Kailash Baruah vs Hinduja Leyland Finance Company on 13 June, 2017

Author: Kalyan Rai Surana

Bench: Kalyan Rai Surana

THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

C.R.P. No. 215 OF 2015

Sri Kailash Baruah
... Petitioner

-Versus-

Hinduja Leyland Finance Co.
..Respondent

BEFORE HON'BLE MR. JUSTICE KALYAN RAI SURANA For the petitioner : Mr. KK Mahanta, Mr. K. Singha, Mr. KM Mahanta, Mr. P. Baruah, Advocates.

For the respondent	:	Mr. PJ Barman, Mr. M. Chetia, Ms. P. Phukan, Adv.
Date of hearing	:	07.06.2017
Date judgment	:	13.06.2017

JUDGMENT AND ORDER

Heard Mr. K.K. Mahanta, the learned Senior Counsel for the petitioner, namely, Kailash Baruah and Mr. P.J. Barman, the learned Counsel for the respondent, namely, Hinduja Leyland Finance Co. Ltd.

2) By filing the present application under Article 227 of the Constitution of India, the petitioner has assailed the order dated 17.11.2014 passed by the learned Civil Judge, Sivasagar, in Title Suit No. 7 of 2013, by virtue of which the parties were referred to arbitration under section 8 of the Arbitration & Conciliation Act, 1996.

3) The petitioner herein is the plaintiff in the said suit, which contained prayer for passing a decree of declaration that the repossession of the vehicle by the defendant (respondent herein) is void ab initio, illegal and cannot be acted upon, for recovery of the vehicle from unauthorized possession of the defendant, for passing a decree to handover the vehicle in good and running condition as well as ad-interim injunction and other reliefs as mentioned in the plaint. The case of the petitioner in the plaint is that he was the registered owner of a Tata winger (Mini Bus) bearing registration No. AS-04- AC-2337. The same was purchased in the month of May, 2011 to give employment to his son. The total cost of the said vehicle was Rs.5,56,500/- and the petitioner had availed a finance of Rs.4,38,000/- from the respondent. The petitioner admitted that he had executed a loan agreement, agreeing to repay the loan in 48 months by paying 47 monthly installments of Rs.13,994/- each. After paying a sum of Rs.2,48,395/- till the month of October, 2012, the petitioner was diagnosed of cancer as a result of which there was default in repaying the loan. However, in the middle part of December, 2012, the respondents arbitrarily dispossessed the petitioner of his property, as such, the petitioner had filed the said suit.

4) The respondent entered appearance in the suit and filed an application under section 8(1) of the Arbitration & Conciliation Act, 1996 and contended that in cause 23.0 of the Loan Agreement dated 31060 dated 31.05.2011, there existed a clause for settlement of all disputes through arbitration. The petitioner contested the said petition by filing written objection. The learned Civil Judge, Sivasagar, by the impugned order referred hereinbefore, referred the parties to arbitration, which is challenged herein.

5) On the prayer made by the learned Senior Counsel for petitioner, this Court by order dated 04.11.2016 had directed the respondent to produce the original copy of the Agreement. Accordingly, in course of time, the said Agreement bearing No. ASGWJO00249 was produced. The learned Senior Counsel for the petitioner had informed this Court that he along with his instructing counsel had inspected the same.

6) The learned Senior Counsel for the petitioner has made a short submission during the hearing of the matter. The points urged were -

a. none of the pages of the said agreement was signed by the lender, but only it contained rubber stamp impression of lender as "Abdul Mazid, Emp. Code: 16074", but it contained no signatures and, as such, without admitting but assuming that the said agreement could have been valid for any other purpose, the same was not a valid document for under section 7(4)(a) read with section 2(b) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "1996 Act" for brevity); and b. that along with the application under section 8(1) of the said 1996 Act, the respondent had filed only a photocopy and did not produce the original of the same before the learned Trial Court and, as such, in view of the mandate of law enshrined under Section 8(2) of the said 1996 Act, the learned Trial Court ought not to have entertained the said application; and c. that the learned Trial Court, by overlooking the said statutory provisions of law had acted illegally and with material irregularity, which has caused failure of justice.

