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

Date of decision: 22nd March, 2023

+ **ARB.P. 967/2022**
SMAS AUTO LEASING INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr.Udit Sharma, Mr.Bhuvnesh
Satiya, Advs.

versus

NEW MORNING STAR TRAVELS Respondent

Through: Mr.Anish Agarwal, Mr.Abhishek
Yadav, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the 'Master Lease Agreement' dated 13.12.2018 (hereinafter referred to as the 'MLA') executed between the parties.

2. The Arbitration Agreement between the parties is contained in Clause 25.1 of the MLA, which is reproduced herein below:

"25. 1 Dispute Resolution

(i) If any dispute arises between the Parties during the Agreement Term or thereafter, in connection

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 27.03.2023

18:49:26

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*with the validity, interpretation, implementation or alleged material breach of any provision of this Agreement or regarding any question, including the question as to whether the termination of this Agreement by one party has been legitimate, the Parties shall endeavour to settle such dispute amicably within 30 (thirty) days of a dispute being raised by a Party and brought to the attention of the other Party ("**Consultation Period**").*

(ii) However, in case the dispute still persists and is not amicably resolved with the Consultation Period, both the Parties shall enter into conciliation and such proceedings shall be conducted in terms of the Arbitration and Conciliation Act, 1996, as Amended from time to time. Both Parties hereby mutually agree that conciliation proceedings shall be conducted in the most expeditious manner and completed within 3 (three) months of the expiry of the Consultation Period.

(iii) In case the conciliation proceedings also fail, the disputes shall be referred to a panel of three arbitrators and the arbitration proceedings shall be conducted in terms of the Arbitration and Conciliation Act, 1996. Both Parties shall appoint one arbitrator and the two arbitrators shall appoint the Presiding Arbitrator. The arbitration proceedings shall be conducted in English and the place of arbitration shall be New Delhi. It is clarified that all costs associated with the arbitration shall be shared equally between the Parties."

3. In terms of the Arbitration Agreement, the petitioner, on alleged default of the MLA by the respondent, addressed notices dated 17.08.2020 and 23.09.2020 (date on the notice wrongly stated as 23.08.2019) to the respondent. On not receiving any response from the respondent, the petitioner terminated the MLA vide notice dated 12.01.2021.



4. The petitioner thereafter requested the respondent for initiation of conciliation proceedings vide notices dated 08.03.2021 and 21.05.2021. The said notices also remained unheeded by the respondent, forcing the petitioner to file a petition under Section 9 of the Act, being OMP (I) (COMM) 375/2021.
5. This Court vide its *interim* order dated 17.11.2021, was pleased to restrain the respondent from transferring the possession or ownership or creating any third party interest in respect of the leased vehicles mentioned in the said order.
6. During the pendency of the said petition, and as the respondent had not responded to the request for the conciliation, the petitioner invoked the Arbitration Agreement vide notice dated 08.02.2022.
7. The petitioner thereafter filed a petition under Section 11 of the Act being ARB.P.483/2022, on which notice was issued by this Court vide order dated 25.04.2022.
8. In the meantime, the petition filed under Section 9 of the Act was disposed of by this Court vide its order dated 28.02.2022, directing the *interim* order to continue till such time that the Arbitral Tribunal is appointed and decides the petitioner's application under Section 17 of the Act seeking *interim* measures.
9. On 31.05.2022, the petitioner withdrew its petition under Section 11 of the Act stating that the dispute with the respondent has been amicably settled. It is pertinent to note that the respondent was represented on the said date and did not object to the withdrawal of the petition. The Court allowed the petitioner to withdraw the petition observing as under:

“4. In view of the submissions made, petition is allowed to be withdrawn with a liberty to approach this Court if the settlement does not materialize.”

10. The parties thereafter executed a Settlement Agreement dated 01.06.2022, which *inter-alia* gave a schedule of payments to be made by the respondent to the petitioner. Clause VIII of the Settlement Agreement is relevant for the present petition and is reproduced herein below:

*“**Clause VIII** - In view of the above repayment schedule proposed by the Second Party, it is agreed that First Party will not refer the present dispute to arbitration. However, in case Second Party fails to make any of the payments mentioned in Clause VI, First Party will approach the Hon'ble Court in terms of order dated 31.05.2022 passed by the Hon'ble Delhi High Court in "ARB.P. 483/2022 titled as M/s SMAS Auto Leasing India Private Limited v New Morning Star Travels" apart from this Second Party will also be liable for civil, criminal and contractual liabilities.”*

11. As the respondent defaulted in making the payment in terms of the Settlement Agreement, the petitioner has filed the present petition.

12. The learned counsel for the respondent submits that the present petition is not maintainable inasmuch as the Settlement Agreement does not contain any Arbitration Agreement between the parties. He submits that the Arbitration Agreement is contained in the MLA which stands superseded by the Settlement Agreement.

