Lenders Act, 1940 is not applicable to the transactions in hand. Learned counsel submits that in any event, no notification has been issued by the State Government under section 2(3) of the Bengal Money Lenders Act notifying the petitioner as a financial institution. It is submitted that section 9 of the said Bengal Money Lenders Act apply only to individuals and not to the petitioner which is a non banking financial company.

16. Learned counsel invited my attention to various definitions under Chapter IIIA of the Reserve Bank of India Act. Under section 45I(f) 'non banking financial company' is defined.

Section 45IA provides for registration of non banking financial company. Reliance is placed on section 45JA which provides for power of reserve bank to determine policies and issue directions. Under section 45M, every non banking institution has to furnish the statements as required by the Reserve Bank. Section 45Q provides that the provisions of the chapter IIIB shall hvn 19/46 ARBP-290-269-271-341.2014 have effect notwithstanding anything inconsistent therein contained in any other law for the time being in force or any instrument having effect by virtue of any such law. It is submitted by the learned counsel that the provisions of chapter IIIB of the RBI Act, 1934 itself is self contained and the petitioner as well as the respondents are governed by the provisions of the said Act. In support of the submission that the provisions of Bengal Money Lenders Act, 1940 are not applicable and that the RBI Act, 1934 would govern the parties, learned counsel placed reliance on the judgment of Gujarat High Court in the case of Radhe Estate Developers Vs. Mehta Integrated Finance Company Limited, reported in 2012(1)Gujarat Law Reporter, 14. Reliance is placed on paragraphs 10, 16 to 20, 23, 24, and 33 of the said judgment which read thus :

> "10. In Letters Patent Appeal No. 1095 of 2010, Respondent - M/s. Sundaram Finance Limited has taken a plea that it is a Company incorporated under the 'Indian Companies Act, 1913' and registered with the Reserve Bank of India as contemplated Under Section 45IA of the R.B.I. Act, and reclassified as a finance company. In other cases, Respondent G.E. Money Financial Services Limited of Letters Patent Appeal No. 1094 of 2010 and Respondent-Bussan Auto Finance India Private Limited in Letters Patent Appeal No. 1097 of 2010, it is stated that they are Companies registered under the 'Indian Companies Act, 1956', and also registered with the Reserve Bank of India Under Section 45IA of the R.B.I. Act. They were served with

notices Under Section 13A of the Money-Lenders Act, calling upon them to produce certain documents with clear understanding that on failure to comply with the same, action can be initiated Under Section 34 of the Money-Lenders Act r.w. Sections 174 and 175 of the Indian Penal Code.

16. From the aforesaid provisions of the Money-Lenders Act, it will be evident that

(i) no company incorporated under the provisions of the Indian Companies Act, 1956, is covered by Money-Lenders Act, and

(ii) in absence of any notification issued by the State Government, no banking financial or any institution carries on the business of money-

lending is covered under the Money-Lenders Act.

The Reserve Bank of India Act, 1934:

17. Chapter IIIB relates to 'provisions relating to non-banking institutions receiving deposits and financial institutions'.

Section 45I deals with the 'definitions'. Under Clause (a) of Section 45I while 'business of a non-banking financial institution' is defined, which includes 'financial institution' as defined under Clause (c) of Section 45I. It also includes 'non-banking financial company' as defined under Clause (f) of Section 45I.

Clause (aa) to Section 45I defines 'company'. Clause (e) of Section 45I defines 'non-banking institution'. All the aforesaid definitions, being relevant for determination of the issue, are quoted hereunder:

45I. Definitions.- In this Chapter, unless the context otherwise requires,

(a) 'business of a non-banking financial institution' means carrying on the business of a financial institution referred to in Clause (c) and includes business of a non-banking financial company referred to in Clause (f);

(aa) "company" means a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956) and includes a foreign company within the meaning of Section 591 of that Act;

(c) "financial institution" means any non-banking institution which carries on as its business or part of its business any of the following activities, namely:

(i) the financing, whether by way of making loans or advances or otherwise of any activity other than its own;

(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature;

(iii) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in Clause (c) of Section 2 of the Hire-Purchase Act, 1972 (25 of 1972);

(iv) the carrying on of any class of insurance business;

(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being in force in any State, or any business, which is similar thereto;

(vi) collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lumpsum or otherwise, by way of subscriptions or by sale or units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies in any other way, to persons from whom monies are collected or to any other person, but does not include any institution, which carries on as its principal business, hvn 21/46 ARBP-290-269-271-341.2014

(a) agricultural operations, or (aa) industrial activity; or Explanation.- For the purposes of this clause, "industrial activity"

means any activity specified in Sub-clauses (i) to (xviii) of Clause (c) of Section 2 of the Industrial Development Bank of India Act, 1964 (18 of 1964);

(b) the purchase, or sale of any goods (other than securities) or the providing of any services; or

(c) the purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales of immovable property by other persons;

(e) 'non-banking institution' means a company, corporation, or co- operative society;

(f) 'non-banking financial company' means

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the official Gazette, specify.

Under Section 45IA no non-banking financial company can commence or carry on the business of a non-banking financial institution without obtaining a certificate of registration issued under Chapter IIIB and having the net owned fund of twenty-five lakh rupees or such other amount not exceeding two hundred lakh rupees as the Bank by notification in the Official Gazette may specify. Every non-banking financial company is also required to file an application to the Reserve Bank of India in such a form as may be specified. In case of rejection of application for registration or cancellation of certificate of registration, there is a provision of appeal under Sub-section (7) of Section 45IA of the R.B.I. Act.

Reserve Bank of India has power to determine the policy and issue directions in the public interest to regulate the financial system of the country to its advantage, or to prevent the affairs of any non-banking financial company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company Under Section ec.45JA, which reads as follows:

> hvn 22/46 ARBP-290-269-271-341.2014 45JA. Power of Bank to determine policy and issue directions.- (1) If the Bank is satisfied that, in the public interest or to regulate the financial system of the country to its advantage or to prevent the affairs of any non-banking financial company being conducted in manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any of the non-banking financial companies relating to income recognition, accounting standards, making of proper provision for bad and doubtful debts, capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a non-banking financial company or a class of non-banking financial companies or non-banking financial companies generally, as the case may be, and such non-banking financial companies shall be bound to follow the policy so determined and the direction so issued.
>
> (2) Without prejudice to the generality of the powers vested under Sub-section (1), the Bank may give directions to non-banking financial companies generally or to a class of non banking financial companies or to any non-banking financial company in

particular as to-

(a) the purpose for which advances or other fund based or non-fund based accommodation may not be made; and

(b) the maximum amount of advances of other financial accommodation or investment in shares and other securities which, having regard to the paid-up capital, reserves and deposits of the non-

banking financial company and other relevant considerations, may be made by that non-banking financial company to any person or a company or to a group of companies.

