

(2003) 04 MAD CK 0216

In the Madras High Court

Case No : Application No. 3222 of 2002

Harita Finance Ltd, "Jayalakshmi Estates", 8, Haddows Road,
Chennai-6

APPELLANT

Vs

ATV Projects India Ltd. D-8, MIDC, Street No. 16 Marvol,
Andheri (East) Mumbai -400093

RESPONDENT

Date of Decision : 01-04-2003

Acts Referred:

Arbitration Act, 1940 — Section 4

Arbitration and Conciliation Act, 1996 — Section 17, 2(b), 21, 22(1), 36

Citation : (2003) 04 MAD CK 0216

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : M.S. Krishnan for Sarva Bhauman Associates, for the Appellant; M. Khempraj and V. Rajgarajan, for the Respondent

Judgement

K. Govindarajan, J.—This Application is filed u/s 9 (ii) (a), (b), (c) and (e) of the Arbitration and Conciliation Act stating that the Applicant-Company has entered into a lease agreement dated 8.9.1993 with the respondent-company with respect to equipment. The said lease agreement dated 8.9.1993 was assigned under the deed of assignment dated 30.7.1998 to M/s. TVS Lakshmi Credit Limited. To the said agreement the respondent is also a signatory and thereby they agreed that the original agreement dated 8.9.1993 would hold good and continue to be in the hands of the assignee, M/s TVS Lakshmi Credit Limited. By an order dated 31.7.1999 in C.P.Nos.141 and 142 of 1999" M/s TVS Lakshmi Credit Ltd., was amalgamated with the Applicant's Company. Referring to Clause 31 which provides that all disputes, differences and claims and questions have to be resolved by referring the same to the Arbitrator, it is stated that they have referred the dispute to the Arbitrator. It is also stated that the respondent-company was declared as a sick company by the B.I.F.R. On the basis of these averments, the Applicant has come forward with this Application to appoint an Advocate-Commissioner to seize with the police protection and sell the

equipments subject to the matter of the lease agreement dated 8.9.1993 and adjust the proceeds thereof to the outstanding of the respondent. Though the respondent filed a counter and the learned counsel submitted that the agreement does not provide to appoint sole arbitrator/ the fact remains, he admits the existence of a clause to appoint an Arbitrator in the agreement.

2. On the basis of the above facts, now I have to decide the scope of Section 9 so as to sustain the Application for appointment of a Commissioner to re-possess the equipment supplied to the respondent on lease basis and sell the same by the Commissioner.

3. In this case, no independent agreement was entered into with respect to arbitration. "Arbitration agreement" is defined in Section 2(b) of the Act stating that an agreement referred to in Section 7. Section 7 of the Arbitration and Conciliation Act, 1996 hereinafter called "the Act" deals with arbitration agreement which reads as follows:-

"7. Arbitration Agreement :-

(1) In this Part, "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract"

4. Since Section 7 of the Act enables the parties to have an arbitration clause in a contract/ the Applicant has complied with the said requirement and in view of the said clause in the lease agreement, it has to be taken that the parties have agreed that if disputes arise between them in respect of the subject matter of the contract, such a dispute shall be referred to the arbitrator.

5. If any dispute arises between the parties with reference to the subject matter of an arbitration agreement, any one of the parties can approach the Court u/s 9

of the Act to get interim measures either before or during arbitrate award, but before it is enforced in accordance with Section 36 of the Act. Such a procedure is contemplated only to support the arbitration making it effective.

6. Before enacting the Act, the parties are entitled to get interim orders u/s 4] of the Act 1940 read with Second Schedule of the Act 1940. Section 41 of the Act 1940 is altogether different from the provisions of Section 9 of the Act. So, we cannot rely on Section 41 though the said provision also provided to approach the Court to get interim orders. To understand the scope of Section 9 of the Act, we have to see the Statement of Objects and Reasons appended to the Bill with respect to the Act. It is specifically stated that the Arbitration Act 1940 had become outdated. The United Nations Commission on International Trade Law (UNCITRAL) and the Rules made thereunder were taken as a model legislation to legislate the provisions of the Arbitration and Conciliation Act.

7. Section 9 of the Act details as to the nature of interim measures of protection could be ordered by the Court. The said provision has been made with the aim to preserve the assets protecting the position of the parties, maintaining the status-quo and preserving evidence.

8. Though arbitral Tribunal also was given power u/s 17 of the Act to pass orders by way of interim measures of protection, it can be passed only with respect to the subject matter of the dispute. Such a power also can be excluded by an agreement between the parties. The scope of Section 9 is considerably wider than that of Section 17. The scope of the said provision came up for consideration before the Apex Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., . The Division Bench of this Court relying on Section 41 of the Arbitration Act 1941 held that Section 9 could be availed only when arbitration proceedings are pending before the arbitral Tribunal or is at the reference before Court or arbitrate award has been passed. While reversing the said judgment, the Apex Court in the decision in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., held as follows:-

"19. When a party applies u/s 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr.Subramaniam is, therefore, right in submitting that when an application u/s 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application u/s 9 is filed, the proceedings have not commenced u/s 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application u/s 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal. But a situation may

so demand that a party may choose to apply u/s 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders u/s 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction u/s 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application u/s 9 merely because no notice has been issued u/s 21 of the 1996 Act".

