
(1999) 07 OHC CK 0024
In the Orissa High Court
Case No : Civil Revision No. 121 of 1999

Mrs. Rama Mishra

APPELLANT

Vs

Sri Ram City Union Finance Ltd.

RESPONDENT

Date of Decision : 16-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1999) 4 CivCC 179 : (1999) 88 CLT 232 : (1999) 2 OLR 194

Hon'ble Judges : D.M. Patnaik, J

Bench : Single Bench

Advocate : B.S. Tripathy, for the Appellant; U.C. Behera, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Shriram City Union Finance Corporation Ltd. Vs. Rama Mishra, AIR 2002 SC 2402 : (2002) 9 SCC 613 : (2002) AIRSCW 2617

D.M. Patnaik, J.—The present revision is by the plaintiff before the lower Court praying for a mandatory injunction to restore possession of her Ashok Leyland Bus bearing Registration No. OR-05 F-7677 seized by the defendant-opp. party, a private financing company. The lower Court by order-dated 3.2.1999 in Misc. Case No. 23 of 1999 allowed the prayer of the plaintiff directing her to repay a sum of Rs. 1,00,000/- against the outstanding instalments to the opp. party within a period of 15 days and to repay the balance outstanding dues in two equal instalments in the month of April and June, 1 999 along with usual instalments regularly as per the terms and conditions of the agreement. The defendant-opp. party was directed to deliver the vehicle to the petitioner soon after receipt of the amount of rupees one lakh. This was challenged by the company in M.A.No. 10 of 1999 before the District Judge, Khurda. The appeal was allowed and the order of the lower Court was set aside.

Aggrieved by the said order of the learned District Judge the plaintiff is in

revision.

2. Facts are not disputed that the defendant as a registered financier sanctioned a loan of Rs. 4,70,000/- (rupees four lakh and seventy thousand) in 1997 to the plaintiff for purchase of an Ashok Leyland Chesis against down payment of Rs. 1,10,000/- (rupees one lakh, ten thousand). The chesis was made available through the defendant. It is claimed by the plaintiff that she spent a further sum of Rs. 5,60,000 (rupees five lakh, sixty thousand) for building the body. The bus was made road worthy from 14.4.1998 and it got the route permit to ply the bus from Cuttack to Mukhiguda. As per the agreement between the parties the petitioner was to repay Rs. 3,60,000/- (rupees three lakh, sixty thousand) with 18 per cent flat interest in three years by monthly instalment of Rs. 17,700/- (rupees seventeen thousand and seven hundred). Since the plaintiff defaulted in paying the instalments regularly on 19.12.1998 the defendant seized the bus through its own agency.

3. Mr. B.S.Tripathy, learned counsel for the plaintiff-petitioner strenuously urged that the learned District Judge wrongly and illegally reversed the decision of the learned Civil Judge, Bhubaneswar and the order is without application of mind and against the principle of law and therefore is liable to be set aside. While supporting the order of the lower Court Mr. Tripathy further submitted that his party has spent a substantial amount in the body- building of the bus and the cost of the bus at present would be nothing less than rupees ten lakhs whereas the plaintiff was only liable to painitially Rs. 3,60,000 (rupees three lakh, sixty thousand) and after the agreement he has also made substantial repayments.

Mr. U.C.Behera, the learned counsel for the defendant-opp. party submitted that no mandatory injunction could be granted in the absence of any prima facie case made out by the plaintiff inasmuch as admittedly he was a defaulter and himself agreed that in case of default the financier would be entitled to take possession of the vehicle.

Secondly, a competent Civil Court at Calcutta having passed an order during pendency of an arbitration proceeding agreed to between the parties, the Civil Court at Bhubaneswar hasno jurisdiction to pass any order and the same has been rightly refused by the learned District Judge.

It was further submitted by Mr. Behera that the matter is hit by the principle of res judicata.

4. Relying on the cases of Bidulata Das Vs. Braja Behari Palit and Others, and Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, Mr. Behera submitted that Section 41(b) of the Specific Relief Act, in the facts and circumstances of the present case bars issuance of a mandatory injunction. Further, relying in the case of Salara Co-operative Society v. Kameswar Primary Fish Production Marketing Co-operative Society and Ors. 87 (1997) CUT 653 Mr. Behera submitted that the scope of the revisional Court is very much restricted and unless there is some jurisdictional error or the

jurisdiction has been exercised with material irregularity, the revisional Court should not have interfered.

Relying on the decision in *L.D. Meston School Society Vs. Kashi Nath Misra*, Mr. Behera also submitted that in a suit for declaration where no relief for mandatory injunction is prayed for, the Court has jurisdiction to issue an injunction merely to preserve the status quo, but it has no jurisdiction to deprive a person from the possession of certain property and give it to another. Relying on the decision in the case of *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, Mr. Behera submitted that in rare cases such a mandatory injunction has to be issued. On this point Mr. Behera has further relied on the case of *Nandan Pictures Ltd. Vs. Art Pictures Ltd. and Others*.

I have carefully gone through all these decisions cited by Mr. Behera. I have no quarrel over the proposition of law laid down in all these decisions. The proposition of law so far as mandatory injunction is concerned has been well settled. The present case is one, in my view, which satisfies the circumstances under which a mandatory injunction could be issued but it has to be judged where it has been issued keeping in view all the relevant facts.

