IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 821 OF 2015
WITH
ARBITRATION PETITION NO. 822 OF 2015

Tata Motors Finance Ltd. … Petitioner
V/s.
Coastal Projects Limited & Anr. … Respondents

Mr. Cyrus Ardeshir, Mr. Kingshuk Banerjee & Mr. Dhruv Joshi i/b Wadia Gandhi & Co. for the Petitioner.

Mr. Bimal Rajasekhar for the Respondent Nos. 1 & 2.

CORAM : K. K. TATED, J.
DATED : 03/02/2016

P.C.:

. Heard learned Counsel for the parties.

2 By consent of both the parties, both the petitions are taken on board for hearing. The issues involved in both the petitions are identical. In both the petitions, Respondents borrowed the loan from the Petitioner for purchase of vehicles and executed loan-cum-Hypothetication-cum-guarantee agreements. In both the matters identical agreements were executed between the parties. Hence, both the petitions can be disposed of by a common order.

3 Both the Petitions filed by the Petitioner under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter will be referred as 'the said Act.') for an order of appointment of Court Receiver of the Hypothecated Assets with all the powers under Order XL of Code of

Civil Procedure, 1908 including the power to seize the vehicles.

4 As the respondents failed and neglected to pay the installment as per loan-cum-Hypothetication-cum-guarantee agreement(hereinafter will be referred as 'the said agreement') within time, the Petitioner filed these two petitions under Section 9 of the said Act for various reliefs. The Petitioner stated that they have to recover a sum of Rs.3,13,44,552/- in Arbitration Petition No. 821 of 2015, and sum of Rs. Rs.2,48,09,630/- in Arbitration Petition No. 822 of 2015 from the Respondents.

5 Initially, this Court by order dated 17.02.2015, restrained the Respondents by an order of injunction in any manner, either directly or indirectly, damaging, transferring, disposing of, alienating, encumbering and/or otherwise creating any third party rights of whatsoever nature in respect of purchased assets or any part thereof.

6 The learned Counsel Mr. Ardeshir appearing on behalf of Petitioner submits that in both the matters, Respondents executed the said agreements and agreed to repay the loan amount on monthly installment. He submits that as the Respondents failed and neglected to pay the installment on time, they called upon the Respondents to clear their outstanding immediately.

7 The learned Counsel for the Petitioner submits that in Arbitration Petition No. 821 of 2015, the following amounts were due and payable by the Respondents as on 20.01.2015 in respect of several agreements, which read thus:

"Statement setting out the amount due and payable by the Respondents as on 20th January, 2015 to the Petitioner

MASTER AGREEMENT NO. 5000455976		
Sr. No.	**Drawdown Request [Agreement No.]**	**Amount due and payable [In Rs.]**
1.	5000461271	22412
2.	5000461268	22412
3.	5000461266	22412
4.	5000461264	22412
5.	5000461263	22412
6.	5000461262	22412
7.	5000461259	22412
8.	5000461255	22412
9.	5000461251	22412
10.	5000461240	22412
11.	5000458017	22051
12.	5000458009	21885
13.	5000458006	21885
14.	5000458001	21885
15.	5000457999	18241
16.	5000457995	21885
17.	5000455056	17086
18.	5000455055	17145
19.	5000455054	17086
20.	5000455053	17086
21.	5000455051	17086
22.	5000455050	17086
23.	5000455049	17086
24.	5000455048	17086
25.	5000455047	16586
TOTAL		**505285**

MASTER AGREEMENT NO. 5000458004		
Sr. No.	**Drawdown Request [Agreement No.]**	**Amount due and payable [In Rs.]**
1.	5000458004	21885
2.	5000458001	18259

3.	5000457999	24046
	TOTAL	**64189**

MASTER AGREEMENT NO. 5000550582		
Sr. No.	**Drawdown Request [Agreement No.]**	**Amount due and payable [In Rs.]**
1.	5000550582	855503
2.	5000550603	1076027
3.	5000550602	805237
4.	5000550599	857028
5.	5000550598	805487
6.	5000550595	856931
7.	5000550594	855479
8.	5000550591	855479
9.	5000550590	856931
10.	5000550587	857100
11.	5000550586	856931
12.	5000550584	856931
13.	5000550581	850852
14.	5000550579	850852
15.	5000550578	850852
16.	5000550576	851018
17.	5000550573	71474
18.	5000550571	70338
19.	5000550570	852908
20.	5000550568	852919
	TOTAL	**15646276**