9. From the above it is clear that to invoke Section 9 of the Act -

(i) there should be a dispute which had arisen with respect to the subject matter in the agreement and referable to the arbitral Tribunal.

(ii) There has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application u/s 9 of the Act. The issuance of a notice in a given case is sufficient to establish the manifest intention to have the dispute referred to an arbitral Tribunal. But it is also not necessary that notice as contemplated under- Section 21 of the Act invoking arbitration clause must be issued to : the opposite party before filing the application u/s 9 could be filed. But, if an application is made in such circumstances u/s 9 of the Act, the Court must satisfy that the arbitration agreement is in existence and the applicant intends to take the dispute to arbitration.

(iii) Apart from this, the application can be entertained u/s 9 of the Act before this Court only if in a given case the subject matter of the arbitration comes within the original civil jurisdiction, both pecuniary and -territorial.

10. A doubt arises as to whether a financier can sustain an application u/s 9 of the Act to appoint a Commissioner to repossess the machinery, equipment, vehicles etc. given to the parties on hire purchase/lease basis though the said machinery, equipment, vehicles etc., are their own properties as they retain the ownership till the last instalment is being paid and so, there cannot be any "dispute" with respect to the same.

11. In the decision in "Official Liquidator vs. Commissioner of Police" ILR (1969) 2 Mad 559, Ramaprasad Rao J, as he then was, as held as follows:-

"29. Such type of agreement are two-fold. One is entered into between the financier and the customer (who are respectively described as owner and hirer in the hire purchase agreement) in a case where the customer secures a new vehicle from a dealer but is unable to pay the price therefor to the dealer. To

secure accommodation he straight away approaches the financier, who purchases the vehicle from the dealer, though the instrumentality of the customer and in return enters into a hire purchase agreement with the customer, providing therein a right to the customer to become the owner after payment of all dues to the financier or on paying a nominal price as agreed to. Besides other usual terms, the vehicle has to be registered in the name of the financier as owner, and a right of seizure of the vehicle in case of default of the customer is also provided. But to satisfy the provisions of the Motor Vehicles Act, the certificate of registration is kept in the name of the customer.

30. In the second form of hire purchase agreement, usually adopted, the customer is the indisputable owner of the vehicle and it is so registered in his name under the Motor Vehicles Act. He requests the financier to grant a loan on the security of the vehicle. This is granted and a hire purchase agreement is entered into. The terms inter alia of this type of agreement provides that on payment of the entire hire as contemplated in the agreement and in some cases on paying a nominal price, the customer (called hirer again) becomes the sole owner. There is also the right of retaking the vehicle on default of the hirer in any manner as stipulated. Ordinarily, the clause vesting on the hirer an option to purchase the vehicle or goods as the case may be would be absent. But its absence does not detract the real legal significance of the agreement.

31. Thus it is seen that whilst in the first type of hire purchase agreement, the property in the goods always remain with the financing company and the customer or hirer becomes the owner thereof eo instant! he pays off the dues or exercises his option, in the second type of hire purchase agreement, the intention as gathered from the content and terms of the agreement is, not to transfer any interest in the vehicle by the customer or hirer to the financing company, notwithstanding there appears in the ancillary documents connected with such a hire purchase agreement, a sale letter by the hirer in favour of the financing company. In both types of agreements, the financing company is described as the owner and the customer as hirer...."

"35 No doubt, the right to seize the vehicle is peculiar to a hire purchase contract. This licence to seize the vehicle in case of default is an extra-ordinary right not available at common law but provided for in the document of hire purchase and which is a peculiar concept by itself. By an overt act of his and on his own volition a financing company or a creditor under a hire purchase agreement can seize a vehicle without intervention of law. This right provided for in the hire purchase agreement has a special signification. It establishes that the financing company or the creditor is not-an ordinary creditor but a creditor having such ordinary rights known to law coupled and annexed with a privilege to seize the vehicle in case of default. Halsbury's Laws of England third edition volume III, paragraph 593 states as follows: where seizure is contemplated:

When the grantee seizes the chattels, the grantor's legal interest in them ceases, and he cannot sue the grantee in trespass for removing them, even after

tender of principal, interest and costs.

I am of the view that if the Official Liquidator desires to own the vehicles so seized, he cannot ignore the pledge, lien, hypothecation or rights under the hire purchase agreement, if it is otherwise cognizable and enforceable under the Companies Act, 1956".

