

(2003) 09 MAD CK 0182

In the Madras High Court

Case No : Original Application No. 69 of 2003 and Application No's. 316 and 1286 of 2003

TVS Finance and Services Ltd.

APPELLANT

Vs

Kwality Spinning Mills Ltd.

RESPONDENT

Date of Decision : 12-09-2003

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 22, 22(1)

Citation : (2004) 52 SCL 500

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Judgement

K. Gnanaprakasam, J.—By consent of the parties both OA. No. 69/2003 and A. No. 1286/2003 were taken up for final disposal.

2. OA.No. 69/2003 is to pass an order of interim injunction, restraining the respondent from alienating, encumbering or otherwise dealing with the machinery. OA.No. 316/2003 is to appoint in Advocate Commissioner to take possession of the machinery and to take Police protection, if necessary and also to break open the lock and to hand over the machinery to the applicant. A.No. 1286/2003 is to extend the time to the Advocate Commissioner.

3. The applicant has been carrying on the business of Hire Purchase Finance, leasing, etc. and the respondent entered into a hire purchase agreement with the applicant on 28-3-1997, whereby, the machinery set out in the Schedule-A to the Judge's Summons were leased out to the respondent and the respondent had also entered into a supplementary agreement on 28-3-1997 to honour the terms and conditions of the hire purchase agreement. By a Memorandum of Understanding dated 1-4-1998, the applicant has transferred the assets and liabilities to M/s. Harita Finance Limited under the Deed of Assignment dated 23-7-1998 entered into between the applicant and M/s. Harita Finance Limited. The respondent also had executed a demand promissory note dated 23-7-1998 in favour of the applicant, agreeing to pay the amounts mentioned therein on

demand. Under a Scheme of Amalgamation, the company and M/s. Harita Finance Limited came to be known as M/s. Harita Srinivasa Finance Private Limited and the same was approved by this court by order dated 31-7-1998 in CP.No. 142 of 1998 and later, the name of M/s. Harita Srinivasa Finance Limited was changed to M/s. Harita Finance Limited and now presently it is known as M/s. TVS Finance and Services Limited, the applicant herein. The respondent has failed to pay the hire charges as agreed and as on 10-1-2003, the respondent is liable to pay a sum of Rs. 1,99,51,681.29. As per Clause 7 of the hire purchase agreement read with Clauses 10 and 29 of the Deed of Assignment, the applicant is entitled to repossess the machinery. The applicant also apprehends that the respondent would alienate the machinery. The respondent had already filed an application u/s 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 and the same is pending, but, it is not a bar in maintaining the present applications.

4. The respondent has not chosen to file any counter. Heard the learned Advocate for the applicant and the respondent as well.

5. The first and foremost objection that has been raised on behalf of the respondent is that there is no hire purchase agreement at all between the applicant and the respondent and in the absence of the same, the applicant is not entitled to invoke the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). It is submitted that in the letter dated 20-3-1997 sent by the respondent to the applicant, it was requested to sanction a sum of Rs. 70 lakhs under HP/Refinance for a period of 3 years for the existing machineries and pursuant to the same, the applicant came forward to advance the amount and entered into an agreement and also obtained the demand Promissory Note. It is further contended that all the machineries were purchased by the respondent under several invoices, which are available in the typed set of papers from page 4 to page 15 and that therefore, the respondent alone is the owner and not the applicant. That in the absence of the applicant's ownership for those machineries, there is no relationship of "owner" and "hirer" between the applicant and the respondent and, therefore, the application filed based upon the hire purchase agreement, treating the amount borrowed as hire purchase is not maintainable. Though the agreement was styled as a hire purchase agreement, the nomenclature of the agreement is not the criterion and the sum and substance of the agreement and the relevant documents in respect of the machinery would go to show that the respondent alone is the owner of all the machineries. As the applicant is not the owner of the machineries, there is no jural relationship of "owner" and "hirer" exists between them.

6. Per contra, the learned Advocate for the applicant would contend that the respondent had entered into only a hire purchase agreement and in the said agreement, the respondent admitted that the applicant is the owner of the machineries and the respondent is the hirer. The applicant also drawn the attention of this court to the hire purchase agreement, which is available at page

7 of the typed set of papers filed by the applicant, wherein, it is stated that the applicant is the owner and the respondent is the hirer. It is further argued that the respondent having accepted the applicant as the owner of the machineries, he is estopped from claiming that he is the owner of the machinery and not the applicant.

7. Now let us consider as to whether the agreement between the applicant and the respondent is the hire purchase agreement or the agreement of refinance.

