

M/S. Manas Constructions vs L & T Finance Ltd. & Anr. on 10 October, 2017

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

FIRST APPEAL

BEFORE: HON'BLE MR. PREM NARAIN, PRESIDING MEMBER
For the Appellant : : Mr. J.N. Singh, Advocate For the Respondent
Dated : 10 Oct 2017 ORDER

The present appeal has been preferred against the order dated 07.09.2016 passed by the Maharashtra State Consumer Dispute Redressal Commission, Mumbai, Circuit Bench at Aurangabad in C.C. No. 17 of 2015. By way of the impugned order, the consumer complaint was dismissed with cost.

2. The brief facts of the case are that in the year 2013, the complainant company purchased crawler excavator for a total sale consideration of Rs. 42,40,836/-, of which Rs. 36,04,000/- was financed by the opposite party vide Loan cum Hypothecation Agreement dated 28.06.2013. It was agreed that the loan would be repaid along with interest @ 6.83% p.a. in 46 EMIs. The remaining balance, i.e. margin money was borne by the complainant. According to the complainant, he purchased the excavator for doing business for the purpose of earning his livelihood by means of self-employment. It is the case of the complainant that till 09.01.2015, the complainant deposited total amount of Rs. 8,98,771/- towards repayment of loan amount with interest. According to the complainant, despite his willingness to repay the outstanding loan amount with interest as per Agreement, few men of the opposite party took away the machine without any notice/intimation after forcibly taking the possession by breaking the lock as the driver of the equipment refused to hand over the keys. It is the case of the complainant that the opposite party forcibly and without prior intimation repossessed the machine even when the period for repayment of the loan amount had not expired and refused to return the equipment despite repeated requests and willingness to settle the outstanding loan amount.

3. Thereafter, on 18.2.2015 the respondent filed application under Section 9 of the Arbitration and Conciliation Act, 1996 claiming several reliefs including relief of possession of the machine although the possession of the machine was already taken forcibly. The appellant also filed application U/s. 9 before the Hon'ble High Court praying for the various injunctive reliefs restraining the respondent from disposing of the said Equipment/machine but meanwhile, hurriedly during the pendency of the application before the Hon'ble High Court even by filing false affidavit, disposed of the machine. Aggrieved by the acts of the opposite party, the complainant filed a consumer complaint before the State Commission.

4. The opposite party contested the claim of the complainant on the ground that the complainant is not a consumer but a proprietorship firm engaged in earning profits/commercial purpose, hence the present complaint under the Consumer Protection Act cannot be maintainable. It was contended that the complainant committed default in repayment and thus the equipment was repossessed in

compliance with the procedure as provided in the agreement. In this regard, it was further contended that demand notices were sent on 11.04.2014, 13.05.2014 and 17.12.2014 asking the complainant to settle the outstanding amount but he failed to settle the outstanding dues. The learned Counsel submitted that the complainant failed to respond even when the pre-sale notice dated 09.02.2015 was issued to him. It was also submitted that when the complainant initiated the arbitration proceeding, the consumer complaint cannot be maintainable. Hence, the present complaint needs to be dismissed.

5. The State Commission vide order dated 07.09.2016 held as follows:-

- "1. Consumer complaint No. 17/2015 stands dismissed.
2. The complainant shall pay to the opponents amount of Rs. 5,000/- towards cost and bear his own cost.
3. Copies of the judgment be supplied to both the parties".

6. Aggrieved by the said order, the complainant preferred the present appeal before this Commission.

7. Heard the learned counsel for the appellant at the admission stage and perused the record. Learned counsel for the appellant stated that the State Commission has dismissed the complaint on mainly two grounds. Firstly, the State Commission has held that the consumer complaint is not maintainable as the arbitration proceedings are going on. Secondly, the State Commission has held that the machine was purchased for commercial purpose and therefore, complainant was not a consumer. The learned counsel argued that Section 3 of the Consumer Protection Act, 1986 clearly states that the provisions of this Act are in addition to and not in derogation of the provisions of any other law for the time being in force. It was emphasized that proceedings under the Consumer Protection Act can continue even if the remedy has been claimed elsewhere. Learned counsel for the appellant has relied upon the following judgments:

- (1). National Seeds Corporation Limited Vs. M. Madhusudhan Reddy and Another, (2012)2 SCC 506, wherein the Hon'ble Apex Court held as follows:-

"29. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section

8 of the Arbitration and Conciliation Act, 1996 Act. Moreover, the plain language of Section 3 of the Consumer Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."

