Irep Credit Capital Pvt.Ltd vs Tapaswi Mercantile Pvt Ltd And Anr on 20 December, 2019

Author: G. S. Patel

Bench: G.S. Patel

909-CARBPL1501-19.DOC

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 1501 OF 2019

IREP Credit Capital Pvt Ltd ...Petitioner
Versus
Tapaswi Mercantile Pvt Ltd & Anr ...Respondents

Mr Sharan Jagtiani, with Kingshuk Banerjee & Arnav Mohanty,&
Shradha Achliya, i/b Khaitan & Co., for the Petitioner.
Mr Ashish Kamat, with Kunal Parekh, & Nirali Shah, i/b Dua
Associates, for Respondents Nos. 1 & 2.

CORAM: G.S. PATEL, J.

DATED: 20th December 2019

PC:-

1. The Petition is under Section 9 of the Arbitration and Conciliation Act 1996. The present application is for urgent ad- interim reliefs after notice. The Respondents have been served. There is an Afdavit in Reply of the 1st Respondent to the Arbitration Petition.

2. The Petitioner ("IREP") is a NBFC. The 1st Respondent ("Tapaswi") does business as a general merchant, trader and dealer in various types of commodities and part of the Essel Group. This is a conglomerate with business and commercial interests in 20th December 2019 909-CARBPL1501-19.DOC various sectors. The 2nd Respondent ("Essel Infra") is also a company from the Essel Group. It is a infrastructure development company.

3. The relevant facts run like this. Tapaswi approached IREP for a loan of Rs. 15 crores as working capital. IREP and both Tapaswi and Essel Infra executed a loan agreement dated 14th May 2019, a copy of which is at Exhibit "A" to the Petition. While I will be returning to some of the relevant clauses, I will note at the forefront that arbitration clause 7.2.1 reads thus:

> "7.2.1. Dispute Resolution and Governing Law This Agreement shall be governed by the laws of India.
>
> Any and all disputes arising out of or in connection with this Agreement and or the performance of this Agreement shall be governed by the laws of India and settled by arbitration to be referred to an arbitrator to be appointed by the Lender and the award thereupon shall be binding upon the parties to this Agreement. The place of arbitration shall be Mumbai, in accordance with the provisions of Arbitration and Conciliation Act, 1996 and any statutory amendments thereof."

4. In view of the recent decisions of the Supreme Court, 1 this clause may not be available in the sense that IREP will not have the unilateral right to appoint an Arbitrator but I will presently leave this contention open for an appropriate proceeding. It has little or no 1 Perkins Eastman Architech DPC & Anr vs HSSC (India) Ltd, 2019 (9) SCC OnLine SC 1517; Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd, (2019) 4 SCC 665; and TRF Limited v Energo Engineering Products Ltd., (2017) 8 SCC 377.

20th December 2019 909-CARBPL1501-19.DOC bearing in this Section 9 Petition even at the stage of ad-interim relief.

5. The loan document sets out a schedule of repayment in clause 2.10. There is a tabulation that shows that the loan was to be repaid in fve equal quarterly instalments on 15th day of the respective months mentioned in the table from the date of initial distribution. The frst tranche of Rs 3 crores was payable on the 15th of the twelfth month of the disbursement date, the second on the 15th day of the ffteenth month and so on, thus providing for an overall two-year repayment period. About this there can be no dispute at all. The contract also had a provision for appropriation, which we fnd in clause 2.13. It sets out the priority of order in which IREP could appropriate payments due to it. The repayment schedule does not include interest and other charges. The interest is separately provisioned in clause 2.4 and there are additional fees as well under the caption of Article 2.

