

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

% Date of decision: 23rd November, 2021

+ ARB.P. 637/2019

ORIX LEASING & FINANCIAL SERVICES INDIA LTD

..... Petitioner

Through: Mr. S.K. Sen and Mr. Kush Gupta,
Advs.

versus

ONE 97 COMMUNICATIONS LTD & ANR.

..... Respondents

Through: Mr. Rohit Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This petition has been filed under Section 11(5) of the Arbitration & Conciliation Act, 1996 ('the Act', for short) for appointment of an Arbitrator.

2. The brief facts, as noted from the petition are that the petitioner entered into a Master Lease Agreement dated August 26, 2016 ('the Agreement', for short), for taking on lease a vehicle with respondent No.1, being the lessee and respondent No.2, being the co-lessee.

3. As per the terms of the Agreement, respondents agreed to pay lease rent of ₹8,683/- along with service tax for the use of the vehicle leased during the tenure of the Agreement, i.e. 24 months. The Agreement also stipulated, as per Article 2.5, that the respondents shall not be entitled to any claim of ownership of the

vehicle or challenge the petitioner's ownership right, title or interest in the leased vehicle during the subsistence of the agreement.

4. It is the case of the petitioner that the respondents defaulted in payment of the lease rental and accordingly a demand notice was sent on November 21, 2018, which was followed by a notice invoking the arbitration clause dated February 22, 2019, by which the petitioner suggested the name of an Advocate to act as a Sole Arbitrator. It appears that a reply dated March 07, 2019 was sent by the respondent No.1, contesting the legal notice dated February 22, 2019 of the petitioner and showing disagreement with the name of the Arbitrator as suggested by the petitioner. In fact, the respondent No.1 in the said reply, suggested the name of a Retired Additional District & Sessions Judge to be appointed as an Arbitrator, which was objected by the petitioner vide Notice dated March 20, 2019.

5. A reply to the petition has been filed by the respondent No.1, wherein the respondent No.1 has taken an objection that this Court does not have the jurisdiction to adjudicate the present petition, in view of Article 22.1 in the Agreement dated August 26, 2016, which stipulates that the Sole Arbitrator is to be appointed by the Chief Justice of Bombay High Court or any other Institution as appointed by the former. The relevant arbitration clause of the Agreement reads as under:-

“Article-22

ARBITRATION AND JURISDICTION

22.1 In the case of any dispute or any difference between the Parties arising out of or in relation to this Agreement including dispute or difference as to the validity of this Agreement or interpretation or any of the provision of this Agreement, the same shall be resolved

by mutual discussion. If the Parties fail to settle the dispute or difference mutually within 15 days after the dispute shall have arisen then the same shall be referred to Arbitration or the sole arbitrator, appointed by the Parties by mutual agreement. If the Parties fail to agree to a common sole Arbitrator within 45 days after the dispute shall have arisen either party shall make an application to the Chief Justice of the Bombay High Court or any other person or Institution appointed by him for the appointment of the Sole Arbitrator and such arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The provisions of this Article shall survive the termination of this Agreement. Each Party shall bear as own costs, all common costs shall be shared equally by both the Parties. The venue of the arbitration shall be New Delhi. The language of arbitration shall be English.

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6. I may also, at this stage note, that it stated in the petition, that a petition under Section 9 of the Act had been filed by the petitioner before the District Court, Patiala House, New Delhi, seeking appointment of a receiver, which was allowed by the concerned Court. It is also pertinent to note that the parties have agreed for New Delhi, to be the venue of the arbitration and agreed that it shall be the Civil Courts in New Delhi which shall have exclusive jurisdiction for any dispute arising with regard to arbitration.

7. Be that as it may, in view of the objection taken by the respondent No.1, the question which arises is, whether this Court has jurisdiction to entertain the present petition.

8. The learned counsel for the petitioner submits that this Court shall have jurisdiction as venue of arbitration is New Delhi

and a petition under Section 9 of the Act has been filed in a Court in New Delhi.

9. I am afraid such pleas cannot be accepted in the peculiar facts of this case, in view of the stipulation in the Agreement i.e. Clause 22.1, which has already been reproduced above. This I say so for two reasons; (i) Section 42 of the Act is not applicable to petition under Section 11 of the Act and (ii) on the ground of party autonomy.

10. It is a settled position of law that Section 42 of the Act would not apply to an application that has been filed under Section 11 of the Act (*Ref: Rodemadan India Limited vs. International Trade Expo Centre Limited 2006 (11) SCC 651; S.B.P. & Co. vs. Patel Engineering Ltd. & Ors. 2005 (8) SCC 618; HBM Print Ltd. vs. Scantrans India (P) Ltd. 2009 (17) SCC 338*).

11. No doubt, the aforesaid judgments were in view of Section 11 of the Act, as existed then [prior to Arbitration and Conciliation (Amendment) Act, 2015], when the power was conferred on the Chief Justice or his delegate. The said position would not change, in view of Section 11 (6) as it exists today. In other words, Section 11 (6) clearly contemplates an application for appointment can be made to the Supreme Court or High Court and does not contemplate petitions to be made to a “Court” as defined under Section 2(1)(e) of the Act, which is different from the Supreme Court / High Court exercising jurisdiction under Section 11 of the Act.

12. Having said that, the stipulation in the Agreement, as executed between the parties has to be given a purposeful meaning, inasmuch as the parties have agreed to approach the Chief Justice of

the Bombay High Court for appointment of an Arbitrator. If that be so, the parties have to be relegated to the Bombay High Court for appointment of an Arbitrator. This I say so, because the party autonomy is the guiding spirit in arbitration. This is held so by the Supreme Court in its various judgments including the judgment in ***Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Ltd.*** (2017) 2 SCC 228, wherein the Supreme Court, in paragraphs 38, 39 and 41 has held as under:-

“Party autonomy

38. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126] this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In para 5 of the Report, it was observed:

5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract— (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as “curial law”. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305] which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Ltd. v. Union of India

[Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603].

Later in para 10 of the Report, it was held:

10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical

meaning of the expressions and the use of the expressions at the proper places in the agreement.

39. *In Union of India v. U.P. State Bridge Corpn. Ltd. [Union of India v. U.P. State Bridge Corpn. Ltd., (2015) 2 SCC 52] this Court accepted the view [O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra, Senior Advocate)] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that:*

16. First and paramount principle of the first pillar is 'fair, speedy and inexpensive trial by an Arbitral Tribunal'. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to.

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41. *However, the authors in Comparative International Commercial Arbitration [Chapter 17 Determination of Applicable Law in Julian D.M. Lew, Loukas A. Mistelis, et al., Comparative International Commercial Arbitration (Kluwer Law International, Kluwer Law International 2003)] go a step further in that, apart from procedure, they say that party autonomy permits parties to have their choice of substantive law as well. It is said:*

All modern arbitration laws recognise party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy

provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice is and should be binding on the Arbitration Tribunal. This is also confirmed in most arbitration rules.”

13. In view of the aforesaid position of law and in the peculiar facts of this case, this Court holds that the present petition is not maintainable in this Court. Liberty is with the petitioner to approach the Bombay High Court for the relief as sought in the present petition.

V. KAMESWAR RAO, J

NOVEMBER 23, 2021/ak/ds

