IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 469 OF 2017

Tata Motors Finance Limited ... Petitioner

Versus

RST Mining & Logistics Pvt. Ltd. & Another ... Respondents

Mr. Cyrus Ardeshir along with Kingshuk Banerjee and Ritvik M. Kulkarni instructed by Wadia Ghandy & Co. for the Petitioner.
Mr. Jondhale instructed by Jondhale & Co. for the Respondents.

CORAM: S. J. KATHAWALLA, J.

DATED: 15th FEBRUARY, 2018.

P.C.

1. Heard Learned Counsel for the parties.

2. The facts of the matter briefly summarized, are as follows:

3. The Petitioner and Respondents entered into and executed a total of Forty-Two (42) Loan-Cum-Hypothecation-Cum-Guarantee Agreements. Under these agreements, the Petitioner advanced finance facilities to the Respondents to enable the Respondents to purchase vehicles / chassis **(the said Assets)**. As security for the due repayment of the loans, the said Assets were hypothecated in favour of the Petitioner.

4. The present petition is concerned with only 29 out of the aforesaid 42 Agreements. These 29 Agreements were executed during the period April to November 2015. Particulars of these 29 Agreements can be found at Exhibit GG to the Petition.

5. Under the said 29 Agreements, the Petitioner had advanced an aggregate sum of Rs. 4,28,41,990/ (Rupees Four Crore Twenty-Eight Lacs Forty-One Thousand Nine Hundred and Ninety only) to the First Respondent; with the Second Respondent as the co-borrower/guarantor.

6. While the Respondents were obliged to repay the amounts advanced in Equal Monthly Installments, they defaulted on their payment obligations under the Subject Agreements. While they made piecemeal payments, substantial sums remained outstanding. On 7 March 2017, the Petitioner, through its advocates, addressed a loan recall notice to the Respondents. The Respondents did not respond to this nor did they make the payments as demanded.

7. Therefore, on or about 28 July 2017, the Petitioner filed the present Petition and *inter alia* sought the following reliefs :

> *" (a) This Hon'ble Court may be pleased to appoint the Court Receiver, High Court, Bombay, as a receiver of the said Assets, described and listed out more particularly in Exhibit GG hereto, with all the powers under Order XL of the Code of Civil Procedure, 1908 including the power to seize the said Assets with the aid of the local police and sell the same either by public auction or by private sale and pay over the proceeds to the Petitioner to be appropriated towards the repayment of the amounts due and payable by the Respondents to the Petitioner under the said Agreements;*
>
> *(b) This Hon'ble Court be pleased to direct the Respondents to disclose the whereabouts of the said Assets, described and listed out*

more particularly in Exhibit GG hereto, to the Court Receiver, High Court, Bombay;

(c)This Hon'ble Court be pleased to pass an order and injunction restraining the Respondents, their employees, servants and/or agents or otherwise, from, in any manner, either directly or indirectly, damaging, dealing with, disposing of, alienating, encumbering and/or creating any third-party rights of whatsoever nature in respect of the said Assets."

8. On 15 November 2017, when this matter came up for hearing, the Ld. counsel for the Respondents stated that a sum of Rs. 22 lacs had been paid on 10th November 2017 and that a further sum of Rs. 78 lacs would be paid on or before 30th November 2017. The Ld. Counsel further stated that a sum of approximately Rs. 1 crore was to be made to regularize the account. These statements were accepted and recorded in the order dated 15th November 2017, as an undertaking of the Respondents. Additionally, by the order dated 15th November 2017, this Court granted interim relief to the Petitioner in terms of prayer clauses (b) and (c) of the Petition as reproduced above and, further, directed the Respondents to disclose the insurance policies for each of the said Assets.

9. In November 2017 itself, the Petitioner and the Respondents along with Shabnam Rai, i.e. wife of the Second Respondent, entered into a composite out of court settlement in respect of all 42 agreements. The parties executed a memorandum of understanding (MoU) recording the terms of settlement.

10. Under the MoU, it was*, inter alia,* agreed as follows:

(a) The Respondents accepted and acknowledged that an aggregate amount of Rs. 4,49,19,807/- (Rupees Four Crore Forty-Nine Lakh Nineteen Thousand Eight Hundred and Seven) was due and payable by the Respondents to the Petitioner under the said 42 Agreements;

(b) The Respondents agreed to pay an aggregate sum of Rs. 1,62,72,921/- in respect of 15 of the said 42 Agreements. Five out of these 15 agreements form a part of this Petition and are described at serial numbers 1 to 5 at Exhibit GG;

(c) Out of the aforesaid sum of Rs. 1,62,72,921/-, a sum of Rs. 1 crore was to be paid on or before 30th November 2017 and the balance sum of Rs. 62,72,921/- was payable on 5 February 2018. For the balance sum of Rs. 62,72,921/-, the Respondents issued a post-dated cheque to the Petitioner. It was agreed between the parties that on payment of the sum of Rs. 1 crore, the Petitioner would agree to release its NoC and other related documents in respect of these 15 Agreements.

(d) A separate payment mechanism was agreed for the balance 27 Agreements. Out of these 27 Agreements, 24 Agreements, as described at serial nos. 6 to 29 at Exhibit GG to this petition, form a part of this proceeding.

1. In terms of the MOU executed between the parties, the Respondents paid the Petitioner a sum of Rs. 1 crore before 30th November 2017. The Petitioner, in turn, issued the NoCs in respect of the assets covered by the 15 Agreements. The Ld. counsel for the Petitioner submitted that the issuance of these NoCs was under the Petitioner's bona-fide belief that the Respondents would honour the post-dated cheque for the balance sum of Rs. 62,72,921/-.

