

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION NO.99 OF 2021**

Tata Capital Financial Services Ltd.

....Petitioner

V/s.

Natraj Construction Company & Anr

...Respondents

Mr. Prathamesh Kamat a/w. Mr. Nikhil Mehta i/b. KMC Legal Venture for petitioners.

Mr. Aseem Naphade a/w. Mr. A. P. Singh i/b. A. P. Singh and Co. for respondents.

CORAM : K.R. SHRIRAM, J.

DATED : 17th JULY 2021

P.C. :

1 On 11th March 2021, the following order came to be passed:

"1. On instructions of the General Manager of Respondent No. 1, who is present in Court and says he has authority to give instructions on behalf of all three Respondents, Mr Naphade makes the following statements:

(a) The Respondent will not, without leave of the Court, create any third party rights or alienation in respect of hypothecated asset, namely the Z Axis 470 Tata Hitachi Construction Machinery item in question;

(b) The Respondents will maintain the hypothecated asset in good, working and serviceable condition at all times;

(c) The Respondents will give the Petitioner's representatives access to inspect the hypothecated asset with 24 hours' prior notice, such notice being acceptable by email, WhatsApp, SMS or in writing.

2. The Respondents are expecting an inflow in the form of refund or reimbursement of Rs. 1.5 crores and will utilize this amount to clear at least part of the debt due to the Petitioners.

3. Every one of the statements is accepted as an undertaking to the Court. This is entirely without prejudice to the Petitioner's rights and contentions in the matter.

4. As and by way of indulgence to the Respondents, and in view of the statements volunteered, list the matter for further orders on 15th April 2021.

5. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order."

2 Affidavit in reply dated 19th April 2021 is filed, in which, at paragraph 3, respondents state that they had sent a demand draft of Rs.18,95,330/- to petitioner but petitioner refused to accept the same. Mr. Naphade states that the demand draft is dated 12th April 2021, which means the demand draft has become stale today as its validity is only three months. Mr. Naphade states that by Tuesday, i.e., 20th July 2021, respondents will take fresh demand draft and forward the same to petitioner, which Mr. Kamat states petitioner will accept without prejudice to its rights and contentions.

3 Though in paragraph 11 of the affidavit in reply respondents state “respondents without prejudice to their rights and contentions.....”, a reading of the said paragraph shows that respondents admit that they are in default and respondents have all intention to pay the outstanding to petitioner and regularise the loan account. Mr. Naphade states that the liability of respondents cannot be disputed but there may be some issues on the amount claimed as per petitioner’s calculations.

4 As on 30th January 2021, the foreclosure amount due and payable by respondents to petitioner is Rs.1,48,29,555/-. Mr. Kamat states that even the amount of Rs.18,95,330/- was offered only after the last order and subsequent to April 2021, respondents have not even approached petitioner with any payment. Mr. Kamat states that the equipment is in use and respondents are earning hire charges for the equipment but not paying a farthing to petitioner. Mr. Naphade agrees that the equipment is under use

and states that respondents are expecting a sum of Rs.80 lakhs in three weeks and they will utilise the amount to repay the claim of petitioner. I have to note that on 11th March 2021, respondents have told the court that they are getting Rs.1.5 crores and will utilise the amount to clear atleast part of the debts due to petitioner. Therefore, between 11th March 2021 till date respondents have received a sum of Rs.70 lakhs but still offering only Rs.18,95,330/- in April 2021. At this stage, Mr. Naphade clarifies that Rs.80 lakhs to be received is over and above Rs.1.5 crores, which is mentioned in the order dated 11th March 2021 of which not a penny has been received yet. Mr. Kamat, therefore, is justified in seeking appointment of receiver so that all the earnings of the machinery will be recovered by the receiver and paid over to petitioner. I, therefore, pass order in terms of prayer clauses (a), (b) and (d), which read as under:

“(a) The Court Receiver High Court Bombay be appointed as Receiver and take peaceful physical possession under Order XL, Rule 1 of CPC 1908 in respect of the hypothecated Z AXIS 470 TATA HITACHI CONSTRUCTION MACHINERY PRIVATE LIMITED whether in the possession of the respondents and/or any 3rd party and this Hon’ble Court be pleased to direct the respondents and/or any 3rd party (who may be in possession of the hypothecated Asset) to hand over the physical, peaceful and vacant possession of the Z AXIS 470 TATA HITACHI CONSTRUCTION MACHINERY PRIVATE LIMITED forthwith accordingly to the Court Receiver. If the Court Receiver is not allowed the physical, peaceful and vacant possession of the hypothecated Z AXIS 470 TATA HITACHI CONSTRUCTION MACHINERY PRIVATE LIMITED by the Respondents, the Court Receiver be allowed to take forcible possession of the said hypothecated asset in the custody of the respondents and/or 3rd party along with appropriate Police protection of the Local Police station. The Court Receiver High Court, Bombay be further directed to hand over the aforesaid asset thereto to the petitioner with liberty to the petitioner to dispose off the same by private treaty with further liberty to adjust the sale proceeds towards the outstanding dues due to the petitioner from the respondents.

(b) The Respondents and/or any 3rd party who may be in possession

of the hypothecated asset be directed by the order and directions of this Hon'ble Court to hand over the hypothecated Asset being Z AXIS 470 TATA HITACHI CONSTRUCTION MACHINERY PRIVATE LIMITED hereto to the petitioner and the petitioner be allowed to sell the aforesaid asset accordingly.

(d) The Court Receiver High Court Bombay be appointed as Receiver and take peaceful physical possession under Order XL, Rule 1 of CPC 1908 in respect of the properties of the respondents as more particularly described in the list annexed and marked as Exhibit B hereto and this Hon'ble court be pleased to direct the respondents to hand over the physical, peaceful and vacant possession of the said properties as described in the said list annexed and marked as Exhibit B hereto forthwith accordingly to the Court Receiver. If the Court Receiver is not allowed the physical peaceful and vacant possession of the aforesaid properties by the respondents, the court receiver be allowed to take forcible possession of the said properties along with appropriate Police protection of the Local Police Station. The Court Receiver, High Court, Bombay be further directed to hand over the aforesaid properties to the petitioner with liberty to the petitioner to dispose off the same by private treaty with further liberty to adjust the sale proceeds towards the outstanding dues due to the petitioner from the respondents."

As regards prayer clause (c), the order has already been passed on 11th March 2021.

5 Mr. Singh states that he will immediately communicate to his client about the order passed today since the order may not get uploaded during the course of today. Statement accepted.

6 Mr. Naphade and Mr. Kamat state a sole arbitrator be appointed by this court. Therefore, Ms Shradha Achliya, an Advocate practicing in this court (Address : Chambers of Mr. Sharan Jagtiani, Oval House, Ground Floor, British Hotel Lane, Off Nagindas Master Road, Fort, Mumbai 400 001, Mobile No.: 7710067668, Email ID : achliyashradha@gmail.com) is appointed as sole Arbitrator to arbitrate on all disputes arising out of and/or in connection with and/or relating to the Loan Agreement dated 31st August

2019 and counter claim, if any.

7 The fees and expenses of the Arbitrator to be shared equally between the parties and the same will be costs in the arbitral proceedings.

8 Learned Arbitrator shall make disclosure in writing under Section 11 (8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 directly to the parties.

9 All rights and contentions, except the jurisdiction of the Arbitral Tribunal and arbitrability of the dispute as contained in the application, kept open.

10 Respondents to inform during the course of today to petitioner's advocates the location of the equipment that is changed and shall not move the same or part with possession, until the receiver takes possession.

11 Petition accordingly stands disposed.

(K.R. SHRIRAM, J.)