
(1997) 03 DEL CK 0023
In the Delhi High Court
Case No : Suit No. 1078A of 1987

Goodwill India Ltd.

APPELLANT

Vs

M.G. Vijaya Kumar and Another

RESPONDENT

Date of Decision : 18-03-1997

Acts Referred:

Citation : (1997) 3 AD 281 : (1997) 1 ARBLR 628 : (1997) 66 DLT 501

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Mamta Mehra and Krishnamurthi, for the Appellant;

Judgement

M.K. Sharma, J.

(1) The present petition u/s 20 of the Arbitration Act has been filed by the petitioner praying for a direction for filing the arbitration agreement in Court and for reference of the disputes to the named Arbitrator in terms of the arbitration agreement between the parties. The petitioner is a duly incorporated company under the Indian Companies Act and carries on the business, amongst others, hire-purchase of motor vehicles. In the course of its business the petitioner purchased a motor vehicle bearing Engine No. 692.D03.1.89700 and Chasis No. 344.050.1.81920 from M/s. M.G.F. India Limited, Cochin and hired out the same to respondent No. 1 under Hire Purchase agreement dated 27.10.1984, as the hirer. The respondent No. 2 signed the said agreement of Hire-Purchase as guarantor for and on behalf of the respondent.

(2) The said Hire-Purchase agreement contained a clause being clause No. V - which states amongst others that the "guarantor further agrees that any time granted to the Hirer or any indulgence shown to him in respect of this Agreement either in the shape of releasing to the Hirer the Motor vehicle after detention or seizure or in any other manner, shall not prejudice the owner's rights or relieve the Guarantor from his guarantee which shall be a Continuing Guarantee and his liability will be co-extensive with that of the Hirer, and that it shall not be

necessary for the owners to give any notice to the guarantor for any defaults committed by the hirer, or any concession or indulgence shown to the hirer by the owners". Clause Vi of the said agreement contained a clause relating to arbitration wherein it is provided that all disputes, differences and / or claims arising out of this Hire-purchase agreement would be settled by arbitration and would be referred to the sole arbitration of Shri Raj Paul Sagar, Advocate, Delhi.

(3) After the aforesaid hire-purchase agreement the vehicle in question was allotted registration No. KRG-6318 with an endorsement that the said vehicle was subject to hire-purchase agreement with the petitioner-company. In terms of the aforesaid hire-purchase agreement the respondent No. 1 agreed to pay a total sum of Rs. 2,61,000.00 in 46 equal monthly installments of Rs. 5,700.00 except the last Installment which was fixed at Rs. 4,500 .00 besides the over-due hire money, compensation charges for late payment and insurance expenses. It is stated that respondent No. 1 did not make payments to petitioner-company in accordance with the terms and conditions of the hire-purchase agreement and had been irregular in payment of the hire installments, and accordingly the petitioner sent notices to the respondents to strictly comply with the terms and conditions of the hire-purchase agreement. Later on the petitioner-company came to learn that the vehicle is being plied by one Shri J.Naziruddin without the consent and knowledge of the petitioner- company and that in pursuance of notice issued by the petitioner-company to comply with the terms and conditions of the agreement the respondent made a payment of Rs. 11,400.00 vide cheque No. 634737 dated 30.12.1986, which was dishonoured on presentation to the bank and that a sum of Rs. 1,93,400.00 is outstanding towards hire money and Rs. 33,500.00 is due towards compensation charges for late payment. Accordingly, the present petition has been filed by the petitioner to give effect to the arbitration agreement between the parties.

(4) After summons and notices were served on the respondent No. 1 the said respondent did not choose to appear in the suit nor filed any written statement. The respondent No. 2, however, on service of summons appeared in the suit and filed written statement. It is contended by the respondent No. 2 that the suit is not maintainable u/s 133 of the Contract Act. It is submitted that the hire-purchase agreement is vitiated by variance and any variance in the terms and conditions of the contract between the petitioner and respondent No. 1 without the consent or knowledge of the surety discharges the surety of any liability under the agreement. It is stated that since the vehicle hired out to respondent No. 1 in respect of which the defendant No. 2 stood surety had been transferred to one Mr. Abdul Rahiman of Rahim Manzil, Haripad, Kerala, who handed over the vehicle to one J. Naziruddin to ply the vehicle for gain, there is variance to the terms and conditions of the contract arrived at between the petitioner, respondent No. 1 & respondent No. 2, and accordingly, the respondent No. 2 is not at all liable to any charges under the agreement dated 25.7.1984.

