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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION NO. 1 OF 2019

IN

COMM ARBITRATION PETITION NO. 1317 OF 2018

WITH

COMM DIVN NOTICE OF MOTION NO. 1404 OF 2019

Mahindra & Mahindra Ltd ...Petitioner
Versus
Yashovardhan Industries ...Respondent

ARBITRATION PETITION (L) NO. 1434 OF 2019

Yashovardhan Industries ...Petitioner
Versus
Mahindra & Mahindra Ltd ...Respondent

Mr Sharan Jagtiani, *with Gulnar Mistry, i/b Khandeparkar Law Office, for the Petitioner in CARBP/1317/2018 & for the Respondent in ARBPL/1434/2019.*
Mr Uday P Warunjikar, *with Siddhesh Pilankar for the Petitioner in ARBPL/ 1434/2019 & for the Respondent in CARBP/1317/2018.*
Mr PK Nardele, *OSD, with Mrs BV Nayak, ASO from the Office of Court Receiver, are present.*

CORAM: G.S. PATEL, J.
DATED: 13th December 2019

PC:-

1. There are three matters before me. Commercial Arbitration Petition No. 1317 of 2018 is filed by Mahindra & Mahindra Ltd ("**MML**"). As we shall see, GS Kulkarni J made an order on that Petition on 6th December 2018. There was a subsequent order as well. The Respondent, Yashovardhan Industries ("**YI**"), has filed its own Arbitration Petition (L) No. 1434 of 2019.

2. Then there is an Interim Application filed by MML in its own Commercial Arbitration Petition. The reliefs in this Interim Application are as follows:

> "a. this Hon'ble Court be pleased to direct the Respondent to hand over the Applicant's goods lying in the Respondent's warehouse within two weeks from the date of the Order passed by this Hon'ble Court in the present Interim Application;
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> b. This Hon'ble Court be pleased to appoint and depute a Court Commissioner to supervise and oversee the exercise of handing over possession of the Applicant's goods by the Respondent, with powers to seek police protection for the said purpose;
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> c. that this Hon'ble Court be pleased to appoint an alternate Arbitrator in the place of the prospective Arbitrator named in the Order dated 19th September 2019 with directions that the said Arbitrator shall enter upon the reference after two weeks from the date on which the shifting of all the goods of the Applicant from the warehouse of the Respondent is completed;"

3. In YI' Arbitration Petition, the prayer is to direct MML to pay YI an amount of Rs. 75,40,957/- 'including damages' for the period November 2017 to November 2019 along with interest at the rate of 18% until the date of payment.

4. What happened earlier is set out in my order of 27th November 2019.

> "1. Although Mr Warunjikar makes a statement on behalf of the respondent in Commercial Arbitration Petition No. 1317 of 2018, having regard to the past history of the matter, and the order that I propose to pass today, I believe a brief background is necessary.
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> 2. The petitioner, Mahindra and Mahindra Ltd., availed of a warehousing facility from the applicant, a sole proprietorship. The warehouse itself is of 5,604 sq ft and it is at Plot No. 72, D3 Block, MIDC Chinchwad, Pune 411 019.
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> 3. There were disputes between the parties. Mahindra and Mahindra filed this Arbitration Petition No. 1317 of 2018 ("the first petition") seeking urgent relief under Section 9.
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> 4. On 6th December 2018, the Court granted interim relief in terms of prayer clause (b), for an injunction in the usual terms against the respondent from disposing of, alienating, encumbering or creating any third party rights with the petitioner's goods that were until then still in the respondent's warehouse.
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> 5. The respondent did not appear on the adjourned date of 22nd April 2019. On the previous date, on 6th December 2018, the respondent had been represented by an

Advocate Mr Butala. On the adjourned date of 22nd April 2019, noting the absence of the respondent and its Advocate, the Court gave the respondent a final opportunity and directed the petitioner to serve the respondent afresh. The matter was stood over to 30th April 2019.

