Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 7 OF 2020

Starlift Services Pvt Ltd ...Petitioner
Versus
Alba Asia Pvt Ltd ...Respondent

Mr Sharan Jagtiani, Senior Advocate, *with Ms Ankita Singhania, Mr Nirman Sharma, Mr Ranjit Shetty, Ms Priyanka Shetty, Mr Jonathan Jose & Ms Vatsala Pant, i/b Argus Partners, for the Petitioner.*
Mr Shyam Kapadia, *with Mr Shailesh Shukla & Ms Shanaya Cyrus Irani, i/b J Sagar Associates, for the Respondent.*

CORAM: G.S. PATEL, J.
DATED: 17th February 2020

PC:-

1. The application is under Section 9. I made an order on 7th January 2020 in the following terms:

> "1. The petition has been served. There is an Affidavit of Service dated 7th January 2020. It is taken on record. The Respondent is absent despite service.
>
> 2. The petition is under Section 9 of the Arbitration and Conciliation Act 1996. It seeks protective reliefs under a contract dated 25th October 2017. According to the Petitioner there is a persistent monetary default by the Respondent in fulfilling its contractual obligations.

3. The Petitioner owns, operates and gives on hire different types of cranes including mobile harbour cranes, etc. It has several operations across India including at ports, power plants etc. The market value of a mobile harbour crane, one of which is the subject matter of this petition, is in the range of approximately Rs. 19 crores. Many industries, faced with this acquisition cost, prefer to take such cranes on hire.

4. The Respondent is engaged in the business of material handling at different ports in India. It participates in tenders floated by ports for handling cargo uploaded from ships at berth at these ports. The Respondent apparently has a license agreement to operate mobile harbour cranes at the New Mangalore Port in Karnataka. This contract requires the Respondent to deploy two mobile harbour cranes at this port. This contract is valid until February 2020. The Respondent owns only one mobile harbour crane and since it needed a second, it approached the Petitioner for taking on hire 1 Liebherr, LHM 425 Mobile Harbour Crane Serial No 141107 of a 2012 year of manufacture. The parties then executed a contract on 25th October 2017. This has the necessary terms and conditions. The contract provided that hire charges from date of commissioning of the mobile harbour crane would be Rs. 30 lakhs per month payable within 30 days from submission of the invoice by the Petitioner. This contract was operative from December 2017 to February 2019 but had an applicable extension clause.

5. Clauses 17 and 18 of the agreement have, respectively, the dispute resolution and jurisdiction clauses and they read thus:

> "17. DISPUTE RESOLUTION: The Parties shall first attempt to amicably settle

> the disputes, if any, by reconciliation between the Director's/CEO's of both parties within thirty (30) calendar days, failing which the dispute may be referred to Arbitration under the Arbitration and Conciliation Act, 2015. Both Parties agree to the appointment of single arbitrator, who shall be nominated by mutual consent, failing which, each party shall nominate an arbitrator and the two arbitrators shall nominate the umpire (presiding arbitrator).
>
> 18. JURISDICTION: The venue for Arbitration shall be Mumbai and Bombay High Court shall be the court of jurisdiction."

6. The Petitioner delivered this mobile harbour crane to the Respondent. It was deployed in December 2017 and has been operational since then, being used by the Respondent almost continuously. The Petitioner regularly raised monthly bills at the start of each month in the amount of Rs. 30 lakhs as specified in the contract. From December 2017, the Respondent made payments, albeit irregularly, until October 2019. The initial term of the contract ended and the parties agreed to an extension of one year, i.e. until February 2020. This is recorded in a letter dated 24th January 2019, which says, among other things, that the extension is on the same terms and conditions as the original contract. A copy of this letter is at Exhibit C to the petition.

7. It seems that from 1st November 2019, although the Petitioner duly invoiced the Respondent, the Respondent has not made payment. Repeated request have gone unheeded. Paragraph 6.10 of the petition says that the Respondent told the Petitioner's representatives that the

Respondent was unable to honour these payment obligations. The Respondent sought further time to make payment and also claimed that it was receiving financial assistance from overseas. These promises of payment have not been fulfilled except in part. The Respondent has paid only an amount of Rs. 17,40,000/-. This is only a part payment of the total contractual dues and invoice for the month of November 2019. The rest remains unpaid. The crane hire charges for the whole of December 2019 are unpaid, and the bill for January is now due. The contract is not yet terminated and the Petitioner has not yet invoked arbitration. The Petitioner agrees to invoke arbitration within three months from today. That statement is noted and accepted.

8. For the present, being satisfied that there is a sufficient prima facie case, that the balance of convenience is with the Petitioner and that irretrievable prejudice would be caused to the Petitioner if reliefs are refused I will, grant an ad-interim order in terms of prayer clauses (iii) and (v) at page 16 which read thus:

"(iii) This Hon'ble Court may be pleased to pass an Order of temporary injunction restraining the Respondent, its offers, representatives or assignees from in any manner creating third party rights in respect of the subject matter of the Petition being LHM 425 Mobile Harbour Crane Serial No 141107;

(v) This Hon'ble Court may be pleased to pass an Order directing the Respondent to file an Affidavit disclosing on oath all its assets owned in India or abroad including immovable properties, movable properties, money held in bank accounts with details of bank accounts along with particulars of encumbrances, if any, in respect of such assets;"

> 9. The affidavit required in prayer clause (v) is to be filed and served by 20th January 2020. No affidavit and rejoinder without leave of the Court.
>
> 10. List the matter on 22nd January 2020."