5. Admittedly the petitioner is bound by the agreement so far as repayment of the loan is concerned. She admits to have defaulted the payment. But at the same time she has made some payments. Admittedly the plaintiff purchased the chesis and thereafter built the bus and plied it on the road. The submission of Mr. Tripathy that the value of the bus should be rupees ten lakhs can be accepted to be a reasonable valuation, but it should be judged keeping in view the over all condition of the bus. The defendant is entitled to recover the outstanding dues. Judging the nature of the dispute between the parties, the lower Court had adopted a correct approach by directing the plaintiff to make payment of one lakh rupees and to pay the rest of the amount by instalments. There was nothing wrong in such an arrangement. Once the petitioner is willing to make the payment, the opp. party must be assured of such repayment, but it cannot refuse to redeliver the vehicle and take the advantage of having a valuable property against its claim which would be much less than the value of the bus. It would be unjust and inequitable to allow the financier to retain the bus, once the plaintiff assures the repayment. It can retain the possession of the bus so long the plaintiff continues to be defaulter and the plaintiff cannot have any grievance for that. Therefore, it is an appropriate case where mandatory injunction should be allowed provided that, plaintiff repays the outstanding dues. Being satisfied with the bonafide intention of the plaintiff to pay the money, the lower Court rightly passed the order.

6. Now I may take up the point about the jurisdiction of the Calcutta Civil Court and its order. The learned District Judge has been influenced by the decision of the Civil Court, Calcutta as is clear from para 7 of the impugned order. The learned District Judge was oblivious to examine the issue whether the Civil Court, Calcutta had at all jurisdiction to pass an order appointing a receiver and

whether the order could have been considered as non-existent being without jurisdiction. The issue is disposed of in the following manner.

7. The learned counsel for the opp. party contended that since the agreement was executed on, 14.8.1997 at Calcutta, the cause of action for the suit arose at Calcutta and therefore the Calcutta City Civil Court was the competent Court to entertain a dispute relating to arbitration under the provisions of the Arbitration Act.

No doubt, the agreement was executed at Calcutta, but the entire cause of action took place at Bhubaneswar which included also the seizure of the bus near Iogania under the Khandagiri Police Station while it was on the road. Therefore, the cause of action arose within the jurisdiction of the Civil Judge, Bhubaneswar. Further, the plaintiff has chosen the forum, since the defendant has its branch office at Bhubaneswar.

Mr. Behera, learned counsel for the opp. party strenuously urged that both the parties agreed under the agreement that the Calcutta Courts shall have jurisdiction in respect of any dispute between them.

Law is well settled that by agreement parties cannot confer jurisdiction on a particular Court, if in fact, it does not have jurisdiction since "consent cannot confer jurisdiction" (vide decision reported in Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.,)

8. The Supreme Court in the case of Sultan Salahuddin Owasi Vs. Mohd. Osman Shaheed and Others, was faced with a similar situation where the Civil Court at Nagpur on a reference of an award held that the award was wrongly presented at Nagpur Court and dismissed the application. The reason given was that the agreement was executed at Warora and most of the property except the house on Plot No. 94 was situated at Sibaji Nagar, Nagpur and therefore the award should have been filed before the Civil Judge (Sr.Dvn.) Chandrapur. The Apex Court held that since a part of the property which was the subject matter of the dispute was within the jurisdiction of the Nagpur Court, the Nagpur Court had the jurisdiction to deal with the matter.

In the case of Sushil Ansal v. Union of India. AIR 1980 Delhi 43, the Court was dealing with the provisions of Sections 2(c), 14, 17 and 31 of the Arbitration Act and Section 20 of the Civil Procedure Code. The High Court did not accept the contention that the jurisdiction of the Delhi Court for the purpose of Arbitration Act could not be claimed on the ground that the Arbitrator was appointed at Delhi, that he made the award at Delhi and that the Union of India has its headquarters at Delhi. The Court held that the above facts did not form the subject matter of reference and therefore, the Delhi Court had no jurisdiction.

Dealing with the provisions of Sections 31, 41 and Section 20(c) of the C.P.C., the Court held that if a suit could not be filed u/s 20(c) of the C.P.C. because of the terms of the contract, the award also could not be entertained by that Court

which cannot entertain a suit u/s 20(c) of the C.P.C. Same view was also taken in the case of Kumud Agarwalla Vs. Fertilizer Corporation of India Ltd., The Court held that for the purpose of filing an application under the Arbitration Act, if one has to ascertain whether a particular Court has jurisdiction in the matter or not, it has to be found out whether a suit could have been filed in that Court on the same cause of action. If the Court is competent to entertain the suit then that Court will also be the competent Court to entertain the application under the Arbitration Act.

Relying on these decisions I hold that it was the Civil Judge, Bhubaneswar and not the City Civil Court at Calcutta had the jurisdiction to entertain the claim of the opp. party under the Arbitration Act and pass any order whatsoever touching the matter of dispute between the parties. The learned District Judge, Khurda committed gross error in setting aside the order of the lower Court. The said order of the District Judge, Khurda is set aside.

9. In the result, the civil revision is allowed. The lower Court order is confirmed with the modification that the petitioner shall pay a sum of Rs. 1,50,00/- (one lakh, fifty thousand rupees) at a time instead of rupees one lakh as directed by the lower Court. The payment of the balance amount shall be as per the order dated 5.2.1999 of the lower Court. However, the lower Court is free to modify and/or alter the terms and conditions of the repayment schedule so as to suit both the parties.

On payment of rupees one lakh fifty thousand as directed above, the defendant-opp. party shall deliver back the vehicle within a period of seven days from the date of payment. The delivery of the vehicle shall be through the lower Court. No cost. The . be sent back forthwith.