6. The order of 30th April 2019 deals with the matter on merits. It seems from a copy of the order sheet that the respondent was once again absent. This is noted in paragraph 7 of that order. The order also notes the relevant prayers in the petition. The effective order passed that day was firstly to direct the respondent to permit the petitioner to lift its goods from the Chinchwad warehouse; to depute a Court officer as an observer on payment of charges to supervise the shifting of this material; necessary directions for notice and for a report; and finally a direction that the petitioner would deposit within ten days from 30th April 2019 an amount of Rs. 15 lakhs as a pre-condition to the rest of the order becoming operative. That deposit was made subject to appropriate orders by the arbitral tribunal either under Section 17 or in the final adjudication. The amount was to be placed in a fixed deposit.

7. When the petitioner, having made the deposit, approached the respondent for removal of the material with a Court officer attendance on 29th May 2019, the respondent apparently told the Court officer that the respondent had no real grievance about the removal of the items, except certain items at Exhibit "B". However, it was found that in the warehouse it was difficult to identify the goods.

8. On 19th September 2019, GS Kulkarni J had before him a Notice of Motion (L) No. 1404 of 2019 filed by the respondent seeking a recall of the 30th April 2019 order. In

paragraph 6 of the order passed that day, Kulkarni J noted that the contention of the respondent was that it was being deprived of rent of the godown, or in other words, that the petitioner was not paying the respondent for its use of the warehouse facility. Mr Warunjikar on instructions from the respondent also contended that the accumulated amount of claim by the respondent was in excess of Rs. 65 lakhs even on that date. That claim was disputed. Kulkarni J noted that this was a monetary claim and that the Court had granted sufficient time to the parties to resolve the dispute. In his order of 19th September 2019, he reproduced the previous orders and noted specifically that the petitioner was required to deposit Rs. 15 lakhs as a tentative amount for warehousing charges but that this was subject to appropriate orders in arbitration either in Section 17 proceedings or in a final adjudication. At that stage, on instructions, Mr Warunjikar said that there was no objection to the arbitration and accordingly Kulkarni J made an order in the usual form appointing Ms Alpana Ghone as a sole arbitrator but in paragraph 1 of the operative portion of his order specifically permitted the petitioner to remove the material or goods in the go-down in question without making any claim against the respondent in respect of quantity. The exercise was to be undertaken within two weeks.

9. I am leaving aside for the moment the fact that Ms Ghone is unable to accept the assignment and has not entered upon the reference. I am told that this order of Kulkarni J was carried in appeal. That appeal was disposed of on 4th November 2019. In paragraph 6 of the appellate order, the Appeal Court noted the grievance of the present respondent that while the petitioner had been secured, the appellant had been 'left in the lurch'. It was argued before the Appeal Court that Rs. 65 lakhs was due from Mahindra and Mahindra towards warehousing charges. Thee was a

subsidiary grievance about the quality of the goods but that need not detain us. As to the money claim, the Appellate Bench noted that Kulkarni J's order of 19th September 2019 permitted the parties to file an application under Section 17 and clarified that the present respondent could do so or could even file an application under Section 9.

10. Where matters stand is this. The goods have not yet been removed from the respondent's warehouse. The respondent has not permitted that to be done. The petitioner has deposited the entire amount of Rs. 15 lakhs as required by the Court and obviously on any fair and correct reading of the previous orders, this deposit is not for the benefit of the petitioner but is entirely meant to secure any possible claim that the respondent may have, at least in part.

11. Once there is a binding order of Kulkarni J, and even more so now that there is an appellate order, it is simply not open to the respondent to refuse to deliver the property in question for any reason whatsoever. It is not open to the respondent to apply to me that the delivery of the goods should be made a pre-condition upon the petitioner depositing an even larger amount. It is not open to contend that there are other conditions that should be imposed on the petitioner. As I pointed out to Mr Warunjikar, none of these applications can be entertained if they are placed in the manner of a pre-condition or pre-requisite for delivery of the goods. I am making it clear that in saying this I am not rejecting at this moment Mr Warunjikar's separate section 9 petition only just filed and yet to be served in which he seeks a relief, I am told, that the petitioner should secure the respondent's warehousing charges claim in the amount of about Rs. 75 lakhs. I will make separate directions in that section 9 petition for service and listing it for ad-interim reliefs.

