G.E. Capital Transportation Financial Services Ltd. Vs Sourav Dey

Court: Calcutta High Court

Date of Decision: Dec. 18, 2008

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 5, 8, 9
Civil Procedure Code, 1908 (CPC) â€" Order 39 Rule 1, Order 39 Rule 2, 151

Hon'ble Judges: Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Mainak Bose and Phiroze Edulji, for the Appellant; Sakhya Sen, Partha Chakraborty, Lal Ratan Mondal, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
This first miscellaneous appeal is at the instance of the defendant in a converted proceeding u/s 9 of the

Arbitration and Conciliation Act, 1996 and is directed against Order No. 13 dated 26th September, 2008 passed by the learned Judge, Seventh

Bench, City Civil Court at Calcutta, thereby disposing of the application u/s 9 of the Act by restraining the appellant, its men, agents and associates

from seizing and taking possession of the vehicle being No. WB-15A-3721 and from disturbing the peaceful possession of the said vehicle in any

manner till the disposal of the Arbitration proceeding.

2. Being dissatisfied, the defendant has come up with the present first miscellaneous appeal.

3. The respondent filed a suit being Title Suit No. 2836 of 2007 in the City Civil Court at Calcutta thereby praying for the following relief:

a) A decree be passed declaring that the plaintiff is a lawful owner in respect of vehicle No. WB-15A-4921 Chassis, 4420 26BSZ 108595.

Engine No. 697TC 57 BSZ 111698 and the plaintiff is entitled to ply the said vehicle peacefully without any disturbance and/or interference by the

defendant in any way whatsoever;

b) A decree be passed declaring that the plaintiff is entitled to supply all papers and documents upon which signatures was taken by the defendant

from the plaintiff in blank form including the 24 cheques without putting the amount and date.

c) A decree of permanent injunction be passed restraining the defendant their men, agents and associates from seizing and/or taking possession of

the vehicle being Nos. WB-15A-4921 and/or disturbing the peaceful possession of the plaintiff in respect of Vehicle No. WB- 15A-4921;

d) A decree be passed for cost and such other reliefs which the plaintiff is entitled to under the law.

4. The case made out by the plaintiff may be summed up thus:

(a) The plaintiff is the owner of the vehicle being No. WB-15A-3721 and for the purchase of the said vehicle, he approached the defendant for

providing financial help and accordingly, the defendant financed the said vehicle and delivered the chassis to the plaintiff.

(b) The defendant took signatures of the plaintiff on various blank papers, printed forms and printed papers and also took 24 blank cheques of

Indian Overseas Bank, Seoraphuli Branch with the assurance that the defendant after preparation of papers and documents will supply the copy of

the documents to the plaintiff; but unfortunately no copy of the documents upon which the signatures were taken from the plaintiff by the defendant

had been provided. The vehicle was delivered to the plaintiff in the second week of January, 2006.

(c) After receiving the vehicle, the plaintiff built up the body of the said lorry by his own money and spent more than Rs. 2 lac. After building the

body, the plaintiff got the said vehicle sometime in the month of March, 2006 and in fact, the plaintiff plied the said vehicle for not more than 17

months. In the meantime, the plaintiff requested the defendant to provide necessary documents indicating how the payment was to be made and as

to the terms and conditions of the said financial deal but nothing has been disclosed.

(d) On 10th March, 2006 the plaintiff requested the defendant to furnish necessary papers and documents of the said vehicle and the conditions of

the said agreement. The said letter was received by the defendant but it refused to put the seal of the company on the same.

(e) The said vehicle was registered with the Motor Vehicles Authority before the Registering Authority, Chinsurah wherein the name of the plaintiff

is appearing as owner of the said vehicle and the defendant has been recorded as the financier.

(f) The said vehicle is also insured with the New India Assurance Co. Ltd. for a period from 18.06.2007 to 17.06.2008. Although the defendant

realised charges for insurance of the said vehicle, yet, the plaintiff had to pay the insurance charges from his own pocket.

(g) All on a sudden, the defendant told the plaintiff that his monthly instalment in respect of the abovementioned vehicle is Rs. 25,427/- payable a

month but no paper regarding the said instalments was delivered to the plaintiff.

(h) On 21st June, 2006, the plaintiff paid a sum of Rs. 25,427/- to the defendant by cheque for the first instalment of the vehicle but no receipt had

been granted and thereafter, the plaintiff paid the monthly instalment of Rs. 25,427/- to the defendant by cheque against receipts and without

receipts. Till now the plaintiff paid a sum of Rs. 3,33,715/- on account of instalments.

(i) On 1st October, 2007, when the vehicle was plying in front of 19, Strand Road, Kolkata under the Hare Street Police Station, a group of

persons tried to forcefully take possession of the vehicle with the help of antisocial elements, but the driver of the vehicle managed to pass through.

(j) The defendant through his officers was asking for giving back the vehicle without realising that the plaintiff had invested Rs. 2,22,013/- for

making the vehicle in running condition and paid Rs. 3,33,715/- on account of instalment till date. Hence, the suit.

5. In connection with the said suit, the plaintiff on the selfsame allegations, prayed for temporary injunction restraining the defendant from taking

possession of the said vehicle or disturbing possession.

6. On such application, the learned Trial Judge issued an ad interim order of injunction restraining the defendant from disturbing the possession of

the plaintiff over the vehicle.

7. The defendant entered appearance and filed an application under Sections 5 and 8 of the Arbitration and Conciliation Act thereby praying for

stay of all further proceedings of the suit on the ground that by virtue of a written agreement between the total amount financed by the plaintiff for

the chassis was Rs. 10,20,000/- and the total amount payable by the plaintiff was Rs. 12,72,462/- including interest by way of equal monthly

instalment of Rs. 21,939/- and that for the purpose of building of the body, a further sum of Rs. 90,000/- was lent and the plaintiff was required to

pay Rs. 1,01,152/- by monthly instalment of Rs. 3,488/- and the plaintiff had defaulted in making of the same.

