

*** THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 2128/1995, IA 6667/2011

Date of Decision: 16.12.2013

M/S. PNR CAPITAL SERVICE LTD. Plaintiff

Through: Ms. Amrita Singh, Adv.

Versus

JEANNE CHRISTIAN EDUCATIONAL SOCIETY & ORS.

..... Defendants

**Through: Mr. Jay Savla, Ms Amrita
Mishra and Ms. Shilpi
Chawdhary, Advs. for D-1 to 3
and 5.**

CORAM:

HON'BLE MR. JUSTICE M.L.MEHTA

M.L. MEHTA, J.

1. The plaintiff has filed this suit against the defendants for recovery of Rs.34,54,101/- along with interest @ 3% per month.

2. The plaintiff is a company engaged in the business of leasing, letting on higher-purchase, financing etc. The defendant No. 1 is a registered society of which defendant No. 2 is a public school. Defendant No. 3 (now since deceased) was the Principal of the school and defendant No. 5 is the Chairman of the Society and also Manager

of the school. Defendant No. 3 is stated to be the guarantor along with defendant No. 4 of the loans given by the plaintiff to defendants No. 1 and 2. The plaintiff's case in brief is that defendants No. 1 and 2 approached it for providing vehicles on lease basis and as per the discussions, two buses were provided vide agreement dated 01.02.1990 and three buses vide agreement dated 15.02.1990. The buses were procured from the dealer M/s. Gitanjali Motors Ltd., who also communicated on behalf of the defendants with the plaintiff. The lease tenure of the buses was for 48 months. The lease value of the two buses was Rs.10,94,400/-, whereas that of the three buses Rs.16,41,600/-. Besides the lease agreements, other documents such as promissory notes of lease amounts were also executed by defendants No. 3 and 4. Defendants No. 3 and 4 also executed guarantee agreements for the re-payment of the due amount to the plaintiff. As per the lease agreements, the defendant/lessee was to pay on demand as late charges an amount of 3% per month of each installment of lease rent or part thereof that remained unpaid. It was also further agreed that in the event of dishonour of any cheque of payment, the rate of interest of entire loan would be increased by 1% per annum and Rs.150/-

would be chargeable in cash as charges of return cheque. Plaintiff submits that defendants No. 1 and 2 failed to adhere to the financial discipline, which is evident from the statement of accounts. It is alleged that a large number of cheques of defendant No. 1 were dishonoured and rather defendant No. 1 issued “stop payment” instructions. It is averred that the plaintiff received a letter dated 07.05.1991 from defendant No. 3 referring to some agreement having taken place in the office of dealer M/s Gitanjali Motors Limited, along with copy of its communication dated 26th November, 1990 addressed to the dealer. The plaintiff refuted the communication on 20.06.1991 and denied any tripartite understanding between the plaintiff, defendants and the dealer. Plaintiff alleges that since the defendants failed to remit the lease rental installments, it sent notices to the defendants. It is further averred that after intense follow up a fresh agreement was entered into with defendant No. 1 and defendant No. 2 on 13.09.1993, whereby the defendants acknowledged the dues, but they again failed to abide by the terms of the said agreement and got the cheques stopped. The plaintiff alleges that as per the statement of accounts as on 31.08.1995, an amount of Rs.10,48,320/- is outstanding

against agreement of 01.02.1990 and an amount of Rs.24,08,781/- against agreement of 15.02.1990. The plaintiff has claimed these amounts with interest from the defendants jointly and severally.