8. The respondent filed the invoices of the machineries and all those invoices do stand in the name of the respondent and the same is also not in dispute and as such, it is made out that the respondent is the owner of all the machineries. But, however, the respondent had entered into an agreement with the applicant and the said agreement is titled as "hire purchase agreement" and the applicant is shown as the owner and the respondent is shown as the hirer. It is argued on behalf of respondent that though the agreement was christened as "hire purchase agreement", it cannot be a hire purchase agreement and the applicant cannot claim that he is the owner and the respondent is the hirer, as the applicant has not filed any document to show that he is the owner of the machinery.

9. True it is that all the invoices of the machineries do stand in the name of the respondent. But, however, the respondent entered into an agreement with the applicant on 28-3-1997, which agreement is a hire purchase agreement and the applicant is treated as the "owner" and the respondent is the "hirer". The respondent, for the first time, questions the tenability of the agreement and contends that it is only a refinance agreement. Even to the application before this court, the respondent has not chosen to file any counter to dispute and disown the hire purchase agreement between applicant and the respondent. That apart, the hire purchase agreement also contains I Schedule, indicating the details of assets and the II Schedule indicating the amount payable by the respondent and also the instalment structure, wherein the respondent has to pay the amount 1 to 34 instalments at the rate of Rs. 2,83,750. That apart, there is also a supplementary agreement dated 28-3-1997, wherein also, the respondent is described only as an "hirer". That in the terms and conditions of the supplementary agreement, the respondent had undertaken/agreed to pay the instalment amount by demand draft or cash. In the letter of guarantee dated 28-3-1997 also, the respondent has been described only as an "hirer". These things would clearly go to show that the respondent has consciously and consistently entered into an agreement only as an "hirer". Now for the first time, the respondent is trying to challenge the agreement, stating that it is not a hire purchase agreement and it is only a refinance agreement.

10. The agreement between the parties is not in dispute. The respondent himself by letter dated 20-3-1997, requested the applicant to sanction the amount under HP/Refinance in respect of the existing machineries. By letter dated 31-3-1997, the respondent had forwarded certain documents, of which, No. 1 is the hire

purchase agreement. As the respondent has committed default in payment of the instalment amounts, the applicant had sent a legal notice dated 7-1-1998 through their Advocates, wherein also, it is stated, "Our client states that for the purchase of Plant and Machinery, set out in Schedule-A Hereunder, you applied for Hire Purchase finance facility as set out in Schedule-B thereunder against the personal guarantee given by Mr. Meyappan, Managing Director. You have entered into an hire purchase agreement on 1-6-1997". Even at that time, the respondent has not chosen to question the validity of the hire purchase agreement. It is not the case of the respondent that the agreement is illegal or against the public policy. Nor it is the case of the respondent that the said agreement was obtained by misrepresentation, fraud and undue influence. That in the absence of these basic elements to vitiate the agreement, it is not open to the respondent to question the validity of the agreement. Though the respondent had claimed ownership by filing the invoices of the machineries, which stand in the name of the respondent, the respondent consciously, willingly and deliberately entered into an agreement with the applicant, treating the applicant as a owner. The intention between the parties is that it should be construed only a hire purchase agreement and the same is evident in more than one place, not only in the hire purchase agreement, but also in the supplementary agreement.

11. The essential feature of a valid contract is that there must be a identity of mind to enter into an agreement and there is a "consensus ad-idem" between applicant and the respondent to treat the agreement as a hire purchase agreement for all purposes of the transaction. The respondent having agreed that the said agreement shall be treated as an hire purchase agreement for all purposes, it is not open to the respondent to question the said agreement that too when the applicant has initiated legal proceedings against the respondent.

12. The stand taken by the respondent to assail the agreement cannot be accepted for the reasons that (1) the agreement is validly entered into, (2) the parties with all consciousness have agreed to treat it as a hire purchase agreement, (3) there is no element of frand, coercion, undue influence or misrepresentation, (4) the respondent has not chosen to question the validity of the agreement till the filing of this petition, (5) even to the notice issued by the applicant, the respondent has not chosen to question the validity of the agreement, (6) even in this application, the respondent has not chosen to file a counter, repudiating the validity of the agreement, and (7) the respondent nowhere stated that there was no "consensus ad-idem" between the parties to treat the agreement as the hire purchase agreement. For all these reasons, this court comes to the irresistible conclusion that the agreement between the applicant and the respondent is only a hire purchase agreement and not otherwise.