12. Mr Jagtiani on behalf of the original applicant/petitioner has also filed Interim Application No. 1 of 2019 seeking an immediate implementation of this order. It is true that as presently worded the interim application says that the respondent be directed to deliver the petitioner's goods to the petitioner from the Chinchwad warehouse within two weeks from the date of an order and also requests for appointment of the Court Commissioner to supervise these proceedings.

13. As the previous trajectory of this litigation itself shows, a lot can happen in two weeks and not all of it may be desirable. In fact, far too much may happen in two weeks. There should be no difficulty (since the petitioner's goods are admittedly in the respondent's warehouse and in a defined location) in implementing the previous orders of this Court. This question of delivery has been going on since April 2019 and at least by the the time the appellate order of 4th November 2019 has now attained complete finality. There is no question of delaying this any further.

14. I am not for the moment considering the other prayers in the Interim Application No. 1 of 2019 which is for the appointment of a substitute arbitrator and other reliefs. I will hear both sides on that at an appropriate stage.

15. The Court Receiver is present in Court. So is the respondent. Mr Warunjikar states on instructions that it will not be possible for the respondent to reach the site in Chinchwad to effect delivery today and there is no other responsible person who can make that delivery in the respondent's absence. I will accept that, but that only means that the delivery will have to be effected by 12.00 noon tomorrow. The respondent agrees to do so. I am now proceeding to appoint a Court Receiver to ensure this is done. I am making it clear that I am not appointing the

Court Receiver either of the warehouse or the goods but only to ensure that there is no hiccup in the goods delivery process.

16. The Court Receiver will accompany representatives of the petitioner to the warehouse site at Chinchwad. The petitioner is to bear all costs of the Court Receiver and is to provide the necessary transportation goods vehicle and the manpower at its own cost for lifting the goods from the warehouse. The respondent is not expected to bear any of these costs or expenses. The respondent will, however, ensure that he gives unrestricted and unfettered access to the warehouse for the purpose of the goods to the Court Receiver's representatives and to the representatives of the petitioner for this limited purpose. The Court Receiver is required to have a responsible person on site and if necessary may take video or photographs. An exercise completion report is necessary and I will take that on record on the next date.

17. If necessary, the Court Receiver is at liberty to take assistance of the local police station from the Chinchwad Police Station. They will act on production of an authenticated copy of this order.

18. Mr Warunjikar submits that this order should be entirely without prejudice to the respondent's contentions in regard to an additional security deposit as also to his submission that the amount of Rs. 15 lakhs should be allowed to be withdrawn by the respondent on a without prejudice basis. I am keeping all those contentions open.

19. There are two active matters recently filed that will need to be taken up. The first is the petitioner's Interim Application No. 1 of 2019, which has been served. Undoubtedly Mr Warunjikar will need to file a reply to this. Equally he has filed a substantive section 9 petition. A copy

> is delivered in lieu of proper service to the Advocates for the Petitioner in Court today. The petitioner waives service of section 9 petition.
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> 20. Affidavits in replies in both the matters are to be filed and served on or before 2nd December 2019. So far as the interim application is concerned, it will survive to the extent of the prayers other than prayer clause (a) and (b) which are worked out by the present order.
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> 21. No affidavits in rejoinder are to be filed without leave of the Court.
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> 22. List the section 9 petition and the interim application for further orders on 3rd December 2019 along with the required Court Receiver's Report."

5. Even after this order the goods could not be lifted in one stretch because of sheer volume. All removal was finally effected by 5th December 2019. I noted this in my order of that date.

6. As the previous litigation indicates, on a rough and ready estimate, Kulkarni J required MML to deposit Rs 15 lakhs as a tentative amount for warehousing charges. MML has done this. The prayer that Mr Warunjikar makes across the bar is to withdraw this amount of Rs. 15 lakhs. I note this because there is no substantive application or petition seeking any such relief. I have considered it nonetheless.