6. So far as Essel Infra is concerned, it executed a document styled as an undertaking on the same date 145th May 2019 in favour of IREP but said to be on behalf of the Tapaswi. Whatever be the nomenclature attached to this document, it is nothing but a guarantee and that is abundantly clear from the terms of the document itself. Clauses 3, 4 and 5 of this undertaking at page 141 read thus:

> "3. The Confrming Party hereby irrevocably and unconditionally assures and undertakes tot he Lender, the due payment/repayment of the Secured Obligations, to the satisfaction of the Lender, in the event of failure on the part 20th December 2019 909-CARBPL1501-19.DOC of Borrower in paying/repaying the same to the Lender or

otherwise upon occurrence of an Event of Default in respect of the Loan or under the Finance Documents.

4. The obligations of the Confrming Party hereunder are independent of the obligations of the Borrower or any other security provider. The Confrming Party agrees and acknowledges that it is a primary obligor and principal debtor to the Lender, and not merely a surety.

5. Upon happening of an Event of Default, the Confrming Party shall forthwith pay to the Lender the whole of Secured Obligations and shall indemnify and keep indemnifed the Lender against all losses, interest or other money due and all costs, charges and expenses whatsoever which the Lender may incur by reason of any default on the part of the Borrower, irrespective of whether such default or any related fact or circumstance was known or ought to have been known to the Lender."

(Emphasis added)

7. The emphasized portion in clause 4 shows that the Infra positioned itself as a co-borrower with a co-terminus liability in the place of the principal borrower on the same footing as Tapaswi.

8. This was not an entirely unsecured loan. There were two securities contemplated by the agreement. One was a mortgage. For this, we turn to clause 3.1 of the agreement itself as part of Article 3 which deals with security. Clause 3.1.1 gives us an overview of the security. This is how it reads:

"3.1 SECURITY FOR THE LOAN 20th December 2019 909-CARBPL1501-19.DOC 3.1.1 The due payment/repayment of the Secured Obligations by the Borrower to the Lender shall be secured, in the following manner:

a) First ranking exclusive charge by way of hypothecation on fxed and current assets of the Borrower to give a security cover of atleast 1.00x of the Secured Obligations;

b) First ranking pari-passu charge by way of mortgage over the Mortgaged Property with a security cover of at least 1.25x of the Secured Obligations;

c) Undertaking from the Confrming Party; and

d) A demand promissory note ("DPN")."

9. For the present purposes, we are concerned with sub-clauses

(a) and (b). The hypothecation in question, and about this there is no doubt at all, is of the all assets and book debts of Tapaswi. This is clear from the separate dedicated document we fnd at page 152, the relevant provision of which is at page 155-156. This charges movables to IREP as security towards repayment of loan and includes:

"(a) the entire moveable properties (both present and future), save and except any current and non-current investments (with respect to equity and debt securities in which the Borrower has invested) of the Borrower, which includes and is not limited to, the current and moveable fxed assets, (including without limitation all tangible and intangible assets such as goodwill and intellectual property) whether afxed to the earth or not, whether now belonging to or that may at any time during the continuance of this Deed belong to the Borrower and/ or that may at present or 20th December 2019 909-CARBPL1501-19.DOC hereafter be held by any party anywhere to the order and disposition of the Borrower or in the course of transit or delivery and all replacements thereof and additions thereof whether by way of substitutional replacement, conversion, realization or otherwise howsoever together with all benefts, rights and incidentals attached thereto which are now or shall at any time hereafter be owned by the Borrower;

(b) the entire stocks of raw materials, current assets, semi-fnished and fnished goods, consumable stores, stock in trade and inventories and the Borrower's uncalled share capital and all rights, title, interest, benefts, claims and demands whatsoever of the Borrower in, to or in respect of all the aforesaid assets; and

(c) all rights, title, interest, beneft, claims and demands whatsoever of the Borrower under any contract or otherwise, its bank accounts, cash insurance proceeds, together with permitted investments and all operating cash flows and receivables of and amounts owing to the Borrower"

10. The other security with which we are concerned is said to be a 'frst ranking pari passu charge by way of mortgage over the mortgaged property with a security cover of at least 1.25x of the secured obligations' meaning that the security would be 1.25 times the total exposure. Now 'mortgage property' is defned in the principal loan agreement document itself thus:

"Mortgaged Property"shall mean all the pieces and parcel admeasuring approximately 450 acres, 39 gunta all of them lying and situate at Village Gorai Borivali West, Maharashtra, together with all present and future estate, 20th December 2019 909-CARBPL1501-19.DOC right, title, interest, property, claim and demand whatsoever of the Confrming Party into and upon the same to be mortgaged by the Confrming Party in favour of the Lender to secure the Secured Obligations and the Obligations of the Confrming Party under the Finance Documents;

This is referred to in the rest of this order as 'the Gorai property'.

