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(2022-1)205 PLR 149

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice G.S. Sandhawalia.

INDUSIND BANK LIMITED – Petitioner,

versus

MEHMOOD – Respondent.

Civil revision No.1067 of 2021

Civil Procedure Code, 1908 (V of 1908) Order 7, Rule 11 – Petitioner-Bank has resorted to recovering a vehicle by using force for which loan installments had already been deposited with it – Instead of proceeding against the vehicle which was in default, it has chosen to recover the vehicle, for which the dues had already been paid – The arbitration clause itself also provides that the arbitration is to be conducted at Chennai whereas the parties are belonging to Palwal and Faridabad, in Haryana and, therefore, the agreement as such itself is unconscionable and one sided being opposed to public policy – Court below are well justified in retaining the jurisdiction with them and not referring the matter to arbitration – Even otherwise it is settled principle that the rejection of plaint is serious matter and should only be resorted in the extra-ordinary circumstances – Arbitration and Conciliation Act, 1996 (26 of 1996), Section 8 (2).

Cases referred to:-

1. 2010(1) KLT 209, *T.M.L. Financial Services Ltd. v. Vinod Kumar.*

2. AIR 1969 SC 78, *Dhulabhai v. State of M.P.*

3. 2012 AIR SC (Civil) 389, *Citicorp Maruti Finance Ltd. v. S. Vijayalaxmi.*

4. 2007(2) SCC 711, *Manager, ICICI Bank Ltd. v. Prakash Kaur.*

5. 2010(1) SCC 72, *N. Radhakrishnan v. M/s Maestro Engineers.*

6. (2017-3)187 PLR 066 (SC), *A. Ayyasamy v. A. Paramasivam.*

7. 2009(9) SCC 478, *Industrial Investment Bank of India Ltd. v. Bishwanath Jhunjhunwala.*

8. 2015 SCC (7) 337, *Central Bank of India v. C.L. Vimala.*

9. 2015(8) SCC 331, *P.V. Guru Raj Reddy v. P. Neeradha Reddy.*

10. 2018(6) SCC 422, *Chotanben v. Kiritbhai Jalkrushnabhai Thakkar.*

Mr. Amarjit Singh Virk, for the petitioner. *(proceedings through video conferencing.)*

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G.S. Sandhawalia , J . – *(3rd September, 2021)* – In the present revision petition filed under Article 227 of the Constitution of India challenge has been raised to the order passed by the Learned Additional Civil Judge (Sr. Division), Hathin, District Palwal dated 01.02.2021 (Annexure P-7), whereby the application under Order 7 Rule 11 cpc for rejecting the plaint had been dismissed and prayer for referring the matter to arbitration had been declined.

2. The challenge has also been made to the order of the Additional District Judge, Palwal dated 15.03.2021 (Annexure P-9), whereby the said order had been upheld, though for different reasons.

3. Counsel for the petitioner has vehemently argued that the Courts below were not justified to reject the prayer as such of the petitioner to refer the matter to arbitrator, keeping in view Clause 20 of the Agreement with respondent-plaintiff dated 01.08.2021 (Annexure P-1) in which he has been shown as co-borrower and third party.

4. The case of Mr. Virk, appearing for the petitioner is that as per Clause 20 of the agreement there is a provision for set off and a lien against the properties of the co-borrowers also was held by the lender as secured asset against the amount in respect of which the default had been committed under the agreement. It is, thus, submitted that as per Clause 15.3 there was power to repossess and possession of the hypothecated asset in question had also been done on 14.01.2021 by the lender.

5. A perusal of the paper-book would go on to show that the Learned Civil Judge had rightly rejected the application under Order 7 Rule 11 CPC read with Section 5 & 8 of the Arbitration and Conciliation Act, 1996. The reasoning contained in the said order was that the original arbitration or certified copy thereof had not been placed on record but xerox copy of loan agreement had been placed on record. The plaintiff as such had denied having entered into such a loan agreement and it was held that it would be a matter of evidence which cannot be looked into at this stage and there were mixed questions of facts and law which could be decided after leading cogent evidence by the parties. Resultantly, the petitioner was asked to file written statement and reply to the injunction application.

6. The appeal was dismissed by the Lower Appellate Court on the ground that there was a amount due of Rs.30,42,304/- for which a legal notice dated 15.12.2020 (Annexure P-3) had been sent for invocation of right of lien. It was noticed that the plaintiff had disputed the execution of the loan agreement in question in as much as the defendant-petitioner had claimed the same was executed on 10.02.2015, whereby the copy of the loan agreement showed that it was on 01.08.2018. It was also noticed that the plaintiff had filed a civil suit, which was pertaining to Tata Truck of the principal borrower Khurshid and that was not a subject matter of present financed vehicle. It was also noticed that there was an illegal seizure of the vehicle and reliance was placed upon the judgments passed in '*T.M.L. Financial Services Ltd. v. Vinod Kumar*', [1] 2010 (1) KLT 209 that once there was illegal seizure of vehicle, the matter would not covered under the Arbitration Act, since it was opposed to public policy and only the Civil Court can entertain the matter. Reliance was placed upon the judgment passed in '*Dhulabhai v. State of M.P.*', [2] AIR 1969 SC 78, which had also been relied upon by the Kerala High Court. Similarly, reliance was also placed upon '*Citicorp Maruti Finance Ltd. v. S. Vijayalaxmi*', [3] 2012 AIR SC (Civil) 389 to hold that the vehicle which had been possessed was no longer on hypothecation and all the EMIs had been paid and therefore, the action of the Bank to effect recovery by use of muscle power and not by due process of law was deprecated.

