

(1999) 07 PAT CK 0068
In the Patna High Court
Case No : Civil Revision No. 575 of 1998

Aman Finance Corporation

APPELLANT

Vs

Nitesh Kumar Sinha and Others

RESPONDENT

Date of Decision : 20-07-1999

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1999 Patna 208 : (1999) 47 BLJR 2360 : (1999) 3 PLJR 123

Hon'ble Judges : Sudhir Kumar Katrari, J

Bench : Single Bench

Advocate : S.P. Singh, Manojeshwar Prasad Sinha and Ratan Kumar Sinha, for the Appellant; Ganga Prasad Rai, for the Respondent

Final Decision : Allowed

Judgement

Sudhir Kumar Katrari, J.—The petitioner is defendant in the suit. This civil revision application is directed against the order dated 19-12-97, passed by Shri Ram Vyas Rani, 2nd Additional District Judge, Rohtas, at Sasaram, in Misc. Appeal No. 4 of 1995 (Aman Finance Corporation v. Nitesh Kumar Sinha), confirming the order dated 12-12-94, passed by Munsif 1st, Sasaram, in Title Suit No. 132 of 1993. Both the Courts below have rejected the application of the defendant (the petitioner herein), u/s 34 of the Arbitration Act, 1940 (hereinafter referred to as "the Act"), and have refused to stay the proceeding of the title suit.

2. Opposite party No. 1 herein (the plaintiff), instituted T. S. No. 132 of 1993, in the Court of Munsif 1st, Sasaram, stating that the defendant is a registered finance company and is selling heavy motor vehicles under hire purchase in the District of Rohtas (Bihar), and other places. The plaintiff intended to have a truck on hire purchase from the defendant in August, 1991, and the defendant agreed to advance the requisite amount for that purpose. According to paragraph 5 of the plaint, the plaintiff made non-payment of Rs. 1,23,914.00, and received from the defendant a brand truck bearing registration No. UP-65/ C 4591, on 26-11-91.

According to paragraph 6 of the plaint, the plaintiff signed some blank and printed papers purported to be hire purchase agreement on 9-10-91, though the defendant did not allow the plaintiff to put the specific date on the paper duly signed by the plaintiff. The plaintiff was not provided with a copy of the hire purchase agreement. It is further stated in paragraph 10 of the plaint that the plaintiff paid a total sum of Rs. 2,04,500/- to the defendant in repayment of the loan under the hire purchase agreement from 26-12-91 to 12-4-93. The plaint further states that the defendant seized and took away the truck which was parked on G.T. Road at Sasaram on 16-8-93. The plaint further states that the plaintiff is still ready to perform his part of contract by payment of outstanding dues, if any, after adjustment of the payments made by the plaintiff to the defendant subject to adjustment of recurring damages to the plaintiff. On these averments, the plaintiff seeks the following reliefs in the plaint:--

"(i) That on adjudication of the facts stated above, it be declared that the seizure of Truck No.

UP-65/ C4591 on 7-8-93 by the defendant is illegal and the plaintiff is entitled to retain the possession of truck in question.

(ii) That the defendant be directed to furnish a copy of Hire Purchase agreement to the plaintiff and also to furnish statements of payment made by the plaintiff along with the outstanding dues against the plaintiff.

(iii) That the defendant be directed to deliver the Truck No. UP-65/C-4591 to the plaintiff with all accessories in the same condition as on the date of seizure by the defendant and the suit be decreed against the defendant with cost.

(iv) That any other reliefs to which the plaintiff be found legally entitled, be given to the plaintiff."

3. The defendant entered appearance and filed an application u/s 34 of the Arbitration Act, 1940, praying therein to stay the aforementioned T. S. No. 132/93, under the provisions of Section 34 of the Act. The application was accompanied with a copy of the hire purchase agreement dated 28-9-91. A copy of the application u/s 34 of the Act along with annexures thereto are annexed to the civil revision application as Annexure 2. Relying on Clause VI of the Hire Purchase agreement (Annexure 2), the defendant submitted before the trial Court that the suit be stayed and be referred to arbitration u/s 34 of the Act. Clause VI is set out herein below for the facility of quick reference :--

