Case No. 76

IN THE COURT OF JUDICATURE AT MADRAS

Present : E. Padmanabhan J.

C.R.P.No. 839 of 1999 8th April, 1999

M/s. Tata Finance Ltd., having its Registered Office
At Bombay House, Chennai Petitioner

Vs.

H.P. Md. MADAR, CHENNAI Respondent

Finance transactions - agreements containing both arbitration clause and the power to repossess - breach of the agreement condition ***ipsofacto*** enables the financier to exercise the power to repossess - no requirement to go before the authority or arbitrator - both the clauses operate independently

The breach of the stipulation or the failure to pay the instalments by the respondent ipso facto enables the revision-petitioner to exercise the power to repossess the vehicle and for such possession, there is no requirement to go before any other authority much less before the Arbitrator. Clause 20 is independent in its operation and the said clause is in no way curtailed by clause 25 of the agreement. The learned counsel for the respondent is not correct in contending that clause 25 of the agreement. The learned counsel for the respondent is not correct in contending that clause 20 of the agreement is also subject to clause 25 and the contention that there could be no repossession except after arbitration cannot be sustained in Law. Such a contention is born out of a misconception of hire purchase system.

(B) Arbitration and Conciliation Act (1996), Secs. 1(3) and 85 - Arbitration Act (Xof 1940 - General Clauses Act (x of 1897), Secs. 8 - Hire purchase agreement in respect of bus entered into on 26-11-1996 - Clouse 25 of agreement Stipulating that all disputes etc., arising from the agreement shall be settled by an arbitrator in accordance with the provisions of the old Act - in spite of repeal, clause 25, held, was not rendered ineffective.

According to the counsel for the respondent, the Arbitration Act, 1940 was not in force on the date when the agreement came to be concluded, and that therefore the clause 25 is unenforceable. The Arbitration Act, 1940 was repealed and replaced by the Arbitration and Conciliation Act, 1996 and it is deemed to have come into

force on the 25th day of January, 1996 as seen from sub-sec.(3) of Sec. 1 of the Act. Therefore, it follows that on 26.11.1996 the Arbitration Act, 1940 stands repealed and the new Act namely the Arbitration and Conciliation Act, 1996 and come into force which will govern the arbitration clause as well. In terms of Sec. 8 of the General Clauses Act and by legal fiction as well as the repealed Arbitration Act, 1940 and by the provisions of the Arbitration and Conciliation Act, 1996, it is obvious that in the place of the Arbitration Act, 1940, the provisions of the Arbitration and Conciliation Act gets attracted and it applies. This is axiomatic. Sec.85 of the Arbitration and conciliation Act provides that notwithstanding such a repeal, the provisions, of the said enactment shall apply in relation to arbitral proceedings which commenced before the 1996 Act came into force unless otherwise agreed by the parties and the provisions of the new enactment shall apply in relation to arbitral proceedings which commenced on or after 1996 Act comes into force. Merely because the Arbitration Act, 1940 had been repealed, it cannot be said that clause 25 has become ineffective or rendered otiose. Such a contention cannot be accepted.

Case referred to :

Official Liquidator v. Commissioner of Police, (1969) C.L.J 5. (Para.12)

Petition under Sec. 115 of Act V of 1908 praying the High Court to revise the order of the (I Assistant Judge), City Civil Court, Madras, dated 29.01.1999 and made in I.A. No.16881 of 1998 in O.S. No.4761 of 1998

T.K. Seshadri, for Petitioner

R. Kamesh, for Respondent

ORDER

This revision is directed against the fair and decretal order dated 29.01.1999 made in I.A. No. 16881 in O.S. No.4761 of 1998 on the file of the First Assistant Judge, City Civil Court, Chennai.

2. The contesting respondent lodged a caveat on 16.03.1999, when the revision came up for admission. This Court directed the learned counsel for the revision petitioner as well as the caveator to be ready for final hearing of the revision petition itself as the issue raised in the revision will decide the very suit itself.

3. Mr. M.S. Palaniswamy, learned counsel for the respondent expressed willingness for the immediate disposal of the revision petition. Accordingly, the revision was taken up with the consent of either side on 23.030.1999.