Reserve Bank of India has complete regulative control and regulative power as evident from different provisions of Chapter IIIB, including Sections 45IB, 45IC, 45J, 45K,45L, 45M, 45MA. Interest of the depositors has been taken care Under Section 45MB, which deals with 'power of bank to prohibit acceptance of deposit and alienation of assets', as quoted hereunder:

45MB. Power of Bank to prohibit acceptance of deposit and alienation of assets.- (1) If any non-banking financial company violates the provisions of any section or fails to comply with any direction or order given by the Bank under any of the provisions of this Chapter, the Bank may prohibit the non-banking financial company from accepting any deposit.

(2) Notwithstanding anything to the contrary contained in any agreement or instruments or any law for the time being in force, the Bank, on being satisfied that it is necessary so to do in the public interest or in the interest of the depositors, may direct, the non-

banking financial company against which an order prohibiting from hvn 23/46 ARBP-290-269-271-341.2014 accepting deposit has been issued, not to sell, transfer, create charge or mortgage or deal in any manner with its property and assets without prior written permission of the Bank for such period non exceeding six months from the date of the order.

The Bank can also file winding up petition, and thereby take penal action in case a non-banking financial company is unable to pay the debts, or by provisions of Section45IA disqualify the company to carry on business, if the continuance of the non-banking financial company is detrimental to the public interest or to the interest of depositors of the company as evident from Section 45MC. The total power and control of the Reserve Bank of India over such N.B.F.Cs. will be evident from the rest of the provisions under Chapter IIIB, including Sections 45N, 45NA and 45NB.

18. Thus, it will be evident that Reserve Bank of India has full control over the N.B.F.Cs. and can take regulatory measures, and in an appropriate case, it can take penal action like winding up, etc. in the interest of its customers, namely, the depositors.

19. We have noticed that the State Government has not issued any notification Under Section 2(10)(b) with regard to any banking financial or any institution, such as N.B.F.Cs., bringing it within the meaning of 'money-lender' as defined Under Section 2(10) of the Money-Lenders Act. It has already been held that except the companies mentioned thereunder and referred to above, companies incorporated under the Indian Companies Act, 1956, do not come within the definition of 'money-lender' as defined Under Section 2(10)(iiia) r.w. Section 2(4) of the Money-Lenders Act.

20. Per contra, it will be evident that 'company' as defined in Section 3 of the Indian Companies Act, 1956, come within the definition of Section 45I(aa) of the R.B.I. Act. Section 3 of the Indian Companies Act, 1956, defines 'company', including the companies integrated under the Indian Companies Act, 1956, Indian Companies Act, 1982, Indian Companies Act, 1913, etc. as evident from the said provision, which reads as follows:

> 3. Definitions of "Company", "Existing Company", "Private Company"
>
> and "Public Company".- (1) In this Act, unless the context otherwise requires, the expressions "company", "existing company", "private company" and "public company" shall, subject to the provisions of Sub-section (2), have the meanings specified below:
>
> (i) "company" means a company formed and registered under this Act or an existing company as defined in Clause (ii);
>
> (ii) "existing company" means a company formed and registered under any of the previous companies laws specified below:
>
> (a) any Act or Acts relating to companies in force before the Indian Companies Act, 1866 (10 of 1866) and repealed by that Act;
>
> (b) The Indian Companies Act, 1866 (10 of 1866);
>
> (c) The Indian Companies Act, 1882 (6 of 1882);

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(d) The Indian Companies Act, 1913 (7 of 1933);

(e) The Registration of Transferred Companies Ordinance, 1942 (54 of 1942); and

(f) Any law corresponding to any of the Acts or the Ordinance aforesaid and in force-

(1) in the merged territories or in a Part B State (other than the State of Jammu and Kashmir), or any part thereof, before the extension thereto of the Indian Companies Act 1913 (7 of 1913); or (2) in the State of Jammu and Kashmir, or any part thereof, before the commencement of the Jammu and

Kashmir (Extension of Laws) Act, 1956 (62 of 1956). in so far as banking, insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968 (25 of 1968) in so far as other corporations are concerned;

(g) the Portugese Commercial Code in so far as it relates to "sociedades anonimas";

(iii) "private company" means a company which has a minimum paid- up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles,-

(a) restricts the right to transfer its shares, if any;

(b) limits the number of its members to fifty not including-

(i) persons who are in the employment of the company, and

(ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and

(c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company:

> (d) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives;

Provided that where two or more persons hold one or more shares, in a company jointly, they shall, for the purposes of this definition, be treated as a single member;

(iv)"public company" means a company which-

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(a) is not a private company.

(b) has a minimum paid-up capital of five lakh rupees or such higher paid-up capital, as may be prescribed;

(c) is a private company which is a subsidiary of a company which is not a private company.

(2) Unless the context otherwise requires, the following companies shall not be included within the scope of any of the expressions defined in Clauses (i) to (iv) of Sub-section (1), and such companies shall be deemed, for the purposes of this Act, to have been formed and registered outside India:

> (a) a company the registered office where of is in Burma, Aden or Pakistan, and which immediately before the separation of that country from India was a company as defined in Clause (i) of Sub-section (1);
>
> (3) Every private company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than one lakh rupees, shall, within a period of two years from such commencement, enhance its paid-up capital to one lakh rupees.
>
> (4) Every public company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than five lakh rupees, shall within a period of two years from such commencement, enhance its paid-up capital to five lakh rupees.
>
> (5) Where a private company or a public company fails to enhance its paid-up capital in the matter specified in Sub-section (3) or Sub-

section (4), such company shall be deemed to be a defunct company within the meaning of Section 560 and its name shall be struck off from the register by the Registrar.

(6) A company registered under Section 25 before or after the commencement of Companies (Amendment) Act, 2000 shall not be required to have minimum paid-up capital specified in this section. Thus it will be evident that all the companies as defined Under Section 2(4) of the Money-Lenders Act now come within the meaning of 'company' for the purpose of Section45I(aa) of the R.B.I. Act.

23. Entry 30 of List-II of the 7th Schedule relates to 'money-lending' and 'money-lenders' apart from 'relief of agricultural indebtedness'. Legislature of a State has exclusive power to make law for such State or any part thereof, but it will be subject to Clause (1) and (2) of Article 246. Therefore, if any law has been made by the Parliament in its exclusive power in respect to matters enumerated in List-I or List-III in the 7th Schedule, the law in respect of such matter, if any, enacted by the Legislature of any State, shall be subject to the hvn 26/46 ARBP-290-269-271-341.2014 law made by the Parliament. Thus, a State Act is always subject to a Central Act.