7. A perusal of the paper-book would go on to show that two agreements were entered into by the petitioner-Bank. The first one on 11.12.2015 (Annexure P-2) in which the principal borrower was Mehmood, the present respondent-plaintiff. The co-borrower was Khurshid in the said case. It is not disputed that this agreement of 2015 is pertaining to vehicle in question bearing no.HR-73-6672, which has wrongly been seized.

8. Similarly, at a subsequent point of time on 01.08.2018 the agreement in same terms (Annexure P-1) was

entered into with one Khurshid Khan and the respondent-plaintiff Mehmood was shown as coborrower. The vehicle in question for the said agreement for which there is a default of payment of Rs.30,42,304/- is HR-38Y-8317. This fact would be clear from the notice dated 15.12.2020 (Annexure P-3), which was served upon both plaintiff Mehmood and Khurshid Khan. Rather the said notice would go on to show that full payment has been made against the vehicle which had been got financed by the plaintiff. Relevant portion of the legal notice reads as under:-

"1. That we carrying on business of banking and financing vehicles and in the normal course of its business it was approached by you the notices as borrower (s)/co-borrower (s) for availing finance in which respect the following Agreements/Deals were executed; the details whereof are reproduced hereinunder:

S. No.	Agreement/ Deal	Dated	Borrower	Co-Borrower	Asset	Amount	Due Status
1.	DDP00753D	01.08.2018	Khurshid Khan	Mehmood Son of Suber Khan	HR-38Y-8317	Rs. 30,42,304/-	Default
2.	DDP00502D	11.12.2015	Mehmood	Khurshid	HR-73-6672	0/-	Non-default

2. That a bare perusal of the aforesaid record demonstrates that full payment have been made only against Agreement/Deal no.DDP00502D. That, however, huge amounts are due and outstanding in respect of Agreement/Deal no.DDP00753D, which amounts you have failed to clear despite repeated requests and demands of Bank. That, without prejudice to its other rights and remedies as per law and under the respective Agreement/Deal, the present notice is restricted to enforcement of right of lien and set off by Bank in respect of Non-Default Deals owing to breach having been committed by you in respect of Default Deals."

9. In spite of the said fact the vehicle of plaintiff Mehmood was possessed on 14.01.2021 which has however now been directed to be released by the Trial Court vide order dated 16.04.2021 (Annexure P-10) by way of interim custody. It is to be noticed that the Bank has been proceeded against ex parte in the said order and therefore, conduct of the petitioner-Bank is apparent and the Trial Court had followed the law settled by the Apex Court for the vehicle having been taken in possession by resorting to using force rather than seeking directions from the Court.

10. Reliance was placed upon the judgment of the Apex Court passed in *'Manager, ICICI Bank Ltd. v. Prakash Kaur'*, [4] 2007 (2) SCC 711 that as to how financed vehicles have to be taken into possession and which was to be done in accordance with law and not by the use of force. A perusal of the arbitration clause would go on to show that it was an agreement which forces the parties to conduct proceedings at Chennai. Relevant clause reads as under :-

"23.3 The venue of Arbitration proceedings shall be at Chennai and the language shall be in English."

11. It is not disputed that the loanee as such are permanent residents of Haryana and belonging to District Faridabad and Palwal. The original agreement itself was also not filed in the Court as noticed by the Trial Court. The plaintiff had denied the execution of the second agreement in which he had been arrayed as a co-borrower in his reply filed to the application had taken the plea that it is forged and the original had never been placed on record.

12. The Apex Court in *'N. Radhakrishnan v. M/s Maestro Engineers & others'*, [5] 2010 (1) SCC 72, has held that if there were allegations of fraud as such and serious malpractices on the part of the respondent, the matter can only be settled before the Civil Court and in the absence of the original deed not being filed as per the mandatory requirement as mentioned under Section 8 (2) of the Arbitration & Conciliation Act, which had not been complied with. Resultantly, the orders of the Courts below which had not referred the matter to arbitration was upheld. It was held that the arbitrator was not competent to deal with the dispute in such facts

and circumstances. Relevant portion of the said precedent reads as under"

"7. In our opinion, the contention of the respondents relating to the jurisdiction of the Arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case.

The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the Arbitrator.