(5) On the pleadings of the parties this Court framed the following issues :

(1)Whether the agreement dated 25.7.1984 is enforceable against respondent No. 2, the guarantor, in view of the assertions made by him that the petitioner colluded with respondent No. 1, the principal-debtor, and transferred the vehicle to a third party?

(2)Whether the arbitration clause in the principal contract binds respondent No. 2?

(3)Whether the petition is bad for non-joinder of parties?

(4)Relief.

(6) The petitioner and respondent No. 2 were allowed to adduce their evidence by filing affidavits which have since been filed and are on record. Since issues No. 1 & 2 relate to similar facts I propose to discuss the said issues together and give my findings thereon. Issues No. 1 & 2 :

(7) The Counsel appearing for respondent No. 2 drew my attention to the provisions of Section 133 of the Contract Act which provides that if there be any variance made without the consent of the surety in terms of the contract between the principal debtor and the creditor, the same discharges the surety as to transactions subsequent to the variance. Relying on the aforesaid provisions the learned Counsel submitted that since subsequent to the contract arrived at between the principal debtor and the creditor namely the Hire Purchase Agreement in the present case, there has been material variance with regard to the terms and conditions of the contract without the consent of the surety by allowing the vehicle in question to be transferred to a third party not recognised under the Hire-Purchase Agreement and, Therefore, in view of such material variance the responsibility of the surety gets discharged as to transaction subsequent to the variance.

(8) In support of his contention the learned Counsel also drew my attention to the letter dated 2.3.1987 written by the petitioner to Mr. J.Naziruddin, which is annexed as Annexure "A" a copy of which was also marked to respondent No. 2. On the basis of the contents of the said letter the learned Counsel submitted that the said letter clearly shows variance in the terms and conditions of the earlier contract since it recognises the transfer of the vehicle to a third party unknown to the earlier Hire- Purchase Agreement in which the respondent No. 2 stood as a guarantor and it gives rise to a new contract without the consent of the surety/ guarantor namely - the respondent No. 2.

(9) The learned Counsel appearing for the petitioner however, submitted that the aforesaid letter was written by the petitioner to said Shri J. Naziruddin without prejudice to any claim of the petitioner as against the respondents which would be apparent from the contents of the letter itself which begins with the words "without prejudice". She further submitted that the petitioner never intended to substitute the earlier Hire-Purchase agreement which would be apparent from the fact that a copy of the aforesaid letter was also marked to respondent No. 2

intimating him that inspire of repeated reminders from the petitioner sent to him he had not discharged his responsibility as guarantor which was co-extensive with that of the hirer and calling upon him to see that full payment is remitted to the petitioner.

(10) Therefore, the question that arises for my consideration and decision is as to whether the transfer of the vehicle made by respondent No. 1 to a third party would amount to variance in the terms of the contract between the principal debtor and the creditor without the consent of the surety and would discharge the surety of his liability under the Hire-Purchase Agreement.

(11) The learned Counsel for the petitioner in support other submission relied upon the decisions of Babu Kameshwar Prasad Singh and Others Vs. Shahamat Mian and Others, , in respect of the principle of novation of contract. She also relief upon the decision in M.S. Anirudhan Vs. The Thomco's Bank Ltd., and also the decision in Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others, .

(12) In M.S. Anirudhan 's case (supra) it has been held by the Supreme Court that unsubstantial alterations to a contract which are to the benefit of the surety do not discharge the surety from the liability. It is held that if such alteration is to the disadvantage of the surety or its unsubstantial character is not self-evident, the surety could claim to be discharged.