7) Per contra, the learned Counsel for the respondent has strenuously argued in support of the impugned order. His points of argument was as follows -

a. By referring to the petition No. 1205 dated 20.06.2013, filed under section 8(1) of the 1996 Act, it was submitted that a duly notarized copy of the said Agreement containing arbitration clause was produced before the learned Trial Court. However, at that time, the petitioner's side raised no objection that the original agreement was not produced. Hence, the same amounts to acquiescence and, as such, the petitioner is precluded from agitating the said issue for the first time before this Court.

b. It is further submitted that the petitioner has admitted in the plaint that there existed an agreement between the parties and, as such, he cannot be permitted to deny the said agreement. c. There is no mandate under section 7(4)(a), that the agreement must be physically signed by the parties and, as such, the affixing of rubber stamp of the concerned officer/staff of the respondent constitutes due signature of the respondent in the agreement.

d. The back-cover-page of the original agreement contained the signature of two officers/staff of the respondent and, as such, no fault can be found with the non-availability of signatures on all pages of the Agreement, which is not even the requirement of law.

e. The petitioner had availed the benefit from the said loan agreement by purchasing the mini bus and, as such, he cannot be permitted to deny the agreement under any circumstances, even assuming but not admitting that the said agreement was not signed.

f. Oxford dictionary meaning of "parties" includes "a person or persons forming one side of the agreement" and, as such, the word "parties" as contained in section 7(1) must be given a liberal meaning and not a restricted meaning and, as such, as the said agreement contained the signatures of the borrower and the guarantor, the alleged absence of the signature of the respondent cannot be held to be fatal so as to deprive the respondent of their right to refer the parties to arbitration as per law and as provided under clause 23.0 of the loan agreement, which is binding on the parties.

g. Under the doctrine of severability, even if the agreement is abrogated, the clause providing for arbitration shall remain valid.

h. In support of his argument, the learned Counsel for the respondent has relied on the following case citations:-

i. Jugal Kishore Rameshwar Das V. Mrs. Goolbai Hormusji, AIR 1955 SC 812 (FB).

ii. Seth Banarsi Das V. The Cane Commissioner & Anr., AIR 1963 SC 1417 (Constitution Bench).

iii. National Agricultural Co-op. Marketing Federation India Ltd.

V. Gains Trading Co., (2007) 5 SCC 692 (Single Bench). iv. Great Offshore Ltd. V. Iranian Offshore Engineering & Construction Company, (2008) 14 SCC 240 (Single Bench).

8) On perusal of the trial court records, it is seen that in the plaint, there is a specific statement made in paragraph 4 of the plaint that "... the plaintiff had signed all the relevant documents including the Hire Purchase Agreement with the defendant on May, 2011....". The respondent herein, in their petition filed under section 8(1) of 1996 Act had specifically stated in paragraph 2 - "That the suit in dispute between the Plaintiff and the defendant on the basis of loan Agreement No. 31060 dt.31-5-11 in respect of the Vehicle bearing Engine No. 483DLTC55BYY704514, Chassis No. MAT 460071BUB01227 purchased by the plaintiff with the financial assistance from the defendant." In paragraph 3(a), it has been stated in sub-paragraph thereof that "Copy of the loan Agreement is filed herewith and market (sic.) as Annexure-A." In paragraph 4 it has been specifically stated "that the plaintiff and the guarantor had signed the agreement...", but nowhere there is a mention that the respondent herein signed the loan agreement. However, the copy of the loan agreement containing Sl. No. 31060, Contract No. ASGWJO 00249, attested by the Notary public on 19.06.2013, has been filed as Annexure-A. In page 1 thereof, the date of Agreement is mentioned as 31 day of June, 2011. It would be relevant to mention here that the learned Counsel for the respondent had produced the original Loan Agreement before this Court, which does not contain any date and the date column is left totally blank as follows - "This Loan Agreement is made on this ____ day of _____20____." The reverse-side of the front cover-page of the said original Loan Agreement contains two illegible initial/short signatures, one of Produce Executive and the other of Credit Administrator, but those two signatures are below the column under heading "Agreement & PDC Checklist". The page containing the said check-list together with two initial/short signatures is, however, not available in the notary attested copy of the Loan Agreement filed with the application under section 8(1) of the 1996 Act. But as stated herein before, all other pages of the Loan agreement paper-book, containing the First Schedule, Second Schedule appended thereto, only contains the rubber stamp impression of "Abdul Mazid Emp. Code: 16074" without any signature of any person on behalf of the respondent.

9) Thus, owing to the mention of the date of 31 day of June, 2011, which is not contained in the original Loan Agreement, it cannot be accepted that the document which was filed as Annexure-A to petition No. 1205/13 dated 20.06.2013 was the true copy or certified copy of the original document. Moreover, as there no 31st day in the month of June, 2011, the insertion of said date in the copy attested by Notary gives an impression that the copy of the Loan Agreement as produced before the learned trial court is prima facie unreliable.