24. Section 45Q of the R.B.I. Act referred to above makes it clear that the provisions of Chapter IIIB of the R.B.I. Act shall have the overriding effect notwithstanding anything inconsistent therewith contained in any other law, which includes the Money-Lenders Act, a State law, which is quoted hereunder:

> 45Q. Chapter IIIB to override other laws. 45Q. Chapter IIIB to override other laws.- The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.
>
> Therefore, if there is inconsistency between the provisions of the R.B.I. Act and Money Lenders Act, so far as it relates to 'companies' as defined Under Section ec. 2(4) of the Money-Lenders Act, in that case, the provisions of R.B.I. Act will prevail.
>
> 30. The parameter of repugnancy has been laid down by the Supreme Court in the case of M. Karunanidhi v. Union of India reported in MANU/SC/0159/1979: (1979) 3 SCC 431, wherein the Supreme Court observed as under:
>
> 24. ...Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts.

Before any repugnancy can arise, the following conditions must be satisfied:

> 1. That there is a clear and direct inconsistency between the Central Act and the State Act.
>
> 2. That such an inconsistency is absolutely irreconcilable.
>
> 3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

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35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:

> 1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
>
> 2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
>
> 3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

17. Learned counsel placed reliance on the judgment of Gujarat High Court in case of Sunderam Finance Limited Versus Assistant Registrar, Prevention of Money Lenders, 2010 (51) (2) Gujarat Law Reporter 1529 and in particular paragraph 11 to 15 and 25 which read thus :

"11. The next aspect to be considered is the applicability of M.L. Act to a non- Banking financial institution or non-Banking financial companies. As observed earlier, Central Act (R.B.I. Act) provides to regulating of the Banking business by hvn 28/46 ARBP-290-269-271-341.2014 non-Banking financial institution through Reserve Bank of India, whereas, the State Act (M. L. Act) provides for regulating the transaction of money lending by the money lenders. The business of non-Banking financial companies as defined in Explanation II of Section 45I provides as under:

Any credit given by a seller to a buyer on the sale of any property (whether movable or immovable) shall not be deemed to be deposit for the purposes of this clause [(c) "financial institution" means any non-Banking institution which carries on as its business or part of its business any of the following activities, namely:

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own.

12. The aforesaid shows that the business of N.B.F.C. which is sought to be controlled and regulated by Chapter-IIIB of R.B.I. Act includes the financing whether by way of loan or advances or otherwise. Further, Section 45J of the said Act enables the R.B.I. to determine the policy and issue directions to such N.B.F.C. which includes the matter relating to deployment of funds by N.B.F.C. The conjoint reading would go to show that the business of financing by such N.B.F.C. is regulated by the provisions of Chapter-IIIB of the R.B.I. Act. There are enabling power with the R.B.I. to issue such instructions and directions and they are binding to N.B.F.C. It can hardly be disputed that the charging of rate of interest for the loans or advances is not an integral component of such business. The regulation of such business of giving loan or advances can be equated with the moneylending.

Therefore, the situation confronted with is that the State Act as existed prior to the insertion of Section 45JA did provide for regulation of the business of moneylending by the State Act. Whereas by subsequent legislation enacted by the Parliament, such business of moneylending by N.B.F.C. is sought to be regulated through R.B.I. The aforesaid is coupled with the circumstance that Section 45Q of R.B.I. Act enacted by the Parliament provides for overriding effect, if there is inconsistency to any other law for the time-being in force or any instrument having having effect by virtue of any other such law.

13. At this stage, reference to the certain observations made in the decision of this Court in the case of Sarvoday Charitable Trust v. Gujarat University reported inMANU/GJ/0089/2008: 2008 (2) GLR 1760 would be relevant on the aspects of interpretation of statutes and reconciliation of the law made by the Parliament and the law made by the State legislature. This Court at Para 12 had inter alia observed as under:

> Therefore, if the interpretation of Mr. Shelat is accepted as that of Section 39 that it is only the University has the right to open a Post- Graduation Centre, then in that case, such would result into curtailing the operation of the laws made in the Parliament as against the State Legislature by virtue of Section 39 of the Act. It is by now well settled, as per the principles for interpretation of the statutes, that attempt on the part of the Court first will be to reconcile the different statutory provisions so as to allow them to operate independently and if such is not possible, the Court may read down the provisions so as to leave room for operating the legislature having overriding effecting and if there is a direct conflict, hvn 29/46 ARBP-290-269-271-341.2014 either the provisions may be declared in operative or may be ultimately struck down as ultra vires. It is not in dispute that the subject of M.Ed., is of higher education covered by Entry No. 66, and consequently, in the field of Parliament to make laws for regulating the education. Therefore, the State Legislature even if is on the statute book has to make room for operation of the laws made by the Parliament when covered by the subject of Parliament.

14. The examination of the situation in light of the aforesaid goes to show that Parliament has not made the law for regulating the business of moneylending activity in the country by all persons including N.B.F.Cs.. But, it has made law for regulating the activities of loans and advances by specific class of persons, viz. N.B.F.Cs. Whereas, the State law provides for controlling and regulating the business of moneylending for all persons which includes the Companies registered under the the Companies Act. The minute examination of the definition of the word 'Company' under the M. L. Act refers to only the Companies defined under the Companies Act, 1913, or the Companies formed in pursuance of the Act of U.K. or by Royal Charter of Letters Patent, or by an Act of Legislature of British possession. It does not refer to the Companies registered under the Companies Act, 1956. If the said provisions of M. L. Act is liberally interpreted keeping in view the principles of purposive interpretation, it would include the Companies registered under the Companies Act, 1956, like the petitioners herein. If the literal interpretation is considered, M. L. Act may not apply to the petitioning companies which are registered under the Companies Act, 1956, but the liberal interpretation would show that M. L. Act may be made applicable to subsequent companies registered under the Companies Act, 1956. It may be that in absence of any specific law made by the Parliament, the provisions of State legislature of M. L. Act may be made applicable for such Companies. However, once the Parliament having enacted the law for regulating the activities of loans and advances through R.B.I. of such Companies which are covered in the definition of N.B.F.C. or which are termed as N.B.F.C. under Chapter-IIIB of the Act, if the application of M. L. Act to such N.B.F.Cs. are allowed to continue, there would be overlapping of the State legislature over the laws made by the Parliament to that extent. As observed earlier, when the State legislature enacted M. L. Act, for the Companies like N.B.F.Cs. in the present case, activities were not being

regulated by any laws of the Parliament. It is only after the insertion of the Chapter-IIIB, more particularly after 1997 by insertion of Section 45JA, the regulation is made and business is controlled in the field of credit by such N.B.F.Cs. through R.B.I. As observed earlier, the said provisions of Chapter-IIIB applies with non-obstante clause as provided under Section 45Q of R.B.I. Act. Therefore, if provisions of Chapter IIIB of R.B.I. Act is allowed to operate qua N.B.F.Cs. so far as relating to moneylending with the application of M. L. Act for moneylending by such N.B.F.Cs., not only the anomalous situation may arise, but there would also be conflict of both the laws qua applicability of the Companies which are N.B.F.Cs. However, Chapter-IIIB of the R.B.I. Act applies to only Companies which are N.B.F.Cs., whereas, M.L. Act applies to all Companies. Therefore, in order to reconcile the situation, the provisions of M. L. Act and more particularly Section 4 providing for the definition of the Companies deserves to be read down to the extent that the Companies which are N.B.F.Cs. and covered and regulated by the provisions of Chapter-IIIB of the R.B.I. Act, would not be covered in the definition of Companies under M. L. Act. The aforesaid appears to be just and proper in order to reconcile both the statutes allowing them to operate instead further examining the constitutional validity of the M. L. Act and more particularly the definition clause as provided under Section 2(4) in light of the specific law made by the Parliament by insertion of Chapter-IIIB under R.B.I. Act.

