

(2011) 06 MAD CK 0212

Madras High Court

Case No: A. No"s. 1579 and 2660 of 2011

Kogta Financial India Limited

APPELLANT

Vs

Jayesh Kishorlal Dawda, Flat
No.301, Maa Vaishnavi Appt.,
Ghass Bazar, Chharpru Nagar,
C.A. Road, Nagpur,
Maharashtra-440 008

Jayesh Kishorlal Dawda,
represented by his lawful Power
Agent, Mrs. Daksha Chandan Vs
Kogta Financial India Limited

RESPONDENT

Date of Decision: June 22, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9

Citation: (2011) 6 CTC 182

Hon'ble Judges: Vinod K. Sharma, J

Bench: Single Bench

Advocate: H. Mohamed Ismail Advocates in A. No. 1579 of 2011, K.V. Bhashyam Chari, in A. No. 1579 of 2011, for the Appellant; K.V. Bhashyam Chari Advocate for Respondent in A. No. 2660 of 2011 H. Mohamed Ismail, Advocate for Respondent in A. No. 2660 of 2011, D. Sophia Selvi, Advocate Commissioner, Appearing in person, for the Respondent

Final Decision: Dismissed

Judgement

Vinod K. Sharma, J.

This order shall dispose of A. Nos. 2660 & 1579 of 2011.

A. Nos. 1579 of 2011:

2. M/s. Kogta Financial India Limited had filed Application with a prayer for appointment of Advocate Commissioner, to seize and deliver the vehicle along with

Registration Certificate described in the Judge's Summons with Police aid for interim custody.

3. In the Affidavit filed in support of the Application, it was pleaded that the Applicant-Company is a Company registered under the Companies Act engaged in the business of providing finance for purchase of motor vehicles.

4. It was also pleaded that in the course of business under the Deed of Assignment dated 14.5.2010, M/s. GMAC Financial Services India Ltd. had unconditionally and irrevocably sold, transferred, assigned and conveyed all the rights, titles and interests of the assignor in and to the assets, including the underlying security thereof, together with all other rights in favour of the Applicant.

5. The Applicant claimed that under the Deed of Assignment executed between M/s. GMAC Financial Services India Ltd., Chennai and the Applicant, all the loan accounts of M/s. GMAC Financial Services India Ltd., Chennai including the loan account in respect of the Respondent stood transferred in favour of the Applicant-Company.

6. It was pleaded that the Respondent entered into Loan Agreement dated 14.5.2010 to avail finance facility to the tune of Rs. 6,50,000/- (Rupees six lakhs fifty thousand only) for the purchase of Chevrolet Optra 1.6 LE vehicle bearing Engine No. F16D3418724K and Chassis No. MA6NF196T5HJ18026 with registration No. MH-31-CN-2182. The vehicle was hypothecated to the Finance Company under the Hire Purchase Agreement.

7. It was stated in the Affidavit that the a total sum of Rs. 8,04,000/-(Rupees eight lakhs four thousand only) was due and payable in 60 monthly instalments commencing from 13.1.2006 at the rate of Rs. 13,400/- (Rupees thirteen thousand four hundred only) by the Respondent. It was further stipulated in the agreement that the delayed payment would carry penal interest @ 36% p.a.

8. It was also pleaded that the Respondent was a willful defaulter and failed to pay the instalments from 13.3.2008. As on 13.11.2010, Rs. 4,28,800/-(Rupees four lakhs twenty eight thousand eight hundred only) towards overdue instalment and Rs. 2,57,762/- (Rupees two lakhs fifty seven thousand seven hundred and sixty two only) towards late payment charges and another sum of Rs. 6,500/- (Rupees six thousand five hundred only) towards cheque bounce charges was due and payable.

9. By invoking Clause 12 of the Agreement executed between the parties, the Applicant claimed that the entire amount outstanding became due and payable, which entitled the Applicant-Company to seize the vehicle, as security pending Arbitration proceedings.

10. A legal notice was sent to the Respondent stating that the Agreement stood terminated in view of the default committed by the Respondent and called the Respondent to make payment within ten days.

11. Clause 22 of the Agreement stipulates that all disputes arising out of Agreement was to settle by way of Arbitration.