"Clause VI (a) All disputes, differences, and/ or claims, arising out of this HIRE PURCHASE AGREEMENT shall be settled by arbitration in accordance with the provisions of the INDIAN ARBITRATION ACT, 1940, or any statutory amendments thereof and shall be referred to the sole arbitration of Shri Rajesh Pandey or in case of his death, refusal, neglect or incapability to act as an arbitrator to the sole arbitration of Shri Harpal Singh Chaddah. The reference to the Arbitrator shall be within the CLAUSES, TERMS AND CONDITIONS of this Agreement. The

award given by the Arbitrator shall be final and binding on all the parties concerned. Provided that the reference to the Arbitrator shall be deemed to be bilateral even if any one of parties refers the dispute to him and send a copy of the memorandum of its dispute to the other party under a prepaid postal cover at its address recorded in this agreement conveying its intention to the other party that it has referred the dispute to the arbitrator for decision between the parties according to the agreement. In such an event, it shall not be open to the other party to treat the reference as unilateral.

(b) It has been expressly explained by the Owners to the hirer and to the Guarantor that either of the afore-mentioned Arbitrators are usually appointed by the Owners in the hire purchase agreements accepted by them and in spite of this information supplied to them the said Hirer and Guarantor have willingly agreed to the nomination of the said Arbitrators and they shall not take any objection against the appointment of anyone of Arbitrator/s on the ground that the Arbitrator/s is/are connected, in any manner, with the Owners.

(c) The notice sent by the Arbitrator to the parties, by Registered Post at the address as mentioned in the Hire Purchase Agreement will be considered sufficient, service on the parties whether such Notice is received by them or not, or is refused or is returned undelivered."

4. The defendant's application u/s 34 of the Act (Annexure 2), was rejected by the trial Court by order dated 12-12-94, inter alia, on the ground that the plaintiffs have pleaded fraud against the defendant with respect to execution of the hire purchase agreement which can be adjudicated only by the Civil Court. In the estimation of the trial Court, the plaintiff's allegation as to fraud prima facie appears to be correct. Aggrieved by the same, the defendant preferred appeal which was rejected by the impugned judgment dated 19-12-97. The appeal has been dismissed, inter alia, on similar grounds and on an additional ground that the truck itself is not in possession of the either party and, therefore, the Arbitrator will not be able to decide the matter regarding the alleged truck.

5. While assailing the correctness of the impugned judgment, the counsel for the petitioner (defendant) submitted that it is manifest from a plain reading of the plaint that execution of the hire purchase agreement inter parties is admitted, and has been fully acted upon. According to the averments in the plaint itself, the plaintiff shall provide the initial payment of Rs. 1,23,914/-, and the defendant shall provide the balance of money needed, for purchase of the truck. The delivery of truck to the plaintiff is admitted in the plaint, payment of Rs. 2,04,500/- towards repayment of the loan is also admitted. According to paragraph-17 of the plaint, the plaintiff is still ready to perform his part of the contract by payment of outstanding dues, if any, after adjustment of the payments made by the plaintiff to the defendant subject to consideration and adjustment of recurring damages. In other words, in his submission, it is primarily a question of adjustment of the rights and liabilities under the hire purchase agreement and of accounting. It was further submitted that in view of

the provisions of Section 5 of the Act, an arbitration agreement, is irrevocable. It was next submitted that the limited issue before the trial Court was to decide the defendant's application u/s 34 of the Act, and has instead entered into the merits of the matter, which is beyond its jurisdiction. He further submitted that the plaintiff has not pleaded fraud in the plaint and is, therefore, precluded from setting up a case on those lines.

6. Learned counsel for the opposite party (the plaintiff) submitted that the issue is concluded by concurrent findings of facts. Both the Courts have concurrently held that the plaintiffs' case as to fraud regarding execution of the hire purchase agreement is prima facie correct which can be adjudicated by the Civil Court alone. The findings may or may not be very sound, but the same cannot be interfered in civil revisional jurisdiction. The petitioner must remind themselves of the constraints of the civil revisional jurisdiction.

He relied on the following reported judgments :--

- (i) D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, ,
- (ii) The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, and
- (iii) The Municipal Corporation of Delhi Vs. Shri Suresh Chandra Jaipuria and Another,

6.1 Learned counsel for the opposite party further submitted that the defendant has sold the truck in question on 3-11-93 to a third party which was not a party to the agreement and, therefore, the dispute cannot be referred to arbitration. The transferee is not a party to the suit. He further submitted that relief No. (ii) of the plaint clearly states that the defendant be directed to furnish a copy of the purchase agreement. According to the plaint, the defendant was never aware of the hire purchase agreement inter parties, nor was in pos-session of a copy of the same, and for the first time became, aware of the same when the defendant had annexed 3 copy of the same with their aforesaid application u/s 34 of the Act.

