

THE HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A

CRP No.86 of 2014

Tata Motors Finance Limited
Having its Branch office at 87
HGB Road, Melarmath,
Opp. Madan Mohan Ashram Agartala,
West Tripura, Pin - 799001.

..... *Petitioner.*

– Versus –

- 1. Sri Manoj Das,**
S/o Lt. Monoharan Das,
Resident of South Nayapara,
P.O & P.S - Dharmanagar,
District - North Tripura.
- 2. The Managing Director,**
Rajarshi Motors Pvt. Ltd.,
Assam Agartala Road,
Chandrapur, Agartala,
District - West Tripura.

..... *Respondents.*

B_E_F_O_R_E
THE HON'BLE CHIEF JUSTICE MR. DEEPAK GUPTA

For the petitioner : Mr. K N Bhattacharji, Sr. Advocate,
Mr. S Pandit, Advocate.

For the respondent No.1 : Mr. H K Bhowmik, Advocate.

Date of hearing and : 18.03.2015.
delivery of judgment.

Whether fit for reporting : Yes.

JUDGMENT & ORDER (ORAL)

This petition is directed against the order dated 8th July, 2014 passed by the learned Civil Judge(Sr. Division), Dharmanagar, North Tripura whereby he rejected the application filed by the petitioner (*hereinafter referred to as the defendant No.1*) for referring their

dispute to arbitration in terms of the arbitration clause of the agreement entered into between the parties.

2. The facts leading to the filing of the suit are that the plaintiff purchased one vehicle under hire purchase scheme from M/s. Rajarshi Motors Private Ltd. and this vehicle was financed by obtaining a loan from the petitioner-Tata Motors Finance Company Ltd. The vehicle in question is a Tata vehicle.

3. It is not disputed that a loan of Rs.7,63,824/- was raised and this was to be repaid over three years. The allegation of the plaintiff is that he has repaid the entire amount and, therefore, he prayed for a decree of declaration to the effect that the plaintiff has paid all the monthly installments under the loan agreement in respect of the vehicle bearing registration No.TR-02B-1588 financed by the petitioner-company. The plaintiff also prayed for a decree that the defendant be directed to issue clearance certificate regarding payment of the loan amount in respect of the vehicle.

4. The defendant No.2 i.e. M/s Rajarshi Motors Pvt. Ltd. filed written statement praying that the suit be dismissed. As far as the petitioner-defendant No.1 is concerned, it did not file any written statement but before filing written statement filed an application under Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 and it was prayed that as per the agreement entered into between the parties the matter was to be referred to arbitration. It was accordingly prayed that

either the suit be dismissed or the parties be directed to refer the dispute to arbitration. Along with this application a certified copy of the agreement was annexed.

5. Clause 23 of the agreement relates to arbitration and reads as follows :

“23. ARBITRATION.

23.1 All disputes, differences and/or claims arising out of this Loan Agreement or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Mumbai in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to a person to be appointed by the lender. In the event of death, refusal, neglect, inability, or incapability of the person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned.”

6. Though the suit was filed in the year 2010 the petitioner-defendant No.1 was only served in the year 2014. On 05.4.2014 Mr. Swaroop Chandra Deb had put in appearance on behalf of the petitioner-defendant no.1 and had sought time to file written statement. The learned Civil Judge on the same directed that the parties should try to settle the matter out of Court in view of Section 89 of the Code of Civil Procedure. On the same date the learned trial Court also ordered that both sides are directed to furnish draft issues, examination-in-chief, if any, by the next date. The order dated 05.4.2014 reads as follows :

“05-04-2014

Ld. Counsel Mr. B B Das is present representing the Plaintiffs side by filing his memo of appearance.

Ld. Counsel Mr. A K Das is present representing the Defendant No.2 by filing his memo of appearance.

Ld. Counsel Mr. Swaroop Chandra Deb is present representing the Defendant No.1 by filing his memo of appearance with vakalatnama and by a petition prays for a short adjournments for furnishing of written statements on the grounds stated therein.

Perused, considered and allowed, he is directed to furnish W/S before the next date.

Both the parties are directed to settle the matter out of Court in view of Section 89 CPC and to furnish memo of settlement before this Court in the mean time.