MASTER AGREEMENT NO. 5000687696		
Sr. No.	**Drawdown Request [Agreement No.]**	**Amount due and payable [In Rs.]**
1.	5000687696	1614507
2.	5000687699	1697174
3.	5000687698	1663169

4.	5000687697	1680035
	TOTAL	**6654885**

MASTER AGREEMENT NO. 5000735017		
Sr. No.	**Drawdown Request [Agreement No.]**	**Amount due and payable [In Rs.]**
1.	5000735017	2510146
2.	5000735096	2508126
3.	5000735091	1727921
4.	5000735027	1727725
	TOTAL	**8473917**

8 The learned Counsel for the petitioner submits that in similar way in Arbitration Petition No. 822 of 2015, the following amounts were due and payable by the Respondent as on 20.01.2015 in respect of several agreements, which read thus:

"**Statement setting out the amount due and payable by the Respondents as on 20th January, 2015 to the Petitioner**

Sr. No.	**Agreement No.**	**Amount due and payable [In Rs.]**
1	5000549286	305558
2	5000549289	305429
3	5000549290	305549
4	5000549292	305531
5	5000556872	1004598
6	5000556870	1004598
7	5000556869	1004598
8	5000556868	1004418
9	5000556867	1004766
10	5000556866	1004598
11	5000556864	1004598
12	5000556861	1004418
13	5000556860	1004886

14	5000556859	1004598
15	5000556857	1003169
16	5000556855	1004790
17	5000556854	1003146
18	5000556852	1003146
19	5000556851	1004598
20	5000556847	1003146
21	5000556845	1004741
22	5000556841	1003146
23	5000556840	1004766
24	5000549281	224238
25	5000549280	224200
26	5000549279	224215
27	5000549278	224215
28	5000549262	342378
29	5000549260	342387
30	5000549242	320057
31	5000549240	320066
32	5000549236	320057
33	5000549234	320066
34	5000549231	320066
35	5000549229	320057
36	5000556862	1004837
TOTAL		**24809630**

9 The learned Counsel for the Petitioner submits that the following are some of the relevant clauses of the said Agreement, which read thus:

"***7. METHOD OF APPROPRIATION:***

Unless otherwise agreed to or decided by the Lender, any payment due and payable under this Loan Agreement and when received by the Lender shall be appropriated towards the dues in the following order viz;

(a) Cost, charges, expenses and other monies;
(b) Interest on cost, charges expenses and other monies;
(c) Delayed Payment Charges, If any,
(d) interest payable in terms of this Loan Agreement; and
(e) Repayment of installment of principal amount as due

and payable under this Loan Agreement

The Borrower shall continue to be liable for any deficiency m the amount due to the Lender by the Borrower after adjustment of the net proceeds of sale, realization, recovery and/or insurance claim as above. The Borrower agrees, that notwithstanding any specific instructions issued by the Borrower, the Lender shall have absolute discretion to appropriate any payments received from the Borrower/ net proceeds of sale, realizations; insurance claim proceeds relating to the Bald Asset herein, towards the dues of the Borrower/ Guarantor under any other agreements with the Lender.

17. EVENTS OF DEFAULT:

*17.1 At the option of the Lender, and without necessity of any demand upon or notice to the Obligors, all of which are hereby expressly waived by the Obligors, and notwithstanding anything contained herein or in any security documents executed by/ to be executed by the Obligors lathe Lender's favour pursuant to this Agreement, all amounts due and payable by the Obligors to the Lender under this Agreement and all of the obligations of the Obligors to the Lender hereunder, shall Immediately become due and payable. Irrespective of any agreed maturity upon the happening of any of the following events, hereinafter referred to as the '**Events of Default'.***

(a) the Obligors shall commit default in.'

i) Payment of installments on the respective due date whether in respect of the Purchased 'Assets or, as the case maybe, Body Building Assets,

ii) Payment of any other amount(s) due and payable by the Obligors to the Lender in terms of this Loan Agreement;

iii) The performance of any of the terms and conditions of this Loan Agreement, on the terms and conditions applicable to any of the Loan Facilities or

iv) If, any, attachment or restraint has been levied on *the Asset or the Asset are confiscated by any authority and/or the properties hereby agreed to be charged and/or any proceedings have been taken or commenced for recovery of any dues from the Borrower by any person or persons including the Lender; or*

v) If the Assets are not hypothecated in favour of the Lender in the manner and within the period specified in this Agreement.

vi) Taking delivery of the Asset.