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15. Even otherwise also, as observed earlier, the State legislature has to make room for enforceability of the laws made by the Parliament. It is not the case of the State that the subject of money lending is exclusively under the State List and the Parliament has no competence to enact the law for regulating the business of the Companies like N.B.F.Cs. Therefore, under these circumstances, if the laws made by the Parliament is to operate over the earlier laws made by the State legislature, it would be reasonable to hold that the Companies which are covered under Chapter-IIIB of R.B.I. Act, would not be falling under the definition of the word Company under Section 2(4) of the M. L. Act.

25. In any case, the provisions of the Constitution is supreme over all sentiment, may be of the State Government or the Central Government. If the scheme of the Constitution provides for making room for operation of laws made by the Parliament for a particular class of Companies over the State legislature, its effect cannot be diluted nor can be dissected on such contention as sought to be canvassed. Therefore, leaving the State Government to draw the attention of R.B.I. for making appropriate representation for such purpose, and expecting the R.B.I. to play proactive role as per the provisions of Section 45JA of R.B.I. Act, no further view deserves to be expressed in this regard and the matter is left therewith the only observation that on such contentions the applicability of M. L. Act to the Companies like ig N.B.F.C. cannot be maintained."

18. Mr. Poojoari learned counsel for the petitioner distinguished the judgment of Kolkata High Court in case of Angels' Consultants Private Limited (supra) on the ground that the Kolkata High court was considering a suit for recovery of money claim whereas this proceedings are filed under section 9 of the Arbitration & Conciliation Act for interim measures. It is submitted that in this case admittedly the State Government had not issued any notification thereby including the petitioner as a money lender or financial institution. In so far as issue of leave under clause 12 raised by the respondent no. 1 and 2 is concerned, learned counsel placed reliance on the judgment of this court in case of L & T Finance Limited Versus Mr. Damodar Bandekar delivered on 18th December, 2013 in Arbitration Petition No. 529 of 2013. The learned counsel placed reliance on the said judgment also on the issue of stamp duty raised by the respondent no. 1 and 2 and would submit that since the petitioner has not brought the loan documents at Mumbai, the stage of payment of differential amount of stamp duty has not arisen according to section 18 of the Maharashtra stamp Act. It is submitted that the difference in payment of stamp duty would be payable on such documents according to section 18 of the hvn 31/46 ARBP-290-269-271-341.2014 Maharashtra Stamp Act, within three months from the date of document received in this state. It is submitted that the stamp duty payable on these documents in accordance with the rate applicable in the state of West Bengal where these documents were executed has been already paid. Paragraph 14 to 17 of the said judgment of this court which are relied upon by the learned counsel on different issues read thus.

> "14. In so far as issue of payment of stamp duty on the loan agreement as well as deed of guarantee is concerned, it is not in dispute that both these documents were executed at Goa. Stamp duty payable on both these documents at Goa has been already paid. As and when these documents are brought to the City of Mumbai and the petitioner seeks to place reliance on these documents for being admitted in evidence, difference in payment of the stamp duty would be payable on such documents according to section of the Maharashtra Stamp Act within three months from the date of the document received in this State. Learned counsel appearing for the petitioner submits that so far the said documents is not brought to city.
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> Statement is accepted. The question of payment of any deficit court stamp duty at this stage does not arise. Be that as it may, on perusal of clause (1) of the deed of guarantee and clause 18.2 of the loan agreement, it is clear that it is obligation on the part of the respondents to bear such expenses including stamp duty. This court after adverting to the judgment in case of SMS Tea Estates Pvt. Ltd. (supra), and the judgment of Division Bench of this court in case of Lakdawala Developers Pvt. Ltd. (supra), in case of Aditya Birla Finance Limited vs. Coastal Projects Limited in Arbitration Petition (L) No. 1603 of 2013 delivered by this Court on 29th October, 2013 has held that since the documents which was executed out of Maharashtra and stamp duty was already paid on such documents, according to the rates prevailing in that State, as and when the said document is received in this State, stamp duty can be paid within three months and thus reliance on such document can be placed in proceedings under section 9 at this stage. This court has also considered the similar provisions in that matter providing obligations on the part of the borrower to pay stamp duty. In my view, since both parties have acted upon loan agreements as well

as deed of guarantee and since it was obligation on the part of the respondents to pay requisite stamp duty and having committed default, respondent cannot raise such objection in this proceeding. The judgment of the Supreme Court in case of SMS Tea Estates Pvt. Ltd. (supra) and the judgment of Division Bench of this court in case of Lakdawala Developers Pvt. Ltd. (supra) is thus distinguishable in the facts of this case. In my view, thus there is no merit in the submission of the learned counsel that both these documents cannot be relied upon or considered in this proceedings under section 9 herein for the aforesaid reasons. Paragraph 30 of the judgment of this court in case of Aditya Birla Finance Ltd. (supra) reads thus:-

30. As far as submission of Mr. Shah that this Court cannot consider the documents relied upon by the petitioner for want of payment of differential stamp duty is concerned, in view of section of Maharashtra Stamp Act, three months' time is provided from the date when such document is received in State for the purpose of payment of differential charge if any. The said document has been received in this State in the month of September, 2013. The deficit if any, thus can be paid under section of the Maharashtra Stamp Act within three months. In any event hvn 32/46 ARBP-290-269-271-341.2014 since it was obligation on the part of the respondent to pay such deficit if any, respondent cannot raise such objection before this court. In my view the judgment of Supreme Court in case of SMS Tea (supra) and order passed by Division Bench in case of Lakdawala Developers (supra) would thus not apply to the facts of this case. Learned Single Judge of this court in case of Marine Container (Supra) has held that even if a document is insufficiently stamped, it cannot be brushed aside at the stage of granting interim relief. Deficit if any can be paid by the parties as per provisions of the agreement.

15. In so far as issue of jurisdiction raised by the respondent is concerned, clause 3.2 read with clause 19.1 clearly provides that repayment of the loan installment had to be paid at the corporate office of the petitioner which is admittedly situated at Mumbai.