3. Defendant No. 4 was proceeded ex-parte and the other defendants contested by filing their written statements. The defendants' case is that the dealer M/s. Gitanjali Motors Limited was the necessary and proper party as a defendant; that the defendant school had entered into agreement with the said dealer who had arranged the finances through the plaintiff. It is averred that the sale of buses and the finances being part of the common transaction, the effective and complete adjudication was not possible in the absence of the dealer M/s. Gitanjali Motors. It is also their case that the plaintiff in conspiracy with the dealer has played a fraud on the defendants and supplied second hand fabricated buses as new, and the contract being against public policy and vitiated by fraud is not enforceable. The documents sought to be relied upon by the plaintiff were also alleged to be rather concocted as these were blank when these were got signed from the defendants. It is denied that defendant No. 5 is empowered or delegator of defendant No. 1 or that defendant No. 5 as also defendant

No. 3 had control over defendants No. 1 and 2. M/s. Gitanjali Motors is stated to be the front organization of the plaintiff and it was this dealer who inducted the plaintiff to the tripartite transaction. The defendants alleged that one of the vehicles being DL IV 0129 was second hand, which had already been supplied by the plaintiff to M/s. Deen Jain Public School and had been confiscated by it on account of non-payment of the installment by the said school. The plaintiff got repaired this vehicle and passed on to the defendants' school as a new vehicle. It is alleged that even before it was leased to the said Deen Jain Public School, it was being used by another institution in Bangalore. With regard to vehicle No. DL IV 0142 also, it is alleged that the same was re-conditioned, and was sold to defendant as a new vehicle. The defendant No. 1 issued a notice dated 13.09.1990 to M/s. Gitanjali Motors complaining about these two vehicles being old and re-conditioned, whereupon the latter agreed to take the said vehicles back and to settle with the defendants. Accordingly, both these vehicles were returned to the dealer, which immediately thereafter wound up its business activities. It is averred that it was in the backdrop of these facts that school stopped paying further installments

and got the payments of the cheques stopped. Another vehicle DL IV 0178 was also returned to the dealer to the knowledge of the plaintiff. It is averred that the plaintiff independently assured the school that it would make all efforts to repossess the buses and replace them with new buses and it was in the light of this that the defendant school was persuaded to sign a fresh agreement on 13.09.1993.

4. On the pleadings of the parties, following issues were framed:

- “(1) Whether the suit is bad for non-joinder of necessary parties? OPD.
- (2) Whether the agreements dated 1.2.1990 and 15.2.1990 being opposed to public policy are valid? OPD.
- (3) Whether the agreements dated 1.2.1990 and 15.2.1990 are vitiated by fraud and misrepresentation? OPD.
- (4) Whether the defendant No. 5 was authorised by defendant No. 1 to enter into any agreement with plaintiff? OPD.
- (5) Whether there exists any guarantee agreement between the plaintiff and defendants No.3 & 4? OPP.
- (6) Whether the leased vehicles as alleged are registered in the name of plaintiff and in possession of the plaintiff? OPP.
- (7) Whether the plaintiff is entitled to a decree of Rs.10,48,320/- along with the interest at 3% per month under the lease agreement dated 1.2.1990? OPP.

(8) Whether plaintiff is entitled to a decree of Rs.24.08.781/- along with the interest at 3% per month under the lease agreement dated 15.2.1990? OPP.

(9) Relief.”

5. The plaintiff has examined its erstwhile Director Mr. Gagan Malhotra and its CFO Mr. Rajiv Kumar Aggarwal.

6. The defendants examined defendant No. 3, the Principal of defendant No. 2 and member of defendant No. 1 as their only witness as DW-1.

7. The onus of issues No. 2, 3 and 5 was upon the defendants and they did not press these issues and thus these stand deleted.

Issue No. 6

8. It is the admitted case of both the parties that the leased vehicles were to remain registered in the name of the lessor plaintiff till these were transferred in the names of the lessees and that the same continued to remain registered in the name of the plaintiff. With regard to the second part of the issue that whether the plaintiff is in possession of the vehicles, it is nobody's case that the plaintiff got possession of the vehicles. The case of the defendant is that the possession of three vehicles named above, was given by the defendants No. 1 and 2 to the

dealer M/s. Gitanjali Motors as the vehicles were old, re-modelled and sold as new. The plaintiff has denied the possession of the three vehicles having been given by defendants to the dealer and alleged that in any case the possession could not have been given to the dealer. This aspect of the matter would be dealt with in the issues No. 7 and 8. For the present, it is suffice to note that the possession of the vehicles was admittedly not with the plaintiff. The issue is decided accordingly.