In DLF Vs. MridulEstate (Pvt.) Ltd., Revision Petition no. 412 of 2011, decided on 13.05.2013, wherein this Commission held as follows:-

"32. In N.K. Modi's case (supra) and Skypay Courier's Case (supra), the Hon'ble Supreme Court in the context of the provisions of the C.P. Act and in particular Section 3 of the Act and Arbitration Act of 1940 has held that the Consumer Fora created under the C.P. Act are at liberty to proceed with the matter in accordance with the provisions of the Act rather than relegating the parties to the Arbitration proceedings pursuant to an Agreement entered into between the parties. Ld. Counsel appearing for the Opposite Parties submitted before us that these judgments would not be applicable as they are in the context of the Arbitration Act of 1940. That the Arbitration Act of 1996 has brought out fundamental changes and in view of the Arbitration Act of 1996, it is mandatory on the part of the Judicial Authorities to refer the parties to the arbitration. That the mandate of Section 8 of Arbitration Act of 1996 would be defeated if the matter is not referred to arbitration in the cases where the parties have agreed to refer the dispute to the Arbitration. We do not find any substance in this submission as well. Hon'ble Supreme Court in Madhusudhan Reddy's case (supra) after posing the following questions for its consideration in para 31 of the judgment:-

The Ld. Counsel relied upon Section 8 of the Arbitration and Conciliation Act, 1996 and argued that in view of the arbitration clause contained in the agreements entered between the appellant and the growers, the latter could have applied for arbitration and Consumer Forums should have non-suited them in view of Section 8 of the Arbitration and Conciliation Act, 1996. held that the complaint filed under the C.P. Act would be maintainable and the consumer cannot be denied the relief by invoking the jurisdiction of Section 8 of the Arbitration Act of 1986. That Section 3 of the C.P. Act makes it clear that the remedy available in that Act is in addition and not in derogation of the provisions of any other law for the time being in force....

34. Another aspect in relation to the consumer disputes which has to be taken note of is that most of the complainants/consumers sign the agreement containing an arbitration clause under duress(instance is taken from Builder's agreement) because

the other party which is in a dominating position insists for it, else they would not enter into builders' agreement. In most of the cases, the builder who is in a dominating position reserves the right to appoint Sole Arbitrator to himself and the Arbitrator so appointed in most of the cases is the officer of the builder from whom it is almost impossible to expect an impartial and fair award. If the builder is allowed to have resort to the arbitration agreement contained in the Builder's agreement, going by the prevalent practice and little experience we have in the matters, the consumer would never be able to redress his genuine grievance. Legislature by providing the additional remedy under Section 3 of the C.P. Act has tried to take care of such a situation to redress the grievances of the small consumers.

35. Respectfully following the view taken by the Hon'ble Supreme Court in catena of judgments and in particular in Madhusudhan Reddy's case (2012)2 SCC 506, the question referred is answered in negative, i.e. in favour of the Complainants and against the Opposite Parties. It is held that the Consumer Fora constituted under the C.P. Act are not bound to refer the dispute raised in the complaint on an application filed u/s. 8 of the Arbitration Act of 1996 seeking reference of the dispute to an Arbitral Tribunal in terms of valid arbitration clause in the agreement entered into between the parties."