10) The provisions of Section 7 of the Act, which sets out the requirement of a written arbitration agreement, reads as under:

"7. Arbitration agreement- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

11) From a plain reading of the provisions of Section 7(3) of 1996 Act it is provided that an arbitration agreement has to be in writing. The written arbitration agreement can also be inferred from other documents as specified in Section 7 (4) (a), (b) and (c). Further, Section 7(5) states that a reference in a contract "to a document containing an arbitration clause" would by itself constitute an arbitration agreement "if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

12) Going by the above requirement as spelt out in the provisions of Section 7 of the 1996 Act, the present agreement in original as produced before this Court does not pass the said requirement of law or test. As narrated above, the original agreement does not contain the date of "31 day of June 2011", as mentioned in the Notary attested copy produced before the learned trial Court. Therefore, it would be difficult to even arrive at a prima facie finding as to which of the two agreements were actually valid between the parties. Thus, in the absence of any other material to prima facie show which agreements the parties have been acting upon all this time, because both the said agreements have been brought on record by the respondent from their own custody and both do not contain the signature of the respondent's representative. As already stated above, the check-list signed by someone in the inside page of front cover was not accompanying the application under section 8(1) of the 1996 Act, nor it is shown to the satisfaction of this Court that the said signature was of the person whose rubber stamp was affixed on other pages.

13) The fact remains that for the purposes of Section 7 of the Act, there has to be an arbitration agreement in writing. There are no contemporaneous documents, in the form of correspondence exchanged between the parties, from which an arbitration agreement can be inferred. Therefore, it is

futile to look to Section 7(4) or Section 7(5) of the 1996 Act to find out whether apart from the two agreements produced by the respondent, there is any other document from which existence of arbitration agreement can be inferred, both the said provisions do not help in sustaining any of the said two agreements for the purpose of section 8(1) of the 1996 Act because both of them are unsigned by the respondent. I hasten to clarify that this is not to be confused with there being no agreement at all between the parties, because the fact remains that the petitioner did take a loan to purchase a commercial vehicle and, as such, the non-availability of signature of the respondent in the agreement shall not preclude the said party from availing any other remedy that the respondent may have under the law in force.

14) I am not inclined to accept the purported agreement containing signature of only the petitioner, which makes the document only a unilaterally signed document and does not satisfy the requirement of section 7(4)(a) of 1996 Act.

15) In so far as the non- filing of original agreement containing arbitration clause, I am of the opinion that the same is not fatal and the same is a curable defect, but the original agreement or its certified copy is required to be produced or brought on record at the time when the court is considering such application. In this connection I find support from the below referred two judgments:-

> a. In the case of Bharat Sewa Sansthan Vs. U.P. Electronics, Corporation Ltd., 2007 (7) SCC 737, the Hon'ble Apex Court has held that photocopies of the agreement could be taken on record under Section 8 for ascertaining the existence of arbitration clause. Following was stated in paragraph 24:
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> "24. The respondent Corporation placed on record of the trial court photocopies of the agreements along with an application under Section 8(1) of the Arbitration Act. The High Court, in our view, has rightly held that the photocopies of the lease agreements could be taken on record under Section 8 of the Arbitration Act for ascertaining the existence of arbitration clause. Thus, the dispute raised by the appellant Sansthan against the respondent Corporation in terms of the arbitration clause contained in the lease agreement is arbitral."

b. In the case of Ananthesh Bhakta represented by Mother Usha A. Bhakta V. Nayana S. Bhakta, (2016) 7 Supreme 633: AIR 2016 SC 5359, it was held as follows:-

> "22. Section 8(2) has to be interpreted to mean that the court shall not consider any application filed by the party under Section 8(1) unless it is accompanied by original arbitration agreement or duly certified copy thereof. The filing of the application without such original or certified copy, but bringing original arbitration agreement on record at the time when the Court is considering the application shall not entail rejection of the application under Section 8(2)."

16) Therefore, as the respondent did not produce the original agreement when the application under section 8(1) of 1996 Act was being heard, in terms of the ratio of the case of Ananthesh Bhakta (supra), the non- filing thereof when the matter was heard, was fatal. There cannot be a defence that the other side did not object to the said document, because it is contrary to the provisions of section 8(1) and 8(2) of 1996 Act, or the defect could have been cured at the time of hearing, which was not done.

17) Therefore, on two counts, the impugned order is not found to be sustainable. First, being that the original agreement was not produced before the learned trial court at the time when the learned court below was finally hearing the matter, which is not in terms of the provisions of section 8(1) of the 1996 Act. Secondly, none of the two agreements shown to this court satisfied the requirement of section 7(4)(a) of the 1996 Act, both not showing the signature of any representative of the respondent.

18) For the aforesaid reasons, this court finds that the learned trial court has committed jurisdictional error by referring the parties to arbitration.

19) Consequently, this application is allowed. As a result, the order dated 17.11.2014, passed by the learned Civil Judge, Sivasagar, in Title Suit No. 7 of 2013, is set aside and the said suit is restored to the file of the learned Civil Judge, Sivasagar, for disposal in accordance with law. The parties are directed to appear before the said learned court on 03.07.2017 without any further notice to seek further instruction from the said learned court.

20) It is clarified to make it clear that the observations made herein are only for the purpose of deciding the issues arising in the present matter before this Court and, as such, the trial court shall not be prejudiced by the observations made herein.

21) The parties are left to bear their own cost.

JUDGE

MKS