11. Clause 3.2 of the agreement at pages 51-52 required Tapaswi not to create any encumbrances. Clause 5.4.3 at page 64, one of three distinct conditions subsequent, required the confrming party, namely Essel Infra, to obtain a no objection certifcate from 'existing charge holders' confrming their no-objection to the creation of this frst-ranking pari passsu charge by Essel Infra over the Goral property in favour of IREP. This was to be done in 12 months. 'Existing charge holders' is a phrase are also defned at page 38 to mean the Life Insurance Corporation of India, Bank of Maharashtra, IFCI Limited and the State Bank of India.

12. Tapaswi (and Essel Infra as a co-borrower) were in default from the very beginning. They defaulted on the very frst interest payment due on 15th August 2019. IREP deposited the frst of several post-dated cheques submitted as additional security. This was dishonoured on 4th October 2019. There followed a second default on 15th November 2019 of the next contractually scheduled interest payment. On 15th November 2019, IREP wrote to both Respondents calling upon Tapaswi and Essel Infra to pay within 48 hours an amount of Rs. 36,55,911/- and penal interest at the rate of 2% per annum computed from 18th October 2019 until repayment. This email notice also noted that the NOC for the mortgaged Gorai 20th December 2019 909-CARBPL1501-19.DOC property had not been received, and the notice called on Essel Infra to ensure that this was done within 48 hours.

13. Then the second post-dated cheque was dishonoured.

14. Consequently, on 21st November 2019, by its Advocates' letter a copy of which is at Exhibit "K" at page 181, IREP recalled the loan. IREP has not in this notice yet invoked arbitration but Mr Jagtiani states on instructions that this will be done within 90 days from today. The statement is noted and accepted.

15. Mr Jagtiani then draws attention to another singular provision of the contract. This is positioned somewhat diferently from the usual loan agreements. This relates to what is called an 'equity event'. The term itself is described at page 38 thus:

> "Equity Event" means any equity infusion within the entities/members comprising the Essel Group or sale of equity/other securities/assets by the entities/members of the Essel Group to any Person;
>
> (Emphasis added) This is to be read with the defnition of Essel Group:
>
> "Essel Group" shall mean group companies of the Promoter and for avoidance of doubt shall include, the Borrower and the Confrming Party;

16. The clause itself is clause 2.16(A) and it will require some explanation. It is best to set this out in full:

> 20th December 2019 909-CARBPL1501-19.DOC 2.16(A) UNDERTAKING TO PREPAY IN CASE OF EQUITY EVENT

(i) In case of an Equity Event, then notwithstanding anything to the contrary contained in this agreement, the Borrower hereby agrees and undertakes and the Confrming Party hereby agrees and undertakes to cause the Borrower to ensure that if there are any excess proceeds realized by the Concerned Entity, out of an Equity Event after relevant appropriations, both statutory and non-statutory (i.e. the secured creditors of the Concerned Entity) ("Excess Proceeds"), then such Excess Proceeds will be utilized towards prepayment of the Lender in accordance with the terms hereof.

(ii) In this regard, the Borrower agrees and undertakes and the Confrming Party agrees and undertakes to cause the Borrower to provide prompt notice about (I) the execution of defnitive documents ("Execution Date") in relation to the Equity Event, (ii) the expected consideration from the Equity Event (iii) details of tranches (if any) for completion/each completion (as the case may be) of the Equity Event ("Tranches"); and (iv) timeline/date for completion of the frst Tranche of the Equity Event and each of the other following Tranches (if applicable) (each a "Closing Date") to the Lender ("Notice of Execution for Equity Event").