Both the sides are further directed to furnish draft issues, examination in chief, if any by the next date without fail and excuse in the interest of speedy disposal of this case.

Fix -8-05-2014 for Plaintiffs evidence.

(Cross-examination of defendants)."

It is shocking that a Judge of the Senior Division is not even aware of the basic principles of law. How could the party submit draft issues when even the pleadings were not completed? The order in question shows total lack of knowledge of the provisions of the Civil Procedure Code. It appears to me that the learned Judge did not even care to read the Civil Procedure Code to see what order is to be passed.

7. The case had been adjourned to furnish written statement by the next date. In the written statement the defendants could have admitted or denied any part of the plaint. Without the written statement I fail to understand how the Court could have directed the parties to furnish draft issues and even more shocking is the fact that the learned Judge also directed that the examination-in-chief be also furnished

without fail by the next date. Till pleadings are complete and issues are framed evidence cannot be filed. Reference may be made to the various provisions of the Civil Procedure Code. Written statements have to be filed in terms of Order VIII of the Civil Procedure Code. While filing a written statement a party can also file a counter-claim or a set-off. How could the learned Judge know whether the defendant is going to file a counter-claim or not?

8. Order X permits the Court to examine parties even before the stage of recording evidence and before framing issues with a view to ascertain the dispute. The parties can be directed to appear-in-person to admit or deny the allegations made therein. It is at this stage that the Court may refer the parties to conciliatory proceedings under Section 89 of Civil Procedure Code. This cannot be done till a written statement is filed. In case settlements are not arrived at or the parties cannot arrive at any settlement then discovery & inspection of documents, admissions and production of documents has to be done in terms of Order XI, Order XII and Order XIII of the CPC. Thereafter, issues are framed in terms of Order XIV CPC and then the case can either be decided in terms of Order XV if no evidence is required or the matter must be listed for evidence in terms of Order XVI. The learned trial Court did not even care to see what procedure is to be followed but interestingly fixed the case on 08.5.2014 for plaintiff's evidence and cross-examination of defendants. I fail to understand how this order could have been passed on 05.4.2014 when the pleadings were not even complete.

9. The matter was then taken up on 08.5.2014 when learned trial Court adjourned the matter to 01.7.2014 for cross-examination of the PWs and in the meantime, the parties were directed to comply with the order in *letter and spirit*. On 01.7.2014 the petitioner-defendant No.1 filed an application under Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 for referring the matter to arbitration and the following order was passed.

"01-7-2014.

Ld. Counsel Mr. Partha Paul is present representing the plaintiffs side by filing his memo of appearance and draft issues along with examination in chief in 2(two) sets filed on behalf of the plaintiffs side.

Ld. Counsel Mr. A K Das and Mr. S C Deb are present representing the defendants No.1 & 2 respectively.

An application under order 5 read with section 8 of the Arbitration and Conciliation Act, 1996 filed on behalf of the Defendant No.1with affidavit.

Perused the same

Keep the draft issue, examination in chief and petition of the defendant No.2 with the instant suit.

Let the suit be fixed for settlement of the disputes amongst the parties under section 89 of CPC, if possible framing of issues and hearing on the petition of the Defendant No.2.

Fix 08-07-2014 for step by parties U/s 89 of CPC, if any/framing of issues/hearing & Order."

10. It is indeed surprising that counsel for the plaintiff also filed examination-in-chief on behalf of the plaintiff in two sets. Examination of witnesses has to take place in accordance with Order XVIII CPC. Order XVIII Rule 3 provides, where there are several issues the

burden of proving some of which lies on the party beginning, that party may either produce his entire evidence on those issues or reserve its right to produce the rebuttal evidence by way of answer to the evidence produced by the other party. Rule 3A provides that a party to the proceedings should appear as a witness before other witnesses of that party as has been examined. Rule 4 provides that the examination-in-Chief of the witnesses shall be filed by affidavit. Evidence has to be led on issues and unless issues are framed how can evidence be led? The defendant may admit the claim of the plaintiff. He may partly admit the claim of the plaintiff or he may totally deny the claim of the plaintiff. Issues will have to be framed by going through the pleadings of the parties and obviously what is the evidence to be led is depended on what are the issues framed. Therefore, before framing of issues the parties should not be directed to lead evidence.

