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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION NO. 192 OF 2016

L & T Fincorp Ltd ...Petitioner
Versus
Saumya Mining Ltd & Ors ...Respondents

Ms Shakuntala Joshi, *with Ms Nikita Pawar & Ms Jalpa Pithadia, i/b SI Joshi & Co for the Petitioner.*
Mr Ajit Anekar, *with Mr Thomas James, i/b Auris Legal for the Respondents Nos. 1 to 4.*

CORAM: G.S. PATEL, J
DATED: 6th March 2017

PC:-

1. This is a Petition under Section 9 of the Arbitration and Conciliation Act. On 16th December 2016, Kathawalla, J passed an order requiring presence of Respondents Nos. 2 and 3 on the next date. On 22nd December 2016, the Respondents were directed to maintain status quo in respect of the property and equipment disclosed in their Affidavit and in the Petition. On 19th January 2017, I observed that the Affidavit filed by the Respondents was unsatisfactory. The Respondents agreed to file a further Affidavit with details of other assets. I also directed Respondents Nos. 2 and 3 to remain present on the next date and I continued the previous status quo order. On 13th February 2017, Respondents Nos. 2 and 3 were present. As Ms Joshi sought further time to file rejoinder the matter was adjourned.

2. On 27th February 2017, I called on the Petitioners to place on Affidavit their inspection report and valuation said to have been obtained of the hypothecated assets. The reason is set out in paragraphs 3 and 4 of that order which reads thus:-

> "3. This indicates that the Respondents' stand is that these assets were acquired prior to the Facility Agreement. The two items in question (the dumper and the Novous, a concrete mixer by Tata) were bought in 2006. For want of spare parts, after sales service and support, the two items fell into disuse. The Novous was a commercial failure and Tata discontinued production in 2009. The assets became scrap and were in a totally dismantled condition. They were disposed of as scrap. These assets, the Respondents say, were free of charges and were provided as additional security.
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> 4. It is unclear from this whether Respondents offered scrap to the Petitioners or what the condition of these and other items was at the time of the Facility Agreement. The Petitioners' inspection report and valuation is thus necessary. It will be placed on Affidavit in the course of the week and served on the Respondents on or before Friday, 3rd March 2017."

3. The Respondents have filed a further Affidavit from pages 210 to 212 on dated 2nd March 2017. The Petitioners have also filed an additional Affidavit of the same date from pages 213 to 223. The facts themselves are largely undisputed. In September 2013, the 1st Respondent approached the Petitioner with a request for credit facilities for long term working capital and general corporate purposes. The request was for loan of Rs.40 Crores. The Petitioner issued a sanctioned letter on 11th September 2013. The 1st Respondent accepted this. A loan amount of Rs.36,08,00,000/-, repayable within 60 months, inclusive of a moratorium of 18 months from the date of the first disbursement was sanctioned. A Facility Agreement dated 26th September 2013 was executed thereafter. A copy is at Exhibit "B" to the Petition. The Respondents Nos. 2 to 4 guaranteed repayment of this loan by Deed of Guarantee dated 26th September 2013. On that date, the 1st Respondent also hypothecated to the Petitioner as security various movables, chiefly in the nature of vehicles used on construction sites. The 1st Respondent also executed a pledge agreement in respect of several equity shares. Copies of all these documents are annexed to the Petition. According to the Petitioners, the 1st Respondent was delinquent in servicing the loan and did not make timely payments. The Petitioner issued a demand notice on 16th June 2016 terminating agreement and demanded payment then due of Rs. 18,76,15,084/- and, in default, threatened to take legal action. The Respondents replied on 11th July 2016 and further correspondence followed but without the Respondents making any payment to clear their liability to the Petitioner. Ultimately, on 14th October 2016, the Petitioners sent yet another Demand-cum-Termination notice, this time the notice claiming amount of Rs.48,85,28,600/- due as on 13 October 2016 with further interest till payment of realisation. The Petitioner says that no amount has been paid. The Facility Agreement annexed at Exhibit "B" from pages 50 to 94 has an arbitration clause and this is set out in pages 74 and 75. This provides the venue of the arbitration will be in Mumbai or as determined by the Petitioner. It also provides that the arbitration will be by a Sole Arbitrator to be appointed by the Petitioner. There is no dispute about the existence of these arbitration clause.

4. The hypothecated assets are listed in schedule III to the agreement itself. There are various kinds of trucks, dumpers and other industrial vehicles. There is also at least one motor car and a bus.

5. In the Affidavits in Reply the Respondents claim that the Facility Agreement is insufficiently stamped and unregistered (pages 170 to 171). They then say that several assets were acquired much before the Facility Agreement and that the many of these assets are at different locations. At page 173 they mention only five items as being of continuing or remaining value.

6. In the next Affidavit from pages 177 to 179 there is a more comprehensive statement of the locations and status of these vehicles. For some of the items the locations are even now not mentioned. At page 179 the Respondents contend that the Petitioners have invoked the shares pledged and received an amount of Rs.7,12,76,710/- but not given credit for this amount.