16. In paragraph (29) of the petition, it is averred by the petitioner that corporate office of the petitioner is situated at Mumbai where the petitioner has sanctioned and disbursed the loan facility to the respondent no. 1. Respondent no. 1 has executed demand promissory note at the registered office of the petitioner at Mumbai. It is stated that respondents had agreed and undertook to repay the loan amount at the corporate office of the petitioner at Mumbai. There is no affidavit in reply controverting the averments. This part of the cause of action has admittedly arisen at Mumbai. This court has thus jurisdiction to entertain this petition under section 9 of the Arbitration and Conciliation Act, 1996. There is no substance in the submission of the learned counsel that this court has no territorial jurisdiction to entertain this petition.

> 17. In so far as submission of the learned counsel that petition is devoid of any particulars about the default alleged to have been committed by the respondent is concerned, on perusal of the petition, it indicates that the petitioner has given details of the default committed by the respondents as well as break up of the amount claimed. Amount claimed by the petitioner as due from respondents which would be subject matter of arbitration is stated to be comprising of installment of Rs. 5,99,394/-, compensation charges, cheque bouncing charges and further loan installment with further compensation. A perusal of the demand notice also clearly discloses the nature of default committed by the respondents and the amount claimed to be due. Particulars of claim annexed to the petition also indicates the breakup of the amount due. There is thus no substance in the submission of learned counsel appearing for the respondents that petition is devoid of particulars. Upon making query, learned counsel for the respondent admits that it is not the case of the respondents that the respondents have not committed any default in making payment of the installment."

19. Learned counsel for the petitioner also placed reliance on the judgment of the Madras High Court in case of Dynasty Developers Pvt. Ltd. Vs. Jumbo World Holdings Limited, British Virgin and Others reported in 2008 (2) arbitration law reporter 249 (Madras) in support of the plea that leave under clause 12 of the Letters patent is not required in case of petition under section 9 of the Arbitration and Conciliation Act, 1996. Paragraph 17 to 19 of the said judgment hvn 33/46 ARBP-290-269-271-341.2014 read thus :

> "17. Learned Counsel appearing for the respondents also referred to the decisions of the Supreme Court in Food Corporation of India v. Evdomen Corporation MANU/SC/0118/1999: AIR1999SC2352 and Jindal Vijaynagar Steel (JSW Steel Ltd) v. Jindal Praxair Oxygen Co. Ltd., MANU/SC/3765/2006 :
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> (2006)11SCC521 in support of their contention that the provisions of Clause 12 of the Letters Patent alone are required to be considered to determine the jurisdiction of the Madras High Court and the provisions of Sections 16 to 20 of the Code of Civil Procedure have no application. In the first decision in Food Corporation of India v. Evdomen Corporation (supra) the contention of the appellant was that the Bombay High Court has no jurisdiction to take the award on file or to issue any process in connection with it. That was a case under the Arbitration Act, 1940. The High Court in its impugned judgment has upheld the jurisdiction of the Bombay High Court on the ground that the appellant, who is in the position of a defendant, has one of its places of business at Bombay. The submission of the appellant relying upon the explanation to Section 20(a) of the CPC was that in respect of any cause of action arising at any place where it has also a subordinate office at such place, the Court at that place also got jurisdiction. Reliance was placed on the decision of the Supreme Court in Hakam Singh v. Gammon (India) Ltd. MANU/SC/0001/1971: [1971]3SCR314 , where the Court observed that the Code of Civil Procedure in its entirety applies to the proceedings under the Arbitration Act by virtue of Section 41 of

the Arbitration Act. The jurisdiction of the Court to entertain a proceeding in connection with arbitration including taking on file an award is accordingly governed by the provisions of the Code of Civil Procedure. Repelling this submission of the appellant the Bench held that under Section 120 of the Civil Procedure Code, Sections 16, 17 and 20 of the Civil Procedure Code do not apply to a High Court in the exercise of its original civil jurisdiction. Jurisdiction of the Bombay High Court to entertain a suit under its ordinary original civil jurisdiction is determined by Clause 12 of the Letters Patent of the Bombay High Court. Under Clause 12 of the Letters Patent, a place where the defendant, or each of the defendants where there are more than one, at the commencement of the suit, carry on business would be a place where the Court has jurisdiction. Therefore, it was held that under Clause 12 of the Letters Patent of the Bombay High Court, the Bombay High Court would have jurisdiction over the subject matter of the dispute in that case because the appellant did carry on business in Bombay. In the second case, namely., Jindal Vijaynagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd. (supra) the appellant sought reconsideration of the decision made in Food Corporation of India (supra) on the ground that it was erroneous and contrary to the decision of a three Judge Bench in Patel Roadways Ltd. v. Prasad Trading Co. MANU/SC/0280/1992. Dismissing the appeal the Supreme Court held that for the purpose of determining the original civil jurisdiction of the Bombay High Court, the provisions of Section 20 of the CPC have been specifically excluded and have no application. Only the provisions of Clause 12 of the Letters Patent are required to be considered to determine the jurisdiction of the Bombay High Court. Under Clause 12 of the Letters Patent, the Bombay High Court would have jurisdiction to entertain and try an arbitration petition even if no cause of action has arisen within its jurisdiction, provided the respondent has an office at Bombay. It is clearly seen that the question as to whether Clause 12 leave was necessary for filing an application under the Arbitration Act was not considered in either of these cases.

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18. Lastly, learned Counsel appearing for the respondents drew our attention to the judgment of a Division Bench of the Bombay High Court in Devidatt v. ShriramMANU/MH/0157/1931where the Bench held that obtaining of leave under Clause 12 is a condition precedent to the entertainment by Bombay High Court of a suit in which the cause of action arises in part outside the original jurisdiction and that the condition is not one which it is competent for a Court to ignore or for the parties to waive. It was further held that the words "empowered to receive" in Clause 12 mean that the Court on the ordinary original civil jurisdiction has no jurisdiction even to receive a plaint where a part of the cause of action only shall have arisen within the local limits of its jurisdiction unless leave of the Court shall have been first obtained.

19. We have given our anxious thought to the submissions made at the Bar and the decisions cited before us. We are unable to agree with the view taken by the learned Judge that in order to maintain an application under the Act, it is a precondition that the leave under Clause 12 of the Letters Patent should have been obtained. Learned Judge has followed the Division Bench judgment of the Kolkata

High Court in MANU/WB/0008/1984and the judgment of Rebello, J. in . The attention of the learned Judge was not drawn to the later decision of the Kolkata High Court in MANU/WB/0067/1986: AIR1986Cal338 . Moreover, the learned Judge was much concerned and swayed by the words 'if the same had been the subject matter of the suit' appearing in Section 2(i)