12. The Division Bench of this Court in the decision in *Ananta Udyog Private Ltd. Vs. Chola mandalam Investment and Finance Co. Ltd.*, while considering the correctness of the submission to the effect that in view of the proceedings of BIFR, the properties leased out cannot be disposed of without getting consent of the BIFR, the Division Bench held that the property which is sought to be seized by the respondent (lessor) is not the property of the appellant (lessee) and it does not fall within the scope of Section 22(1) of the Act, as the said property is not the property of the industry, namely, the respondent in that case. It is also held that the hirer who is the owner of machineries covered by the hire purchase agreement can make an application for seizure and sale of the same.

13. The above said decisions are referred to only to support the conclusion that there cannot be any legally sustainable dispute with reference to the machinery, equipment, vehicle etc.,. "Dispute" means a genuine and real dispute and a claim, which is indisputable because there is no arguable defence, does not create a dispute at all. In *Hayter vs. Nelson* (1990)2 Lloyd's Rep 265, it was held that the word "dispute" in an arbitration clause should be given its ordinary meaning and was not party confined to cases where it could not then and there be determined whether one party or other was in the right, so that the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it. But this view in *Hayter vs. Nelson* (supra) was not by Court Appeal in the judgment reported in 1998(2) ALL ER P 23 (*Halki Shipping Corpn. vs. Spea Oils Ltd*).

14. Under the Law of Arbitration, a dispute means that one party has a claim and the other party says for some specific reasons that the said claim is not correct and then the same can be concluded as a dispute.

15. On the basis of the above discussion we have to now decide whether such an application can be brought into the mischief of Section 9 of the Act though such relief can be sustained invoking common law remedy in view of the right given in the agreement. This doubt arises only due to the fact that in view of the settled law with respect to the ownership of the machinery, equipment, vehicle etc., that there cannot be any dispute about the same before the arbitrator. If it is so, can the applicant sustain application like present one u/s 9 of the Act?

16. Before dealing with the above issue/ it is necessary to mention certain facts regarding the scheme of Hire purchase so as to appreciate the issue to be decided in this case. In the hire purchase system, the mutual rights and obligations of a financier and a borrower/hirer are specifically mentioned in the agreement. Almost in the hire purchase agreements the financier retains his

ownership in the machinery, equipments, motor vehicles etc., till the last instalment is being paid as per the agreement and they also retain the right of seizure of vehicle etc., in case of default of borrower, without intervention of Court as per the procedure provided. Such a right is being retained only to safeguard the financier's interest to secure the money parted with by them to purchase such machinery, equipment etc. Unless they retain such ownership, the financiers have to face great difficulty in recovering the said amount and they have to run after the borrower/hirer to recover the amount by filing a suit, and at the same time, the borrower/hirer are allowed to enjoy the benefit out of the said machinery, etc., without even paying the money out of which such machineries etc., were purchased.

17. On this background, now we have to consider the scope of Section 9 of the Act. Section 17 of the Act specifically refers to the power of the Arbitral Tribunal only with respect to the subject matter of the dispute. But u/s 9 of the Act no such restriction is contemplated. Wide power has been given to Court u/s 9(2)(e) of the Act to pass interim measure of protection, which according to the Court is just and convenient. Though the machinery etc., could not be the subject matter of any dispute before the Arbitrator as the applicant is the owner of the property, the appointment of Commissioner for the purpose of repossessing and sale of the machinery etc., can be made "to secure the amount in dispute" in the arbitration proceedings at an early date. If the applicants are allowed to repossess and sell their own machinery- etc., the sale proceeds are being adjusted towards the amount payable by the respondent to the applicant which is the subject matter before the arbitrator in view of dispute raised. By securing and making adjustment towards the amount sought to be recovered by the applicant from the respondent, the liability of the respondent also reduces correspondingly. If for any reason such a course viz., appointment of a Commissioner to repossess the machinery, etc.; and selling the same is not adopted, the value of those machinery etc., goes down in course of time and subsequently if it is sold it fetches only low price and thereby the hirer/lessor also will be prejudiced.

17-a. In such a case, even if the machinery etc., are not the subject matter of the dispute directly before the arbitrator, such an application can be entertained u/s 9 of the Act and ordered for the purpose of securing the amount in dispute by selling the said machinery etc.

18. In the present case the only objection raised by the learned counsel appearing for the respondent is that since there is a dispute regarding appointment of Arbitrator, which itself is pending, the applicant cannot sustain the application filed u/s 9(ii) (a), (b) (c) and (e) of the Act. Such a submission cannot be countenanced. Section 9 can be invoked as held above even without referring the dispute to the arbitrators as the requirement that there should be a dispute which is referable to the Arbitral Tribunal. It is not disputed that such a requirement is in existence in this case. So, in view of the above rejection of the defence taken by the respondent, the application filed for appointing the

Advocate Commissioner to re-possess and sell the equipments is maintainable. The Commissioner is directed to proceed with his work as directed by the learned Judge by orders dated 19.08.2002 and 17.09.2002 and file a report within twenty days.