12. This Court on 31.3.2011 passed the following order in A. No. 1579 of 2011.

1. The learned Counsel for the Applicant contends that the Respondent is in default in payment of loan amount and he also refused to hand over the vehicle hypothecated to the Applicant, is in violation of the terms of the Loan Agreement.

2. The Arbitration proceedings have commenced. The Applicant prays for appointment of an Advocate Commissioner to seize the vehicle, by way of an interim custody, to secure the amount in the Arbitration proceedings.

3. Notice of motion returnable on 27.4.2011.

4. In the meantime, Mrs. D. Sophia Selvi, Advocate, No. 131/2, Alwarpet street (Near SIET Women College), Alwarpet, Chennai-18, having contact phone No. 9884459053, is appointed as the Advocate Commissioner to seize and deliver CHEVROLET OPTRA 1.6 LE vehicle bearing Engine No. F16D3418724K and Chassis no. MA6NF196T5HJ18026, lying at Flat No.301, Maa Vaishnavi Apartment, Ghass Bazar, Chharpru Nagar, C.A. Road, Nagpur-440 008, Maharashtra or wherever it is found to the Applicant.

5. It is hereby made clear that if Police help is required, the Advocate Commissioner shall make a request to the local Police Station, within whose jurisdiction the vehicle is found and on such request being made, the Station House Officer shall send the Police personnel along with the Advocate Commissioner to seize the vehicle. If breaking open of a lock is necessary, the Advocate Commissioner shall do so in the presence of the Police personnel, who shall countersign the proceedings regarding breaking open of the lock and re-locking of the premises.

6. After seizure, the vehicle be handed over to the Applicant or to their representative, after taking inventories, by way of interim custody.

7. The remuneration of the Advocate Commissioner is fixed at Rs. 10,000/-(Rupees ten thousand only) and actual expenses to be incurred. The Advocate Commissioner shall file her report on or before 27.4.2011.

8. Post the matter on 27.4.2011.

13. In pursuance to the appointment of Advocate Commissioner, the Advocate Commissioner seized the vehicle and handed it over by way of interim custody to the Applicant pending Arbitration proceedings which stood initiated and the date is fixed for 30.6.2011 for filing of Claim Petition.

14. The Respondent has filed Application No. 2660 of 2011 claiming restoration of possession of the vehicle seized in pursuance to the interim order passed by this Court.

15. In the Affidavit filed in support of the Application No. 2660 of 2011, it is pleaded that even though in the Judge's summons, it prayed to show cause, as to why the Advocate Commissioner be not appointed for taking possession of the vehicle, but on the same day, an Advocate Commissioner was appointed. The Advocate Commissioner with the help of local Police, seized the vehicle from the Respondent. By this process, the very purpose of issuance of Judge's summons stood defeated. This is outcome of fraud played on the Court.

16. It is also stated that subsequently, time was extended and fresh notice was issued to the Respondent returnable on 17.6.2011.

17. It is also the case of the Applicant/borrower, that the Respondent was not served with complete typed set of documents filed in support of the Affidavit/Judge's summons. It is the case of the Applicant in the Application, that though it was mentioned that the Applicant was taking steps to commence Arbitral proceedings, no such steps were initiated. Thus, the provisions of Section 9 of the Arbitration Conciliation Act stood violated, as steps for appointment of Arbitrator were also not taken after moving Application for interim relief.

18. It is pleaded in the Affidavit that documents were executed in Nagpur and the cases pertaining to the subject matter of the Application are pending in Nagpur Court, therefore, Nagpur Court alone has the jurisdiction to try the case.

19. In the Affidavit, it is pleaded that the Applicant in A. No. 1579 of 2011, suppressed the material facts, as it failed to disclose the Criminal proceedings, wherein charge stood framed against the dealer by the Trial Court. Revision against the order framing charge also was dismissed by the Sessions Court.

20. The main contention of the learned Counsel for the Applicant/ borrower was that, she was told that on purchase of new Chevrolet Optra car, the Company shall provide free registration of Car at RTO and shall provide free insurance, for one year from the date of purchase.