6.2 Counsel lastly submitted that it is well settled law that whenever the validity of the existence of an agreement incorporating the arbitration clause is in dispute, then the matter cannot be referred to arbitration. He relied on the judgment of a single Judge of the Calcutta High Court reported in General Enterprises and Others Vs. Jardine Handerson Ltd., .

7. Learned counsel for the petitioner in reply submitted that the plaintiff has not pleaded fraud in the plaint. The aforesaid judgment of the Calcutta High Court is quite distinguishable for the reason that the fraud was clearly alleged in the plaint in that case and in those circumstances the Calcutta High Court held that in cases where the plaint speaks of fraud relating to execution of hire purchase, the matter cannot be referred to arbitration, and the issue relating to fraud can be adjudicated by the Civil Court alone.

8. Having considered the rival submissions, this Court is of the view that this civil revision application has to be allowed. Counsel for the petitioner is right in his submission that it is manifest from a plain reading of the plaint (Annexure 1) that prima facie there is a concluded hire purchase agreement inter parties incorporating the arbitration clause, and the same has been acted upon. It was in furtherance of the hire purchase agreement that the plaintiff had contributed a sum of Rs. 1,23,914.00, and the defendant had contributed the balance amount for purchase of the truck in question. The plaint admits that the plaintiff did receive a brand new truck on hire purchase and states in detail in paragraph 10 of the plaint about the payment of fifteen instalments by the plaintiff to the defendant totalling Rs. 2,04,500/- on fifteen different dates from 26-12-91 to 12-4-93. Paragraph 17 of the plaint states that the plaintiff is still ready to perform his part of the contract by payment of outstanding dues, if any, after adjustment of the payment made by the plaintiff to the defendant subject to consideration and adjustment of recurring damages to the plaintiff. Paragraph 16 of the plaint clearly states that ".....,.... the plaintiff did not contravene any of the terms and conditions of hire purchase agreement. The plaintiff has been always willing to clear off the dues, if any, but the defendant always avoided to furnish particulars nor ever served notice containing details of alleged laches on the part of plaintiff. The plaintiff was always kept in dark. The legal formalities have not been observed by the defendants before seizure of truck on 7-8-1993"This Court is, therefore, convinced that execution of the hire purchase agreement inter parties is admitted in the plaint which has been acted upon. The plaintiff in substance makes a grievance of the fact that the defendant had not at the time of execution of the hire purchase agreement supplied a copy of the same to the plaintiff, complains about the seizure of the truck in question, and also makes out a case for accounting.

9, This Court is thus convinced that there is a concluded hire purchase agreement inter parties," Clause VI of which is the arbitration clause which binds the parties. The hire purchase agreement has been acted upon. Having taken the benefit under the said agreement, he cannot resile from, or disown, the agreement. In other words, he cannot approbate and reprobate at the same time. The law in this behalf is very well enunciated in Halsbury's Laws of England, Vol. 16, para 1507, page 1012 (Fourth Edition, the Hailsham Edition), which is set out herein below for the facility of quick reference :--

"1507. APPROBATION AND REPROBATION. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions, (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he had first pursued and with which his subsequent conduct is inconsistent.

Thus a plaintiff, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claim and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

The common law principle which puts a man to his election between alternative inconsistent courses of conduct has no connection with the equitable doctrine of election and relates mainly, though not exclusively, to alternative remedies in a Court of justice."

10. Learned counsel for the petitioner next contended that the trial Court has erroneously entered into the merits of the case. On the other hand, counsel for the opposite party submitted that the present matter is concluded by concurrent findings of facts which cannot be interfered with by this Court in civil revisional jurisdiction. This Court is unable to agree with the contention of the opposite party. Once it is held that there is a concluded hire purchase agreement which incorporates arbitration clause, then the trial Court has clearly erred in recording the finding of facts. This Court fully agrees with the contention of the petitioner that no case of fraud has been set up in the plaint and, in fact, execution of the agreement inter parties is admitted in the plaint. It has been found hereinabove that the same has been acted upon. The trial Court has recorded perverse findings of facts which can be interfered with in civil revisional jurisdiction. The issue relates to the jurisdiction of the Court. In such circumstances, the ratio of the aforesaid three judgments of the Supreme Court are distinguishable and do not apply to the facts and circumstances of the present case. The Supreme Court has held in paragraph 8 in the D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, , that while exercising the jurisdiction u/s 115, C.P.C. it is not competent for the High Court to correct errors of facts however gross or even errors of law unless the said errors have relation is the jurisdiction of the Court to try the dispute itself. The words "illegally" and "with material irregularity" as used in Clause (c) do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors only of fact of law, after the prescribed formalities have been complied with.