(b) Any of the Obligors dies or any action or other steps are taken or legal proceedings are initiated for winding up, insolvency, dissolution, or reconstitution of any of the Obligors or for the appointment of a liquidator, receiver, and trustee or similar officer on Its properties or assets (including the Asset) of the Obligors or any of the Obligors otherwise becomes incapacitated to enter into a contract under the applicable Laws;

(c) Any of the Post Dated Cheques and/or cheques delivered by ft Borrower to the Lender in terms and conditions hereof are dishonoured for any reason whatsoever on presentation including. due to instructions given by the Borrower for stop payment;

(d) Any of the Assets is confiscated, attached, taken into custody by any authority or subject to any execution proceeding;

(e) Any of the Assets is endangered or badly damaged due to accident or any other reason whatever causing the same to be a total loss in the opinion of the Lander or caused bodily Injury to any. person due to any accident or otherwise;

(f) any distraint or seizure order is levied on the Assets;

(g) the Borrower fails to pay any tax impost, duty or other imposition or comply with any other formalities required

for the Assets under law from time to time;

(h) *any of the Assets is stolen or untraceable for a period of 30 days for any reason whatever,*

(i) *the Borrower fails to adhere to the timeframes specified in this Agreement (including timeframes as to "supply of a copy of the Registration Certificate and Insurance Certificate);*

(j) *any of the Assets is destroyed for any reason whatsoever and/or is incapable of being used for any permissible use under any law or regulation or is used or alleged to be used for any illegal purpose;*

(k) *Any information or representation or warranty given by the Borrower under this loan Agreement is found to be misleading or incorrect in any respect;*

(1) *Any circumstances arises which gives reasonable grounds in the sole opinion of the Lender that it is likely to prejudice or endanger the Asset or the ability of the Obligors to fully discharge any of their obligations under this Loan Facilities or*

(m) *Death of the Borrower.*

18. CONSEQUENCES OF EVENT OF DEFAULT:

a) *If one or more of the events specified in Clause 17 above occurs ("Event of Default"), the Lender by notice in writing to the Obligors, declare the Loan to be Immediately du e and payable (whereupon the same shall become due and payable together) and forthwith recall the Loan together with all interests and other monies payable by the Obligors pursuant to this Loan Agreement, and in default of such payment enforce the charge created In terms of this Loan Agreement. Further, the Lender shall be entitled to, at all times to, take possession, seize, recover, appoint a receiver/ manager, remove the Asset from its place of standing, and, also be* *entitled, on such terms as may be deemed fit by the Lender, without the intervention of court or authority, to sell the Asset by public auction or by private contract at the best available prices according to the prevailing market condition including as regards repossessed vehicles / assets, realise Its claims in respect of the Loan, without being bound or being liable for any loss l losses that the Obligors may suffer due to such action and without prejudice to the Lenders other rights and remedies as stated, herein or otherwise in law entitled to.*

b) *The Lender may further deal with all or any part of the Asset, to enforce, realise, settle, and compromise with any rights or claims relating thereto. It shall not be bound to exercise any of these powers or be liable for any losses arising therefrom. Without prejudice to the Lender's rights and remedies of legal action or otherwise and notwithstanding any pending proceedings, the Obligors undertake to give immediate possession to the nominee/s of the Lender on demand of the Asset, and transfer and deliver all relative bills, contracts, securities and documents (including all registrations, policies, certificates and documents relating to the said Asset) to the Lender. The Obligor hereby also agree, to accept the Lender's account of sales and realisation as sufficient proof of amounts realised and relative expenses incurred, and to pay on demand by the Lender, any deficiency shown in the accounts, provided however, that the Lender shall not be liable or responsible for any loss, damage or depreciation that the Asset may suffer or sustain in the course of seeking repossession and/or while the same is. in possession of the Lender or its nominees or by reason of exercise or non-exercise of rights and remedies available to the Lender as aforesaid.*

c) *In case the net sale proceeds, after deducting all costs. charges, and expenses incurred by the Lander are not sufficient to meet In full, the dues payable to the Lender under this Loan Agreement, the Obligors shall make good and pay such deficiency to the Lender.*

d) *The Lender may, in the event of death, lunacy or* *insolvency of any of the Obligors or any of the Obligors having received an order from any adjudicating authority or insolvency notice served upon it/ him or an attachment levied on any of it/his property or the Obligors having allowed the Asset to be seized in distress or execution or under any other process of law, also forthwith recall the Loan together with all interest and other monies payable by the Obligors and retake the possession of the Assets.*

23. ARBITRATION:

All disputes, differences and / or claims arising out of this Loan Agreement or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder" be settled by arbitration to be held in Mumbai in accordance with the Arbitration. and Conciliation Act 1996, or any statutory amendments thereof and shall be referred to a person to be appointed by the Lender. In the event of death, refusal, neglect, Inability, or Incapability of the person so appointed to act as an Arbitrator, the Lender may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned."