2. Though, as recorded above, the parties agreed to a certain payment mechanism for the balance 27 Agreements, by an oral agreement, the parties subsequently modified the terms of the MOU. It was now agreed that for the balance 27 Agreements [including the 24 Agreements forming part of this petition identified above at paragraph 10(d)], the Respondents would pay the Petitioner a lumpsum amount of Rs. 1,84,00,000/- on or before 31 January 2018.

3. On 31st January 2018, the Respondents did make the agreed payment of Rs. 1,84,00,000/- in full and final settlement of the Petitioner's claims in respect of the 27 Agreements [including the 24 Agreements forming part of this Petition and identified above at paragraph 10(d)].

4. The Respondents were now required to fulfil their final obligation of honouring the post-dated cheque dated 5th February 2017 for a sum of Rs. 62,72,921/-. While the sum of Rs. 62,72,921/- related to the 15 balance Agreements out of the total 42 Agreements entered into between the parties, as recorded above at paragraphs 10(b) and 10(c), only 5 out of these 15 Agreements form the subject matter of these proceedings. According to the Petitioner, a sum of Rs. 36,35,915/- out of the total sum of Rs. 62,72,921/- is apportionable towards these 5 Agreements.

5. When the Petitioner presented the post-dated cheque for Rs. 62,72,921/- on 5th February 2018 it was dishonoured and returned to the Petitioner under the caption 'PAYMENT STOPPED BY DRAWER'.

6. When this Petition came up for hearing on 9th February 2018, this Court passed the following order :

"1. Stand over to 13th February, 2018.
2. Harbinder Singh Rai – Defendant No.2 shall remain present before this Court
on the adjourned date."

7. Despite the order dated 9th February 2018, the Second Respondent remained absent on 13th February 2018. The following order was passed on 13th February 2018:-

"1. On 9th February, 2018, this Court passed the following order :-

> *"1. Stand over to 13th February, 2018.*
> *2. Harbinder Singh Rai – Defendant No.2 shall remain present before this Court on the adjourned date."*

2. Mr. Harbinder Singh Rai – Defendant No.2 has not remained present before this Court. Instead he has given an undertaking that he will pay Rs.62,72,921/- within six months in respect of the bounced cheque. From the past conduct of Mr. Harbinder Singh Rai it is clear that he has no respect for Law or the Courts. In view thereof, his undertaking cannot be accepted. He is given one more opportunity to comply with the order passed by this Court dated 9th February, 2018 and is directed to remain present before this Court on 15th February, 2018 at 3.00 p.m., failing which this Court shall pass necessary orders to ensure his presence before the Court including issuing a warrant of arrest against him.
3. Stand over to 15th February, 2018 at 3.00 p.m."

8. On 15th February 2018, the General Manager of the First Respondent was present in Court. The Ld. counsel for the Respondents admitted that the cheque for Rs. 62,72,921/- was dishonoured. However, he sought to justify this by stating that the General Manager had requested the Petitioner's representatives, by SMS, not to

present the cheque. It was further submitted that, in fact, the Respondents had cleared all payments in respect of the agreements forming part of the present Petition. However, no proof of such payment was produced by the Ld. counsel for the Respondents.

9. The Ld. counsel for the Petitioner disputed the Respondents' statement that all amounts in respect of the subject agreements are cleared. On instructions, he submitted that an amount of Rs. 36,35,915/-, out of the total sum of Rs. 62,72,921/- , is payable in respect of the 5 Agreements described at serial numbers 1-5 at Exhibit GG of the Petition. He submitted that, accordingly, the Court Receiver of this Court be appointed in respect of the assets hypothecated under these 5 Agreements and liberty be granted to the Court Receiver to sell the hypothecated assets by private treaty.

10. Having regard to the conduct of the Respondents, including their admitted failure to honour the cheque for the sum of Rs. 62,72,921/- coupled with the fact that the assets in question are depreciable in nature, I am of the view that a case is made out for grant of reliefs in respect of the 5 Agreements described at serial numbers 1-5 at Exhibit GG of the Petition. Pending determination and final disposal of the arbitration, the following directions are necessary in the interest of justice :

(a) The Court Receiver, High Court, Bombay is appointed as Receiver in respect of the assets hypothecate under the said 5 Agreements, i.e. the agreements at Serial Nos. 1 to 5 at Exhibit GG to this Petition;

(b) The Respondents are directed to disclose the location of the said Hypothecated Assets to the Court Receiver within a period of seven days from the date of this order;

(c) The Court Receiver will take symbolic possession of the assets and give the Respondents an opportunity to act as agents in respect of the same upon execution of an agency agreement and payment of such royalty, directly to the Petitioner, as the Court Receiver may fix having regard to the facts of the case;

(d) In the event the Respondents do not express their willingness to act as an agent or otherwise fail to execute the agency agreement or pay the royalty fixed by the Court Receiver, the Court Receiver shall proceed to take physical possession of the hypothecated assets, if necessary with the assistance of the local police. The Respondents are directed to bring the assets to such location as the Court Receiver directs;

(e) On taking physical possession of the assets, the Court Receiver is permitted to sell the same by public auction or private treaty after completing the requisite formalities with respect to obtaining a valuation of the hypothecated assets through an empanelled valuer.

1. The Petition is disposed of accordingly.

2. Parties are at liberty to apply.

3. No order as to costs.

(S.J.KATHAWALLA, J.)