(iii) Upon occurrence of the frst Closing Date and every following Closing Date (as applicable), the Borrower agrees and undertakes to notify and the Confrming Party agrees and undertakes to cause the Borrower to notify the Lender about the Closing Date in relation to the Equity Event ("Notice for Closing for Equity Event") within seven (7) days from the relevant Closing Date in relation to Equity 20th December 2019 909-CARBPL1501-19.DOC Event setting out the end use of the consideration received as part of the relevant Closing Date.

(iv) Upon issuance of the Notice for Closing for Equity Event, the Borrower agrees and undertakes and the Confrming Party agrees and undertakes to cause the Borrower the ensure prompt prepayment of the entire Secured Obligations to the Lender out of the Excess Proceeds.

(v) For the avoidance of doubt, it is clarifed that any prepayment pursuant to this Clause 2.16A will not be subject to any Prepayment Premium."

17. What this clause means that notwithstanding anything to the contrary in the agreement, an 'equity event' -- which means an equity infusion within the Essel group entities or a sale of equity, securities or assets by any entities or on sale of equity, securities or assets by any entities or members of the Essel Group -- works to accelerate the repayment of the debt to IREP from any excess proceeds of any such sale. These excess proceeds are to be utilized for what is described as 'pre-payment' (and this is nothing if not accelerated re- payment) to IREP. It is to facilitate this that clause (ii) has detailed provisions requiring the Respondents to give notice to IREP of the occurrence of any equity event.

18. In this regard, Mr Jagtiani draws attention to certain paragraphs of the Petition to contend that there have been without notice precisely such equity events, but no corresponding pre- payment. Paragraphs 41 to 44 of the Petition say this:

> 20th December 2019 909-CARBPL1501-19.DOC "41. Apart from the above, the aforesaid fact was also widely reported in the media and is available in the public domain. On 15 October 2019, in an article published in the online edition of the Business Line, it was reported that the second Respondent had efected the sale of the three road projects comprising of toll roads in Madhya Pradesh, Karnataka and Teleangana to Caisse de depot et placement du Quebec. It was further reported that the second Respondent was in advanced talks to sell six road projects tot eh national Infrastructure and Investment Fund.

Printout of the said article is annexed hereto and marked as Exhibit "N".

42. Subsequently, on 21 November 2019, as per an online report published in CNBC TV, the Essel Group who are the promoters of Zee Entertainment Enterprises Limited ("Zee") sole 15,00,000/- (Fifteen Crore) or 15.72% of their shares in Zee via block trades to fnancial investors, raising Rs.4560 Crores. It was reported that the fnancial proceeds from the sale would be used to repay lenders who lent to the Essel Group against pledged shares. Further, as per the report, the lenders who stood to recover their loans include VTB Capital (Rs.2,000 crore), Birla MF(Rs.750 crore), HDFC PMS (Rs.550 crore), L&T Finance (Rs. 250 crore), and ICICI Prudential (Rs. 270 crore). Printout of the aforesaid article is annexed hereto and marked as Exhibit "O".

43. On 26 November 2019, it was reported in the online edition of Business Standard that ICICI Prudential Mutual Fund and HDFC Mutual Fund, being two asset management companies, and received payments to the tune of Rs 437 crore from Essel Group. As per the aforesaid article, individually, ICICI Prudential Mutual Fund received Rs 270 crore as repayment and interest from the Essel Group, while HDFC Mutual Fund received Rs 167 20th December 2019 909-CARBPL1501-19.DOC crore. Printout of the aforesaid article is annexed hereto and marked as Exhibit "P".

44. Thus, the above reports demonstrate that the second Respondent has been actively selling of its assets and also making preferential payments to third party creditors other than the Petitioner. This despite an express obligation that if any excess funds are realised from the sale of Essel Group entities or assets, the same would be utilised to pay the Petitioner."