13. He further submits that the petitioner, in terms of Section 62 (4) of the Act, did not communicate its election to treat the lack of reply from the respondent to the notices dated 08.03.2021 and 21.05.2021 as a



rejection of invitation to conciliate. He submits that, therefore, there was no failure of conciliation, and the Arbitration Agreement could not be properly invoked by the petitioner.

14. He further submits that in any event, as the disputes between the parties are in relation to the Settlement Agreement, the same are not covered by the Arbitration Agreement, which in terms of the Clause 25.1, confines itself to any disputes in connection with the validity, interpretation, implementation or alleged material breach of any provisions of the said MLA. He submits that as the Settlement Agreement modified the terms of the MLA, the obligation of the parties will be governed by the Settlement Agreement. In support, the learned counsel for the respondent placed reliance on the judgment dated 26.07.2022 of the High Court of Judicature at Bombay in Arbitration Application No.295/2021, titled ***Vishwajit Sud & Co. v. L & T Stec JV, Mumbai.***

15. I have considered the objections of the respondent and find no merit in the same.

16. As noted hereinabove, the petitioner, before invocation of the Arbitration Agreement had addressed notices dated 17.08.2020 and 23.09.2020 (date on the notice wrongly stated as 23.09.2019) calling upon the respondent for an amicable settlement of the dispute. On failure of the respondent to respond to the same, the petitioner requested the respondent to initiate conciliation proceedings vide notices dated 08.03.2021 and 21.05.2021. The respondent again failed to respond to these notices. Left with no option, the petitioner invoked the Arbitration Agreement vide notice dated 08.02.2022. The invocation of the

Arbitration Agreement was therefore, in terms of the procedure prescribed in the Arbitration Agreement/MLA.

17. The submission of the respondent that the petitioner did not convey its election to treat the non-response of the respondent to the conciliation notice as a rejection to conciliate, is incorrect. The notice dated 08.02.2022 invoking arbitration mentions about the non-response of the respondent to the conciliation notice and failure of such conciliation process thereby. Paragraphs 3 and 4 of the notice are reproduced herein below:

“3 That Petitioner also sent two conciliation notices dated 08.03.2021 & 21.05.2021 as per Clause 25.1(ii) of the Agreement. However, Noticee paid no heed to the said notices and failed to discharge the dues.

4. In light of the afore-said background, SMAS seeks to refer the dispute between the parties to arbitration in terms of Clause 25.1 (iii) of the Agreement as all attempts at resolving the outstanding disputes via consultation and conciliation have failed.”

18. The petitioner thereafter filed not only a petition under Section 9 of the Act but also under Section 11 of the Act. The petition under Section 11 of the Act was withdrawn by the petitioner in view of the settlement of the disputes with the respondent, however, reserving liberty to approach the Court again in case the settlement does not “materialize”.

19. The submission of the learned counsel for the respondent is that as the Settlement Agreement was executed on 01.06.2022, it “materialized” and, therefore, the petitioner cannot rely upon the liberty that was granted by this Court. This, in my view, is an incorrect suggestion and is liable to

be rejected. The Settlement Agreement itself, in terms of Clause VIII thereof reproduced hereinabove, states that in case the respondent fails to make any of the payments mentioned in accordance with the schedule agreed to in the Settlement Agreement, the petitioner shall approach this Court in terms of the liberty granted vide order 31.05.2022. It does not, therefore, lie in the mouth of the respondent to contend that the petitioner cannot avail of this liberty.

20. The same also applies to the submission of the respondent that with the execution of the Settlement Agreement, the MLA, including the Arbitration Agreement contained in the MLA, stood superseded. The same was clearly not the intent of the Settlement Agreement as is reflected in Clause VIII of the Settlement Agreement, reproduced hereinabove, as also from a bare reading of the Clause VII (ideally should have been mentioned as Clause IX) and Clause X (ideally should have been mentioned as Clause XI) of the Settlement Agreement. The same are reproduced hereinbelow:

“Clause VII - Both parties agree that, in case Second Party will make a default of payment mentioned in Clause VI, Second Party shall deliver the physical possession of all the vehicles mentioned in Clause I to the First Party within 24 hours and the entire outstanding amount will be payable along with the interest amount mentioned in Clause V and future interest amount as per MLA dated 13.12.2018.

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Clause X - In the event of conflict between the terms of this Agreement and the MLA, the terms of the MLA shall supersede.”

21. The judgment of ***Vishwajit Sud & Co.*** (*supra*), in view of the

above facts, is clearly not applicable to the present case inasmuch as the petitioner is not seeking enforcement of the Settlement Agreement but of the MLA itself through this petition.

22. At this stage, the learned counsel for the respondent submits that a Sole Arbitrator may be appointed.

23. I, accordingly appoint Mr. Justice G.S. Sistani, (Retired) Judge of this Court (Mobile- 9871300034) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the MLA.

24. The Arbitrator shall give the disclosure in terms of Section 12 of the Act before entering into the reference.

25. The fee of the Arbitrator shall be governed in terms of Schedule IV of the Act.

26. The petition is allowed in the above terms.

NAVIN CHAWLA, J

MARCH 22, 2023/Arya