
(2000) 04 CAL CK 0016
In the Calcutta High Court
Case No : F.M.A. No. 1476 of 1999

Tata Finance Limited

APPELLANT

Vs

Pragati Paribahan and Others

RESPONDENT

Date of Decision : 17-04-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : AIR 2000 Cal 241 : 105 CWN 924

Hon'ble Judges : S.B. Sinha, J;M.H.S. Ansari, J

Bench : Division Bench

Advocate : Sudhir Dasgupta, for the Appellant;Shib Das Banerjee, for the Respondent

Judgement

S.B. Sinha, J.—This appeal is directed against an order dated 1-9-99 passed in Misc. Case No. 4481 of 1999 by Shri B. Basu, Judge, 2nd Bench, City Civil Court, Calcutta whereby any whereunder while disposing of an application filed by the respondent herein u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the application), it was directed :--

"In view of the above circumstances, the ptr. is directed to deposit Rs. 52,900/- by 10-9-99 and the balance amount of Rs. 50,000/- in five consecutive monthly instalment of Rs. 10,000/- each. On payment of Rs. 52,000/- by the ptr. the respondent No. 1 shall release the vehicle bearing No. WB-41/9889 to the ptr. forthwith."

2. The fact of the matter is not in dispute.

3. The respondent herein had entered into an agreement of hire purchase with the appellant herein on or about 27th October, 1997.

4. The respondent herein was to make payments as has been specified in the agreement itself and upon his failure to pay one or more instalments, the entire amount becomes payable at once empowering the appellant to seize the vehicle in question. The relevant provision whereof is :

"18(1): Upon the occurrence of any event of default and at any time thereafter, the Owners shall be entitled to declare and sums due and to become due hereunder for the full term of the Agreement as immediately due and payable and upon the Hirer failing to make the said payment in full within 14 days thereof, the Owners may, at their sole discretion, do any one or more of the following :

(a) Upon notice to the Hirer terminate this Agreement;

(b) Demand that the Hirer return the Vehicle to the Owners at the risk and expense of the Hirer, in the same condition as delivered (ordinary wear and tear excepted), at such location as the Owners may designate and upon failure of the Hirer to do so within 14 days from the date of demand, enter upon premises where the vehicle is located and take immediate possession of and remove the same without liability to the Owners or their Agents for such entry or for damage to property or otherwise.

(c) On such terms and conditions and for such consideration as the Owners may deem fit and with or without any notice to the Hirer sell the Vehicle at a public or private sale, otherwise dispose of, hire, use, operate lease to others or keep idle such Vehicle, all free and clear of any rights to the Hirer and without any duty to account to the Hirer for such action or inaction or for any proceeds in respect thereof;

(d) By written notice to the Hirer, require the Hirer to pay to the Owners (as liquidated damages or loss of a bargain and not as a penalty) on the date specified in such notices an amount (plus interest at the rate of 30% per annum for the period until receipt of the said amount) equal to all unpaid hire charges payments and all other payments which, in the absence of a default, would have been payable by the Hirer hereunder for the full term hereof, or

(e) Exercise any other right or remedy which may be available to them under the applicable law.

(2) In addition, and without prejudice, to what is stated above, the Hirer shall be liable for all legal and other costs and expenses resulting from the foregoing defaults and from exercise of the Owners' remedies, including possession of any of the vehicle :

(3) No remedy referred to hereinafter is intended to be exclusive, but the same shall be in addition to any other remedy available to the Owners at law. The Owners reserve the right to appoint Bankers or Financial institutions as their Attorney or Agent for the purpose of enforcing their rights and remedies under this Agreement."

5. On or about 3-5-99 the appellant herein served a notice upon the respondent herein. The respondent admitted that he had not been able to pay the entire amount and required the Appellant to allow him to pay the arrears in Instalments. The seizure of the vehicle was effected at Calcutta on 5-6-99

whereupon the aforementioned application was filed.

6. Mr. Subhish Dasgupta the learned Senior Counsel appearing on behalf of the appellant, inter alia, submitted that keeping in view the forum selection clause, the learned trial judge had no territorial jurisdiction to entertain the said application. In support of the said contention reliance has been placed on *Hakam Sing Vs. Gammon (India) Ltd.*, . The learned Counsel contends that in any event, it was not a case where the learned trial Judge should have exercised its Jurisdiction u/s 9 of the Act inasmuch there did not exist any arbitrable issue. Reliance in this connection has been placed on *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, . In any event, contends Mr. Dasgupta, the learned trial Judge erred in not issuing any direction as regard the payment of future instalment and, thus, the impugned order cannot be set aside.