19. Mr Jagtiani is at some pains to point out that his is not a case for realization of the security or for enforcement of a mortgage. That is not his claim in arbitration. His claim is for recovery of the debt and if he points to any such equity events it is only to justify the prayer for disclosure and similar reliefs including information and disclosure as to whether there are excess sale proceeds from such equity event. These, he says, and I think with some justifcation, are the inevitable consequence of Tapaswi's and Essel Infra's consistent defaults in making repayments from the very frst interest payment onwards.

20. A brief Afdavit in Reply tendered by Mr Kamat on behalf of Tapaswi on this aspect of the matter is interesting, essentially saying in this context that the recoveries by secured lenders do not fall within the defnition of an equity event at all. These were recoveries forced on Tapaswi or the Essel

Group and, therefore, fall outside the defnition of an equity event. But this does not answer what IREP has said in paragraph 41, viz., that Essel Infra has divested itself of three assets being toll road projects in Madhya Pradesh, Karnataka and Telangana to a Canadian entity, and proposes to hive of another 20th December 2019 909-CARBPL1501-19.DOC six. To this there is no answer at all. Now this must certainly constitute a divestment of an asset or a sale of an asset squarely within the frame of an equity event as defned in clause 2.16(A). The lack of an answer is at this stage at least unsurprising. I do not see what answer there can be. It can hardly be suggested that those toll road projects were not of Essel Infra. To say, as Mr Kamat valiantly attempts to do, that this is merely a newspaper report is actually no answer at all, unless one is suggesting that everything in the media is to be rapidly discounted only because it is in the media. Of course Mr Kamat does say that there are enough judgments to the efect that media reports 'should not be relied on', but that is in a completely diferent context: newspaper reports are no evidence of the facts they claim to report. That does not make them per se unreliable. IREP correctly places its case as information derived or gleaned, not as a fact proved. It seeks a confrmation from Essel Infra. It is no answer at all then to say that no denial is necessary only because this is a newspaper report. The requirement of answering a charge made in a petition before a court is not dispensed with in this fashion. I am not in the least interested in knowing whether the news report was inaccurate. I require a confrmation if Essel Infra did in fact divest itself of three projects to this Canadian company or any other entity, and whether it proposes to hive of another six.

21. Mr Kamat's argument also overlooks a fundamental principle founded on the Evidence Act. The sale of these assets would be a matter that was covered entirely, should the matter referred to trial, by Section 106 of the Evidence Act being a fact especially within the knowledge of Essel Infra. Who else but Eseel infra could tell us (tell 20th December 2019 909-CARBPL1501-19.DOC me or the arbitrator actually) whether it had or had not sold its road toll projects to this Canadian entity? I cannot expect IREP to know this and if IREP says this has happened, whatever be the source to its knowledge, and Essel Infra does not deny it, then certainly the Evidence Act, or principles analogous to its provisions, would allow me to conclude at this prima facie stage that this fact has gone uncontroverted and, therefore, must be accepted. This approach is neither prohibited nor impermissible, and it is not in the least answered by pointing to the source cited instead of the event or fact alleged.

22. This takes us to the next major defence from Mr Kamat that this entire action is nothing but an action to enforce the mortgage. I believe that is a over-simplifcation. The reliance on paragraph 46 of the Supreme Court decision in Booz Allen & Hamilton Ind vs SBI Home Finance Ltd & Ors2 will not assist. The case seems to me to more squarely fall within the ambit of the decision of this Court in Tata Capital Financial Services Ltd vs Deccan Chronicle Holdings Ltd. 3 Only because a lender is secured by a mortgage, this does not mean that his claim in arbitration for recovery of the loan metamorphoses into a mortgage action for foreclosure. The argument is over- simplistic because it is predicated on an assumption that there is a mortgage that lends itself to enforcement to begin with. But there again the Respondents are in default. Essel Infra was to obtain a NOC from defned lenders (and they are named in the contract itself) to ensure that IREP had a frst-ranking pari passu charge over the Gorai property. That NOC has not come forward at all. It 2 (2011) 5 SCC 532.