8. Coming to the commercial purpose, the learned counsel stated that the complaint clearly mentions that the machine was purchased for self-employment and for earning livelihood of the complainant. The complainant is not in the business of procuring and selling these machines. The complainant uses this machine himself and earns charges which he uses for the purpose of livelihood. From any angle, the purchase of the machine by the complainant cannot be considered as a commercial activity. The State Commission also questioned the fact that the complainant had put in margin money for the purchase of this machine from his own funds apart from the loan of Rs.36 lakhs from the OP. The State Commission has observed that the complainant has other income and that is why he has paid margin money more than Rs.6 lakhs for the purchase of this machine. The learned counsel mentioned that it was his personal money that was paid as margin money and this does not affect his status as consumer who purchased this machine for earning his livelihood by means of self-employment.

9. Coming to the merits, it was emphasized by the learned counsel that the complainant was ever willing to pay the remaining due amount of the loan when the machine was seized by the OP. The complainant had paid Rs.8,98,771/- when the machine was re-possessed by force. Learned counsel mentioned that he has merit in his case and this case should be decided on merit rather than on technical ground.

10. I have given a thoughtful consideration to the arguments advanced by the learned counsel for the appellant and examined the material on record. From the facts of the case, it is clear that both the parties have filed petitions for arbitration proceedings. In this regard, the State Commission has observed as under:

"Considering the undisputed fact that the arbitration proceedings U/s 9 of the Arbitration Act are pending before Hon'ble High Court and further the arbitrator is already appointed, we have no hesitation to accept the arguments advanced by Shri Narwadkar Advocate appearing for opponents. Section 3 of the Consumer Protection Act 1986 would come into play before filing the proceeding with any other competent authority and not pending the proceedings before the authority having the jurisdiction. Therefore we are unable to accept the arguments advanced by Shri Kalani Advocate appearing for the complainant."

11. I fully agree with the observation of the State Commission that the complainant cannot proceed under two Acts for the same grievance. It is true that Section 3 of the Consumer Protection Act envisages proceedings under the Consumer Protection Act as an additional remedy but it is clear that a person cannot proceed under two legal authorities under two different Acts for the same relief. Both the judgments relied upon by the learned counsel for the appellant seem to be inapplicable in the circumstances of the present case, as in those judgments, the arbitration proceedings, was not initiated whereas in the present case, the complaint has been filed during the pendency of the arbitration proceedings. Both the referred judgments only provide that in spite of the arbitration clause in the agreement, the proceedings under the Consumer Protection Act, 1986 are maintainable. As the proceedings under Arbitration Act are already going on, the proceedings under Consumer Protection Act, 1986 cannot proceed simultaneously. This Commission has already decided this issue in number of judgments as mentioned below:

(i) M/S. Magma Fincorp Ltd Vs Gulzar Ali, RP 3835 of 2013 decided on 17.04.2015, this Commission held as follows:-

"It is well settled that terms and conditions of the agreement to this effect do not bar jurisdiction of the Consumer Fora but when the parties opt to proceed, first of all, before the Arbitrator, in that event, the jurisdiction of this Commission stand barred".

(ii) Similar view has been taken by this Commission in the following other cases:

Beverly Park Maintenance Services Ltd Vs Kashmir Fab Styles Pvt. Ltd., II (2014) CPJ 109 (NC);

T. Srinivas & Anr Vs Srija Constructions, I (2016) CPJ 552 (NC) and Vishnu Chandra Sharma Vs Sriram finance company ltd. & Anr, III (2017) CPJ 211 (NC).

12. From the above judgments of this Commission, the view of this Commission is very clear that proceedings under the Arbitration and Reconciliation Act and that under the Consumer Protection Act, 1986 cannot go together. Thus, the complaint is not maintainable under the Consumer Protection Act, 1986 in the present case.

13. As the complaint is not maintainable under the Consumer Protection Act, 1986, I desist from considering other issues raised in the appeal.

14. Based on the above, discussion, as the complaint is not maintainable under the Consumer Protection Act, 1986, I do not find any force in the appeal and accordingly, Appeal No. 1621 of 2016 filed by the appellant is dismissed at the admission stage.

..... PREM NARAIN PRESIDING MEMBER