(e) of the Act. According to the learned Judge the leave would be necessary in case this Court has jurisdiction over the part of the cause of action only and as no suit could be filed without leave, no application under the Act under the similar circumstances could be entertained without leave under Clause 12 of the Letters Patent. The analogy of 'suit' given in Section 2(i)(e) of the Act only gives us guideline to find out the right court. The word 'suit' acts as an indicator and points out which court will be competent court to entertain the application under the Act. Section2(i)(e) does not treat an 'application' under the Act as a 'suit' and the application under the Act remains an application. As a matter of fact, if a civil suit is filed covering the subject matter of an arbitration agreement, the Act makes it obligatory for the Court to refer the parties to arbitration in terms of the arbitration agreement. Therefore, it cannot be contended that the Act intended that an application under the Act and the civil suit should be treated on the same footing. It has been consistently held that the applications under the Arbitration Act cannot be equated with civil suit. (See Bhagwat Singh v. State of Rajasthan MANU/SC/0166/1963:

> (1964)ILLJ33SC , Usmanali Khan v. Sagarmal MANU/SC/0366/1965:
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> [1965]3SCR201 , Firm Ashok Traders v. Gurumukh Das Saluja MANU/SC/0026/2004: AIR2004SC1433 . The procedure for obtaining leave is applicable only to a suit and not to an application under the Arbitration Act. In our opinion, if a part of the cause action has arisen within the jurisdiction of this Court, the application under the Arbitration Act can be instituted in this Court and in that event leave under Clause 12 of the Letters Patent is not necessary."

20. Learned counsel submits that the respondent nos. 1 and 2 have not raised any defence on merits. Several matters are filed against respondent nos. 1 and 2 for interim measures in view of the huge arrears. The financial condition of respondent no. 1 and 2 is very precarious and if the hvn 35/46 ARBP-290-269-271-341.2014 interim measures as prayed are not granted, even if petitioner succeeds in arbitration, petitioner would not be able to recover any amount from respondent nos. 1 and 2.

21. Learned counsel submits that there is no lacunae in any of the documents executed between the parties as alleged by the respondent nos. 1 and 2. In so far as impleadment of respondent no. 3 and 4 is concerned, it is submitted that under section 9 of the Arbitration and Conciliation Act, 1996, though the third parties are not parties to the arbitration agreement, interim measures can be prayed against the third parties who have to pay amounts to respondent nos. 1 to 2.

22. Learned counsel submits that court receiver has already been appointed by this court against the hypothecated assets of the respondent nos. 1 and 2 in Arbitration Petition No. 201 and 202 of 2014 and the court receiver has already taken possession of such equipments.

REASONS AND CONCLUSION :

23. In so far as issue of jurisdiction of this court raised by the respondent no. 1 and 2 on the ground that the loan agreement was executed at Kolkata and the respondent no. 1 and 2 are carrying on business at Kolkata and without obtaining leave under clause 12 of Letters Patent, this court would not have jurisdiction to entertain this petition is concerned, it is not in dispute that the clause 19 of the agreement provides that any dispute arising under the said agreement shall be subject to non-exclusive jurisdiction of the courts of city of Mumbai. The venue of the arbitration under the agreement is also at Mumbai. Under clause 3.3 of the agreement, it is provided that all payments of the loan installments, other charges and moneys due under the loan agreement shall be payable by the borrower to the lender at the corporate office or at such other addresses as may be specified in the schedule to the said agreement. The deed of guarantee is hvn 36/46 ARBP-290-269-271-341.2014 addressed to the petitioner having its corporate office at Mumbai. The Promissory note has been executed at Mumbai. It is thus clear that the part of cause of action has arisen at Mumbai. In my view since part of the cause of action has arisen at Mumbai, no leave under clause 12 of the Letters Patent is required to be obtained for filing a petition under section 9 of the Arbitration & Conciliation Act, 1996. This court has already taken this view in several matters.

24. A Division Bench of Madras High Court, in case of Dynasty Developers Pvt. Ltd.

(supra), has held that the analogy of suit given in section 2(1)(e) of the Arbitration & Conciliation Act, 1996 only gives guideline to find out the right court. The word "suit" acts as an indicator and points out which forum be the competent court to entertain the application under the Act. Section 2(1)(e) does not treat an application under the Act as a suit and the application under the Act remains an application. It is held that if a civil suit is filed covering the subject matter of the arbitration agreement, the Act makes it obligatory for the court to refer the parties to arbitration in terms of the arbitration agreement and thus it cannot be contended that the Act intended that an application under the Act and the civil suit should be treated on the same footing. It is held that the procedure for obtaining of leave is applicable only to a suit and not to an application under the Arbitration Act. Since part of the cause of action has arisen within the jurisdiction of the court, application under the Arbitration Act can be instituted in that court and in that event leave under clause 12 of the Letters Patent is not necessary. I am in respectful agreement with the views expressed by the Division Bench of the Madras High Court in case of Dynasty Develops (supra). The submission of the learned counsel on the issue of jurisdiction of this court is accordingly rejected.

25. In so far as issue of stamp duty raised by the respondent no.1 and 2 is concerned, it is not in dispute that the loan agreement as well as hypothecation deed were executed at Kolkata and hvn 37/46 ARBP-290-269-271-341.2014 the stamp duty payable under the Act applicable in the state of West Bengal has been duly paid on those documents. The submission of respondent no. 1 and 2 is that the purported copy of the loan documents are brought into the State of Maharashtra and is therefore, subjected to stamp duty in Maharashtra under the provisions of Bombay Stamp Act, 1958. It is however, case of the petitioner that the loan agreement is not yet brought to the city of Mumbai and as and when the same is brought to the city of Mumbai, within three months from the date of such event, difference in payment of stamp duty would be paid by the petitioner under section 18 of

the Maharashtra Stamp Act.

26. Learned counsel for the petitioner in support of this submission placed reliance on the judgment of this court in case of L & T Finance Limited Vs. Damodar Mandekar (supra). This court in the said judgment after considering the judgment of Supreme Court in the case of SMS Tea Estates Private Limited Versus Chandmari Tea Company Pvt. Ltd and the judgment of this court in the case of Aditya Birla Finance Limited Vs. Coastal Projects Limited and judgment of Division Bench of this court in case of Lakdawala Developers Pvt. Ltd. has held that since the document in that case had not been received in the state, deficit if any of the stamp duty being the difference between the stamp duty already paid in the state in which such document is executed and the state in which the document is received will be paid within three months under section 18 of the Maharashtra Stamp Act. Statement made by the learned counsel appearing for the petitioner that the loan documents have not been received in the state of Maharashtra is accepted. In my view thus there is no merit in the submissions made by the respondent no.1 and 2 about insufficiency of stamp duty or that the loan agreement is not admissible in law and this petition on that ground cannot be entertained.

27. In so far as submission of the learned counsel that there is unilateral subsequent variation hvn 38/46 ARBP-290-269-271-341.2014 by the petitioner of the terms of the purported loan and therefore, guarantor is released of its obligation under the deed of guarantee is concerned, the loan agreement entered into between the parties, which is also referred in the deed of guarantee executed by the guarantor does not indicate any such change as alleged in the terms of the loan. The guarantor never raised any such issue when the deed of guarantee was signed by him as far back as on 31st December, 2011.

The submission of the learned counsel is accordingly rejected.