3 (2013) 3 Bom CR 205: 2013 SCC OnLine Bom 307.

20th December 2019 909-CARBPL1501-19.DOC therefore seems to me entirely unclear what it is that Mr Kamat would have Mr Jagtiani do in a situation such as this.

23. The second limb of this argument that there is adequate cover in the form of hypothecated goods is also an inadequate answer at this prima facie stage simply because nobody knows what those goods are, and this is precisely the information that Mr Jagtiani seeks. It is hardly an answer to say for a borrower to say to his lender that 'you are secured by hypothecation of my assets but I will not tell you what those assets are.'

24. If, therefore, the mortgage is attempted to be frustrated in this fashion and the hypothecation of the assets yet unknown, then I do not see what possible plausibility can be attached through this line of defence.

25. What is more curious about the defence is not what it says but what it does not say. There is no explanation in this Afdavit in Reply about any of the defaults at all. There is not a word about the two defaulted interest payments. There is not a word about the dishonour of the post-dated cheques. The sum and substance of the defence seems to be that it is perfectly all right for the borrower to take the lender's money, default on solemn contractual obligations, but then to oppose all recovery proceedings by invoking some nebulous statement that there are 'assets'. What are those assets? In what form might they be? Where are they? What is their value? These are the answers that Mr Jagtiani seeks, and which Mr Kamat 20th December 2019 909-CARBPL1501-19.DOC would leave to our collective imagination or our speculation. That is hardly a tenable defence.

26. Mr Jagtiani is also correct in saying that the Petition makes it clear, especially in paragraphs 44 and 47, that the claim to be taken to arbitration is, in the words of the Petition, 'for recovery of its dues'. It is hardly an answer, therefore, to say that this is a mortgage action. Most emphatically it is not.

27. There is one other defence taken in the Afdavit in Reply to which I must now make reference (the frst of course is the question of this being a mortgage action, and I have already dealt with that). This objection, taken in paragraph 5, is that the loan agreement is insufciently stamped. To begin with I am not entirely certain that it is permissible for any Respondent to frustrate an arbitration merely saying this nor should Garware Wall Ropes Limited vs Coastal Marine Constructions & Engineering Ltd4 be read to allow this kind of a defence without further specifcs. At a minimum, a respondent taking such an objection must be able to point out if not the exact amount of stamp, (because that is a matter left to the adjudicating authority) what it is that the agreement purports to do and which would attract stamp and under what particular Article or Section of the Maharashtra Stamp Act. I do not believe the decision of the Supreme Court was meant to arm dishonest borrowers to delay legitimate recovery actions in this fashion.

4 (2019) 9 SCC 209.

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28. The argument, however, is on the footing that if insufciency of stamps will not permit a Section 11 Petition or will not permit the appointment of an Arbitral Tribunal, then no order can be made in a Section 9 proceeding either. As far as I am concerned, the question is no longer res integra. It was squarely before GS Kulkarni J in Saifee Developers Pvt Ltd v Shanklesha Constructions & Ors.5 The submissions today are precisely those that were before Kulkarni J (see paragraph 8). He held, after considering the Supreme Court decision in Garware Wall Ropes Limited vs Coastal Marine Constructions & Engineering Ltd6 and the ratio in Gautam Landscapes Pvt Ltd v Shailesh Shah7 that this submission can have no bearing on the petition under Section 9. Garware Wall Ropes, as Kulkarni J said, was a matter under Section 11. Gautam Landscapes was under both Section 9 and Section 11. In Garware Wall Ropes, the Supreme Court held that the Full Bench decision in Gautam Landscapes did not correctly state the law on Section 11. The Supreme Court did not address the question of stamping being required even for a Section 9 petition. Kulkarni J noted that in fact there is a Special Leave Petition pending in the Gautam Landscapes matter,8 and that, on 29th April 2015, the Supreme Court issued notice but did not stay the Full Bench decision. It said that the Section 9 petition may continue, but any judgment on it would not be implemented without leave of the Supreme Court. Kulkarni J held in paragraph 11 of Saifee Developers that he was bound by the decision of the Full Bench on the Section 9 aspect in Gautam Landscapes and that the 5 Order dated 15th July 2019 passed in Commercial Arbitration Petition No. 1060 of 2019.

