

rajshree

RAJSHREE
KISHOR
MORE
Digitally
signed by
RAJSHREE
KISHOR
MORE
Date:
2023.08.19
10:12:18
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION (L) NO.30417 OF 2022
WITH
COMMERCIAL ARBITRATION APPLICATION (L) NO.15538 OF 2023

Mahindra and Mahindra Financial Services Ltd.].. Petitioner

vs.

Green Valley Energy Ventures Pvt.Ltd. & Anr.].. Respondents

Mr.Manan Sanghai a/w Arya Jain i/b Paarth Singh for the Petitioner.

Mr.T.V. Yogi for the Respondents.

CORAM : BHARATI DANGRE, J

DATE : 22nd June, 2023.

P.C.

1] On the service being effected, the Respondents have put their appearance and even Affidavit in Reply affirmed on 13.03.2023, is filed,.

2] Arbitration Petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, by the Petitioner seek the following reliefs :

“(c) pending the hearing and final disposal of the present petition, it is just, necessary and in the interest of justice that this Hon'ble Court be pleased to :

(i) to restrain the Respondents and/or their servants, agents and representatives from selling, transferring and/or creating any third party rights with respect to 104 Mahindra Treo Zoe Electric Three Wheeler Vehicle (as per List annexed at Exhibit "E")

(ii) Direct the Respondents to handover 104 Mahindra Treo Zoe

Electric Three Wheeler Vehicle (as per List annexed at Exhibit "E") to the Petitioner, and/or permit the Petitioner to dispose the hypothecated asset "as is where is" condition to realize the dues and adjust the sale realization towards the dues of the Petitioner.

(iii) to direct the Respondents to furnish a bank guarantee for the sum of Rs 38280335/- securing the outstanding amount of the Petitioner till the final adjudication of the arbitration proceedings."

3] The above relief is sought in the wake of an Agreement entered with the Respondent, a private limited company engaged in the business of mobility solutions provider. The Petitioner being a Non Banking Finance Company was approached by the Respondents, seeking approval of Rs.3.70 Crore for a period of 24 months for lease of 104 Mahindra Treo Zoe Electric vehicles.

In order to avail the said facility, the Lease Agreement was executed on 15.05.2021 specifically setting out the terms and conditions, since the lessor/Petitioner at the request of the lessee/the Respondent agreed to lease the asset(s) and provide the services as mutually agreed, the terms being incorporated in the Agreement.

The Schedule I appended to the said Agreement enlist description of Mahindra Treo Zor Electric 3 wheeler.

The lease facility was further secured by the personal guarantee of Respondent No.2, who had guaranteed the due repayment of the loan as agreed under the Lease Agreement and Deeds of Guarantee.

4] It is the case of the Petitioner that the Respondents started defaulting on payment of the monthly lease rentals, despite being repeatedly called to regularize the accounts. An assurance came from the Respondents to clear the outstanding dues and this was recorded in the communications exchanged between the parties.

However, since the payment did not come, on 18.08.2022 the Petitioner allegedly terminated and recalled the Lease facility vide their

recall notice and called upon the Respondents to pay the outstanding amount of Rs.3,82,80,335/-, towards the lease rentals recoverable.

5] While responding to the Petition filed under Section 9 seeking the reliefs reproduced above, the Respondents denied the averment that there was default in payment of the lease rentals and rather a specific stand is taken that in terms of Clause 15 of the Sanction Letter, the Petitioner was liable to provide maintenance and repair services through its sister concerns, for the said vehicles as the vehicles which were provided, were suffering from inherent manufacturing defect and they were of substandard quality and the Respondents were not able to run the said vehicles satisfactorily. It is the specific stand, that the grievance was sought to be agitated before the Petitioner in respect of the defect in the vehicles, but it was not taken cognizance of.

It is also specifically pleaded, that the Respondent, time and again, was required to take the faulty vehicles to the designated workshop for its repairs, but no solace was provided to the Respondents, as the vehicles did not serve the purpose for which they were leased out.

It is also specifically stated that the Respondents have not earned anything from the use of the vehicles and in fact, according to them they have suffered a loss of approximately of Rs.4 Crores and have a claim against the Petitioner to compensate this loss.