21. According to the Applicant in A. No. 2660 of 2011, the expense towards RTO registration, insurance premium and registration charges, are Rs. 29,280/- (Rupees twenty nine thousand two hundred and eighty only), Rs. 26,748/- (Rupees twenty six thousand seven hundred and forty eight only) and Rs. 1,972/- (Rupees one thousand nine hundred and seventy two only) respectively which were agreed to be paid by the Finance Company. Apart from this, the Applicant is entitled to cash discount of Rs. 12,000/- (Rupees twelve thousand only) which stand admitted by the Applicant in A. No. 1579 of 2011, before the Nagpur Court. It was on these assurances that the Applicant/borrower agreed to purchase the Car.

22. The further case of the Applicant is that the Respondent/finance Company has no privity of contract, as there was no Agreement executed between the parties. On the basis of averments made hereinabove, the Applicant furnished calculation with

regard to the amount payable and the amount paid. In para 14 of the Affidavit, it is pleaded that an excess amount of Rs. 19,390/- (Rupees nineteen thousand three hundred and ninety only) stood paid by the Applicant/borrower, as per following details:

Description	Ref	Amount paid/ Receivable	Amount Payable (Rs.)
1. Total cost of Car quoted hence payable	(a)		6,95,400
2. Less: Down Payment	(b)	1,53,400	
3. Less: Discounts	(c)		
RTO Tax	(d)	26,280	
Insurance	(e)	26,748	
Registration	(f)	1,972	
Cash Discount	(g)	12,000	
Second Hand Car Discount	(h)	1,50,000	
Total (b to h) Receivable	(i)	3,70,400	
Total payable (a-i)	(j)		3,25,000
Interest at 4.74% p.a. to be calculated on the amount (for 2 years) on (j)	(k)		30,810
Total Payable with Interest	(l)		3,55,810
Total paid as 28 EMI's of Rs. 13,400/-each	(m)	3,75,200	
Paid in excess to payable (m-1)	(n)		19,390

It is, thus, claimed that the possession of the vehicle was illegal, which entitles the Applicant to repossess the vehicle.

23. In support of the Application No. 1579 of 2011, the learned Counsel for the Applicant, vehemently contended that the Applicant being a Assignee of the Finance Company entitled to all the rights vested with the Finance Company, including right to invoke Arbitration clause.

24. In support of his contention that the Assignee can invoke Arbitration clause in the Agreement executed between the borrower and Assignor, he placed reliance on the judgment of the Hon"ble Delhi High Court in the case of Birla VXL Limited v. DLF Universal Limited, 2003 42 SCL 153 (Del), wherein the Hon"ble Delhi High Court was pleased to lay down as under:

Thus far, we have discussed the position which exists where the Arbitration clause is in the ordinary form. If the clause is of the Scott V. Avery type, the claim must painly be pursued by Arbitration, since the original party could not, by assigning away his right, deprive the Respondent of his right to rely on the contractual stipulation making an award a condition precedent to legal proceedings. (Dennehy v. Bellamy, ante; Freshwater v. Western Australian Assurance Co. Ltd, ante; Smith v. Pearl Assurance Co. Ltd., 1939 (63) LJ L Rep. (1). But who should be the parties to the Arbitration ? Should the assignee arbitrate in his own name, or should be cause the original party to arbitrate on his behalf ? It appears that the former view is correct. (Digby v. General Accident, ante; Dennehy v. Bellamy, ante), unless the clause is so worded as to admit only on Arbitration between the original parties to the contract.

8. In Halsbury 's Laws of England, Fourth Edition, Volume 2, the law is stated in the following terms:

528. Parties and their assignee.-- An Arbitration Agreement or an oral submission in binding on the parties thereto. (Baron v. Sunderland Corporation, 1966 (2) QB 56 : 1966 (1) All ER 349, CA or Ronaasen & Son v. Metsanomistajan Metsakeskus O/Y 1931 (40) LJ Rep 267). Where the subject matter of the reference is capable of assignment the assignee of a party to an Arbitration Agreement is likewise bound. (Shauler v. Woolf 1946 Ch 320, CA; Smith v. Jones, 1842 (1) Dow 1 NS 526).

