

Case No. 75

2000 III CTC 74

IN THE HIGH COURT OF MADRAS

S.S.Subramani, J

C.R.P.NO. 2048 Of 1999 and C.M.P.No.10957 of 1999
30.09.1999

M/s Sugai & Damani Finlease Ltd., rep. by its
Executive Director, City Center Plaza, 1st Floor,
No. 3 Anna Salai, Chennai -2

Petitioner

P. Subramania Reddy

Respondent

**Section 8 of the arbitration Act - arbitration clause valid and enforceable
whether the agreement is a HP agreement or a financial agreement.**

Mr. P. Mathivanan, Advocate for Petitioner

Mr. N. Anand Venkatesh, Advocate for Respondent.

C.R.P. ALLOWED

ORDER

1. Defendant in O.S.No. 1536 of 1997 on the file of II Assistant Judge, City Civil Court at Chennai, is the revision petitioner.
2. The respondent herein as plaintiff filed in O.S.NO. 1536 of 1997 for the following reliefs:

" (i) directing the defendant to deliver possession of the vehicle viz., Ambassador Diesel Car bearing Registration No. T.N-02-Y -1593 together with all accessories therein including in built A/c and bearing Engine No. 6ED/- 142159 and Chasis NO. ABV/754872, more fully described in the Schedule to this plaint, to the plaintiff:

- (ii) directing the defendant to pay to the Plaintiff a sum of Rs. 50,000 together with interest at 24% per annum from the date of Plaint till date of payment:
- (iii) directing the defendant to pay to the plaintiff a sum of Rs. 13,000 by way damages:
- (iv) for a permanent injunction restraining the Defendant or his agents or servants form in any way dealing with the Ambassador Car (Diesel) bearing registration No. TN-02-Y-1593 together with all accessories therein including in built A/c and bearing Engine No. 6ED/ 142159 and Chassis No, ABV/754872 more fully described in the Schedule to this plaint either by way of sale or otherwise:
- (v) directing the defendant to pay to the plaintiff the costs of this suit:
- (vi) grant such further or other reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case."

3. It is alleged, in the plaint that the plaintiff wanted to purchase an Ambassador Diesel Car and the defendant represented to the plaintiff that he will arrange for purchase of the car for a price of Rs, 3,11,000. It is also the representation of the defendant that it will advance money for the purchase of the car. For the said purpose, the defendant wanted the plaintiff to pay a sum of Rs. 1,07,815 as initial advance for the purchase, of the vehicle and the plaintiff paid the same to the defendant by cheque dated 27.3.1996 drawn on Indian Bank, purasawalkam Branch Chennai. The defendant agreed to advance the balance amount of Rs, 2,03,185 and thereafter entered into a Hire Purchase Agreement. He agreed to pay sum of Rs, 2,03,185 with interest in 56 instalments totalling Rs. 3,51,325. The defendant took the signatures of the plaintiff in various blank cheques, forms, blank papers affixed with revenue stamps and also a cheque for Rs, 2,33,250 without date. The defendant also wanted a sum of Rs. 20,000 for premium to enable the car to be delivered earlier. The said amount is also paid, and the car was delivered to the plaintiff on 12.4.1996.
4. According to the plaintiff, he has been paying the instalments regularly. But all of a sudden and without notice, on 18-2-1997 when the vehicle was parked in the premise of the High Court, the defendant with some Goondas forcibly took possession of the same. It is also alleged that in the car the plaintiff, has kept Rs. 50,000 which has also been taken to the possession of the defendant.

5. The defendant is now threatening to sell away the vehicle, which has been now exposed to sun and rain. According to the plaintiff, the action of the defendant in forcibly taken possession of the vehicle is illegal and the plaintiff is entitled to recover the same.
6. On receipt of summons the petitioner filed I.A.No. 7698 of 1997 on 27-3-1997 under Section 8 of the Arbitration and Conciliation Act. In the affidavit in support of the application it was stated that as per the contract between the plaintiff and defendant the suit should not have been entertained when there is an arbitration, clause. As per the agreement all disputes difference and claims arising out of this hire purchase agreement, will have to be settled by appointment of an arbitrator as per the provisions of Arbitration Act, 1940 or any statutory amendments thereof and the matter will, have to be referred to the sole arbitration of an arbitrator nominated by owner. According to the defendant, the entire suit claim is coming within the arbitration clause and the plaintiff is not entitled to prosecute the suit and the matter will have to be stayed and the parties will have to be referred to the arbitrator.
7. A detailed counter affidavit was filed by the plaintiff where it is alleged that the agreement between the parties is not a hire purchase agreement but only a financial agreement and therefore the arbitrary clause itself is not valid. The Registration Certificate stands in the name of the plaintiff and the defendant is entitled to hold on the vehicle only as security. It is also stated that the various fraudulent acts on the part of the defendant which have been set out in the plaint are matters which the Civil Court alone should decide and not the arbitrator He prayed for dismissal of the application.
8. After the counter statement was filed, the defendant also filed a written statement on 27.4.1998.
9. The lower court by the impugned order view that the dated 2-2-1999, dismissed the application. The lower court took the view that the plaintiff is the owner and the defendant can only be a financier. So, naturally the provision of arbitration agreement will have no application between a financier and the owner,. Since the document is not a hire purchase agreement, the arbitration clause is also not valid. It further came to the conclusion that the defendant has also filed his written statement and therefore, the civil court is competent

it decide the case. It also held that since the plaintiff has filed a suit for recovery of the car and for a permanent injunction restraining the defendant from dealing with the disputed car, the civil court alone competent to decide the issues and reference to the arbitration is not necessary nor it is proper. The application was dismissed.

