
(2011) 04 KL CK 0108

High Court Of Kerala

Case No: C.R.P. No. 264 of 2010

Shriram Transport
Finance Co. Ltd.

APPELLANT

Vs

Babuy E.C.

RESPONDENT

Date of Decision: April 11, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 2, 36, 8, 8(1), 9, 9
- Civil Procedure Code, 1908 (CPC) - Section 115, 9
- Contract Act, 1872 - Section 28

Citation: (2012) 1 KLJ 197

Hon'ble Judges: Thottathil B. Radhakrishnan, J; S.S. Satheesachandran, J

Bench: Division Bench

Advocate: Rajesh Nambiar, for the Appellant; P. Babu and M. Gopikrishan Nambiar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Thottathil B. Radhakrishnan, J.

These revision petitions are referred to the Division Bench particularly on the question whether [T.M.L. Financial Services Ltd. Vs. Vinod Kumar](#), hereinafter referred to as "TML", requires re-consideration. The impact, if any, of Section 9 of the Arbitration and Reconciliation Act, 1996, hereinafter referred to as the "A & C Act", is focused in the reference order as a question that may be germane for consideration. TML was decided in a matter that arose from a suit filed for damages and for a declaration that the plaintiff was not liable to repay any outstanding instalments defaulted on a loan availed from the defendant. Holding out an arbitration agreement, the defendant invoked Section 8 of the A & C Act and applied to the trial court to refer the parties to arbitration. That was refused. That led to the judgment in TML, holding, inter alia, that when the agreement is opposed

to public policy or where one of the parties commit acts which are per se illegal and causes injury to the other party, the arbitration agreement cannot be put forward as a shield. In TML, it was found that suit of a civil nature would lie in situations where the act complained of is not referable to the agreement between the parties and relief sought for is built on legal rights de hors the agreement, including the arbitration agreement.

2. The fact that the arbitration agreement cannot be used as a shield in cases of acts which are per se illegal or unlawful is not in dispute before us. The fundamental issue that was sought to be focused is the effect of Section 9 of the A & C Act, including whether the availability of such remedy amounts to an implied bar to other proceedings.

3. We heard learned counsel appearing for the petitioners and Adv. M. Gopikrishnan Nambiar as Amicus Curiae.

4. It was rightly pointed out by the learned Amicus Curiae that the Apex Court had issued guidelines in relation to matters involving the exercise of power in terms of hire purchase agreements and that the primary jurisdiction of the court to come to the aid of a person visited with actions cannot be stultified by making reference to the provisions of the A & C Act. Learned counsel for the petitioners point out that in many of the cases, by contract, the parties have chosen the jurisdiction of a particular court with reference to territory and therefore, if litigations are permitted to be instituted in different places, that may be a case where a lender has to scout the entire territory of India to face such litigations. It is pointed out that the obligation of a judicial authority u/s 8 of the A & C Act ought to be treated as salutary.

5. Section 8(1) of the A & C Act provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party applies in terms of that provision, refer the parties to arbitration. Therefore, if the conditions in Section 8(1) are satisfied, the judicial authority shall refer the parties to arbitration. The first condition for the exercise of the power to so refer the parties to arbitration, is that the action pending before the judicial authority is brought in a matter which is the subject of the arbitration agreement that is relied on in support of the application u/s 8(1). All the arbitration agreements which are held out by the lenders in these cases are agreements consisting of commercial transactions. The finding in TML that a suit can be maintained independent of the arbitration agreement in cases where the act complained of is per se illegal and in violation of the laws, necessarily means that the subject matter of the litigation before the judicial authority would stand before it notwithstanding an arbitration agreement between the parties, if the nature of the disputes are not referable to the rights and obligations of the parties on the basis of the agreement, between them, including the arbitration agreement. Therefore, if the complaint before a judicial authority is about acts or omissions which tantamount to violations of laws, including commission of offences, the arbitration agreement is no defence to oblige the judicial authority to make a reference in terms of Section 8(1) of the A & C Act. Equally would be the situation if the agreement between the parties is one that

would not amount to a contract in view of Section 28 of the Contract Act.

6. It is apposite in this context to refer to the precedents pointed out by the learned Amicus Curiae and the learned counsel for the petitioners, in particular, [Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others](#), [Charanjit Singh Chadha and Others Vs. Sudhir Mehra](#), [Orix Finance \(India\) Ltd. v. Shri Jagminder Singh](#) 2006 (1) KLT 814 (SC), [Shibi Francis v. State of Kerala](#) 2007 (3) KLT 923, [Sabu v. Assistant Commissioner, Cantonment Police Station](#) 2008 (3) KHC 849 (DB), [Bharath Metha Vs. State by Inspector of Police Chennai](#), [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums](#), and [Kotak Mahindra Primus Ltd. Vs. S. Laxmana Rao](#). It emerges there from that disputes between the parties in relation to their rights, obligations and liabilities under a contract between them could be a matter for arbitration in cases where there is an arbitration agreement. Even in relation to hire purchase transaction, the arbitrability of such issues is the norm and not otherwise. However, any exercise of the lender under the cover of the express or implied authority, in a hire purchase or similar transaction to re-possess the subject matter of the hire purchase agreement, cannot be carried out in such a manner as would defeat the laws. In this view of the matter, the principle of law stated in TML is not open to any criticism on such issues.

7. Now, the plea of the petitioners that Section 9 of the A & C Act creates an implied bar needs to be considered. That provision empowers the court to grant interim measures and provides remedy to the party to apply for interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced by the proceeding of execution and enforcement enjoined by Section 36 of that Act. An examination of the nature of interim measures that may be sought for in terms of Section 9 would clearly show that they are only those which are referable to the matters which can be the subject of an arbitration agreement and therefore, arbitration proceedings and matters incidental thereto. This power of court to issue interim measures is with the court as defined in Section 2(e) of the A & C Act. A party to an arbitration agreement, who complains of unlawful acts under the cover of the agreement between the parties, cannot be compelled to seek interim measures u/s 9 of the A & C Act. Similarly, when the arbitration agreement itself is impeached with reference to grounds of public policy, the matter cannot be brought for interim measures u/s 9 of the A & C Act. As a necessary corollary, it has to be held that Section 9 of the A & C Act does not expressly or impliedly bar any action on a plea as to the sustainability of the agreement between the parties on a ground referable to public policy or otherwise and also regarding any act or omission not referable to the terms of the agreement between the parties and the rights and obligations of the parties amounting there from. This is what emerges contrasting Section 9 of the A & C Act and Section 9 of the Code of Civil Procedure. The reference is answered as above.

Resultantly, the orders impugned in these revisions do not merit interference in revision u/s 115 CPC. We, however, clarify that the contents of the impugned orders to the extent it expresses anything on the rival contentions before the court below on facts, would not

be treated as final, at the trial and disposal of the main matter. We may note that in C.R.P. No. 325 of 2010, the plaintiff has the further contention that the agreement containing the arbitration clause is not genuine. That is a matter for adjudication at trial. We leave open that issue also. These revisions are hence dismissed, subject to the above.