25. Reliance was also placed on the judgment of the Hon"ble Bombay High Court, Nagpur Bench, in the case of Kotak Mahindra Prime Limited v. Sanjeev and two Others (Appeal against Order No. 61 of 2008 decided on 13.10.2008) wherein it has been laid down that, the question whether Arbitration clause has been assigned or not, needs to be decided in the facts and circumstances of each case. It cannot be disputed that the Applicant had no right to invoke Arbitration clause.

26. It is also contended that it is prima facie proved that the total instalments as agreed were not paid. On the prima facie case being shown, the Applicant is entitled to seizure and possession of the vehicle under the Hire Purchase Agreement, as security for the loan amount. Accordingly, vehicle was seized by way of interim measure.

27. The offer of settlement by making part payment pending Arbitration proceedings to order of repossession was not accepted by the Respondent.

28. The learned Counsel for the Applicant/borrower vehemently contended, that the order directing to seizure and possession of the vehicle deserves to be recalled, and

the Application moved by Finance Company be dismissed, as the order was without notice to the Respondent.

29. It is also the contention of the learned Counsel for the Applicant in A. No. 2660 of 2011 that though the Judge's summons shows that notice was issued as to why the vehicle be not seized, but the vehicle was seized by way of ex parte order.

30. This contention of the learned Counsel for the Applicant deserves to be noticed to be rejected. The order passed was by way of interim measure, to secure the amount under Arbitration, with notice to the Respondent to show cause as to why the interim order be not made absolute. It cannot be said that the order deserves to be recalled, merely for want of advance service of notice. The ex parte interim order can be passed without notice, which is always subject to the final adjudication by the Court, after hearing the parties and in case party fails in the Petition, status quo ante can always be ordered. However, the contention of the learned Counsel that Court cannot pass ex parte interim order cannot be accepted, as it is against the settled law.

31. The next contention of the learned Counsel for the Applicant in A. No. 2660 of 2011 is that the Arbitral proceedings are without jurisdiction, as the Applicant was not party to the Arbitration Agreement executed between the parties. This contention again deserves to be noticed to be rejected. For the reasons alone A. No. 1579 of 2011, it is held that assignee of a contract is entitled to invoke Arbitration clause, in absence of specific bar in the Agreement.

32. It is next contended by the learned Counsel for the Applicant in A. No. 2660 of 2011, that on 4.4.2008, a legal notice was issued by the Applicant to the predecessor in interest of the Applicant pointing out legal infirmity in the dealing where it was pointed out that fraud was played on Applicant by the dealer of vehicle.

33. It is also the contention of the learned Counsel for the Applicant/ borrower, that Criminal proceedings were initiated against the dealer wherein charges stood framed. The Applicant/Finance Company, failed to mention this fact in the Application filed for seizure of the vehicle. This amounts to concealment of fact for which they are not entitled to discretionary relief u/s 9 of Arbitration & Conciliation Act from this Court.

34. The Finance Company/Applicant has no concern with Criminal proceedings, otherwise also, pendency of Criminal proceedings cannot bar a party to enforce its Civil right. Therefore, this contention is misconceived, admittedly, the Applicant/Finance Company, is not a party to the Criminal proceedings, nor any notice was issued to the Respondent/Finance Company/ Applicant in A. No. 1579 of 2011. It acted purely on the basis of record transferred to it. Nothing has been shown as to how prima facie case is not made out, as the account shown by the Applicant, in A. No. 2660 of 2011 is self prepared account, and is not as per the terms of the Agreement, which was duly signed, wherein it was agreed that against

the loan amount of Rs. 6,50,000/- (Rupees six lakhs fifty thousand only), total payable amount is Rs. 8,04,000/- (Rupees eight lakhs four thousand only).

35. It was next contended that Arbitration proceedings have been initiated without notice, therefore, no reliance on the stand of lender can be placed.

36. This contention again is wrong. The documents placed on record shows that the Arbitrator issued notice, which was unclaimed. The contention of the learned Counsel for the Applicant in A. No. 1579 of 2011, is that Nagpur address was given in the Registry and notice was sent at Nagpur which was returned with the report of the Postal Authority that it was unclaimed. The refusal to accept notice amounts to due service, thus, it can safely be said that the stand of borrower that no notice was sent/received is misconceived. In any case, Arbitration proceedings have been served informing the Respondent/borrower in A. No. 1579 of 2011 that the next date of hearing is 30.6.2011. As already observed, the Respondent refused to accept the offer of part payment for repossession of vehicle.