6 (2019) 9 SCC 209.

7 (2019) 3 Mah LJ 231 (FB).

20th December 2019 909-CARBPL1501-19.DOC contention (that without stamp being paid no order could be made even on a Section 9 petition) was without merit.

29. Kulkarni J's order was carried in appeal. 9 That appeal was disposed of on 13th August 2019, with a consent order suspending one particular direction. The fnding on law returned by Kulkarni J was undisturbed. Thus, the statement of law pronounced by Kulkarni J and undisturbed in appeal binds me.

30. I will pre-empt another line of attack that I see hovering on the horizon, though in fairness Mr Kamat does not take it explicitly today. There is no use and will be no use saying that Kulkarni J's view in Saifee Developers was "only at the ad interim stage". That means nothing, or next to nothing. It muddles two diferent facets: a pronouncement on law, and the stage at which this is done. It is entirely possible, and indeed often happens (and, given the way we handle our interim applications, increasingly happens) that a question of law is fully decided at an interim or even ad interim stage. The fact that it is at an ad interim stage makes it no less binding. One must look at what was decided, and how. If the pronouncement on law is said to be a prima facie view, then a diferent view at a later stage may be possible. But if the fnding on law is determinative, in the sense there is nothing further to be discussed or decided at any later stage, and no diferent result is possible no matter what facts are later on record, then that fnding must be taken as concluded,

conclusive, binding and not merely a prima facie view. There may be a fnal decision on the law applied to 9 Commercial Appeal No. 411 of 2019.

20th December 2019 909-CARBPL1501-19.DOC a prima facie fnding on facts; the two are not inconsistent, and nothing is shown to me to suggest that a fnding on law at an ad interim or interim stage is never binding or need not be followed. Were it so, it would never be necessary to fully consider the law at any interim (let alone ad interim) stage. It would only ever be necessary to return a broad-brush fnding of what the position in law might likely be. Indeed, I believe this to be a wholly incorrect approach. The only judicious approach is to apply the correct law to a prima facie view of the facts. On a fuller examination of the facts, the legal position remaining unchanged, there may well be a diferent outcome. But I do not see how a fuller examination of facts can alter the position in law. The dichotomy that Kulkarni J noted and resolved has nothing at all to do with the facts of any given case. It was simply a matter of considering a set of precedents and examining their impact on the statute. That appears to me to be a sufciently fnal pronouncement on law, subject only to a contrary view at an appellate stage, and it cannot be brushed aside by a later bench of coordinate strength only because of the stage at which it came to be pronounced or decided.

31. In this case, even venturing to suggest (again, which Mr Kamat does not today) that Kulkarni J's view was at an ad interim stage in a Section 9 also goes nowhere. This case too is an ad interim application in a Section 9 petition.

32. Apart from being in complete and most respectful agreement with the decision of GS Kulkarni J, I believe it is complete judicial indiscipline to venture to take diferent opinions from those of an earlier Bench of coordinate strength. It is nobody's case that GS 20th December 2019 909-CARBPL1501-19.DOC Kulkarni J's decision is one rendered per incuriam and just because another view is desirable, plausible or even convenient is no reason to depart from well settled principles of stare decisis. Our entire system of jurisprudence is predicated on there being some certainty in law and on the value of precedent. Departures are the exceptions and those exceptions must be narrowly tailored.

