

Prajakta Vartak

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

COMMERCIAL ARBITRATION APPLICATION NO. 128 OF 2021

Tata Capital Financial Services Limited	..Applicant
Vs.	
21 Auto India Pvt. Ltd. & Ors.	..Respondents

Ms. Jyoti Ghag i/b. Dua Associates for Applicant.

**CORAM : G.S. KULKARNI, J.
DATE : FEBRUARY 21, 2022.**

P.C.:

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicant has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences which have arisen between the parties under the Channel Finance Agreement dated 07 October, 2016 and the amended agreement dated 22 August, 2017.

2. As observed in the earlier order, the respondents despite service are not represented. Sufficient opportunity was granted to the respondents as seen from the order dated 05 February, 2021 passed by this Court (G. S. Patel, J.) and the subsequent order dated 13 July, 2021 passed by this Court (K. R. Shriram, J.) and the order dated 16 November, 2021 passed by this Court (P. B. Colabawalla, J.) whereby service by publication was permitted. The said order reads thus:-

“1. By order dated 5th February, 2021, it was ordered that if service cannot be effected to the Respondents through the Court, the Applicant would be entitled to effect service by publication, i.e. substituted service. It was further ordered that publication will need to be in two newspapers - one in English and one in Marathi in Mumbai, and second set of newspapers in English and Marathi in Thane. Notice could not effected through the Court.

2. When the matter thereafter, came up on 13th July, 2021, it was ordered that the Advocate for the Applicant to serve the Respondents by hand delivery. That also has not materialized as evidenced by the affidavit of service filed by the advocate for the Applicant dated 14th September, 2021. After going through the record, I am satisfied that the Respondents are keeping out of the way for the purpose of avoiding the service of the above application.

3. In these circumstances, it is ordered that the Respondents shall be served by substituted service under Order V Rule 20 of the CPC through advertisement in two newspapers, one in English and one in Marathi in Mumbai and a second set of newspapers in English and Marathi in Thane, returnable on 7th December, 2021.

4. The Advocate for the Applicant shall thereafter, file an affidavit of service evidencing proof of publication as directed by this order.

5. Stand over to 7th December, 2021. 6. All parties to act on an authenticated copy of this order digitally signed by the Personal Assistant/Private Secretary/Associate of this Court.”

3. On 09 February, 2022 when this application was listed before this Court the proceedings were adjourned, to enable the learned counsel for the applicant to examine as to whether respondent nos.2, 3 and 4 are parties to the Channel Finance Agreement which has been invoked by the applicant for appointing an arbitral tribunal. On 14 February, 2022, the proceedings were listed before this Court and the Court has passed the following order recording that the service of the proceedings on the

respondents is already complete and while adjourning the proceedings for today, the Court observed that there shall not be any further adjournment :-

“1. At the request of learned counsel for the applicant, stand over to 21 February, 2022.

2. It is informed that the service of the proceedings on the respondents is already complete as permitted by an order dated 5 February, 2021 passed by this Court (G.S. Patel, J.). There shall not be any further adjournment.”

4. Accordingly, the application has been listed today before this Court.

5. Today, learned Counsel for the applicant states that respondent Nos.2,3 and 4 are not parties to the Channel Finance Agreement. Accordingly, she seeks permission to delete the names of respondent nos.2, 3 and 4 as independent proceedings need to be instituted by the applicant against these respondents invoking Section 11 of the Arbitration and Conciliation Act, 1996.

6. Permission to the applicant to delete respondent nos.2, 3 and 4, with liberty to the applicant to file appropriate proceedings. All contentions in that regard are expressly kept open.

7. Now coming to the application as maintainable against respondent No.1, there subsists an arbitration agreement between the

applicant and respondent no.1 which is contained in clause XV of the Channel Finance Agreement. The subsequent agreement namely the amended agreement dated 22 August, 2017 as entered between the parties forms part of the Channel Finance Agreement.

8. The case of the applicant is that the disputes and differences have arisen between the parties under the agreements in question. The applicant which is a non-banking finance company and carrying on business of granting lease finance and other credit facilities, lent a sum of Rs.1 Crore to respondent no.1 under the agreements in question. The said borrowing by respondent no.1 was also guaranteed by independent guarantors. On 13 October, 2016 also a Deed of Hypothecation was executed by respondent no.1 creating a first and exclusive charge on the stocks both present and future financed by book debts and movable assets funded by the applicant as set out in Schedule 2 of the Deed of Hypothecation in favour of the applicant. Thereafter on 22 August, 2017 the amended agreement was executed with the Channel Finance Limits.

9. The applicant has contended that respondent no.1 committed default in repayments of the amount due and payable to the applicant. Consequently, as no payments were forthcoming, on 07 September, 2019 the applicant through its advocate called upon the respondents to pay an

amount of Rs.95,81,432.12 due and payable inclusive of interest and penal charges, however the same was not responded. The applicant accordingly, by its advocate's notice dated 12 March, 2020 invoked the arbitration agreement and nominated a sole arbitrator to adjudicate the disputes and differences which have arisen between the applicant and the respondents. As the respondent did not reply to such notice and convey its acceptance for referring the disputes for arbitration, the present application has been filed.

10. As noted above, it appears that the respondent is not interested to appear in the present proceedings. Accordingly, the averments as made in the application are required to be taken as uncontroverted. As clearly seen there exists an arbitration agreement between the parties, as also there is an invocation of the arbitration agreement as per law, the Court needs to exercise jurisdiction under Section 11 of the Act and appoint an arbitral tribunal.

11. In the above circumstances, the following order is passed:-

ORDER

(i) Ms. Alpana Ghone, Advocate of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Channel Finance Agreement dated 07 October, 2016 and the amended agreement dated 22 August, 2017;

- (ii) The learned prospective sole arbitrator, before entering the reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;
- (iii) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.
- (iv) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (v) All contentions of the parties are expressly kept open;
- (vi) The petition is disposed of in the above terms. No costs.
- (vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

**“Ms. Alpana Ghone, Advocate,
K. K. Chambers, 2nd Floor,
Purshottamdas Thakurdas Marg,
Off. D. N. Road, Fort,
Mumbai – 400 001.
Contact No. 9821087963.”**

[G.S. KULKARNI, J.]