Issues No. 7 and 8

9. These issues are being dealt with together. Issue No. 7 relates to the transaction of the two buses leased to defendants No. 1 and 2 vide agreement dated 01.02.1990, and the issue No. 8 relates to the lease agreement dated 15.02.1990 for three buses. There is no dispute that vide agreement of 01.02.1990 two buses were leased out, whereas vide agreement dated 15.02.1990 the three buses. Onus of both these issues was upon plaintiff. The plaintiff has alleged the aforementioned amounts to be outstanding as per its statement of accounts.

10. At the outset, it may be noted that the statement of accounts have not been produced by the plaintiff. The plaintiff's witness CFO Rajiv Aggarwal brought the ledger books of the plaintiff for the period

1994-1995 and 1995-1996 and placed on record copies of ledger account of the defendant No. 2 School for the period from 1.7.1994 to 30.6.1996 as Ex. PW3/A, PW3/B and PW3/C respectively. The mode of proof of these documents was objected to by learned counsel for the defendants alleging that the statement of accounts of the relevant period, as also original ledger books of the relevant period of 1990 onward were not produced. When asked as to why he has not brought the statement of accounts for the period 1991 to 1994, PW Rajeev Agarwal stated that he received the summons to bring the account books relating to the period of 1994 to 1996 only. When questioned as to whether the account books for the period 1991 to 1994 were available in the office, he stated to be not sure whether these are available in the office or not. However, he stated that the books are to be maintained only for 8 years. When questioned that this case was pending since 1995 and if the books of accounts were to be maintained for 8 years, how that the books of accounts of the year 1990 were not maintained, and further as to how the books of accounts of the years 1994 to 1996 are preserved till the year 2013, he stated to be not sure if in a pending case the books were required to be preserved or not. He

was confronted with the deposition of Mr. Gagan Malhotra, the erstwhile Director of the plaintiff, where he had stated that account books up to August 1995 have not been preserved and are not available. If it was so then how come he could produce the ledger books of the period of 1994-1996. Mr. Agarwal was unable to comment on this. It was specifically put to him that he has deliberately not brought the account books for the relevant period of 1990 to 1994. The Ex. PW3/A to Ex.PW3/C are stated to be prepared as per the ledger books of account of the defendant No. 2 school from 1st July, 1994 to 30th June, 1996. In the absence of there being any cogent and reliable evidence on record as regard to non-availability of the books of account of the relevant period of 1990 to 1995, no reliance could be placed on these photocopies Ex.PW3/A to PW3/C. However, it is noted that these Ex.PW3/A to PW3/C reflect outstanding dues of defendant No. 2 school separately in respect of the five vehicles. The submission of learned counsel for the plaintiff was that with regard to the two vehicles being DL IV 0021 and DL IV 0024, the defendants themselves have placed on record the plaintiff's statement of accounts as Ex. D-4 and D-5 showing outstanding dues qua these two buses as

on 12th May, 1993. So far as the outstanding dues of these buses is concerned, there is no dispute raised by the defendants that the outstanding dues are payable by them, though they have disputed the amount of outstanding dues as also liability of payment of interest.

11. It is desired to comment on the two buses DL IV 0021 and 0024 separately than the remaining three buses. With regard to these two buses DL IV 0021 and DL IV 0024, the defendants have themselves placed on record the statement of accounts of the plaintiff as Ex. D-4 and D-5, which are the admitted documents. As per these, a sum of Rs.1,37,200/- is outstanding against each of these buses as towards principal and a sum of Rs.32,295/- as towards the overdue interest as on 12.05.1991. The plaintiff as per Ex. PW3/A to Ex. PW3/C has claimed outstanding amount towards these two buses as Rs.2,39,800/- each as on 30.06.1996. It is not clear as to whether these amounts were inclusive of overdue interest or not. Admittedly, an agreement Ex.P-3 was arrived at between defendant No. 1 and the plaintiff on 13.09.1993, whereby the defendant accepted the liability of outstanding dues as per Annexure-A. The question for determination would be as to what was the outstanding amount as per Annexure-A