28. The next submission of respondent no. 1 and 2 is that on the demand promissory note the principal amount of the purported loan and place of loan transaction is not mentioned and thus no reliance thereon can be placed. A perusal of the demand promissory note indicates the amount that the signatory has promised to pay to the petitioner with interest. Name of the borrower is also mentioned therein. There is thus no merit in the submission of the respondent no.1 and 2.

29. The next submission of the respondent is that in the notice invoking arbitration agreement, the petitioner has not clearly stated that in case of which particular dispute the petitioner has invoked which arbitration agreement and which dispute the petitioner had proposed to refer to the sole arbitration of the arbitrator appointed by the petitioner. A perusal of the notice dated 10th September, 2013 indicates that the said notice was addressed to the borrower as well as guarantor. In the said letter there is a reference to the loan agreement and the deal number executed between the petitioner as the lender and respondent nos. 1 and 2 as the guarantors. In the said notice the petitioner has referred to the said two documents signed by respondent no. 1 and 2 individually. Both the parties were called upon to pay the alleged dues of the petitioner. It is stated that the guarantor would become liable to pay the outstanding amount.

In paragraph 9 of the said notice it is stated that the disputes and differences and the claim would stand referred to the sole arbitration if the respondent no.1 and 2 failed to comply with the requisitions contained in the said notice.

30. It is not in dispute that in the loan agreement as well as in the deed of guarantee arbitration agreement is provided. In the deed of guarantee there is reference to the loan agreement. Clause 18.1 of the loan agreement provides for arbitration. In respect of all questions, dispute or difference of claims arising between the parties or any of them touching or concerning the said loan agreement or other loan documents, or any condition contained therein as to the rights, duties, liabilities of parties thereto or any of them. Under the said loan agreement, 'Loan documents' is defined under clause 1.8. Under the said definition the loan documents, means the loan agreement with relevant schedules, offer letter issued by the lender to the borrower, deed of hypothecation, power of attorney, deed of guarantee and/or any other deeds or documents as may be required by the lender to be executed by the borrower. It is thus clear that the deed of guarantee is also part of the loan document. In my view the dispute between the petitioner and the guarantor also can be referred to arbitration not only under the deed of guarantee but also under clause 18.1 of the loan agreement. Be that as it may, the deed of guarantee is executed pursuant to and so as to secure the repayment of the loan granted under the loan agreement, the petitioner is entitled to invoke arbitration agreement under both the documents. Both the disputes being interwined can be referred to the same arbitrator. There is thus no merit in the submission of the learned counsel appearing for respondent no.1 and 2 that the notice issued by the petitioner invoking arbitration agreement does not indicate as to which arbitration agreement is invoked and what dispute is proposed to be referred to arbitration.

31. The next submission of respondent no.1 and 2 is that since the office of the respondent hvn 40/46 ARBP-290-269-271-341.2014 no.1 is situated at Kolkata, loan agreement was executed at Kolkata, Petitioner is carrying on business at Kolkata, the parties are governed by the provisions of Bengal Money Lenders Act, 1940 and the petitioner not having obtained any licence under section 8 of the Bengal Money Lenders Act, 1940, in view of section 13 of the said Act, there is an express bar from passing any decree or order by a court in favour of the plaintiff till money lending licence is obtained and penalty under the provisions of the said Act is paid. It is also submitted by the respondent no.1 and 2 that the petitioner did not keep the statement of accounts regularly in the manner set out in section 24 and 25 of Bengal Money Lenders Act. The petitioner has also alleged to have charged interest exorbitantly and more than the interest permitted under the provisions of Bengal Money Lenders Act, 1940.

32. Under section 2(1) of the Bengal Money Lenders Act, 1940, Bank is defined which includes any

other financial institution which may be notified in that behalf by the State Government. The petitioner is not notified by the State of West Bengal under the provisions of section 2(1) of the said Act. Under section 4 of the said Act, the courts which would have jurisdiction to entertain the proceedings under section 16 and 19 and to pass orders therein are specified. It is not the case of the respondent no. 1 and 2 that the invocation of arbitration agreement by the petitioner or filing of petition under section 9 under the provisions of Arbitration & Conciliation Act, 1996 is not maintainable on the ground that the remedy of seeking interim measures would be under the provisions of Bengal Money Lenders Act, 1940.

The only submission of respondent no. 1 and 2 is that since the petitioner had not obtained money lending licence under the provisions of Bengal Money Lenders Act, 1940, the present proceedings filed under section 9 of the Arbitration & Conciliation Act, 1996 shall be stayed till such licence is obtained and penalty is paid. In my view, petition filed under section 9 of the hvn 41/46 ARBP-290-269-271-341.2014 Arbitration and Conciliation Act, 1996 for interim measures is not a suit. It is not in dispute that the petitioner has obtained permission and is registered under the provisions of Reserve Bank of India for the purpose of carrying out the business as non banking financial company.

33. In Chapter IIIB of the Reserve Bank of India Act, 1934 provisions are made relating to non banking financial company receiving deposits and financial institutions. "Business of non banking financial institution" is defined under section 45-I(a). The duties obligations and powers of such non banking financial institutions are provided under the said chapter. Such non banking institutions are under the control and supervision of Reserve Bank of India. Section 45Q of chapter IIIB provides that the provisions of the said chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. The Division Bench of Gujarat High Court in case of Radhe Estate Developers (supra) has dealt with the provisions of chapter IIIB of Reserve Bank of India Act and also the Bombay Money Lenders Act, 1946 prevailing in the state of Gujarat.

34. It is held by the Division Bench that Reserve Bank of India has full control over the non banking financial corporation and can take regulatory measures including penal action like winding up etc. in the interest of its customers namely the depositors. In that case also, the State Government had not issued any notification under section 2(10)(b) with regard to any banking financial or any institution such as non banking financial companies bringing it within the meaning of money lender as defined under section 2(10) of the Money Lenders Act. It is held that all the companies as defined under section 2(4) of the Money Lenders Act, come within the meaning of company for the purpose of section 45I(aa) of the Reserve Bank of India Act. It is also held that any law has been made by the Parliament in its exclusive power in respect to hvn 42/46 ARBP-290-269-271-341.2014 matters enumerated in list I or list III in the seventh schedule, the law in respect of such matter if any, enacted by the legislature of any State shall be subject to the law made by the Parliament and a State Act is always subject to Central Act. It is held that section 45Q of the Reserve Bank of India Act makes it clear that the provisions of chapter IIIB of the Reserve Bank of India Act shall have the overriding effect notwithstanding anything inconsistent therewith contained in any other law which includes the Money Lenders Act, a State law. It is held that if there is any inconsistency between the

provisions of Reserve Bank of India Act and Money Lenders Act, so far as it relates to companies, as defined under section 2(4) of the Money Lenders Act, in that case the provisions of Reserve Bank of India Act, will prevail.