7. Turning first to what survives in the Interim Application, it is clear that prayers (a) and (b) has worked themselves out. What remains is prayer clause (c), a substitution of the arbitrator since the arbitrator appointed by Kulkarni J, Ms Alpana Ghone, could not enter upon the reference to her arbitration. Later in this order, I will make an order of substitution. With that order of substitution, this disposes of the Interim Application.

8. The Court Receiver's costs, charges and expenses are to be borne by the MML Limited in the first instance but will be subject to a claim to be made in the arbitration. The Court Receiver naturally stands discharged without passing accounts.

9. Coming now to Mr Warunjikar's claim for payment of Rs. 75 lakhs (approximately) by MML (including for damages and interest), on the face of it this not a relief that can be granted in a Section 9 Petition, at least not in the form in which it stands. To all intents and purposes, this is nothing but a decree in a civil proceeding. It assumes that this amount claimed has been adjudicated and found due as damages with interest. Nothing of the kind has happened.

10. In fact, in order to determine whether there was any level of clarity about this claim, I asked Mr Warunjikar whether his client had any records at all of the movement of the goods in and out of his warehouse, could establish the raising and delivery of invoices and the maintaining of accounts and could establish the basis on which these invoices were raised. I asked for this because the original warehousing contract in question, now in arbitration, contains a provision for payment of a monthly fee or charge of Rs. 1,68,538/-. This was for a period of 11 months and was subjected to a unspecified incremental revision as mutually agreed for every subsequent like period. Apparently, the arrangement was that the whole of the YI warehouse could be used by MML. The storage was of fasteners and other parts for MML vehicles. Various consignors from around the country would transport these goods for storage to this warehouse when so nominated by MML. There was an initial agreement for an annual revision by 7.5% on 18th October 2016, roughly a year and half after the principal agreement of 5th February 2015. It seems that on 7th July 2017 MML terminated the agreement in its entirety, but then, for some reasons that will demand explanation in arbitration, on 28th July 2017 agreed to a 10% increase in the warehousing contract charges. This was confirmed by YI by an email o]f 21st August 2017.

11. Mr Warunjikar says that his clients' operation is too small and not sufficiently organised to allow for any meaningful record keeping system. His clients are, he says, not of sufficient means to even afford any such system. Beyond a ledger or some entry in an informal record, one that may or may not have been maintained with any regularity by his security person, there is little to nothing by way of routine accounting records to show the movement of MML goods in and out of the YI warehouse. Yet he maintains that there is an amount of Rs. 75 lakhs due to YI.

12. In order to make any kind of order on YI's prayer for payment, and even if I read that prayer as one for a deposit rather than a direct payment, I would need some sort of prima facie material to indicate the regular raising of invoices with supporting documents justifying them. There is a complete absence of any such material today. To say that YI and its proprietor or partner is of too meagre means to maintain such a record is insufficient reason to warrant any kind of an order of this kind.

13. There is also no case made out that should YI, in arbitration, be able to sustain its claim and obtain an award, MML cannot and will not be able to satisfy that debt. Merely saying that nowadays even large companies sink or go under is hardly an argument that can support an argument that is, for all intents and purposes, one for security or attachment before judgment.

14. I do not think it would be fair, however, to dispose of this application or to dismiss it outright. It is entirely conceivable that in arbitration and perhaps even in a Section 17 Application, YI might yet be able to put before the learned Sole Arbitrator the fullness of material that is not possible before the Court in Section 9 Petition. I am, therefore, not rejecting the claim but merely declining ad-interim or interim relief. Instead, I will require this Section 9 Petition filed by YI to be treated and disposed of as a Section 17 Application by the learned Sole Arbitrator. Of course, before the learned Sole Arbitrator all additional materials and affidavits may be filed including an Affidavit in Rejoinder that Mr Warunjikar enthusiastically says that he wishes to file today and which I specifically declined since I see no purpose achieved by it.