6] The learned counsel for the Petitioner, on instructions make a categorical statement that since the vehicles are alleged to be faulty and not been used extensively, they be surrendered to the respective service centre, as in any case, they are incurring expenses on their own in maintaining the vehicles and even make arrangement for

parking as the vehicles are not in running condition and had to be parked.

7] In light of the above statement, the 104 vehicles, list of which is appended to the Lease Agreement, the learned counsel state that the vehicles mentioned in the said list alongwith the description contained therein, shall be surrendered to the service centres, which are located nearby, the list of which is already given to the learned counsel for the Respondents, and this exercise shall be carried out within a period of four weeks from today.

The vehicles shall be surrendered on 'as is where is' basis. Upon receipt of the vehicles, undisputedly, the Petitioner shall undertake its technical inspection and record the present status of vehicles, copy of which shall be exchanged with the Respondent.

8] In the wake of aforesaid statement, coming from the Respondents, Section 9 Petition deserve to be disposed off with a liberty to seek the relief as prayed in prayer clause (c) before the learned Arbitrator.

9] The learned counsel for the Respondents, in the Affidavit has raised preliminary objection about maintainability of the Petitioner before this Court, as he would submit that Clause 13.2.2 of the Lease Agreement contemplate that the venue of Arbitration shall be Bangalore. However, when I perused clause No.13.2.3, it is subject to the following recital contained therein :

"Parties hereby agree that the competent courts at Mumbai shall have exclusive jurisdiction to settle any disputes that may arise out of or in relation to this Agreement."

10] In the wake of the decision of the Apex Court in the case of **BBR (India) Private Limited vs. S.P. Singla Construction Private Limited**¹, the clear distinction between the Seat and venue of arbitration and since in the wake of clause 13.2.3 of the Lease Agreement, the parties have agreed that the Court in Mumbai shall have jurisdiction merely on the ground that the venue of the Arbitration was determined to be Bangalore, I do not think that this Court would lack jurisdiction to entertain the Section 11 Application or the reliefs prayed in Section 9 Petition. The preliminary submission is therefore deserve to be rejected.

11] The learned counsel for the Petitioner also inform that the Petitioner has filed an Application under Section 11, which is not listed today. Hence, I have called for proceedings of CARAPL No.15538/2023.

On perusal of the Arbitration Application and since the learned counsel did not dispute the existence of arbitration clause in the Lease Agreement and when the arbitration has been invoked by the Applicant, the learned counsel give his no objection for the appointment of sole arbitrator as contemplated in the said clause for resolving the disputes that have arisen between the parties.

The learned counsel for the Petitioner, however, dispute the specific stand taken in the Affidavit in Reply and submit that the Agreement itself contemplate that the vehicles are to be maintained by the Respondents at their own costs and expenses.

In any way, I do not intend to go into the merits of the contention and I deem it appropriate to direct the parties to agitate the contention

1 (2023) 1 SCC 693

before the Arbitrator, who may be appointed in the wake of clause contained in the Lease Agreement and Deeds of Guarantee.

In the wake of above, I deem it appropriate to appoint Justice P.D. Kode (Retired) to resolve the disputes between the parties, in the following terms :

TERMS OF APPOINTMENT

(a) Appointment of Arbitrator :

Mr. Justice P.D. Kode, (Retired), is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the documents referred to above.

(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/petitioner within one week from the date this order is uploaded.

(c) Disclosure : The learned Arbitrator, within a period of 15 days before entering the arbitration 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.

(d) Appearance before the Arbitrator : The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of hearing in the week commencing from 10/07/2023. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) Contact and communication information of the parties : Contact and communication particulars are to be

provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional E-mail address as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(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) Fees : The learned Arbitrator shall be entitled for the fees as per the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

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

(i) Procedure : These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

(j) All contentions of both sides are left open to be raised by the respective parties before the Arbitral Tribunal, in accordance with law.

Arbitration Application and Arbitration Petition stand disposed off in the aforesaid terms.

[BHARATI DANGRE, J]