which could solve the controversy so far as the said two buses are concerned. The plaintiff has not chosen to file the said Annexure-A on record. It was specifically put to Mr. Gagan Malhotra in his cross examination as to what was the amount as per the said Annexure-A. He replied stating that as annexure A is not attached with the agreement, he is not in a position to state the amount mentioned therein. In answer to another question as to what was the amount that was payable by the defendants under the agreement Ex. P-3, Mr. Malhotra stated that in the absence of Annexure A, he is not in a position to tell the exact amount payable by the defendants under this agreement Ex. P-3. It was specifically put to him that the statement Ex. D-3 mentioned about the amount that was due for these two buses and that was the Annexure A of the agreement Ex P-3. He replied stating that as “Annexure-A” was not mentioned on Ex. D-3, he could not recall whether it is the referred Annexure A.

12. From the type of evidence led by the plaintiff through the deposition of Mr. Aggarwal and Mr. Malhotra, as discussed above, it would be evidenced that the books of accounts of the relevant period of 1990-1995 were not produced. Further, the Annexure A, which

admittedly formed part of the agreement Ex.P-3 dated 13.09.1993, showing outstanding amount payable by the defendants for these two buses, is not produced. Mr.Malhotra is unable to deny that the outstanding amount that is mentioned in Ex. D-3 was the amount that was payable by defendants as on 13.09.1993 in respect of the two buses. It would thus be seen that as per the statement of accounts of the plaintiff as on 12th May 1993, reflected in Ex.P-3, the defendants were to pay Rs.3,68,653/- towards the outstanding dues of the two vehicles bearing No. DL IV 0021 and DL IV 0024. These amounts were inclusive of outstanding EMIs of Rs.2,74,700/-, cheque return charges of Rs.5,100/-, overdue interest of Rs.65,792/- and increased interest of Rs.23,361/-. This coincided the statement of accounts Ex. D-4 and Ex.D-5 which showed the outstanding EMIs of each bus of these two buses to be Rs.1,37,200/- as on 12.05.1993. Mr. Malhotra being unable to deny that this amount as mentioned in Ex. D-3 was the amount payable by the defendants as per annexure A, these can be taken to be the amounts payable by the defendants as on 12th May, 1993 towards these two buses. However, there is an admitted letter written by defendant No. 3 to the plaintiff dated 19th July, 1993,

wherein reference is made to the agreement arrived at between the parties. In this, the defendants have admitted outstanding dues of Rs.5,35,000/- against these two buses DL IV 0021 and DL IV 0024, and which they paid through the four cheques mentioned therein. Since this letter mentions about the agreement arrived at between the parties and was in fact followed by the agreement of 13th September 1993 (Ex.P-3), I am of the view that the amounts which were payable on 12th May 1993 as Rs.3,68,653/-, was now agreed to be payable as Rs.5,35,000/-. Thus, so far as these two buses are concerned, irrespective of the fact that statement of accounts are not proved, but from the admitted facts, this amount of Rs.5,35,000/- is found to be payable by defendants No. 1 and 2 to the plaintiff as on 13.09.1993 when the agreement was arrived at between the parties.

13. Admittedly, the defendants got the cheques stopped and no amount was paid to the plaintiff in pursuance of the agreement Ex.P-3 dated 13.09.1993. The defendants' case in this regard is that as per the said agreement, the plaintiff was to extend all possible help to the defendants in re-possession of the three vehicles DL IV 0142 and DL IV 0178 and DL IV 0129 from M/s. Gitanjali Motors and till such time