15. The next prayer by Mr Warunjikar, one that is unsupported by any petition or application, is for an unconditional withdrawal of the deposit made by MML pursuant to Kulkarni J's order of 30th

April 2019. That order itself indicates that the requirement for a deposit was not on the basis of any mathematical calculation or even on the basis of material produced by YI. In fact, YI was not even before the Court on that date. That much is clear from the foregoing narrative. This could not, therefore, have been said to be an 'adjudication', even prima facie, of any amount said to have been found due by the Court to YI from MML. There was simply nothing to adjudicate. All that Kulkarni J did was to exercise an entirely salutary caution. He put MML to terms as a condition to granting it an interim order. This is clear from the wording of sub-clause (v) of the order which says that the deposit is being ordered in the amount of Rs. 15 lakhs '*to enable the Petitioner to have the benefit of*' the foregoing directions. I do not see how it is possible for YI to say or even imply that this is an adjudicated amount found due. It certainly does not serve to dispense with proof in arbitration by YI of its claim. Kulkarni J did not make that adjudication. He could not have. I cannot make it either. There is only one person who can, and that is the Arbitrator. This claim is also, therefore, not rejected at this stage. It may be made before the learned Sole Arbitrator. That can be done in a separate Section 17 application or combined, after obtaining leave to amend, in the existing YI Section 9 petition that is sent to arbitration for disposal as a Section 17 application. It is for the Arbitrator to decide on the material before her whether there is any justification for (a) an order of withdrawal of the whole or any part of the amount deposit; or (b) an order requiring a further deposit. All contentions are expressly kept open in that behalf.

16. Should the Arbitrator permit withdrawal of this amount of Rs. 15 lakhs or any part of its, the Prothonotary and Senior Master will act on production of an ordinary copy of an arbitral order, subject to any orders of the Court in appeal, to permit and effect that withdrawal.

17. As to the substitution of the Arbitrator, I nominate Ms Manjari Shah, learned Advocate of this Court to serve as a Sole Arbitrator.

(a) **Appointment of Arbitrator**: Ms Manjari Shah, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.

(b) **Communication to Arbitrator of this order**:

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from today of the order being uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s	**Ms Manjari Shah, Advocate.**
Address	Flat No. 19, 5th floor, Dhanvantari Bhavan, 143B, August Kranti Marg, Mumbai 400 036
Mobile	98211 15928
Email	manjaridshah@gmail.com

(c) **Disclosure**: The learned Sole Arbitrator is requested to forward her statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.

(d) **Appearance before the Arbitrator**: Parties will appear before the learned Sole Arbitrator on such date and at such place as she nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) **Contact/communication information of the parties**: Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.

(f) **Section 16 application**: The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) Interim Application/s:

(i) Commercial Arbitration Petition No. 1317 of 2018 filed by Mahindra & Mahindra Ltd and Commercial Arbitration Petition (L) No. 1434 of 2019 filed by Yashovardhan Industries, both under Section 9 of the Arbitration & Conciliation Act, 1996 are to be treated and disposed of by the learned Sole Arbitrator as applications under Section 17.

(ii) All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application.

(iii) Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.

(iv) Liberty to Yashovardhan Industries to file a separate Section 17 application as set out above for withdrawal of the deposit made by Mahindra & Mahindra Ltd in this Court, along with liberty to apply to the learned Sole Arbitrator to include that relief by amending Yashovardhan Industries' present Section 17 application (being the Arbitration Petition (L) No. 1434 of 2019 under Section 9).

(v) Further liberty to both sides parties to make an additional interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.

(vi) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.

(h) **Fees**: The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) **Sharing of costs and fees**: Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) **Consent to an extension if thought necessary**. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) **Venue and seat of arbitration**: Parties agree that the venue and seat of the arbitration will be in Mumbai.

18. In view of the loss in time, the time for completion of the arbitration will commence from the date of this order.

19. MML will be the claimant in the arbitration and YI will be entitled to file a counter-claim, if so advised.

20. Nothing in this order is to be construed or read as an adjudication either for or against either of the parties. Their claims will have to be fully proved before the learned Sole Arbitrator. All contentions are expressly kept open.

21. The Notice of Motion, Interim Application and both the Arbitration Petitions are disposed of in these terms.

22. Liberty to claim all costs of these petitions and the interim application in the arbitration.

(G. S. PATEL, J)