7. Mr. Shibdas Banerjee, the learned Counsel, appearing on behalf of the respondent, on the other hand, submitted that in a case of this nature this Court should not interfere inasmuch as the disputes and difference between the parties must be adjudicated in the arbitral proceedings. According to the learned Counsel, in the instant case, as no part of cause of action arose at Bombay, Clause 27 of the agreement containing the forum selection clause, cannot be said to have any application whatsoever.

8. The learned Counsel submits that his client has pursuant to the order of the Court below already deposited a sum of Rs. 50,000/-with the agent of the appellant as was the practice but despite the order of the learned trial Judge the vehicle having not been handed over, the petitioner cannot be asked to deposit the instalments inasmuch as he was not in a position to use the vehicle.

9. Although Clause (27) of the agreement confers exclusive jurisdiction upon the Bombay High Court, there cannot be any doubt whatsoever that conferment of exclusive jurisdiction would be void in law unless more than one Court had the jurisdiction to try the suit or entertain the application.

10. In *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, , Saikia, J. Speaking for the Division Bench, distinguished *Hakam Sing Vs. Gammon (India) Ltd.*, and held *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, a :--

"When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made as a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other Courts. Thus, in *Salem Chemical Industries, a registered Firm Vs. Bird and Co. (P) Ltd.*, Calcutta, where the terms and conditions attached to the quotation contained an arbitration clause provided that : "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom

shall be settled by an arbitrator to be jointly appointed by us, it was held that it merely fixed the status of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the Court at Calcutta, and when a part of the cause of action had arisen at Salem, the Court there had also jurisdiction to entertain the suit u/s 20(c) of the Code of Civil Procedure.

From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specified accepted notions of contract would bind the parties and absence of *ad idem* can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "*expressio unius est exclusio alterius*" -- expression of one is the exclusion of another -- may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

11. In the instant case it has wrongly been stated in the agreement that the same was being executed at Bombay. In fact, the same had been executed at Calcutta. Admittedly, all the instalments had been paid at Calcutta. The seizure of the vehicle which gave rise to the disputes and differences between the parties also took place at Calcutta.

12. It cannot, therefore, be said that any part of cause of action arose at Bombay and, thus, the Bombay Courts could have exclusive jurisdiction in the matter.

13. It is true that an application u/s 9 of the Arbitration and Conciliation Act, 1996 cannot be invoked where there does not exist any manifest intention, on the part of the applicant to take recourse to the arbitral proceedings. But for that purpose, no prior notice is necessary.

14. In *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, the law has been stated by the Apex Court in the following terms :

"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, 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."

15. Having heard the learned Counsel for the parties, we are of the opinion that there exists disputes and differences between the parties which might have been referred to the arbitral proceedings. The power u/s 9 of the Act is exercised, inter alia, to keep the property under arbitration intact. In the arbitral proceedings a binding may be arrived at that the seizure of the vehicle was illegal and thus, in a case, like the present one where no order of injunction is passed, it may be open to the appellant to dispose of the same upon causing a seizure of the vehicle which may give rise to further complication. In a situation of this nature, therefore, an attempt should be made to protect the interest of both the parties.

16. Keeping in view the facts and circumstances of this case we are of the opinion that the petitioner should be directed to pay the entire amount of arrears which have become due and payable upto 5-6-1999 i.e. the date of seizure within a period of further one month. For the said purpose, the amount of Rs. 50,000/- paid by the respondent should be adjusted. The said amount may be deposited with the respondent No. 2. (Bhandari Automobiles Pvt. Ltd.) who is an agent of the appellant herein. Upon such deposit, the appellant shall immediately release the vehicle, whereafter upon expiry of a month from the date of release the respondent shall continue to pay the rest monthly instalments which has become payable from July, 1999 onwards. Such amount should be deposited with the agent of the appellant by the 15th of the next month following for which this instalment has become due.

17. This appeal is disposed of with the aforementioned directions. In the facts and circumstances of this case, however, the parties shall bear their respective costs.

M.H.S. Ansari, J.

18. I agree.

It is clarified that if the demand draft of Rs. 15,000/- deposited with the respondent No. 2 has expired by efflux of time, the respondent No. 1 herein shall take steps forthwith for re-validation thereof.