13. A hire purchase agreement is normally one under which an owner hires goods to another party called the hirer and further agrees that the hirer shall have an option to purchase the chattel when he has paid a certain sum, or when

the hire rental payments have reached the hire purchase price stipulated in the agreement. But, there are variations when a financier is interposed between the owner of the goods and the customer. The agreement, ignoring variations of detail, broadly takes one or the other of two forms : (1) when the owner is unwilling to look to the purchaser of goods to recover the balance of the price and the financier who pays the balance undertakes the recovery. In this form, goods are purchased by the financier from the dealer, and the financier obtains a hire purchase agreement from the customer under which, the latter becomes the owner of the goods on payment of all the instalments of the stipulated hire and exercising his option to purchase the goods on payment of a nominal price. The decision of this Court in *K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III*, dealt with a transaction of this character. (2) In the other form of transactions, goods are purchased by the customer, who in consideration of executing a hire purchase agreement and allied documents remains in possession of the goods, subject to liability to pay the amount paid by the financier on his behalf to the owner or dealer, and the financier obtains a hire purchase agreement which gives him a licence to seize the goods in the event of failure by the customer to abide by the conditions of the hire purchase agreement - *Sundaram Finance Ltd. Vs. State of Kerala and Another*, .

14. In our case also, the applicant was treated as the owner, who hired the machinery to the respondent as an hirer and further agrees that the hirer shall have an option to purchase the machinery when he has paid the hire amount. That apart, the applicant has given right to seize the goods in the event of failure by the respondent to abide by the conditions of the hire purchase agreement.

15. The learned Advocate for the applicant has also submitted that the respondent is estopped from challenging the agreement on the ground that it is not a hire purchase agreement, for which, relied upon the cases of *B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others*, and *Shish Ram and Others Vs. The State of Haryana and Others*, . In those cases the principles of estoppel have been stated and in the former case, it is stated, "Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing". Of course, it could also be stated that the respondent is also estopped by his conduct, to say that, the agreement between them is not a hire purchase agreement.

16. On the contrary, the learned advocate for the respondent placed reliance upon the case of *Tarun Bhargava v. State of Haryana AIR 2003 Punj. & Har. 98*, wherein, the learned single Judge of the said court has described that a hire purchase agreement is the one under which the owner hires the goods to the hirer giving the hirer an option to purchase the goods. On the other hand, when

a person borrows money and pays it to vendor, transaction between the customer and the lender will be a loan transaction in a hire purchase agreement, the hirer to under no obligation to buy. Where the customer is himself the owner and with a view to finance his purchase he enters into an agreement, it will be a loan transaction. A hire purchase agreement may in substance be a loan transaction and the label of such an agreement is not conclusive. It is open to the court to determine whether a particular agreement is a loan transaction or a hire purchase agreement. In that case also it was not decisively decided in favour of the hirer, but, it is stated that it depends upon the facts of each case.

17. In our case, if we consider the documents between the parties and also the other attending circumstances, one could easily come to the conclusion that the agreement between the applicant and the respondent is only a "hire purchase agreement" and not a loan transaction.

18. The next question that has been raised by the respondent is that the respondent/company has been declared as a Sick Industry and the proceedings are pending before BIFR and therefore, the applicant cannot repossess the property and to bring the same for sale. This question has been answered by the Division Bench of this court in the case of Ananta Udyog (P.) Ltd. v. Chalamandalam Investment & Finance Co. Ltd. [1995] 83 Comp. Cas. 498. Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, was considered and the pendency of the application by the sick industry before BIFR was also considered and it was ultimately held that the machineries covered by the hire purchase agreement do not belong to the industrial company and the property set out thereunder shall remain the absolute property of the company until the payments mentioned therein were made completely. As the applicant is the owner of the machinery and the respondent is only a hirer, the ownership of the goods always lie with the applicant and as the respondent is the hirer, it cannot be treated as the property of the respondent and therefore, the proceedings before BIFR would not come in the way of the applicant in repossessing the property and bring the same for sale. The stay contemplated u/s 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 is only in respect of the properties owned by the sick industries and that alone has got to be stayed and not the proceedings against any of the properties of the industrial company, viz., the applicant herein and mere pendency of the proceedings before BIFR is not a valid ground to stay the proceedings to repossess the property of the company (owner) and bring the same for sale and therefore, the applicant is entitled to seize and repossess the properties.

19. This court by order dated 22-1-2003 in OA. 316/2003 has appointed Mr. R. Santhanam, Advocate as Advocate Commissioner to take possession of the machinery and to file a report and as he could not complete the work in time, extension of time is sought for in A.No. 1286/2003 and the same is hereby allowed.

20. The Advocate Commissioner is directed to carry out the directions in the

warrant already issued to him and file a report within four weeks from today. Call after four weeks.

21. OA.No. 69/2003 : There shall be an order of injunction, restraining the respondent, its men, agents, servants and any person claiming through it from alienating, encumbering or otherwise dealing with the machinery, morefully described in the Schedule-A to the Judge's Summons. Petition is ordered accordingly.