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14. Arguments were favoured by either parties relating to the ambit of Section 8 (2) of the Act wherein the scope of the mandatory requirement to file the original copy of the partnership deed dated 7th of April, 2003 was elaborately discussed. It is to be noted that since we have already decided that there is no requirement to appoint an Arbitrator in view of the matter that the issues involved in the case involved detailed investigations into the same and production of elaborate evidence to prove the allegations or refute the same, there is no need to dwell into this matter.

Even assuming that a dispute subsists and an Arbitrator is appointed, still the appellant cannot absolve himself from the mandatory requirement of filing an original copy of the deed. The learned counsel for the appellant, however, argued that since the notarized copy of the deed was already filed by the respondents before the 1st Addl. District Munsif Court at Coimbatore, there was no need for the appellant to produce the same. Learned counsel for the appellant cited various decisions to substantiate his claim. But from a careful perusal of the order of the 1st Addl. District Munsif Court at Coimbatore, in I.A. No. 494 of 2006 (in O.S. No. 526 of 2006) it would be evident that the learned Munsif had noted that the appellant had filed a Xerox copy of the partnership deed dated 7th of April 2003 and had not filed the original copy thereof. Further, Ex-P23 is the notarized copy of the Partnership deed dated 6th of December, 2005, which was the reconstituted deed formed after the alleged retirement of the appellant from the firm. The learned counsel for the appellant pointed out to this deed and argued that since the original copy of this deed was filed by the respondents, there was no need for him to file the original copy thereof under section 8 (2) of the Act. But it is to be noted herein that the claim of the appellant regarding the dispute was under the arbitration clause mentioned under the original partnership deed and not on the subsequent one.

Since the original deed was not filed within the requirement of Section 8(2) of the Act, it must be held that the mandatory requirement under the Act had not been complied with. Accordingly, even if we accept the factum of a dispute relating to the retirement of the appellant under the original deed dated 7th of April, 2003, still the Court would not be empowered to refer the matter to an Arbitrator due to the non compliance of the provisions mentioned under Section 8(2) of the Act. For the above-mentioned reasons and in view of our discussions made hereinabove, we, therefore, do not find any merit in this appeal and we direct the 1st Addl. District Munsif at Coimbatore to dispose of the suit being O.S.No.526 of 2006 filed by the respondents for a declaration that the appellant was not a partner of the Respondent No 1 (the firm herein) after 18th of November, 2005 and to prevent him from causing any disturbance to the respondent no 1 for its peaceful running by way of a permanent injunction within a period of six months from the date of receipt of a copy of this judgment."

13. However, in *'A. Ayyasamy v. A. Paramasivam'*, [6] (2017-3)187 PLR 066 (SC), while clarifying the judgment passed earlier, it was held that once there are allegations of fraud that nature of dispute cannot be referred to arbitrator and if allegations are of serious and complicated nature, it was for the Court to deal with the matter rather than relegating the parties to arbitration. Though it was also held that mere allegation of fraud was not

sufficient to detract from the obligation of the parties and can be determined by arbitration and it was for the Court concerned to make a meticulous enquiry into the allegations of fraud. The relevant portion of the said judgment reads as under:-

"20. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non- arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public for a, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

14. The background as such had already been gone into by this Court acknowledging the facts and the Courts below also noticed that the petitioner-Bank has resorted to recovering a vehicle by using force for which loan installments had already been deposited with it. Instead of proceeding against the vehicle which was in default, it has chosen to recover the vehicle, for which the dues had already been paid. The arbitration clause itself also provides that the arbitration is to be conducted at Chennai whereas the parties are belonging to Palwal and Faridabad and, therefore, the agreement as such itself is unconscionable and one sided being opposed to public policy. Nothing has been shown that any simultaneous proceedings against the original borrower had been resorted to, though as per the law laid down by the Apex Court in *'Industrial Investment Bank of India Ltd. v. Bishwanath Jhunjhunwala',* [7] 2009 (9) SCC 478 that under Section 128 of the Contract Act the liability of the guarantor is co-extensive with that of debtor. Similar is the view of the Apex Court in *'Central Bank of India v. C.L. Vimala and others',* [8] 2015 SCC (7) 337.

15. Keeping in view the cumulative discussion, this Court is of the opinion that in the facts and circumstances of the case, the Courts below are well justified in retaining the jurisdiction with them and not referring the matter to arbitration. Even otherwise it is settled principle that the rejection of plaint is serious matter and should only be resorted in the extra-ordinary circumstances. Reference can be made to the judgment of the Apex Court in *'P.V. Guru Raj Reddy v. P. Neeradha Reddy',* [9] 2015 (8) SCC 331 and *'Chotanben v. Kiritbhai*

Jalkrushnabhai Thakkar, [10] 2018 (6) SCC 422.

16. Resultantly, since the orders passed by the Courts below do not suffer from any material irregularity or illegality,which would warrant interference by this Court in its supervisory jurisdiction, no case is made out for entertaining the present revision petition and the same is, accordingly, dismissed in limine.

R.M.S. – *Petition dismissed.*

Tags: (2022-1)205 PLR 149, INDUSIND BANK LIMITED v. MEHMOOD