2. There is now an affidavit in reply. An attempted settlement has failed.

3. Apart from reiterating the essentials already set out in the first order of 7th January 2020, i.e. the conspectus of the agreement, its purpose ended and its arbitration clause, only a few further facts are necessary. These are almost entirely centred around the rather peculiar opposition now taken for the first time in the affidavit in reply (and only taken in the affidavit in reply). The opposition is this. According to the Respondents represented by Mr Kapadia there was an advance or a deposit of three months' hire charges for the Mobile Harbour Crane. The defence is that the hire charges are payable from the date of commissioning of the crane at New Mangalore and secondly that the three months' hire charges in advance were to be paid after the contract is signed. Now the contract makes it clear that this is a dry lease. The crane was delivered to the Respondent at Tuticorin Port. The Respondent may have moved it to new Mangalore but the important point is not the clause so much as the date because the Respondent made the shift of the crane to Mangalore in December 2017. In fact this three month deposit covered the months of December 2017, January 2018 and February 2019. Nobody said that no rent was payable thereafter. To the contrary: The Petitioner raised invoices from January or March 2017 all the way to October 2019 and these were paid regularly by the Respondent. It is only for half of November 2019, the whole of December 2019, January 2020 and February 2020 that no payment has been made. The contract in any case ends at the end of February 2020.

4. Mr Jagtiani, learned Senior Counsel for the Petitioners, points out that the fact that the deposit was applied to the rent for three months is inter alia established by the payment of GST on each of the invoices for December to February 2017. This GST payment's effect is contested by Mr Kapadia and I will therefore not base a finding on this.

5. More pertinent is the fact that the entire defence taken comes for the first time only in the Affidavit in Reply. There is not even a hint of it in any correspondence prior to this petition. Certainly no payment for any of the intervening months was held up on this ground, viz., that there was three months' deposit or that date of commissioning was to be differently reckoned.

6. Mr Jagtiani invites my attention to some correspondence from page 54 onwards, the gist of which is the Petitioner writing to the Respondent demanding payment from November 2019. Curiously, the Respondent's only answer to this was to invoke some corporate fraternity between the two companies and seek a further financial handout from the Petitioner. For instance, on 26th November 2019 the Respondent wrote to the Petitioner saying that it was in financial difficulties but also saying that in the past few months the Respondent had gone back to its shareholders and others to inject about Rs. 80 lakhs to meet expenses. The Respondents sought support of the Petitioner as another shareholder to assist the Respondent through this phase. Came the reply from the Petitioner that it was not a shareholder in the Respondent company at all, that there was a clear and independent contract and that Respondent should commit no default of its contractual obligations. The answer to this at page 57 needs to be reproduced in full. This is how it reads:

> "We know that Starlift is not a shareholder in ALBA but is a group company of shareholder of ALBA and hence our request was in regard with partnership state of mind.
>
> **At least could Starlift agree to receipt in instalments. We can pay 10% this month and later subsequently.**"

(*Emphasis added*)

7. I do not know what to make of this last line except to agree with Mr Jagtiani's submission that this is nothing but an express admission that the amount for November was indeed payable, there was no question of adjustment of any alleged deposit and indeed there is a promise to pay 10% in that month and a request to defer the rest. There was a reminder a little later on November 2019.

8. The Affidavit in Reply for the first time now makes the following submission in the first sentence of paragraph 11:

> "11. Further, I say that since the subject Crane was commissioned only on 27th March 2018, the Petitioner in terms of Clause 9(I) of the Contract was entitled to hire

> charges *"from the date of commissioning of crane at New Mangalore"* i.e. from 27th March 2018. ……..."

9. This has never been the Respondent's case at any time. It is actually impossible to accept this at a prima facie stage. There may be some other disputes that require to be taken into arbitration and therefore the only order that needs to be made is to secure the Petitioner in as neutral a fashion as possible in the amount of hire charges for half of November 2019, and for the months of December 2019, January 2020 and February 2020. There cannot be a direction to make this payment to petitioner but there can be a direction that the amount should be deposited in this Court. The aggregate amount comes to Rs 1,21,80,000/-.

10. Mr Jagtiani makes a statement that as on the date of Affidavit of Disclosure, there is sufficient balance in the Respondent's bank account to cover this deposit and he seeks an order freezing this bank account. The submission is rejected.

11. The amount is to be deposited within four weeks from today.

12. It is made clear that the respondents right to file a statement of defence or a counter claim is expressly conditional upon this deposit being made. Upon deposit, that amount is to be invested in accordance with the usual practices of the office of the Prothonotary and Senior Master initially for a period of one year or as such period approximating one year as would fetch an optimal rate of return.

13. The Petitioners have already invoked arbitration and have suggested the names. The Petitioners have in fact suggested the names. Mr Kapadia presently have no instructions to agree or to accept any of these three names but he does have instructions to say that the choice of arbitrator can be left to the Court.

14. Hence the following order:

(a) **Appointment of Arbitrator**: Mr Naushad Engineer, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under contract dated 25th October 2017.

(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 the date this order is 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	**Mr Naushad Engineer, Advocate.**
Address	1-D, Lentin Chambers, Dalal Street, Fort, Mumbai 400 023

Mobile +91 98210 47087

Email naushad.re@gmail.com

(c) **Disclosure**: The learned Sole Arbitrator is requested to forward the necessary 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 before entering upon the reference to 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 the learned Sole Arbitrator 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) Liberty to the parties to make an 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.

(ii) 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.

15. The petition is disposed of in these terms.

16. The costs of petition may be recovered in arbitration.

(G. S. PATEL, J)