8. It was further pointed out that in the agreement between the parties, there is an arbitration clause and as such, no civil suit was maintainable in

terms of Sections 5 and 8 of the Arbitration and Conciliation Act. The moment, such application was filed by the defendant under Sections 5 and 8

of the Arbitration and Conciliation Act, the plaintiff filed an application u/s 151 of the CPC for treating the application under Order XXXIX Rules

1 and 2 as well as the suit as an application u/s 9 of the Arbitration and Conciliation Act. In the body of the said application, there was, however,

no schedule of amendment of the averments made in the plaint or the application for injunction. It was only submitted that if the Court found that

there was an arbitration clause and the dispute was required to be decided by the Arbitrator, in that event, the injunction application might be

treated or converted into one u/s 9 of the Arbitration and Conciliation Act.

9. The learned Trial Judge allowed such prayer and thereafter, disposed of the application u/s 9 of the Act by maintaining the ad interim order of

injunction earlier granted. In arriving at such conclusion, the learned Trial Judge found that the plaintiff had proved the prima facie case as alleged in

the original plaint and, thus, it was a fit case for grant of temporary injunction without imposing any condition.

10. Being dissatisfied, the defendant has come up with the present first miscellaneous appeal.

11. After hearing the learned Counsel for the parties and after going through the materials on record, we are of the view that without the

amendment of the original plaint and the application for temporary injunction filed therein thereby accepting the existence of a valid arbitration

clause, there was no scope of converting the suit and the application for temporary injunction filed therein to one u/s 9 of the Act. Once the plaintiff

prayed for conversion of the suit to one u/s 9 of the Act, he must be prepared to withdraw his allegation that the agreement was a void one as the

same was prepared by taking his signatures on blank paper and must accept the position that there was a valid agreement between the parties

containing an arbitration agreement duly executed between the parties in accordance law. In the application u/s 151 of the CPC for conversion, no

such admission has been made and even at the time of final hearing of the application u/s 9 of the Act, the learned Trial Judge has proceeded as if

on blank papers, signatures of the plaintiff were taken by the defendant and thus, prima facie case was established.

12. As pointed out earlier, in order to maintain an application u/s 9 of the Act, the plaintiff must accept the fact that there is a valid agreement of

arbitration and, thus, his case made out in the original plaint that the agreement was vitiated by fraud is not tenable. If the plaintiff wants to maintain

that there was no valid agreement and consequently, no valid clause of arbitration for the fraud practised by the defendant, his appropriate remedy

lies before the Civil Court for avoiding the said agreement.

13. The court below itself having converted the civil suit into one u/s 9 of the Arbitration and Conciliation Act, it necessarily follows that the learned

Trial Judge accepted the position that the respondent was no longer disputing the existence of a valid arbitration clause and thus, no longer pressing

his initial claim that without going through the contents of the agreement he put his signatures on blank papers. Such being the position, the learned

Trial Judge at the time of hearing of the application u/s 9 of the Act, could not proceed as if there was no valid agreement between the parties as

the purported agreement was vitiated by void. We cannot shut our eyes to the fact that when the appellant came up with an application under

Sections 5 and 8 of the Act asserting existence of the valid arbitration agreement, the respondent did not dare to face such challenge and without

filing written objection to that application, prayed for conversion of the suit to one u/s 9. Therefore, it was unfair on the part of the Court to treat

the agreement as a prima facie void agreement even at the time of hearing of the application u/s 9 of the Act after conversion. It is absurd to

suggest that a party to litigation will apply u/s 9 and at the same time, will contend that there was no valid agreement of arbitration. If somebody

alleges fraud in entering into agreement containing an arbitration clause, he should go before the Civil Court for avoiding the agreement. (See: Atul

Singh and Others Vs. Sunil Kumar Singh and Others, ; India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. reported in

AIR 2007 SC 1357).

14. Therefore, on the aforesaid ground alone the learned Trial Judge ought to have dismissed the application.

15. Over and above, it appears that the plaintiff has taken loan of more than Rs. 11 lac and the registration document of the vehicle itself shows

that the defendant was described as the financier. It is admitted position that 14 instalments were paid but thereafter, the plaintiff did not pay any

instalment. In such circumstances, it is ridiculous to suggest that although the plaintiff did not know the contents of the agreement, he got possession

of the vehicle and plied the said vehicle for not more than 14 months and paid instalment at the same rate without knowing the terms and conditions

of the agreement. The learned Trial Judge should not have relied upon such absurd story made in the application. It appears that the attention of the

learned Trial Judge was drawn to an earlier judgment delivered by the same learned Judge where in a similar situation the learned Trial Judge found

that such plea was not tenable but in spite of the fact that the said earlier judgment was made annexure to the written objection, the learned Trial

Judge did not try to distinguish the said decision by showing any reason and at the same time, preferred not even to refer the decision in his

judgement.

16. We, thus, find that in the facts of the present case, the learned Trial Judge erred in law in granting injunction without imposing any condition and

that too, after converting the suit into an application u/s 9 of the Act without any formal amendment of the plaint of the suit. The appeal is, thus,

allowed and the order impugned is set aside. The application u/s 9 of the Act is dismissed as no prima facie case has been made out to get any

interim relief during the pendency of the arbitral proceedings.

17. In the facts and circumstances, there will be, however, no orders as to costs.

Bhaskar Bhattacharya, J.

18. I agree.