

(2009) 06 CAL CK 0058
In the Calcutta High Court
Case No : C.O. No. 218 of 2009

The Manager, G.E. Capital Transportation Financial Services Ltd. and Another APPELLANT

Vs

Rajwant Singh RESPONDENT

Date of Decision : 16-06-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Constitution of India, 1950 — Article 227
Consumer Protection Act, 1986 — Section 12, 2

Citation : (2009) 06 CAL CK 0058

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Y.J. Dastoor, Phiroze Edulji and Siddhartha Lahiri, for the Appellant; S.P. Roy Chowdhury, Kaushik Chanda, Debasis Basu and Siddhartha Kanjilal, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J.—Several orders are under challenge in this application under Article 227 of the Constitution of India. One of such orders was passed on 3rd October, 2008 by the State Commission, West Bengal in F.A. No. 08/190. The other order which is under challenge in this application was passed by the learned District Consumer Disputes Redressal Forum, Hooghly on 15th January, 2009 vide order No. 17 in C.D.F. Execution Case No. 4 of 2008.

2. The fate of the order passed by the learned District Consumer Disputes Redressal Forum, Hooghly in the execution proceeding is dependent upon the fate of the order passed by the learned State Commission, West Bengal on 3rd October, 2008 in the aforesaid appeal. As such, let me first of all consider the merit of the order passed by the Appellate Forum on 3rd October, 2008 as aforesaid.

3. For proper appreciation of the dispute involved in this revisional application,

the following facts are required to be taken note of:

A. Admittedly the petitioner which is a non-banking financial institution granted a loan to the opposite party herein for purchase of a ten wheeler truck bearing registration No. WB 23A 8541 by entering into a higher purchase agreement containing an arbitration clause which provides that in case any dispute regarding the subject matter is cropped up between the parties, such dispute would be referred to the arbitrator at New Delhi.

B. It is also an admitted fact that the opposite party committed default in payment of some of the monthly installments as per the said higher purchase agreement.

C. It is also an undisputed fact that a sum of Rs. 1,07,233/- was paid by the opposite party to the petitioner therein by bank draft on 6th October, 2007 and after such payment was made only a sum of Rs. 33,840/- remained due and payable by the opposite party to the petitioner herein on account of the said loan transaction.

D. Immediately after receipt of the aforesaid amount, the petitioner herein forcefully took the possession of the vehicle from the opposite party herein on 11th October, 2007.

E. Since the opposite party's request for return of his vehicle was not adhered to by the petitioner herein, the opposite party ultimately filed a dispute case being CDF Case No. 141 of 2007 before the learned Consumer Disputes Redressal Forum, Hooghly seeking various reliefs such as return of the vehicle, damages by way of compensation etc.

F. In spite of service of notice upon the petitioner herein, the petitioner did not choose to appear in the said proceeding for contesting the claim of the opposite party in the said dispute case.

G. Accordingly, the said dispute case was ultimately decided ex parte by the aforesaid forum and following orders were passed therein on 24th January, 2008:

Hence, it is ordered that the complaint petition u/s 12 of the C.P. Act is allowed ex parte against the OPs with costs. The O.P. are directed:

(a) To release the vehicle No. WB 23A 8541 along with all documents and loaded goods therein to the complainant.

(b) To intimate the complainant in writing the actual outstanding dues of EMI as on the date of seizure i.e. on 11.10.2007 and allow the complainant to repay the said outstanding amount in three monthly installments.

(c) To supply an authentic copy of loan agreement duly signed by both parties.

(d) To pay Rs. 50,000/- to the complainant as compensation for the loss of service and mental agony and suffering meted to him by O.Ps during this time.

(e) To pay Rs. 5,000/- to the complainant for litigation cost.

All such directions above should be complied with by the OPs within 30 days from the date of receipt of this order, failing which an interest @12% shall be levied upon the total amount as described above till final payment is made. The complainant is directed to serve the copy of this order upon OPs. Let a copy of this order be made over to the party free of cost.

H. The petitioner was aggrieved by the said order. Hence, the petitioner filed an appeal being S.C. Case No. -FA 08/190. In the appeal, several points were raised by the petitioner for challenging the order passed by the District Forum. The petitioner contended that service of notice of the dispute case was not effected upon the petitioner and as a result thereof the petitioner could not contest the said dispute case before the District Forum at Hooghly. It was further contended that though the claim of the opposite party was not duly proved by evidence, still then the District Forum allowed the reliefs claimed by the opposite party in the said dispute case. It was further contended that since the vehicle was purchased for a commercial purpose by the opposite party, the opposite party cannot be regarded as a consumer under the Consumer Protection Act and as such the reliefs claimed by the opposite party ought not to have been granted in the said proceeding. It was further contended therein that since the higher purchase agreement contained an arbitration clause for resolution of such dispute by way of arbitration in New Delhi, the dispute case ought not to have been entertained by the Forum. These are the four points on which the propriety of the order of the District Forum was challenged in the said appeal.

I. Though the learned State Forum, while deciding the said appeal discussed the first two points of challenge as aforesaid but remained totally silent with regard to the other two points of challenge raised by the petitioner in the said appeal as aforesaid. The learned State Forum concurred with the finding of the learned District Forum regarding service of notice upon the petitioner herein. The learned State Forum also held that the claim of the opposite party was duly proved by the said opposite party before the District Forum and as such, the learned State Forum refused to interfere with the decision of the District Forum.

J. Being aggrieved by the said judgment and order passed by the learned State Forum in the aforesaid appeal, the instant application under Article 227 of the Constitution of India has been filed by the petitioner (creditor).