10 The learned Counsel for the petitioner submits that it is specifically stated in the said agreements that in case there is default on the part of the Respondents in payment of monthly installments, the petitioner has right to take possession of the purchased assets and recover their dues by disposing of the same. He submits that as the Respondents failed and neglected to clear the dues in both the matters, which were more than Rs.5 crores, the Petitioner invoked the Arbitration Clause and filed the present petitions under Section 9 of the said Act for interim protection pending the hearing and disposal of the Arbitration Proceeding between the parties.

11 The learned Counsel for the Petitioner submits that as of today

the vehicles are in possession of the Respondents. They are using the same for their commercial activities. He submits that in the interest of justice, this Hon'ble Court be pleased to appoint the Court Receiver with full powers under Order XL of Code of Civil Procedure, 1908 to take forcible possession of the purchased assets and handover the same to the Petitioner. He submits that if possession is not taken of the purchased assets from the Respondents, Petitioner will suffer irreparable loss and injury. He submits that Court Receiver may be permitted to take help of police if required for taking forcible possession from the Respondents.

12 On the other hand, the learned Counsel Mr. Bimal Rajasekhar appearing on behalf of the Respondents vehemently opposed the present Petitions. He submits that Petitioner has not made out any case for allowing the present petitions under Section 9 of the said Act. The Respondents filed their affidavit-in-reply in both the matters. It is the contentions of the Respondent that in Arbitration Petition No. 821 of 2015 as per their record, only small amount is due and payable in respect of approximately 8 vehicles. In Arbitration Petition No. 822 of 2015 small amount in respect of 20 vehicles is due and payable. Hence, there is no question of allowing the present petitions in respect of more than 80 vehicles which are in possession of the Respondents. He submits that from December 2009 Respondents have been paying consolidated amount of EMI's for all vehicles to the Petitioner. These payments were made from December 2009 to June 2012 without any default. He submits that after June 2012, Government of India defaulted in making payment to the Respondents as result whereof from July 2012 up to May 2013 all EMI were paid by the Respondents

but not in accordance with the due dates of EMI. Thereafter, the Respondents have been making the payment until the CDR process came in and thereafter, the Respondents have made payment from July 2013 on the basis of moneys received under their project till September 2014. He further submits that even in other matter i.e. Arbitration Petition No. 1200 of 2013 as per minutes of order dated 06.01.2015, the Respondents are making the payment of Rs.45 lacs to the Petitioner by way of monthly royalty on/or before 10th of each month in respect of 86 vehicles which were subject matters of the those agreements. He submits that as per their record, the EMI of some vehicles are fully paid by them and inspite of that the Petitioner is seeking the relief under Section 9 of the said Act.

13 The learned Counsel for the Respondents submits that the present petitions are not maintainable because, earlier, the Petitioner appointed the sole Arbitrator. Before the sole Arbitrator the Respondent Company appeared and filed application under Section 12. Thereafter, the Petitioner filed an application before the sole Arbitrator for withdrawal of the proceeding, which was allowed with liberty to file a fresh proceeding. Hence, the present Petitions under Section 9 of the said Act are not maintainable.

14 The learned Counsel for the Respondents submits that Respondent No.1 Company has still to receive a sum in excess of Rs.800 crores from the Central and State Governments for work already done for their infrastructure project. He submits that the said non payment of Rs.800 crores by the Government and/or it's departments is a fact and/or cause that is well beyond the control of

Respondent No.1 Company. He submits that those facts were in knowledge of the Petitioner and inspite of that they filed the present petitions.

15 The learned Counsel for the Respondents, in support of his contentions, relies on the judgment of this Court in the matter of ***Ashapura Minechem Ltd. V/s. Pacific Basin IHX (UK) Ltd. reported in 2013(4) Mh.L.J. 103*** particularly in paragraph 12. On the basis of these submissions, the learned Counsel for the Respondents submits that there is no substance in the present petitions and both the petitions required to be dismissed with costs.