33. At this stage, therefore, there is no reason to refuse relief.

34. I will frst set out all the prayers:

> "(a) This Hon'ble Court be pleased to pass an order directing the Respondents to disclose on oath (a) the details of all assets sold by the Respondents and/or any Essel Group Entity from 14 May 2019 until date; (b) the manner in which the proceeds of such sale have been utilized by the Respondents and/or the respective Essel Group Entity, providing detailed particulars of sums paid to third parties and the names of such third parties; and (c) details of all payments made by the Respondents to its creditors since 15 August 2019.
>
> (b) this Hon'ble Court be pleased to direct the Respondents to deposit in this Hon'ble Court all excess proceeds arising out of sale of assets of the second Respondent

and/or other Essel Group entities, as the case may be after 14 May 2019.

(c) this Hon'ble Court be pleased to direct the Respondents to furnish solvent security to the Petitioner in such form and manner as this Hon'ble Court considers appropriate to secure the due repayment of the entire 20th December 2019 909-CARBPL1501-19.DOC Outstanding Amount along with further interest thereon as will accrue in terms of the Loan Documents.

(d) This Hon'ble Court be pleased to pass an order directing the Respondents to disclose on oath details of all assets, movable or immoveable, tangible or intangible, in which the Respondents have any direct or indirect interest whatsoever;

(e) This Hon'ble Court be pleased to pass an order and injunction restraining the Respondents, their employees, servants and/or agents or otherwise, from, in any manner, either directly or indirectly, disposing of the Mortgaged Property and the Hypothecated Assets and, pending provision of solvent security in terms of prayer clause (c) above, all their other assets;

(f) This Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay, as a receiver of the Mortgaged Property and the Hypothecated Assets pursuant to prayer clause (a) above, with all powers under Order XL of the Code of Civil Procedure, 1908 including the power to seize the aforesaid assets with the aid of local police and sell the same either by public auction or by private sale and pay over the proceeds to the Petitioner to be appropriated towards the repayment of the Outstanding Amount along with accrued interest in terms of the Loan Documents;"

35. This being at an ad-interim stage, Mr Jagtiani limits the reliefs to prayer clauses (a), (d) and (e).

36. Prayer clause (a) need some explanation. The reason to include all Essel Group entities is because of the wording of the equity event clause. Obviously this was necessary because even if 20th December 2019 909-CARBPL1501-19.DOC there had been sales inter se or transfers of shares, this would have triggered pre-payment. Prayer (d) again is required because even if IREP obtains an arbitral Award it cannot then be told, after Award, that all it has in his hands is mere paper and then has to begin the process of discovering what assets are available to it in satisfaction. I believe prayer clause (e) is somewhat too broadly worded, especially in regard to the hypothecated movable assets. I will necessarily have to restrict that prayer and provide an exception in the usual form.

37. I will, therefore, grant prayer clauses (a) and (d) as they stand but prayer clause (e) will be with the addition of the words 'except in the ordinary and usual course of business'.

38. There is one clarifcation required which may fall either under prayer clause (a) or prayer clause (d) and that relates to paragraph 41 of the Petition. Simply because there is today no answer when they could well have been, and, in my view, should have been, the 2nd Respondent will now be required to disclose the precise terms of the transfer of the three toll road projects or assets mentioned in that paragraph with complete details of the third party Canadian entity and the

transfer consideration as also how that consideration has been appropriated or applied. If it has been utilized in the payment of a debt to a third party that will need to be specifed. Specifcally the 2nd Respondent Essel Infra must specify whether after satisfying those debts there is indeed any surplus left over. This will take the form of an Afdavit of Disclosure which may be included in a further and more detailed Afdavit in Reply. The disclosure will also extend to the six other road toll projects said to be proposed to be sold to the National Infrastructure and Investment Fund. I am 20th December 2019 909-CARBPL1501-19.DOC making it clear that whether that transaction with the National Infrastructure and Investment Fund goes through or not, the disclosure must be made on the basis that there have been discussions in regard to those six projects by Essel Infra with that entity.

39. Afdavit in Reply (including the disclosure) is to be fled and served on or before 20th January 2020. Afdavit in Rejoinder is to be fled and served on or before 27th January 2020.

40. List the Petition on 3rd February 2020.

(G. S. PATEL, J) 20th December 2019