

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 259 OF 2015

L & T Finance Limited

..... Petitioner

VERSUS

Omnitech InfoSolutions Ltd. & Ors.

..... Respondents

Ms.S.I.Joshi, a/w. Ms.Nikita Pawar, i/b. S.I.Joshi & CO. for the Petitioner.

Mr.J.S.Kini, a/w. Mr.Suresh Dubey for Respondent No.1.

CORAM : R.D. DHANUKA, J.

DATED : 23rd SEPTEMBER, 2015

P.C.

By this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, the petitioner seeks appointment of the Court Receiver and injunction in respect of the hypothecated assets described in Ex.F to the petition and also seeks an order against the respondents to provide security to secure the claim of the petitioner in the sum of Rs.96,80,819/- and for payment of further interest thereon.

2. The petitioner had sanctioned the lease facility in favour of the respondent no.1 to the tune of Rs.2 crores and executed a lease agreement dated 2nd March, 2012 with the respondent no.1 on the terms and conditions more particularly described in the said agreement. The respondent no.1 also executed a demand promissory note in favour of the petitioner. It is the case of the petitioner that since the respondent no.1 committed default in making repayment of the amount, on 18th October 2013, the petitioner issued demand cum termination notice through their advocate and called upon the respondent no.1 to pay a sum of Rs.1,58,22,128.88 with further interest thereon.

3. There was neither any repayment nor any reply to the said notice. The petitioner therefore filed arbitration petition under section 9 of the Arbitration and Conciliation Act, 1996 (1285 of 2013) on 20th November, 2013.

4. By an ad-interim order dated 18th February, 2014, the respondent no.1 was directed to deposit the sum of Rs.40 lacs with the Prothonotary and Senior Master of this court. The respondent no.1 deposited the said amount of Rs.40 lacs which is admittedly withdrawn by the petitioner. By an order dated 17th July, 2014, this court directed the respondent no.1 to pay Rs.40 lacs to the petitioner without prejudice to the rights and contentions of both the parties. Learned counsel appearing for the petitioner states that the respondent has already paid the said sum of Rs.40 lacs pursuant to the said order dated 17th July, 2014 passed by this court.

5. According to the petitioner, the respondent no.1 is further liable to pay Rs.96,80,819/- with further interest thereon from 23rd December, 2014 till payment to the petitioner.

6. By an order dated 24th June, 2015 passed by this court, the respondent no.1 had been directed to disclose the location of the equipments by filing an affidavit within one week from the date of the communication of the said order.

7. On 24th June, 2015, the respondent no.1 filed an affidavit stating that the equipment which had been leased to the respondent no.1 were never stored at any one point of location and were subject to wear and tear. It was alleged that the equipment containing of various small components which were put to different uses at different places and therefore there was no records available with the respondent no.1 to ascertain where the equipment was located. It was further

alleged that none of the equipments were at the office of the respondent no.1.

8. On 8th July, 2015, this court recorded the statement made by the learned counsel for the respondent no.1 that if all such equipments along with spare parts were available, the same shall be surrendered to the petitioner within four weeks from the date of the said order. This court made an observation that there was no dispute that the respondent no.1 was heavily indebted and several winding up proceedings were filed by the creditors, including the petitioner against the respondent no.1. This court also noted that the learned Company Judge had already passed an order for winding up of the respondent no.1 company. An appeal against the said order passed by the learned Single Judge is pending before the Division Bench. This court granted ad-interim order in terms of prayer clause (k) until further orders.

9. The respondent no.1 also annexed copy of the affidavit filed in Appeal before this court on 9th June, 2015 in which it was alleged that due to lack of manpower who maintained records and thus no records were available with the respondent no.1 company to ascertain where the equipments were located. It is further alleged that since the staff and employee strength of the respondent no.1 company had drastically reduced owing to the cash crunch faced by the company and on account of non-payment of salaries, location of the leased equipments became more difficult as there were no records available with the company to trace out the locations of all the equipments. It is further alleged that the present value of the equipments as leased financed by the petitioner would be negligible when compared to the claim amount of the petitioner. The petitioner disputed the allegations made by the respondents about the location and whereabouts of the equipments. It is the case of the petitioner that the petitioner had provided lease of

three servers which were not of the small size as alleged by the respondent no.1. The petitioner placed reliance on the photographs of such servers which were given on lease by the petitioner to the 1st respondent. It is the case of the petitioner that the servers were the large equipments and can easily be located.

10. Mrs.Joshi, learned counsel appearing for the petitioner invited my attention to various orders passed by this court from time to time and also the annexures to the petition. My attention is also invited to the order passed by the Division Bench on 8th May, 2015 in Notice of Motion (L) No.978 of 2015 in Appeal (L) No.325 of 2015 filed by the respondent no.1 herein and other connected matters. Those appeals were arising out of various company petitions filed by the creditors including the petitioner herein. The Division Bench by the said order has directed the respondent no.1 company to file an affidavit detailing the list of assets of the respondent no.1 company and also the location of the leased equipments on or before 10th June,2015. The respondent no.1 produced a letter dated 6th May, 2015 from the Managing Director and CEO of the respondent no.1 to Axis Bank Limited which was the lead bank in the consortium of the banks to which the respondent no.1 had applied to pay 50% of the amounts to the petitioning creditors within one month from the date of sanction.

