(2013) 05 SHI CK 0016

In the High Court Of Himachal Pradesh

Case No : CMPMO No. 404 of 2012

M/s. Mahindra and Mahindra Finance Services Ltd. and Another	APPELLANT
Vs	
Irish Grover	RESPONDENT

Date of Decision : 14-05-2013

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 8
Constitution of India, 1950 — Article 227

Citation : (2013) 05 SHI CK 0016

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Advocate : Seema K. Guleria, for the Appellant; Mahesh Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, J.—This petition under Article 227 of the Constitution of India has been filed against the order dated 6.11.2012 passed by learned Civil Judge (Junior Division), Court No. V, Shimla in case No. 12/1 of 2012 rejecting the application u/s 8 of the Arbitration and Conciliation Act, 1996 (for short ''Act''). The pleaded case of the petitioners is that the respondent has filed a suit for permanent prohibitory injunction against the petitioners restraining them from taking forcible possession of Scorpio SLX HP-63A-8100. The petitioners moved an application u/s 8 of the Act for referring the dispute between the parties for arbitration on the basis of agreement dated 15.4.2008.

2. M/s. Mahindra & Mahindra Finance Services Ltd. (for short ''Company'') is a non-banking financial company registered under the Companies Act, 1956. The respondent approached the Company for financial assistance for Scorpio SLX No. HP-63A-8100 and entered into an agreement with the Company on 15.4.2008 which contains an arbitration clause. The respondent committed defaults in repayment of loan. He was asked orally to pay the instalments in due time. At

that stage the respondent filed the suit to avoid the payment of instalments. The respondent contested the application u/s 8 of the Act. The Court below has erred in dismissing the application in view of arbitration clause.

3. I have heard the learned counsel for the parties. Learned counsel for the petitioners has submitted that Clause 26 of the agreement dated 15.4.2008 provides arbitration and Clause 12 of the agreement provides consequences upon event of default. The respondent has committed default in payment of loan. The suit has been filed by the respondent to forestall the likely action of the petitioners under the agreement. In any case, the suit is not maintainable. The grievance, if any, of the respondent is arbitrable. On behalf of the respondent it has been submitted that the respondent has filed the suit for prohibitory injunction which is not covered by Clause 26 of the agreement.

4. The petitioners have placed on record a copy of plaint. The respondent in the suit has prayed permanent prohibitory injunction against the petitioners restraining them and their officials, servants to take forcible possession of Scorpio SLX HP-63A-8100 from the lawful custody of the respondent. It has been pleaded in the plaint that the petitioner without issuing any notice had sent officials to the house of the respondent on 6.2.2012 and threatened the respondent that in case he would not make the balance payment in lumpsum, then the vehicle would be taken away. This forced the respondent to arrange money for making balance payment and the respondent paid Rs. 20,000/- in cash and issued cheque of Rs. 51,300/- dated 26.2.2012. One Pankaj official of the petitioners told the respondent that his higher officials had refused to accept the cheque and are pressurizing him to take the vehicle in his custody. Pankaj also asked the respondent to deposit Rs. 5,000/- in the saving account of one Pawan Kumar at UCO Bank, Hamirpur which respondent deposited on 6.2.2012.

5. In the plaint, it has been stated that the petitioners again sent their officials to the shop of respondent on 29.2.2012 and threatened that in case the respondent would fail to make the payment, then they would take away the vehicle forcibly. The Section 8 of the Act is as follows:

8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

6. The consequences of default are provided in Clause 12 of the agreement. The Clauses 12 and 12.1 of the agreement provide as under:

12) Consequences upon event of default:

12.1. Upon the occurrence of any event of default and any time thereafter, the Lenders shall without prejudice to its rights in law, be entitled to declare all sums due and to become due hereunder for the full term of the agreement as immediately due and payable including that the Borrower shall be liable to pay to the Lender foreclosure charges calculated as the percentage (as per Schedule 1) of the balance principal outstanding along with other dues including unpaid installments, service taxes, late charges etc., due as on date of such declaration and upon the Borrower failing to make the said payment in full within 7 days thereof, the Lender may, at its sole discretion, do any one or more of the following:

(i) Upon notice to the Borrower terminate this agreement;

(ii) Demand that the Borrower should return the Product to the Lenders at the risk and expense of the borrower, in the same condition it was delivered to him (Ordinary wear and Tear Excepted) at such Location as the lender may designate and upon failure of the borrower to do so within the period of demand the lender/ agents/allies as agent and constituted attorney of the Borrower can enter upon premises where the product is located and take immediate possession of and remove the same without liability to the lenders or their agents of such entry or for damage to property or otherwise. Upon such return of the product or upon the lender taking possession of the product as herein before stated the loan agreement can be foreclosed or terminated by the lender at its discretion and provided however the remedies available to the lender as herein given shall survive such foreclosure and termination of loan and the lender shall be entitled and authorized to exercise its rights herein including in connection with the product to recover its dues under this Agreement.

(iii) to (vi) xx xx xx xx

7. The application u/s 8 of the Act lacks fundamental averments for invoking agreement so as to refer the parties to arbitration under the agreement. In the application pleadings are only to the extent that there is an agreement between the parties and respondent was very irregular in making the instalments since from beginning. There is no averment in the application that the petitioners declared all sums due and payable by respondent nor there is an averment that petitioners demanded the return of vehicle from the respondent and on failure of the respondent to return the vehicle within the period prescribed by the petitioners told the respondent that petitioners would take immediate possession of the vehicle.

8. In Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others, , the Supreme Court has observed that practice of hiring recovery agents, who are musclemen,

is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics. The Supreme Court has also observed the recovery of loans or seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force.

9. There is nothing in the application u/s 8 of the Act that the petitioners proceeded under the agreement before taking threatened possession of the vehicle. The suit has been filed by the respondent against the forcible possession of the vehicle. In case the petitioners in the suit would establish that their action is in accordance with agreement that would be end of the matter, so far petitioners are concerned. There is no averment in the application that petitioners have declared all sums due and payable by respondent nor an averment that after such declaration respondent has not paid the sums due within seven days. There is no averment that petitioners had demanded from respondent return of the vehicle. The pleadings in the application are lacking so as to conclude that the essential conditions on the part of the petitioners are complete under the agreement for referring the dispute u/s 8 of the Act for arbitration. There is no merit in the petition and is accordingly dismissed, so also the pending application.