16 I heard both the sides at length. There is no dispute between the parties that as per the said agreement, the Respondents borrowed amount for purchase of vehicles and agreed to repay the said borrowed amount by installment as per terms and conditions of the said agreement. It is specifically stated in clauses 17 and 18 of the said agreement that in the event of default, the petitioner has right to take possession of the purchased assets. As per clause 7 of the said agreement, the method of appropriation of the EMI is given. Therefore, the contentions raised by the Respondents that they have made the full payment of some of the vehicles cannot be considered at this stage. The Respondents have not placed on record any documents to show that at the time of making the payment of EMI, they had written any letter to the Petitioner stating that they were making the payment in respect of specific agreement and/or vehicle. Apart from that, there is no dispute that as on today more than Rs.4 crores is due and payable by the Respondents to the Petitioner. The reasons given by

the Respondents in their affidavit-in-reply that they have not received the amount from the Central Government, State Government and the Departments cannot be considered while passing the order in the present petitions. It is to be noted that though more than Rs.4 crores are due and payable by the Respondents to the petitioner, the Respondents are using the vehicles/purchased assets without paying any EMI. Hence, if Court Receiver is not appointed at this stage, irreparable loss and injury will be caused to the Petitioner. The authority cited by the learned Counsel for the Respondents in the matter of *Ashapura Minechem Ltd. (Supra)* is not applicable to the facts and circumstances of the present cases.

17 During the course of the arguments, the learned Counsel for the Petitioner pointed out that if the Respondents are ready and willing to sign the minutes of order as they have already signed in Arbitration Petition No. 1200 of 2013, they have no objection to allow the Respondents to use the vehicles. But the said proposal is not accepted by the Respondents.

18 The object of appointment of Court Receiver is to protect the property during the pendency of the litigation. In the present matter, the property involved is movable i.e. several vehicles. If those vehicles remained in the possession of the Respondents during the pendency of the present litigation, Respondents may or may not take proper care. By the time of final decision in the present proceeding, the value of suit property may become zero. Hence, it is necessary in the interest of justice that Court Receiver to be appointed to take physical possession of the same and if the Respondents agree that they are ready and

willing to maintain suit property during the pendency of the litigation as a agent of the Court Receiver, then Court Receiver may be permitted to appoint the Respondents as a agent on usual terms and conditions including payment of royalty and deposit of the security amount. This can be done in view of Section 9 of the said Act. Section 9 specifically state that Court has power to pass interim measure to protect the property during the pendency and decision of the Arbitral Tribunal.

19 Considering the facts and circumstances of the present cases that Petitioner has to recover more than Rs.4 crores from the Respondents and vehicles/purchased assets are in possession of the Respondents, I am of the opinion that Petitioner has made out the case for allowing both the Petitions in following terms:

a) The Court Receiver of the High Court, Bombay at Bombay is appointed as a Receiver of the purchased assets/vehicles with all the powers under Order XL of the Code of Civil Procedure, 1908 including the power to seize the purchased assets with aid of the local police and handover the possession of the same to the Petitioner.

b) The Respondents are directed to disclose the whereabouts of the purchased assets to the Receiver within two weeks from the receipt of the letter to that effect from the office of the Court Receiver.

c) After taking possession, the Court Receiver shall give an option to the Respondents to act as agent of the Court Receiver of the said vehicles/purchased assets.

d) The Respondents shall be given two weeks time by the Court Receiver from the receipt of the Court Receiver's communication letter to exercise such option.

e) In the event of the Respondents desire to act as agent of the Court Receiver, they shall be appointed as agents of the Court Receiver subject to deposit of security and payment of royalty amount.

f) The Court Receiver shall determine the amounts of security and royalty on the basis of the terms and conditions contained in loan-cum- Hypothetication-cum-guarantee agreement.

g) In the event, the Respondents do not communicate their willingness to the Court Receiver to act as agents within the period of two weeks from the date of receipt of the communication from the office of Court Receiver, the Court Receiver to take forcible possession of the vehicles/purchased assets and if necessary with the assistance of the local police from the Respondents and/or anybody whosoever in possession/custody and hand over the same to the Petitioners.

h) It would be open to the petitioner to apply to the Court for further orders including the sale of the vehicles/purchased assets.

i) Until the Court Receiver takes possession, there shall be an interim injunction restraining the Respondents from alienating, parting with possession or creating any third party rights in respect of vehicles/purchased vehicles.

j) If the Petitioner does not take steps for appointment of the Court Receiver within six weeks from the date of this order, interim order passed by this Court for appointment of Court Receiver except injunction order shall stands vacated without further reference to the Court.

k) Both the Arbitration Petitions are accordingly disposed of.

l) No order as to costs.

m) Parties as well as Court Receiver to act on an authenticated copy of this order.

22 At the request of Advocate for the Respondent Court Receiver is directed not to take possession of the vehicles/purchased assets till 29.02.2016.

(K.K.TATED, J.)