the activities of repossession were going on, the plaintiff could not seek recovery of the balance amounts. There is no dispute that it was so stipulated in the said agreement Ex. P-3. Though, at one place, the plaintiff had stated that these were the defendants who were to extend the helps in repossession of the vehicles by the plaintiff, but PW Mr. Malhotra admitted that the plaintiff did not extend the helps in the repossession of these vehicles. The defendants' submission is that since the plaintiff did not render any help in repossession, nor took any steps, the defendants stopped making payments and also got stopped payments of the cheques. So far as the plaintiff not rendering any help or taking any step in repossessing the said three vehicles, it is stated by Mr. Malhotra that since Gitanjali Motors denied having received the three vehicles, there was no question of their taking steps to repossess from them. When asked as to who in Gitanjali Motors informed him in this regard, he stated that he did not remember the name of the person. He also could not state as to from where he learnt that M/s. Gitanjali Motors denied having received the three vehicles. To the repeated questions asked in this regard he maintained that so far as these three vehicles are concerned, these were in the possession of the lessee

defendant and so there was no question of taking steps for repossession. When asked that as per the agreement Ex. P-3 no steps for recovery could be taken by the plaintiff till these three buses were re-possessed and sold by the plaintiff, he again stated that as per them, the buses continue to be in the possession of the defendants and thus no action of repossession was required on their part. From all this, it would be seen that according to the defendants the possession of the three buses continued to remain with the dealer M/s. Gitanjali Motors. Admittedly, no steps were taken by the plaintiff to seek the repossession of the buses from M/s. Gitanjali Motors. I failed to understand if the possession of the three buses was not with Gitanjali Motors, then why would the plaintiff agree to extend possible help to the defendants in the repossession of the vehicles from M/s Gitanjali Motors and not to take steps for recovery of the balance till the repossession activity was on and further agree to sell the re-possessed vehicles and adjust the proceeds towards the outstanding dues from the defendants.

14. It is not only from this, but from the other material on record also, the conclusion comes out to be that the possession of three

vehicles was taken by M/s. Gitanjali Motors to the knowledge of the plaintiff. The defendants have alleged that one of the vehicles DL IV 0178 had been transferred by the plaintiff to one Mahender Pal Sharma on 13.05.1992. Mr. Giriraj Singh, an official of transport department was examined as DW-2. He has proved forms 20, 21, 29 and 30, pertaining to this vehicle DL IV 0178, collectively as Ex. DW2/1. The testimony of this witness as regard to this vehicle is not assailed, though Mr. Malhotra has denied the signatures of Mr. Rajiv Kumar Relan, the Director of plaintiff company on forms 29 and 30 and has expressed ignorance as to who had signed as Rajiv Kumar Relan. But, but from these documents as also un-assailed testimony of DW-2 it would be seen that these two documents have been signed on 13.05.1992 for transfer of ownership of vehicle DL IV 0178 by Mr. Relan, Director of the plaintiff. Vide this the vehicle No. DL IV 0178 had been transferred in the name of Mahender Pal Sharma on 13.05.1992. This has not been controverted by any documentary evidence that this vehicle was not transferred in the name of Mahender Pal Sharma. This fact being so, it remained unexplained as to how the plaintiff got possession of this vehicle DL IV 0178 and could transfer

the same on 13.05.1992, if it was, according to the plaintiff, with the defendants. This would point towards the plaintiff and M/s. Gitanjali Motors being hand in glove in the entire transaction.

15. DW-2 has also proved Form 20 and Form 21 in respect of vehicle No. DL IV 0142 collectively as Ex. DW2/2. There is also nothing in the cross examination to doubt the veracity of these documents. From Ex. DW2/2, it would be seen that the year of manufacture of this vehicle is 1987. This also has not been controverted by the plaintiff, these forms are admittedly signed by the plaintiff's Director Mr. Relan. It was specifically put to Mr. Malhotra that this document Ex. DW2/2 mentioned the month and year of manufacture of this vehicle No. DL IV 0142 as 1987 and the plaintiff himself represented this vehicle to be a new one. Mr. Malhotra was evasive to this and stated that the delivery of this vehicle was taken by the lessees themselves from the dealer. This further remained uncontroverted that in this document Ex.DW2/2 Mr. Relan himself had stated the year of manufacture to be of 1987. This substantiated the plea of the defendants that the old vehicle of 1987 was sold to them as new after repairing and remodeling.