4. Heard Mr. T.K. Seshadri for the revision petitioner and Mr. M.S. Palaniswamy and Mr. Kamesh for ;the respondent.

5. The factual matrix requires a mention. The respondent in this revision petition instituted O.s. No.4761 of 1998 on the file of the 1 Assistant Civil Judge, Chennai seeking for declaration that the repossession of the bus bearing Registration No.KA-05-B-7899 on 8.6.1998 is illegal and high-handed and for consequential mandatory injunction directing the defendant to release the said But to the plaintiff forthwith and for other incidental reliefs. The said suit is pending. Pending the suit, the defendant took out an Interlocutory Application in I.A. No.16881 of 1998 under Sec.8 of the Arbitration and Conciliation Act, 1996 requesting the court to refer the plaintiff and the defendant in the suit to arbitration as agreed to in the hire purchase agreement admittedly executed by the plaintiff. The said application was resisted by the plaintiff contending that the defendant had repossessed the but high-handedly without resorting to arbitration and that the relief prayed for will not fall within the scope of dispute for which arbitration has been provided in the hire purchase finance agreement entered between the parties and therefore the application is not maintainable.

6. The court below by order dated 29.11.1999 rejected the application holding that suit as instituted by the plaintiff is maintainable and that the application is not maintainable either on facts or in law. Being aggrieved, the present revision has been preferred by the defendant, in the said suit.

7. Even on 16.3.1999, after hearing for a while this Court made it clear that instead of an arbitrator being appointed by the defendant/hire purchase financier in terms of the agreement, this Court itself will appoint an arbitrator and all the disputes between the parties would be gone into before the said Arbitrator and this Court required the counsel for the either side to get instructions. On 23.3.1999 Mr. T.K. Seshadri, the counsel for the petitioner on instructions reported that the revision petitioner is agreeable for such a course for expeditious disposal of the dispute even thought the revision petitioner is anxious to appoint its own Arbitrator in terms of the hire purchase agreement. However, the learned counsel for the respondent was not willing to adopt such a course and hence arguments were advanced on merits.

8. This court makes it clear that the revision has to be decided on merits and on the interpretation placed on the arbitration clause contained in the hire purchase agreement entered between the parties.

9. Admittedly the vehicle in question is a new vehicle with respect to which the defendant/hire purchase financier entered into an hire purchase agreement with the defendant. The defendant also admits the execution of the hire purchase agreement and there is no challenge to any portion of the agreement. The relevant clauses in the hire purchase agreement in this respect are to be extracted for immediate reference. A copy of the hire purchase agreement placed before the court by the counsel, for the revision petitioner. The same has been admitted to be correct by the respondent as well.

10. The hire purchase agreement is dated 26.11.1996 in respect of the vehicle in question. Clause 20 of the hire purchase agreement in terms of which the vehicle has been taken repossession by the defendant reads thus:

"28. Upon the expiration of earlier termination of this Agreement, the Hire shall if required by the owners, deliver the vehicle to the owners at the address of the owners stated in the agreement or at such other address as the owners may specify. It not so required, the Hirer shall hold the vehicle available for collection by the owners or their agents and the owners or their agents may without notice, retake possession of the vehicle and may for that purpose enter upon any land or buildings on or in which the vehicle is believed by the owners or their agents to be situated, and to remove the vehicle. The hirer alone and not the owners shall be responsible for any make goods all damages caused to the land or buildings by such removal."

Clause 25 of the same hire purchase agreement provides for settlement of dispute by Arbitration in respect of difference or disputes or claims arising out of the said agreement, Clause 25 reads thus:

"25. All disputes, differences and/or claims arising out of these present or as to the construction, meaning or effect hereof or as to the right and liabilities of the parties hereunder shall be settled by arbitration to be held in Bombay in accordance with the provisions of the Arbitration Act, 1940, or any statutory amendment thereof and shall be referred to the sole arbitration of a person to be nominated by the owners. In the event of death, refusal, neglect, inability or incapability of the person so appointed act as an arbitrator, the owners may appoint a new arbitrator. The

award of the Arbitrator shall be final and binding on all parties concerned and may be made a Rule to the High Court of Judicature at Bombay or any other court of competent jurisdiction within the city of Bombay."