11. I must at this stage deal with the contention of the petitioner that the trial Court has erred in entering into the merits of the case it is not possible to agree with the contention; inasmuch as the plaintiff opposed the defendant's application u/s 34 of the Act before the trial Court as well as the appellate Court on the ground that the hire purchase agreement is a product of fraud. Once such a plea was raised, the trial Court was bound to examine the question. Therefore, this Court does not find fault with the effort on the part of both the Courts below in examining this question. It is another matter that this Court disagrees with the

findings of facts recorded by the Courts below. In such circumstances, the aforesaid judgment of the Calcutta High Court (*supra*) is quite distinguishable and the ratio laid down thereunder do not apply to the facts and circumstances of the present case, inasmuch as fraud was clearly alleged in the plaint in that case, As has been found hereinabove, the plaintiff has not alleged fraud in his plaint in the instant case. The Calcutta High Court has held in the *General Enterprises and Others Vs. Jardine Handerson Ltd.*, that "the fact that there are allegations of fraud is a factor which the Court should take into consideration in considering the exercise of discretion. The nature and type of the allegations are also relevant factors. If a party charged with fraud wants public trial, stay should, subject to the above factors, be always refused. But even if the party charged with fraud does not want public trial but the party charging the fraud so wants then, in appropriate cases, the Court should refuse to grant a stay. Having regard to the nature of the allegations of fraud and having regard to the facts averred, it cannot be said that there was no *prima facie* evidence of fraud. In that background, it would be an improper exercise of discretion of the Court to allow this question not to be agitated in public forum. In view of the nature of the allegations made, the allegations are as such which are not abatable under the arbitration clause in the instant case. In view of the nature of the suit it would not be desirable to try the allegation whether there was a valid contract or not in the application u/s 34 of the Act. In view of the fact that it is not a party to the arbitration agreement, it would not be proper to exercise the discretion in the facts and circumstances of the case to grant stay of the suit. The nature of the allegations of fraud made in the instant case, also is a fact which is against the grant of stay".

12. It was also submitted on behalf of the opposite party that he (the plaintiff) was not aware of the arbitration agreement and he became aware of the same for the first time when the defendant had filed its application u/s 34 of the Act before the trial Court annexing thereto a copy of the arbitration agreement. As it has been found hereinabove that the hire purchase agreement has been acted upon between the parties, the plaintiff has taken benefit thereunder and, therefore, the conclusion is irresistible that they were fully aware of the hire purchase agreement from the inception.

13. Counsel for the opposite party lastly submitted that it is manifest from paragraph 14 of the plaint that the defendant seized the truck in question on 6-8-93, and it is further manifest from paragraph 12 of the counter-affidavit that the same has been sold to a third party on 3-11-93. In his submission, such an act is not covered by any of the clauses of the hire purchase agreement and, therefore, cannot be referred to arbitration. In his submission, only those issues can be referred to arbitration which are clearly or by necessary implication covered by the terms of agreement. His further submission is that the transferee is not a party to the arbitration agreement, nor in the plaint. This Court has no hesitation in rejecting this contention. The seizure of the truck and its sale to a third party are covered by the arbitration agreement by necessary implication.

The truck was seized in purported exercise of the rights under the hire purchase agreement, namely, on failure to repay the instalments. Once the truck was validly seized by the defendant, it was within their right to sell it to a third party. It is the defendant which is liable before the Arbitrator for seizure and sale of the truck in question. There fore, the transferee need not be a party to arbitration agreement or the suit.

14. In the result, this civil revision application is allowed. The impugned judgment dated 19-12-1997, passed by Shri Ram Vyas Ram, 2nd Additional District Judge, Rohtas, at Sasaram, in Misc. Appeal No. 4/95 (M/s. Aman Finance Corporation v. Nitesh Kumar Sinha), is hereby set aside The defendant's application u/s 34 of the Act is allowed, the trial Court is directed to stay further proceedings in the suit, and refer the dispute to arbitration in terms of Clause VI of the hire purchase agreement.

15. Let the lower Court records be sent down promptly.