35. The Division Bench in the said judgment has held that chapter IIIB of the Reserve Bank of India Act, occupy the field with regard to control, penal action etc. against those companies and thereby the State law namely the Money Lenders Act, 1946 cannot transgress on the field occupied by the law of Parliament. It is held that in view of section 45Q of the Reserve Bank of India Act, provisions of chapter IIIB of the said Act shall have overriding effect on the Bombay Money Lenders Act, 1946. It is held that in the absence of any notification under section 2(10)

(iii)(a) non banking financial companies are not covered by the definition of money lenders and thus the State Government or its authorities have no jurisdiction to take any regulatory measure or penal measures under the Bombay Money Lenders Act, 1946.

36. It is not in dispute that the State of West Bengal has also not issued any such notification under the provisions of Bengal Money Lenders Act, 1940 thereby covering the petitioner under the definition of money lenders. I am in agreement with the views of the Division Bench of Gujarat High Court in case of Radhe Estate Developers (supra). In my view, since no notification hvn 43/46 ARBP-290-269-271-341.2014 is issued by the State of West Bengal as aforesaid, provisions of the Bengal Money Lenders Act, 1940 would not apply to the transactions between the petitioner and respondent no. 1 and 2. Be that as it may, proceedings filed under section 9 of the Arbitration and Conciliation Act, 1996 is not a suit and even on that ground the submission of the learned counsel for respondent no.1 and 2 that the petitioner not having obtained money lending licence under the provisions of Bengal Money Lending Act, 1940, no interim measures can be granted by this court on that ground has no merits and is rejected.

37. Gujarat High Court in case of Sunderam Finance Limited (supra) has considered the similar situation and after interpreting the provisions of Reserve Bank of India Act and the Bombay Money Lenders Act, 1946 has held that if the provisions of Chapter IIIB of the Reserve Bank of India Act is allowed to operate qua non banking finance companies, so far as relating to money lending with the application of Money Lending Act, for money lending by such non banking finance companies, not only the anomalous situation may arise but there would also be conflict of both the laws qua applicability of the companies which are non banking finance companies. It is held hat chapter IIIB of the RBI Act applies to only companies which are non banking finance companies whereas Money Lending Act applies to all companies. It is held that if the laws held by the Parliament is to operate the earlier laws made by the State Government, it would be reasonable to hold that the companies which are covered under chapter IIIB of the Reserve Bank of India Act would not be falling under the definition of the word "company"

under section 2(4) of the Money Lending Act. In my view the definition of 'Money Lending' under the provisions of Bengal Money Lending Act and Bombay Money Lending Act are in pari materia. I am in agreement with the views of the Gujarat High Court in case of Sunderam Finance Limited (supra) which principles can be extended to the facts of this case.

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38. In so far as judgment of Kolkata High Court in case of Angel's Consultants Private Limited (supra) relied upon by the learned counsel for respondent no.1 and 2 is concerned, the Kolkata High Court was considering the suits filed by the lenders who were admittedly governed by the provisions of Bengal Money Lending Act. The plaintiffs had not obtained any licence under the provisions of Bengal Money Lending Act. The Kolkata High Court in that matter took a view that the plaintiff must be given an opportunity to obtain licence under section 13 of the Bengal Money Lending Act and to pay statutory penalty within a reasonable period of time and after obtaining such certificate on payment of penalty may proceed with the suit. In my view the judgment of Kolkata High Court relied upon by the learned counsel is not at all applicable to the facts of this case as the transactions in question are not governed by the provisions of the said Act. The proceedings filed under section 9 of the Arbitration and Conciliation Act, 1996 are not in the nature of a suit. The said judgment is thus of no assistance to respondent no. 1 and 2.

39. In so far as submission of the respondent no.1 and 2 that no order for interim measures can be passed against respondent no. 3 and 4 on the ground that they are not parties to any arbitration agreement between petitioner and respondent no. 1 and 2 is concerned, since I do not propose to grant any reliefs against respondent nos. 3 and 4 in this proceedings, I need not decide that issue raised by respondent no. 1 and 2. A perusal of the affidavit in reply filed by respondent no. 1 and 2 indicates that the respondent no. 1 and 2 have not dealt with the reliefs claimed in the petition on merits. A perusal of the agreement indicates that in the event of default, petitioner is entitled to take various steps including repossession of the assets. Petitioner can recall the entire loan amount. The petitioner has terminated the loan agreement and had hvn 45/46 ARBP-290-269-271-341.2014 called upon the respondents to pay the entire amount with interest. There is neither any repayment nor any response to the notice of demand. Number of petitions are filed against respondent no.1 and 2 by the petitioners. In my prima facie view the petitioner has good chances of succeeding in the arbitration proceedings. There has been default in payment of outstanding dues. The petitioner has thus made out a case for appointment of receiver as receiver of the hypothecated equipments described in Exh. G in so far as Arbitration Petition No. 290 of 2014, Arbitration Petition (L) No. 271 of 2014 and Arbitration Petition (L) No. 269 of 2014 and and hypothecated equipments described in Exh. H in so far as Arbitration Petition No. 341 of 2014 is concerned. The appointment of the Receiver is necessary in order to ensure that the equipments are not wasted or alienated, thereby defeating the rights of the petitioner. Section 9 empowers the Court to pass an interim measure of protection. Hence, the following order :

> i) The Court Receiver appointed by this order, shall give an option to the respondent no. 1 and 2 in writing to act as agents of Receiver in respect of the said equipments. The Respondent nos. 1 and 2 shall be given two weeks time by the Court Receiver from the date of receipt of the Court Receiver's communication letter to exercise such option. In the event of the respondent nos. 1 and 2 being desirous of acting as agents of the Receiver, they shall be appointed as agents of the Receiver, on usual terms and conditions including security and royalty. The Receiver shall determine the quantum of security and royalty having regard to the terms and conditions contained in the Loan-cum-

hypothecation Agreement (Exhibit A to the petition).

ii) In the event that the respondents do not communicate their willingness to the Receiver to act as agents within a period of two weeks from the date of receipt of the communication from the Court Receiver, Court Receiver to take forcible possession of the equipments and if necessary with the assistance of police from the respondent. It would be open to hvn 46/46 ARBP-290-269-271-341.2014 the Petitioner to apply to the Court for further orders including sale of the equipments by private treaty.

iii) Until the Receiver takes possession, there shall be an interim injunction restraining the Respondents from alienating, encumbering parting with possession or creating any third party right in respect of equipments described in Exhibit G in so far as Arbitration Petition No. 290 of 2014, Arbitration Petition (L) No. 271 of 2014 and Arbitration Petition (L) No. 269 of 2014 and hypothecated equipments described in Exh. H in so far as Arbitration Petition No. 341 of 2014 is concerned.

38. Petitioner is directed to approach the office of the Court Receiver for enforcement of this order within three weeks from today.

39. The Arbitration Petitions are accordingly disposed of. There shall be no order order as to costs.

(R.D. DHANUKA,J.)