11. It is the specific case of the revision petitioner that on the failure of the respondent to pay hire charges, the petitioner had exercised the right under the hire purchase agreement to repossess the vehicle and on 8.6.1998 the revision petitioner had taken repossession of the vehicle in question. It is further pointed out by the petitioner that the revision petitioner is the absolute owner of the vehicle as it is a hire purchase on a new vehicle and he is entitled to repossession and sell the vehicle in case of any default and adjust the sale proceeds against the dues of the respondent.

12. The power of repossess the vehicle by hire purchase financier, in the present case owner of the vehicle is well settled in *Official Liquidator v. Commissioner of Police, (1969) I C.I.J 5,* wherein Ramaprasada Rao, J., as he then was held thus:

"With the advancement of commerce and industry, a new outlet and marketing system commonly known as "hire-purchase system" has been introduced. Under this system the mutual rights and obligations of a lender and a borrower or, to adopt the words used in hire-purchase agreement, the 'owner' and the 'hirer' are curiously 'Veiled in mercantile allegorical language. South inherence of allegory and peculiar words in the documentation of the system has compulsorily led Courts of Law to pierce through such a commercial veil and find out the real scope and intendment of the bargain. Courts are bound to be astute in interpreting them. As Lord Esher, M.R. said in *Modell v. Thomas Co.* "…the Court is to look through or behind the documents and to get at the reality."

Such a penetration in behind what appears on the fact of the record is no doubt an exception to the rule, "What is expressed makes what is silent cases." But such exceptions are bound to be engrafted in circumstances where a well instructed judge finds that what is patent is not the reality but what is latent. It is this peculiar mode of interpretation that has to be necessarily adopted while scrutinizing a hire purchase agreement. Such type of agreements are two fold. One is entered into between the financier and the customer (who are respectively described as owner and hirer in the hire-purchase agreement) in a case where the customer secures a new vehicle from a dealer but is unable to pay the price therefore to dealer. To secure accommodation he straight away approaches the financier, who purchases the vehicle from the dealer, through the instrumentality of the customer and in return enters into a hire-purchase

agreement with the customer, providing therein a right to the customer to become the owner after payment of all dues to the financier or on paying a nominal price as agreed to. Besides other usual terms, the vehicle has to be registered in the name of the financier as owner, and a right of seizure of the vehicle in case of default of the customer is also provided. But to satisfy the provisions of the Motor Vehicles Act, the certificate of registration, is kept in the name of the customer.

In the second form of hire-purchase agreement, usually adopted, the customer is the indisputable owner of the vehicle and it is so registered in his name under the Motor Vehicles Act. He requests the financier to grant a loan on the security of the vehicle. This is granted and a hire-purchase agreement is entered into. The terms, *inter alia,* of this type of agreement provides that on payment of the entire hire as contemplated in the agreement and in some cases on paying a nominal price, the customer (called hirer again) becomes the sole owner. There is also the right of retaking the vehicle on default of the hirer in any manner as stipulated ordinarily, the clause vesting in the hirer an option to purchase the vehicle or goods as the case may be would be absent. But its absence does not detract the real legal significance of the agreement.

Thus it is seen that whilst in the first type of hire-purchase agreement, the property in the goods always remains with the financing company and the customer or hirer becomes the owner thereof instant he pays off the dues or exercises his option, in the second type of hire-purchase agreement, the Intention as gathered from the content and terms of the agreement is, not to transfer any interest in the vehicle by the customer or hirer to the financing company, notwithstanding, there appears in the ancillary documents connected with such a hire-purchase agreement, a sale letter by the hirer in favour of the financing company is described as the owner and the customer as hirer. But in some cases, in the first type of agreement, the vehicle is registered in the name of the hirer as owner under the Motor Vehicles Act. This apparent paradox has to be reconciled. It can be done if we appreciate that the description of the customer as the owner under the Motor Vehicles Act is to satisfy its statutory norms. This is one of those cases in which the technical meaning of the word has to be followed, as it is sometimes the rule-see *Laurence Arthur Adamson v. Melborne and Metropolitan Board of Works.* In the view of the Supreme Court, such a factum of registration under the Motor Vehicles Act in the name of one or the other of the parties to a hire purchase agreement, may not be determinative of the ownership of the vehicle even so the learned Judges would say that undue importance to the sale letter in the second type of the hire-purchase agreement cannot be