7. The last Affidavit also has the details of when some of these machines were sold.

8. A consolidated reading of these various tabulations paints a very dismal picture. The assets listed in schedule III to the Facility Agreement although numbered serially from 1 to 14 contain multiple items against individual serial numbers number. There are five Mercedes vehicles mentioned at serial number 1. It now appears from a reading of all the Affidavits that two of these were sold while three are said to be lying in heavily damaged condition in Jharkhand. All five of the Hemang machines have been sold as scrapped. These are mentioned in serial number 2. The vehicles mentioned in serial numbers 3 and 4, a Tata Sumo Grand and Volvo EC 460 are said to be unsold. The Tata Sumo Grand is at site in Rewa and the Volvo is at some site at Assam. Both are said to be in a broken down condition. Items Nos. 5, 6 and 7 of the schedule are all supposedly sold as scrap. Items Nos. 8, 9, 10 and 11 are said to be unsold. Item No.12 in the list is a Star Bus. Its status is unknown and it is said to be in Meghalaya. Then there are 10 Tata Tippers at serial number 13 and another 5 at serial number 14. This make 15 Tippers in all. Of these four are supposedly sold while five are unsold.

9. On pages 178 to 179 the Respondents have given figures of the amount received by them from the sales of some of these vehicles as scrapped. The total is Rs.84.75 lakhs. None of it has come to the Petitioners. Ms Joshi points out and quite correctly that apart from the fact that the value of these vehicles was taken from the book value provided by the Respondents themselves, within a few days or few weeks of the Facility Agreement several of these vehicles were in fact sold and disposed of and this is evident from the particulars now furnished at page 211 in the Affidavit of 2nd March 2017. As regards the Pledge of Shares Ms Joshi points out that these were sold with notice to the 1st Respondent and that the Petitioner has given and will give credit to the amount realised on sale.

10. The question of registration of the document, in her submission, does not arise because there was no mortgage or transaction in respect of land. The only transactions were of a hypothecation and a Pledge. The last Affidavit filed on 2nd February 2017 by the Petitioner also points out that these charges on various properties were noted by the 1st Respondent Company by filing Form 8 with the Registrar of Companies. Moreover, the value of Rs. 9,04,78,534.50 of the hypothecated assets was drawn from a certificate provided by the Chartered Accountants of the 1st Respondent Company.

11. After I heard Ms Joshi and Mr Anekar this morning, I kept the matter back at Mr Anekar's request to enable Mr Anekar to take instructions on whether the Respondents were in a position to provide any security for the Petitioners' claim. At 3.00 p.m., having taken instructions, he said that the Respondents were unable to provide any further security.

12. The result is that there is an undoubted *prima facie* case made out. There is no doubt that the Respondents availed of a substantial loan and provided security. It was not open to them to sell this security without crediting the sale proceeds to the Petitioner. The Petitioner has invoked the pledge agreement and realised some amount from the sale of the pledged shares. Undoubtedly credit will be given to that amount. But this does not mean that the other vehicles hypothecated can be allowed to remain at large in the hands of the Respondents. The balance of convenience clearly favours the Petitioner and irretrievable injury and prejudice will be caused to them if the reliefs are not immediately granted. Hence the following order:

(a) The Court Receiver, High Court, Bombay will immediately proceed to take charge of such of these assets as are unsold as indicated by the Petitioner at whatever locations they may be and from whoever is found to be controlling, operating or in possession of those vehicles.

(b) In every jurisdiction, the Court Receiver will be at liberty to take the assistance of the local police authorities. They will act on production of an authenticated copy of this order.

(c) The amount of Rs.84.75 lakhs admittedly realised by the Respondents from the sale of some of the machines will be deposited with the Prothonotary and Senior Master within four weeks from today.

(d) The Prothonotary and Senior Master to invest this amount in accordance with the usual practise of his office.

(e) The Respondents are restrained from parting with possession, transferring, alienating, encumbering or from creating any third party rights in respect of any of these assets, movable or immovable, except in the ordinary and usual course of business.

(f) The 1st Respondent and its directors will, before 29th March 2017 file in this Court a comprehensive Affidavit disclosing all their assets, encumbered or unencumbered, movable or immovable, along with the statements of investments, the last five years' financial returns and bank accounts.

13. The Petitioner will lodge an authenticated copy of this order with the Court Receiver within five days of the authenticated copy being made available. Compliance with Rule 596 of the Bombay High Court Original Side Rules is dispensed with on such authenticated copy being lodged.

14. Since many of these items are in the hands of third parties, the Respondents will depute an authorised officer of the 1st Respondent to accompany the Court Receiver while taking possession of these various in various states across the country.

15. The Court Receiver will arrange to give adequate notice to the Respondents. If any of these vehicles, on being taken in to Receivership are found in damaged condition, the Court Receiver will make a note of this and will also take photographs of the state of the vehicles.

16. The Section 9 Petition is disposed of in these terms.

(G. S. PATEL, J.)