11. It is submitted that the respondent no.1 has not even complied with the said order dated 8th May, 2015 passed by the Division Bench and are in contempt of the said order.

12. Learned counsel appearing for the petitioner thus submits that since the lease assets which were given to the respondent no.1 are not in place and the location thereof is not informed to the petitioner inspite of several orders passed by

this court, even if the petitioner succeeds in the arbitral proceedings, the petitioner would not be able to recover any amount from the respondent no.1. It is submitted that the large number of creditors have already filed winding up proceedings against the respondent no.1. It is submitted that the claim of the petitioner thus shall be secured by passing an appropriate order against the respondent no.1.

13. Mr.Kini, learned counsel for the respondent no.1 submits that there are other creditors of the respondent no.1 including the petitioner. He states that pursuant to the ad-interim order passed by this court, the respondent no.1 has already deposited a sum of Rs.80 lacs. He submits that though the respondent no.1 has filed a copy of the letter dated 6th May, 2015 addressed to the Axis Bank Limited with a direction to pay 50% of the amounts to the petitioning creditor before the Division Bench, the said Axis Bank Limited refused to release any amount in favour of the unsecured creditors. He submits that no amount thus could be paid to any of the petitioner creditors including the petitioner herein pursuant to the said letter.

14. It is submitted by the learned counsel that the respondent no.1 is ready and willing to make a statement that it would not recover any amount from respondent nos. 2 and 3. Learned counsel however is not able to make any statement whether respondent no.1 has to recover any amount from the respondent nos.2 and 3 and if so, what amount. Respondent nos. 2 and 3 are absent though served.

15. The next grievance of the learned counsel for the respondent no.1 is that though the arbitral proceedings are pending for quite sometime, the petitioner is not proceeding with the arbitral proceedings deliberately. This statement of the learned counsel for the respondent no.1 is disputed by the learned counsel for the

petitioner.

16. A perusal of the record prima facie indicates that the respondent no.1 has committed default in making payment of the lease rent to the petitioner. There are large number of creditors of the respondent no.1 who have already filed winding up proceedings. Learned Company Judge has already passed an order of winding up of respondent no.1 company. The said order has been however stayed by the Division Bench. The respondent no.1 however has not complied with the interim order passed by the Division Bench.

17. A perusal of the affidavits filed by the respondent no.1 pursuant to the interim orders passed by this court clearly indicates that the whereabouts of the lease assets is deliberately suppressed from this Court and the petitioner. The respondent no.1 has not come to this court with clean hands and has not disclosed the true and correct location of the lease assets. I am not inclined to accept the submission made by the learned counsel for the respondent no.1 that the location of the lease assets cannot be made known in view of the alleged smaller size of such assets or in view of the shortage of staff available with respondent no.1.

18. The respondent no.1 has not disputed the amount claimed by the petitioner. The petitioner has in my view good chances of succeeding in the arbitral proceedings. The lease assets are not available even according to the respondent today. The financial condition of the respondent no.1 is not such that even if the petitioner succeeds in the arbitration proceedings, the petitioner would be able to recover any amount from the respondent no.1.

19. In my view, the petitioner has thus made out a case for an order and

direction against the respondent no.1 to provide the security so as to secure the claims of the petitioner. I, therefore, pass the following order :-

(a) Ad-interim orders passed by this court on 24th June, 2015 and 8th July, 2015 to continue till disposal of the arbitral proceedings and for a period of six weeks thereafter.

(b) Respondent no.1 is directed to furnish solvent security to the satisfaction of the Prothonotary and Senior Master which may be by way of bank guarantee to the tune of Rs.96,80,819/- and shall include further interest thereon at the rate of 12% per annum from the date of filing this petition till the date of furnishing such security. Such security should be kept alive till the declaration of the arbitral award and for a period of six weeks thereafter. Such security shall be furnished within four weeks from today.

(c) It is made clear that if the respondent no.1 furnishes such security, the ad-interim order passed in terms of prayer (k) shall stand vacated.

(d) Respondent nos. 2 and 3 are directed to file affidavit within two weeks from the date of communication of this order whether they are in fact liable to pay any amount to the respondent no.1 and if so, what amount ?

(e) The learned arbitrator is directed to dispose of the arbitral proceedings within six months from the date of

communication of this order. Both the parties are directed to co-operate with each other and with the learned arbitrator for expeditious disposal of the arbitral proceedings.

20. Arbitration petition is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]

CERTIFICATE

Certified to be true and correct copy of the original signed order.