attached - *vide: K.L.Johar C. v. Deputy Commercial Tax Officer and Sundaram Finance Ltd. v. State of Kerala.* The distinction between the first type of hire-purchase agreement (hereinafter referred to as the finance hire-purchase agreement) and the second type of hire-purchase agreement (hereinafter referred to as the refinance hire-purchase agreement) has been well brought out by the Supreme Court in *Sundaram Finance Ltd. v. State of Kerala* thus.

The agreement, ignoring variations of detail, broadly takes one or the other of two form; (1) When the owner is unwilling to look to the purchaser of goods to recover the balance of the prices, and the financier who pays the balance of the price 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 installments 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. v. Deputy Commercial Tax Officer,* dealt with a transaction of this character. (2) In the other form of transaction, 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 of 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."

13. The power to repossess was exercised by the revision petitioner in terms of Clause 20 of the Hire Purchase Agreement. It is rightly pointed out by Mr.T.K.Seshadri for possession the vehicle in exercise of the stipulation contained in Clause 20 of the agreement, there is neither warrant, nor there is any requirement for the revision petitioner to go before the Arbitrator or any other authority as the very agreement itself enable the petitioner to repossess the vehicle in case of default or one or more of the other contingency stipulated in the agreement.

14. Though the learned counsel for the respondent contended that the vehicle cannot be re-possessed by the hire purchase financier, be it a new vehicle, without recourse to the arbitration. Such a contention cannot be sustained in the light of the earlier pronouncement of this Court as well as clause 20 of the Agreement. The breach of the stipulations or the failure to pay the instalments by the respondent *ipso facto* enables the revision petitioner to exercise the power to repossess the vehicle and for

such repossession, there is no requirement to go before any other authority much less before the arbitrator. Clause 20 is independent in its operation and the said clause is in no way curtailed by Clause 25 or the agreement.

15. The contention to the contra raised by the learned counsel for the respondent cannot be sustained as such a contention will render the very stipulation ineffective and otiose. The learned counsel for the respondent is not correct in contending that clause 20 of the agreement is also subject to clause 25 and the contention there could be no repossession except after alienation cannot be sustained in law. Such a contention is born out of misconception of the very 'hire purchase system'.

16. The learned counsel for the petitioner contended that in terms of Clause 25 of the hire purchase agreement the parties have agreed that all disputes, differences or claims arising out of the agreement or as to the construction manner or effect or as to the rights and liabilities of the parties under the agreement shall be settled by arbitration to be held in Bombay in accordance with the provisions of the Arbitration Act, 1940. Thus the parties to the agreement have agreed for an arbitration in case of dispute or difference.

17. The present suit has been filed by the respondent for declaration that the repossession of the vehicle is illegal and high handed and for consequential mandatory injunction directing the petitioner to release the bus. This dispute definitely falls within the arbitration clause of the agreement, as it is claim of difference or dispute which had arisen between the plaintiff and the defendant in the suit and such a difference or claim or dispute has to be decided only in terms of clause 25 of the agreement.

18. It cannot be assumed that clause 25 of the agreement, will not take in the present dispute between the parties. The entire arbitration clause namely clause 25 has been extracted above and it is obvious and definite that the said clause takes in the entirety of the suit claim and it is not as if the suit claim will not attract arbitration clause or will fall under clause 25 of the agreement which provides for settlement of disputes by arbitration. The contention to the contra put forward by the respondent cannot be sustained as the clause 25 takes in all disputes, differences arising out of the agreement between the parties which includes as to whether repossession in illegal or invalid or whether the revision petitioner had to release the vehicle or for other consequences are to be decided by the Arbitrator to be appointed in terms of clause 25 of the agreement.