10. The order of the lower court challenged in this revision under section 115 of the Code of Civil Procedure.

11. I ordered " Notice of Motion" and the respondent has also entered appearance. The question to be considered is whether the order of the lower court in refusing, to stay the application under Section 8 of the Arbitration and Conciliation Act is in any illegal or improper and whether the discretion has been exercised according to law.

12. Before going to the facts of the case, it is only proper to incorporate Section 8 of the Arbitration and Conciliation Act. It reads thus:

Power to refer parties to arbitration where there is any 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 and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made"

As per the said Section, the following conditions will have to be satisfied.

- (i) There must be an arbitration agreement between the parties: (ii) a party to that agreement must bring an action before judicial authority against another party thereto: (iii) such action must be in respect of "a mat-

ter which is subject of an arbitration agreement" (iv) the application of a party must be made not later than when submitting his first statement (V) the application shall be accompanied by the original arbitration agreement on a duly certified copy thereof.

13. In this case a suit has been filed before the judicial authority against another party no the agreement is not in dispute. From the facts I have narrated earlier, it is clear that the application under section 8 has been filed before filing the written statement. It is also seen that original arbitration agreement has also been filed in court. The only matter that requires consideration is whether there is any arbitration agreement between the parties and whether it a dispute raised by the respondent is a matter which is subject matter of the agreement. What are the matters that are agreed to be referred to the arbitration Clause 22 of the agreement reads thus:

" 22, (a) All disputes, differences and/ or claims, arising out of this hire purchase agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of Indian Arbitration Act. 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the owner. The award given by such an Arbitrator shall be final and binding on all the parties to this Agreement.

It is a term of this agreement that in the event of such an Arbitrator to whom the matter has been originally referred dying or being unable to act for any reason, the owner, at the time of such death of the Arbitrator or his inability to act as Arbitrator, shall appoint another person to act as the reference from the stage at which it was left by his predecessor.

Notwithstanding anything contained in any of the aforesaid clause, the hirer agrees that the owner shall be entitled to vary the Instalments of hire money in the event of a change occurring in the lending rates charged to the owner by its. bankers Consequently, for every change in the banks lending rates half per cent per annum the instalments of hire money as mentioned in the Second Schedule, falling due on or after ' the date of such change shall at and revised by the amounts mentioned in the Third Schedule to this Agreement.

(b) The venue of arbitration proceedings shall be at Madras."

14. The lower court has taken the view that this is not an hire purchase agreement but only a financial agreement and therefore this agreement cannot be enforced at all. For the said purpose, it has taken note of the fact that subject matter of registration stands in the name of respondent.

15. In terms of agreement I do not think that the lower court was right in coming to the conclusion that the agreement is not enforceable. The document begins with the statement i.e. agreement executed with M/s. Sugal & Damani finlease Ltd. (hereinafter called the Owners) and the plaintiff (hereinafter called the Hirer) so; who is the owner is defined under the agreement itself. It is in terms of this agreement.. the respondent has entered its name in the registration certificate. Whether it is hire purchase agreement or financial agreement there is agreement between the parties to the suit and those who have agreed that all disputes and difference claims under this agreement will have to be referred to an arbitration. The question as to the interpretation to the agreement i.e. whether the plaintiff the owner and the defendant is a financier or the owner Is also a dispute or difference arising out of the agreement and that also will have to be decided “only as per the arbitration clause.” It could be seen from this agreement that the defendant is given the power to seize the vehicle if default is committed. Whether the default is committed or not and whether the defendant was justified in seizing the vehicle also will be a dispute coming under clause 22. The question whether the plaintiff is entitled to get back the vehicle or its value depends on the interpretation of the agreement and the power to seize to seize the vehicle. Form the relief sought for in the plaint, it is clear that of the most reliefs are” connected with the arbitration agreement.

16. An argument was taken by the learned counsel that the written statement has already been filed and therefore. It must be taken that the defendant has waived his claim for arbitration. The submission cannot be accepted, the defendant has filed an application under Section 8 long before he filed his first statement of, in defence and even/ the written statement. It has taken the contention that the suit is not maintainable in view of the arbitration clause.

17. It is further argued by the learned counsel for the respondent that the act of defendant is illegal and unauthorised as such disputed questions of fact are not to be referred to arbitration. I do not find any merit in his submission. Merely because of there is some dispute that will not taken away, the jurisdiction of the

arbitrator when the parties have voluntarily agreed to resolve the dispute under the Act. It is also well settled that under Section 8 (1) of the Arbitration and Conciliation Act, that on the part of judicial authority, if a party so requests not later than submitting to his first statement on the substance of the dispute to refer the parties to arbitration if an action is brought before it has to direct the parties to refer to arbitration. The basic principle accepted under the Act, is whether the parties have contracted the arbitration they must go. The court must be lenient towards directing the parties to seek the redressal through arbitration once they have chosen for that course. A reading of the Section also make it clear that section 8(1) is a mandatory provision and when the conditions are satisfied, the court shall refer the parties to arbitration. The court has no discretion in that matter Section 8(1) says that the court shall refer the parties to arbitration. In this case, even though the plaintiff has contended that the action of the defendant is fraudulent or dishonest, absolutely no materials are placed to substantiate the same. Atleast a bona fide case of fraud or dishonesty must be made out, for, otherwise the tendency must be to refer the parties to arbitration.

18. I set aside the order of the lower court and I.A.No. 7698 of 1997 in O.S.No. 1536 of 1997 is allowed to and there will be a direction to the plaintiff to submit the claim before the arbitrator and if any such claim is made the defendant shall appoint the arbitrator as per the Clause 22 of the agreement.

19. In the result, the impugned order is set aside and the revision is allowed. There will be no order as to costs. Consequently, C.M.P.No. 10957 of 1999 is closed