IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 951 OF 2015

Tata Capital Financial Services Limited … Petitioner

V/s

ABG Shipyard Limited & Anr. ...Respondents

Mr.Chetan Kapadia alongwith Ms. Nelly Mehta and Ms. Neha Varhadi i/b MDP & Partners for the Petitioner

Mr. Abbas Mandvivala i/b M/s Raval-Shah & Co. for the Respondents

CORAM : S.J.KATHAWALLA, J.

DATE: 1st APRIL 2016

P.C.

1. This Petition is filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 seeking reliefs as prayed against the Respondents.

2. In order to meet the normal capital expenditure and long-term working capital requirement of the Respondent No. 1 Company, the Respondent No. 1 issued 2000, 11.40% p.a. (payable quarterly) Coupon Rate Secured Redeemable Non-Convertible Debentures (NCDs) of the face value of Rupees 10,00,000/- (Rupees Ten Lakhs only) each aggregating to Rupees 200,00,00,000/- (Rupees Two Hundred Crores Only) on a private placement basis subject to the terms and conditions as contained in the Information Memorandum dated 10th May, 2010. Out of these listed NCDs, NCDs of Rs. 40 Crores were originally subscribed to by ICICI Bank Limited, and in or around September, 2012, vide ISIN No. INE067H07021, the said NCDs worth Rupees 40,00,00,000/- (Rupees Forty Crores only) were purchased by Tata Capital

Limited (TCL) from the original subscriber ICICI Bank Limited on 28th September 2010 and consequently the name of TCL was registered as the debenture holder of such NCDs.

3. However, as the Respondent No. 1 failed and neglected to pay the amounts of the NCDs on its maturity to the Petitioner, the Respondent No. 1 approached the Petitioner and offered to settle the amounts due and payable towards the said NCDs and upon the request of the Respondent No. 1, the Petitioner agreed to adjust/appropriate the said amounts due and payable by the Respondent No. 1 to the Petitioner against the consideration payable for the equipments proposed to be sold by the Respondent No. 1 to the Petitioner. Accordingly, by and under two Agreements for Sale, dated 28th September 2013 and 28th November 2013 respectively ("**Agreements for Sale**") executed between the Respondent No. 1 and the Petitioner and more particularly marked as **Exhibit "F"** and **Exhibit "G"** respectively to the Petition, the Respondent No. 1 sold and transferred the equipments as mentioned in the Annexure 1 to each of the said Agreements for Sale and more particularly described in **Exhibit "V"** to the Petition (**"the said Equipments"**), the consideration whereof to be adjusted against the amounts due and payable under the NCDs subscribed to by the Petitioner.

4. Thus, the said Equipments were transferred to the Petitioner as the Owner thereof and pursuant thereto, under two Hire-cum-Service Agreements, dated 30th September 2013 and 29th November 2013 respectively (**"Hire-cum-Service Agreements"**) and more particularly marked as **Exhibit "H"** and **Exhibit "I"** respectively to the Petition executed between the Petitioner as the Owner, the Respondent No. 1 as the Permitted User, and the Respondent No. 2

as the Hirer, the said Equipments purchased by the Petitioner were given to the Respondents on rental/hire basis.

5. According to the Petitioner, the Respondents are in possession and use of the said Equipments. The Respondents in their respective capacities as the Hirer and the Permitted User defaulted in the payment of the amounts due and payable under the said Hire-cum-Service Agreements, and failed to rectify the same despite repeated requests and reminders. Accordingly, on 5th December, 2014, a Notice was sent to the Respondents by the Petitioner's Advocates calling upon them to surrender the Equipments to the authorised representatives of the Petitioner, immediately repay to the Petitioner a sum of Rs. 10,68,46,845/- (Rupees Ten Crores Sixty Eight Lakhs Forty Six Thousand Eight Hundred Forty Five only) due as on 2nd December 2014, as well as pay all unpaid Hire Charges totalling to an amount of Rs.11,68,80,468/- (Rupees Eleven Crores Sixty Eight Lakhs Eighty Thousand Four Hundred Sixty Eight only) (plus compensation @ 24% p.a. for the period of default until actual receipt/realisation of the amounts due and payable). The Petitioner states that there was failure on the part of the Respondents to respond to the Petitioner's requests and reminders, and repay the amounts due and payable to the Petitioner. In any event, the tenure of the said Hire-cum-Service Agreements dated 30th September, 2013 and 29th November, 2013 has already expired on 29th September, 2015 and 28th November, 2015 respectively.