19. The learned counsel for the respondent nextly contended that clause 25 of the agreement provides that an Arbitrator to be appointed under the said clause to settle the disputes if accordance with the provisions of the Arbitration Act, 1940 or by any statutory amendment thereof and reference shall be made to the sol arbitrator to be nominated by the owner name the petitioner. According to the learned couns for the respondent, the Arbitration Act, 1940 ….not inforce on the date when the agreement came to be concluded. Therefore the said clau——arbitration Act, 1940 stands repealed and the new Act namely the Arbitration and Conciliation Act, 1996 and come into force, which will govern the Arbitration clause as well.

20. In terms of Sec.8 of the General Clauses Act and by legal fiction as well the repealed Arbitration Act, 1940, and by the provisions of the Arbitration and Conciliation Act, 1996, it is obvious that in the place of the Arbitration Act, 1940 the provisions of the Arbitration and Conciliation Act, 1996 gets attracted and it applies. This is axiomatic Sec.85 of the Arbitration and Conciliation Act, 1996 provides that notwithstanding such a repeal the provisions of the said enactments shall apply in relation to Arbitral proceedings which commenced before the 1996 Act came into force unless otherwise agreed by the parties and the provisions of the new enactment shall apply in relation to arbitral proceedings which commenced on or after 1996 Act comes into force. Merely because the Arbitration Act, 1940 has been repealed, it cannot be said that Clause 25 has become ineffective or rendered otiose. Such a contention cannot be accepted.

21. Mr.T.K.Seshadri, the learned counsel for the petitioner is well found in his contention that the arbitration clause agreed to between the parties in the hire purchase agreement falls within the ambit of the expression Arbitration Agreement as provided in Sec.7 of the Arbitration and Conciliation Act, 1996. When once an action is brought in a matter which is the subject matter of arbitration agreement before a judicial authority and if a party so applies not later than submitting his statement on the issues of the dispute, such judicial authority has to refer the parties to arbitration in terms of Sec.8 . Sec.8 is mandate and the court below in terms of the Sec.8 ought to have referred the parties to arbitration and in terms of the said Act the parties are required to proceed further.

22. The court below had misconstrued the scope of Secs.7 and 8 of the Arbitration and Conciliation Act, 1996 and in its approach. The court below had proceeded as if

Sec.8 has no application and that arbitration clause will not take in the present dispute. This Court is unable to sustain the view taken by the court below. The view taken by the court below suffers with error apparent on the face of the record and it is an illegality committed by the learned trial Judge. Sitting in revision, this court has to interfere as the learned. Trial Judge has acted with material irregularity and illegality in the exercise of its jurisdiction.

23. Mr.T.K.Seshadri, the learned counsel for the petitioner relied upon the decision of the Apex Court in *M.M.T.C. Ltd. v. Sterlite Industries (India) Ltd., A.I.R. 1997 S.C. 605* and contended that the Arbitration agreement entered between the parties is valid and it satisfies the requirements of Sec. 7 of the new Act and therefore in terms of Sec.8, the court below should refer the parties to arbitration in terms of the agreement. The Apex Court while considering Sec.7 of the Arbitration and Conciliation Act, 1996 held thus:

"Sub-sec.(3) of Sec.7 requires an arbitration agreement to be in writing and Sub-sec.(4) describes the kind of that writing. There is nothing in Sec.7 to indicate the requirements of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Sec.10 which is a part of machinery provisions for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the new Act as contended by the learned attorney General.

The question is:

Whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the new Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Sub-sec.(1) of Sec.10 is satisfied and Sub-sec. (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Sec. 7 of the Act, and therefore is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Sec. 11 of the New Act."

24. The question whether repossession of the vehicle is valid in law or invalid and what are the consequence will also be an incidental question which requires to be decided by the Arbitrators in the disputes which has to be settled by the Arbitrator. It

is also to be pointed out that the respondent had not challenged any portion of the hire purchase agreement and therefore the respondent is bound by the stipulation which the respondent had agreed to abide.

25. In the circumstances, the fair and decretal order passed by the court below are set aside and the parties are to proceed further and there will be an order as prayed for in I.A. No.16881 of 1998 in O.S. No.4761 of 1998 on the file of the court below in terms of the provisions of The Arbitration and Conciliation Act, 1996. The parties shall bear their respective cost.

B.S. ———— Revision petition allowed.