(13) If we apply the ratio of the aforesaid decision to the facts of the present case we find that mere transfer of the vehicle to a third party by the respondent No. 1 without the knowledge and consent of the petitioner cannot be said to be a substantial alteration to the earlier contract. The very fact of the petitioner writing to the said third party stating therein that the letter is without prejudice to the claims of the petitioner in respect of the Hire-Purchase agreement for making payment of the amount by the said third party cannot be said to have resulted in any disadvantageous position to the surety. As a matter of fact the said action on the part of the petitioner in asking the said third party to deposit the amount and if in pursuance of the said communication the amount would have been deposited with the petitioner the same would have resulted in advantageous position to the respondent No. 2. Besides action on the part of the petitioner in addressing a copy of the said letter to respondent No. 2 reminding him of his liability under the Hire- Purchase Agreement and asking him to see that the amount is deposited in full without further delay proves and establishes that the petitioner did not intend to give rise to a substituted new contract. On an examination of the evidence on record I find that the said action on the part of the petitioner in addressing a communication to a third party did not in fact harm the surety at all.

(14) In Amrit Lal Goverdhan Lalan's case (supra) it has been laid down by the Supreme Court that the entries in the books of account were mere internal instructions not legally binding on the respondents, and in view of the formal

record in the original agreement and letter of guarantee, there could not have been a variation in the terms without a proper written agreement. In my considered opinion the ratio of the aforesaid decision applies to the facts of the present case. Letter written by the petitioner to a third party with a copy thereof endorsed to respondent No. 2 were internal instructions and the original Hire-Purchase agreement with the guarantee clause therein having not been in any way altered, modified and/or changed and /or varied in any manner and there being no written agreement executed between the creditor and the debtor showing any such variance in the terms of the original contract between the creditor and the principal debtor, the provisions of Section 133 of the Act, in my considered opinion, were not at all attracted. The petitioner never intended either to vary and/or to alter the conditions in the Hire-Purchase Agreement between the creditor, the principal debtor and the surety, nor the Hire-Purchase Agreement could be said to have been superseded by the action of the petitioner in sending a communication to third party.

(15) The petitioner-company also never agreed or consented to the transfer of the vehicle by respondent No. 1, to Shri J. Naziruddin, who according to the petitioner was plying the vehicle without the knowledge of the petitioner or consent in writing of the petitioner company. The vehicle is registered in the name of respondent No. 1, hirer and was not transferred in the name of Shri J.Naziruddin. It is further stated that all the payments which were received by the petitioner company were credited in the account of the hirer. In the books of accounts of the petitioner company the transaction still remains in the name of respondent No. 1. In support of aforesaid statement the petitioner has filed annexures 1 to 5.

(16) On consideration of the aforesaid factors and in the facts and circumstances of the present case I hold that the petition is maintainable and that the provisions of Section 133 are not attracted and not applicable to the facts of the present case. Since the hire purchase agreement is held to be valid and binding and enforceable the same is also held to be enforceable as against respondent No. 2, the guarantor and the arbitration clause in the principal contract is held to be binding on respondent No. 2 as well. The aforesaid issues are accordingly answered in favor of the petitioner and against the respondents. Issue No. 3:

(17) In support of issue No. 3 the respondent No. 2 failed to prove that the petition is bad for non-joinder of parties and accordingly the said issue is also answered in favor of the petitioner and against the respondent No. 2. " Relief:

(18) The Hire-Purchase agreement entered into between the petitioner and respondents No. 1 & 2 is on record which contains the arbitration clause. It is stated that the Installment payments required to be made by the respondents to the petitioner as agreed to under the hire-purchase agreement are not being paid by the respondents in accordance with the terms and conditions of the hire-purchase agreement. It is stated that the respondent No. 1 is irregular in payment of hire- installments and that a total sum of Rs. 1,93,400 / - is

outstanding towards hire money and Rs. 33,500.00 is due towards late payment of dues to the petitioner.

(19) Thus disputes have arisen between the parties in respect of the hire-purchase agreement and in terms of clause 6 of the hire-purchase agreement the said disputes are referred to the sole arbitration of Shri Raj Paul Sagar, Advocate, Delhi. The Arbitrator shall enter into the reference without any further delay and shall make/ publish his award within 4 months or within such reasonable time as the parties may agree upon. The petition stands allowed to the extent indicated above. There shall however, be no order as to costs.