6. According to the Petitioner as on 27th April 2015, a sum of Rs. **10,72,60,299/- (Rupees Ten Crores Seventy Two Lakhs Sixty Thousand Two Hundred Ninety Nine Only)** together with overdue charges @ 18% p.a. as well as the rental/hire charges as per Particulars of Claim at **Exhibit "U"** to the present Petition is payable by the Respondents. The Petitioner has sought appointment of the Receiver and grant of injunction in respect of the said Equipments described in the Schedule at **Exhibit "V"** to the Petition.

7. After filing of the Petition, an Affidavit in Reply dated 12th August, 2015 was filed by the Respondents. At the ad interim stage statement of the Advocates for the Respondents that they will not dispose, alienate, encumber, transfer, mortgage, or hypothecate or part with possession of, or create third party rights in respect of the said Equipments was made and accepted by order dated 9th September, 2015.

8. During the pendency of the present petition, the arbitral proceedings between the Petitioner and the Respondents were proceeded with. The learned Counsel for the Petitioner had drawn my attention to two interim awards both dated 30th March, 2016 in respect of the Hire-Cum-Service Agreements dated 30th September, 2013 and 29th November, 2013 which inter alia award sums exceeding Rs.8,42,21,610/- to be paid by the Respondents to the Petitioner. The said interim awards also direct sums aggregating to more than Rs.2,19,33,373/- being deposited by the Respondents with their Advocates within 15 days from receipt of the award with further directions to invest the same in fixed deposits, failing which the Respondents to issue a Bank Guarantee for the same to the Petitioner within one week therefrom. The Interim Award also directs the said Equipments to be returned back to the Petitioner.

9. The Petitioner accordingly submitted that the Respondents have failed to pay the amounts due and payable under the Hire-Cum-Service Agreements. The same have been terminated on 5th December, 2014. In any event, the tenure of the Hire-Cum-Service Agreements have already expired by efflux of time, thus, the Respondents cannot continue to use and enjoy the said Equipments which are admittedly owned by the Petitioner in the light of the defaults committed by the Respondents and the agreements having expired by efflux of time.

10. The learned Advocate for the Respondents has urged that the 30 cranes form an essential part of a daily operations of the Respondents Company. If the cranes are not permitted to be used by the Respondents, their activities and affairs are likely to be crippled. It is further urged that the cranes are crucial and essential towards the day to day affairs of the shipyard, without which the ship building process would come to a standstill. The Learned Advocate express his inability to make any payment presently and expressed hope of the affairs of the Respondents undergoing a change.

11. The Respondents have in their Reply admitted that the ownership of the said Equipments vests in the Petitioner. Despite the Hire-cum-Service Agreements being terminated and despite the Petitioner calling upon the Respondents to handover the said Equipments to the Petitioner, the Respondents failed and neglected and/or avoided to do so and continue to retain and utilize the said Equipments till date to the benefit of the Respondents and to the detriment of the Petitioner, without any compensation or payment whatsoever to the Petitioner. The Respondents admittedly committed default in their payment towards the Petitioner. Since the Hire-Cum-Service Agreements have admittedly expired, the Respondents have no present right to continue to be in possession of the said Equipments and enjoy the same on the one hand and maintain their stand that they can make no payments at all.

12. Hence, in view of the above facts, it is just and necessary to safeguard the interest of the Petitioner by appointing Court Receiver, High Court, Bombay as Receiver in respect of the said Equipments described in the Schedule at **Exhibit "V"** to the Petition. The appointment of Court Receiver is necessary in order to ensure that the said Equipments are not wasted or alienated, thereby defeating the rights of the Petitioner. The claim of the Petitioner is very substantial and unless adequately protected, the Petitioner may suffer irreparable harm and injury. The balance of convenience also warrants the grant of relief. Section 9 of the Act empowers the Court to pass an interim measure of protection. Hence the following order is passed:

(i) The Court Receiver, High Court, Bombay, is appointed as Receiver in respect of the said Equipments described in the Schedule at **Exhibit "V"** to the Petition. The Court Receiver shall take forcible physical possession of the said Equipments described in the Schedule at **Exhibit "V"** to the Petition alongwith the help of the police, if necessary. The Court Receiver, High Court, Bombay shall hand over physical possession of the said Equipments described in the Schedule at **Exhibit "V"** to the Petition to the Petitioner.

(ii) Till such time the said Equipments are handed over to the Petitioner, there shall be an injunction restraining the Respondents from selling, alienating, encumbering, parting with the possession and/or creating third party rights in respect of the said Equipments described in the Schedule at **Exhibit "V"** to the Petition.

(iii) All parties, including the Court Receiver to act on a copy of this order duly authenticated by the Learned Associate of this Court.

13. The captioned Petition stands disposed off in the aforesaid terms.

{S.J. KATHAWALLA, J.}