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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 170/2017

KOTAK MAHINDRA BANK LIMITED Petitioner

Through Mr.Sanjeev Singh and Mr.Sumit
Goswami, Advocates

versus

SHESH NATH TIWARI & ANR Respondent

Through Mr.Rohit Goel, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

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13.02.2017

CM No.5594/2017

Allowed subject to all just exceptions.

CM(M) 170/2017 & CM No.5593/2017 (stay)

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 24.01.2017 by which the Receiver appointed earlier has been directed to hand over vehicle No. HR- 55-P7910 to respondent No.2.

2. The background facts of the case are that the petitioner entered into a loan agreement with respondent No.1 for purchase of a Tata vehicle. Respondent No.2 was a party in the capacity of a guarantor. Respondent No.2 independent of this contract had also entered into a separate/independent loan-cum-guarantee agreement dated 4.1.2012

regarding purchase of a Tata vehicle for himself. It is urged by the petitioner that both the agreements contained Cross Liability and Cross Security Clauses.

3. As respondent No.1 has defaulted in making payment of the present loan, the petitioners initiated arbitration proceedings. The Sole Arbitrator vide Award dated 10.07.2013 passed an Award in favour of the petitioner for Rs.2,58,735.47 alongwith appropriate interest. The petitioner has thereafter filed the Execution Petition. He relied upon Cross Liability and Cross Security Clauses and moved an application for appointment of a Receiver to take into possession the vehicle that was purchased by respondent No.2 by a separate independent Agreement. It is also the case of the petitioner that respondent No.1 is untraceable.

4. By the impugned order, the Executing Court noted that the application that was filed by the petitioner was filed as if Award has been passed in respect of vehicle HR-55-P7910 i.e. the vehicle owned by respondent No.2. It also noted that the application does not disclose that JD No.1 is untraceable. Hence, the Executing Court directed the petitioner/decreed holder/Receiver to hand over the said vehicle owned by respondent No.2 to respondent No.2 in the same condition. Notice was also issued to the petitioner for contempt.

5. I have heard learned counsel for the parties. Learned counsel for the respondent No.2 has pointed out that as per the Award itself passed by the Sole Arbitrator dated 10.7.2013, respondent No.2 was never served. He further submits that in fact the petitioners had tried to serve respondent No.2 at the old address. Even a copy of the Award that was passed by the Arbitrator was never received by respondent No.2. He submits that now

when the Receiver has come to take custody of the vehicle of respondent No.2 that the respondent No.2 has received knowledge of these proceedings. He also submits that he has filed a suit seeking N.O.C. regarding the vehicle owned by respondent No.2 which is also pending.

6. Learned counsel appearing for the petitioner has refuted the contentions of the respondent. He submits that respondents have been evading service and respondent No.2 has entered appearance only after the Receiver has taken action.

7. Keeping in view the fact that respondent No.2 states that he is yet to be served and has limitation available for filing objections under section 34 to the Award, it would be in the interest of justice that the vehicle which is owned by respondent No.2, which is also used by him for his livelihood may be released to the said respondent No.2, subject to deposit of Rs.50,000/- before the Executing Court. This order is being passed keeping in view the facts and circumstances of the case especially the fact that respondent No.1 is absconding and the petitioner has been unable to trace the actual vehicle that was purchased on the loan basis. Respondent No.2 has admittedly cleared his loan amount on the basis of which he had got his own vehicle hypothecated. In case, the sum of Rs.50,000/- is deposited by respondent No.2, the same would be subject to further orders of the Executing Court.

8. Learned counsel appearing for the petitioner has also pointed out that the Executing Court has not complied with the directions of this court passed in *M/s.Bhandari Engineers & Builders Pvt. Ltd. vs. M/s.Maharia Raj Joint Venture & Ors., (2016) 227 DLT 302* regarding filing of an affidavit under Order XXI Rule 41 CPC. He submits that the trial court should have made these directions to respondent No.2.

9. Liberty is granted to the petitioner to bring this judgment to the notice of the trial court for appropriate compliance.

10. The impugned order stands modified accordingly. Petition stands disposed of. All pending applications, if any, also stand disposed of accordingly.

11. Dasti.

JAYANT NATH, J

FEBRUARY 13, 2017

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