16. With regard to the third vehicle bearing No. DL IV 0129, the defendants submitted that engine and chassis number of vehicle No. DL IV 0219 of Amrit Kaur was put on this vehicle 0129. In this regard, the defendant has relied upon the information obtained from the transport department which confirms that the Engine and Chassis number of vehicle No. DL IV 0219 registered in name of Amrit Kaur 20th July 1990 were the same as of 0129. This has also gone unexplained and uncontroverted as to how Engine and Chassis number of the vehicle No. 0219 had been mentioned in the Invoice and Registration Certificate Ex.DW2/3 of vehicle No. DL IV 0129. Defendant No. 3 was examined as DW-1. He deposed that the Registry and Licensing Authority, Delhi on 18.09.1990 confirmed that as per their record, the owner of aforesaid vehicle No. DL IV 0129 was Deen Jain Public School. She also proved copy of the report dated 18.09.1990 received from this Authority as Ex.DW1/1, which would evidence and substantiate what was stated by her that this vehicle was registered in the name of Deen Jain Public School in the office of the Authority. This has also remained unexplained and uncontroverted. The testimony of DW-1 in this regard has remained unassailed.

17. Thus, all these substantiate the submission of the defendants that so far as these three buses are concerned, the plaintiff and the dealer M/s. Gitanjali Motors have actually played a fraud on them. It appears, it was in this backdrop that the agreement was arrived at between the parties on 13.09.1993 (Ex. P-3), whereby the plaintiff had assured to repossess those three vehicles and sell them and adjust the proceeds towards the outstanding amounts.

18. From the above it comes out to be that so far as the claim of amount of Rs.24,08,781/- in respect of three buses, the subject of discussion on issue No. 8, the plaintiff is not entitled to any amount. However, with regard to the plaintiffs claim regarding the two buses bearing No. DL IV 0129 and DL IV 142, the subject of issue No. 7, the plaintiff is found to be entitled to Rs.5,35,000/- as on 13.09.1993 and also at the time of filing of the suit. Since the defendants are in possession of these two buses and have not paid the outstanding dues, they are liable to pay this amount of Rs.5,35,000/-. As regard to the amount of interest, the plaintiff has claimed @ 3% per month alleging the same to be as per the lease agreement. Having regard to the entire factual matrix and particularly that the defendant could not be faulted

for not making the payment on account of inaction on the part of the plaintiff to repossess the three buses and adjust the proceeds against the outstanding balance, the defendants cannot be burdened with the interest @ 3% per month, which is otherwise highly exorbitant. The plaintiff at the most can be said to be entitled to this amount of Rs.5,35,000/- with interest @12% per annum pendente lite and future till realization. Issues No. 7 and 8 are decided accordingly.

Issue No. 1

19. The defendant had filed an application under Order 1 Rule 10 CPC for impleadment of M/s Gitanjali Motors, which was dismissed by this Court on 08.09.2008, and which order has attained finality, having not been challenged by the defendants. In any case, as the lease agreements were between the plaintiff and defendants, M/s. Gitanjali Motors was not required to be made a party. The issue is decided against the defendants.

Issue No. 5

20. The guarantee agreements of both the lease agreements are proved on record as Ex. PW2/6 and Ex.PW2/9. The plaintiff's case is that defendants No. 3 and 4 stood guarantors of the liability of payment

by defendants No. 1 and 2. A look at these two documents would show that defendants No. 3 and 4 have signed these documents as witnesses and not as guarantors. Both these documents are seen to have been prepared casually so much so even the signatures of the guarantor do not appear at all on Ex. PW2/6, and whereas in Ex. PW2/9 it is defendant No. 2 school which is shown as guarantor. The issue is decided against the plaintiff.

Relief

21. In view of my above discussion, the plaintiff is entitled to a decree of Rs. 5,35,000/- along with interest @ 12% pendentelite from the date of filing of the suit i.e. 07.03.1995 till date and further future interest at this rate till realization, against defendants No. 1 and 2. The suit stands decreed on these terms. No orders as to costs. The decree be drawn accordingly.

M.L. MEHTA, J.

DECEMBER 16, 2013
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