10. Heard Mr. Dastoor, learned Advocate appearing for the petitioners and Mr. Roy Chowdhury learned Senior Counsel appearing for the opposite party herein. Considered the materials-on-record and the orders impugned.

11. Having regard to the admitted facts with regard to the aforesaid loan transaction between the parties as recorded hereinabove, this Court has no hesitation to hold that the first two grounds of challenge i.e. (i) non-service of notice of the proceeding upon the petitioner herein and (ii) passing of the order by the District Forum in the absence of proper proof, practically have lost their

significance particularly in the light of the petitioner's admission in this revisional application to the effect that the vehicle was subsequently returned to the authorized agent of the opposite party herein as the substantial amount of the arrear dues had already been paid by the opposite party.

12. Though it is true that the opposite party never admitted the receipt of the said vehicle either by the opposite party himself or by his agent as claimed by the petitioner herein but still then since such a dispute is not a matter for consideration before this Court presently and furthermore since such a dispute is now under consideration before the other forum, this Court does not think it proper either to deal with and/or decide as to whether the said vehicle was really delivered to the authorized agent of the opposite party by the petitioner on 28th December, 2007, or not but even without resolving the said dispute this Court can certainly hold that the petitioner cannot wriggle out of its admission regarding such delivery of vehicle to the authorized agent of the opposite party and such admission really for all practical purposes amounts to admission of the claim made out by the opposite party in the said dispute case.

13. In the aforesaid facts this Court holds that the first two points of challenge have lost their significance for all practical purposes.

14. Let me now consider the other two points of challenge raised by the petitioner as indicated above.

15. It is no doubt true that if the opposite party is not a consumer within the meaning of the "consumer" as defined u/s 2(d) of the Consumer Protection Act, then the opposite party cannot seek any remedy before any of the forums created under the Consumer Protection Act, 1986. For ascertaining as to whether the petitioner is a "consumer" or not, the definition of "consumer" under the said Act is required to be considered. Accordingly, Section 2(d) of the said Act is set out hereunder:

2(d) "Consumer" means any person who:

(i) buys and goods for a consideration which has been paid or promised to partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person (but does not include a person who avails of such services for any commercial purpose);

(Explanation- For the purposes of this clause "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;)

16. Here the petitioner claims that he purchased the said vehicle for commercial purpose for earning his livelihood. In fact, a certificate issued by the Pradhan of the concerned Gram Panchayat has also been produced by the opposite party before the District Forum showing that the said vehicle is utilized by the opposite party for commercial purpose for earning his livelihood. There is no denial of such claim of the opposite party from the side of the petitioner either in its pleading or in its evidence. In view of such uncontroverted claim of the opposite party, this Court has no hesitation to hold that in view of the explanation added to the provision contained in Section 2(d) of the said Act, the opposite party is a consumer within the meaning of the consumer as defined in the said Act. In fact, in a similar set of facts the Hon"ble Supreme Court has held in the case of Laxmi Engineering Works Vs. P.S.G. Industrial Institute, that when a person buys goods and uses them himself exclusively for purpose of earning his livelihood by means of self-employment is a consumer within the definition of expression consumer under the said Act.

17. Mr. Dastoor submitted that the pleadings of utilising the vehicle for commercial purpose for earning his livelihood is absent in the petition of complaint. As such, according to him, the Forum should have held that the opposite party is not a consumer within the meaning of the consumer under the said Act.

18. Though Mr. Dastoor is correct in his submission about the inadequacy of the pleading in this regard, but if the pleading coupled with the documents filed in support of his pleading, are taken into consideration as a whole, then there will be no difficulty in holding that the petitioner is consumer as he utilises the said vehicle for earning his livelihood.

19. Trial of such proceeding is not conducted by applying the provisions of the Evidence Act, strictly. Trial of such proceeding is conducted on the basis of the principles of natural justice. As such, this Court does not find much substance in the submission of Mr. Dastoor in this regard.

20. Thus, this Court holds that the learned District Forum did not commit any illegality in entertaining the said complaint case of the opposite party and/or in deciding the same on its own merit.

21. Let me now consider the other point which was raised by the petitioner in this application regarding the entertainability of such a dispute case by the District Forum by ignoring the arbitration agreement entered into between the parties concerning the subject dispute. The petitioner claims that the jurisdiction of the District Forum for resolving such dispute by way of arbitration in New Delhi was practically excluded by such arbitration agreement entered into between the

parties.

22. In my view, the said contention of the petitioner has no substance at all in view of the provision contained in Section 8 of the Arbitration and Conciliation Act, 1996 which provides as follows:

Section 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 Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

23. The said provision thus makes it clear that the jurisdiction of a judicial authority to decide any dispute between the parties covered by an arbitration agreement is not as such ousted under the provision of the said Act and it is only when a party applies for such reference before submitting his first statement on the substance of the dispute, before such judicial authority, a reference will be made to the Arbitrator for arbitration of the said dispute between the parties and in that event the judicial authority will not proceed further to decide the said dispute between the parties. Here is the case where neither the petitioner appeared in the proceeding before the District Forum nor applied for reference to arbitrator for arbitration of the dispute between the parties and as such this Court cannot hold that the District Forum had no jurisdiction to entertain and/or to decide the said dispute case.

24. Thus, this Court holds that there is no substance even in this contention of the petitioner. Under such circumstances, this Court holds that the said impugned order does not require any interference in the facts of the instance case.

25. Since the order of the Appellate forum is maintained by this Court, no interference with the orders passed by the execution forum, which are impugned in this revisional application, can be called for.

26. Accordingly, the revisional application stands rejected.

27. The interim order which was passed earlier, thus, stands vacated.

28. Urgent xerox certified copy of this order, if applied for, be supplied expeditiously after complying with all formalities.