37. The learned Counsel for the Applicant in A. No. 2660 of 2011, by placing reliance on the judgment of the Hon'ble Division Bench of this Court, in the case of [R. Joseph Miranda Vs. Dhandapani Finance Private Limited](#), , contended that if vehicle is illegally seized or sold in violation of law, thus, this Court can restore the vehicle to the Respondent.

38. The contention of the learned Counsel for the Applicant, was that in view of the Division Bench Judgment of this Court, the Applicant is entitled to repossess the vehicle.

39. This contention again deserves to be rejected, for the reason that the ratio of the judgment, on which reliance is placed was that without giving opportunity to pay the amount, possession of the property cannot be taken. The relevant portion of the judgment read as under:

22. In this case, it is very clear that the Arbitral proceedings have not commenced. In fact, for the first time, the First Respondent issued a notice on 9.11.2009 foreclosing the entire loan and in that notice, they have called upon the Appellant to pay Rs. 29,37,009.48 and for the default committed by the Appellant, an arbitral dispute has arisen and pursuant to the Arbitration clause in the Loan Agreement, the First Respondent will initiate Arbitral proceedings against the Appellant. But on the very same date, they have filed the Application seeking seizure of the vehicle before this Court. Even in that notice, nowhere it was stated that the Appellant is attempting either to dispossess the vehicle or take away the vehicle from the reach of the First Respondent. Thereafter, the vehicle was seized on 1.12.2009. On 5.12.2009, the Appellant issued a notice stating that they are ready and willing to settle the matter in full and final quit by paying ₹20,07,383/-. A reply was sent by the First Respondent on 22.12.2009 wherein also they did not say anything about the initiation of Arbitration proceedings. Only after the Application u/s 9 of the Act was closed by

this Court, after sale of the vehicle, the Arbitration proceedings commenced in the month of February 2010. Therefore, this is a fittest case where, in an extraordinary case where it is proved that the First Respondent has taken possession of the vehicle in contravention of the Rules and Regulations, this Court can definitely interfere and hold that it is an illegal act. The First Respondent has taken possession of the vehicle pursuant to the order passed by this Court, but it was misused and abused by selling the vehicle soon thereafter without any reason or without obtaining order from this Court. Therefore, this Court can set at naught the discrepancies committed by the First Respondent, even though the vehicle was sold to an alleged purchaser, whose details have not been given to this Court, barring a voucher indicating only the name of the alleged purchaser. This Court also feels that this is a fittest case where the wrong committed by the First Respondent has to be corrected.

40. The judgment cited supra, there has no Application to the facts of the present case, as in this case, the Respondent is not ready for settlement or to make part payment, of the amount due.

41. For the reasons stated, no ground is made out to order repossession of the vehicle to the borrower.

42. Consequently, A. No. 2660 of 2011 is ordered to be dismissed. Whereas A. No. 1579 of 2011 is allowed. The Applicant/Finance Company is permitted to retain interim custody of the vehicle pending Arbitration proceedings.

43. No cost.

44. Advocate Commissioner has filed Memo pointing out that she spent four days to execute the order of this Court. An additional remuneration of Rs. 15,000/- (Rupees fifteen thousand only) is directed to be paid to the Advocate Commissioner by the Applicant, which shall not be debited, to the account of the Respondent.

ORDER

1. That the Applicant/Finance Company in A. No. 1579 of 2011 be and is hereby permitted to retain interim custody of the vehicle morefully set out in the Schedule hereunder till the disposal of the Arbitration proceeding.

2. That the Applicant in A. No 1579 of 2011 do pay a sum of Rs. 15,000/-(Rupees Fifteen Thousand only) to the Advocate Commissioner appointed herein towards her additional remuneration fixed herein, and the same shall not be debited, to the account of the Respondent herein.

3. That the A. No. 2660 of 2011 do stand dismissed.

4. That there shall be no costs of these proceedings.