11. In the State of Tripura I found that the examination-in-chief which is filed in the form of an affidavit is *more often than not* a complete copy of the plaint or petition. Sometimes even the limitations and prayer clause are included. This practice has to be stopped. Even where the evidence is to be filed by way of affidavits the Courts must direct the parties to file affidavits and the evidence should be on the basis of issues and the Court has the power, the authority, to strike out those portions of the affidavit which are argumentative and which do not constitute evidence. The Courts must be strict that evidence is restricted to the issues involved and long and meandering affidavits having no

connection with the issues in hand are not permitted to be filed. However, as far as this case is concerned, the affidavits were taken on record and thereafter on 08.7.2014 the following order was passed :

“08-07-2014

Ld. Counsel Mr. Partha Paul is present representing the plaintiffs side by filing his memo of appearance.

Ld. Counsel Mr. A K Das and Mr. S C Deb are present representing the Defendants No.1 and 2 respectively by filing their memo of appearance.

Today, the suit was fixed for settlement of the disputes amongst the parties U/s.89 of C.P.C and for hearing on the application under order 5 read with section 8 of the Arbitration and Conciliation Act, 1996 filed on behalf of the Defendant No.1 with affidavit.

Ld. Counsels of both the sides verbally informed the Court that they tried but failed to settle the disputes U/s.89 CPC.

Hence, heard both the sides on the application under order 5 read with section 8 of the Arbitration and Conciliation Act, 1996 filed on behalf of the Defendant No.1.

Considered and the prayer of the defendant No.1 is rejected.

Let the suit be fixed for framing of issues on the next date and the parties are directed to furnish draft issues if any, in the next date positively.

Fix 11-08-2014 for framing of issues.”

The impugned order gives no reason why the application under Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 has been rejected. No order allowing or rejecting an application can be passed by only saying “*considered and prayer of the defendant no.1 is rejected*”. I am constrained to observe that the learned trial Court again did not even care to read the provisions of the Section 8 of the

Arbitration and Conciliation Act, 1996 and dismissed the application without giving any reasons whatsoever.

12. It is not disputed before me that the written statement had not been filed by the defendant No.1 in the civil suit. Section 8 of the Arbitration and Conciliation Act, 1996 reads as follows :

“8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

13. Along with the application the petitioner had attached the arbitration agreement Clause 23 of which has been reproduced hereinabove. The learned trial Court did not make any reference to the arbitration clause or to the provisions of the Arbitration and Conciliation Act, 1996 and only passed a cryptic order that the suit be fixed for settlement of the disputes amongst the parties under Section 89 of CPC, if possible, framing of issues and hearing on the petition of defendant No.1 on 08.7.2014.

14. The hallmark, indeed the heart and soul of any judicial order are the reasons which are contained therein. An order which does not contain reasons is not a judicial order, it is not even a judicious order and an order without reasons is an arbitrary order. Judicial authorities are expected to pass judicious reasoned orders and not cryptic unreasoned orders as has been done in the present case.

15. As far as the present case is concerned, it is not disputed that the claim of the plaintiff arises out of the arbitration agreement. The plaintiff himself claims that he had taken the loan. According to the plaintiff, he had repaid the entire loan and therefore, clearance certificate must be issued to him. This claim was denied by the defendants who claimed that the plaintiff still owes some amount to the defendants. It is not for this Court to decide the dispute between the parties and this Court is not making any observation on the merits of the dispute.

16. The sole issue is whether the Civil Court could hear the dispute when the arbitration agreement between the parties contained an arbitration clause whereby the disputes were to be referred to the arbitration proceedings. The Arbitration and Conciliation Act, 1996 was enacted with a view to encourage arbitration and lessen the burden on the Courts and, therefore, a party, who wants that a dispute which has been raised in Court should be referred to arbitration must, before filing his first statement in the suit, file the application under Section 8 of the Act.

17. As far as the present case is concerned, I am of the considered view that this dispute is squarely covered by the arbitration clause and should have been referred to arbitration. However, as pointed out by Mr. H K Bhowmik, I am not inclined to permit the insurance company to appoint an arbitrator of its choice to hold arbitration proceedings in Mumbai. According to the arbitration agreement, all proceedings with regard to the agreement should be filed in Mumbai. In my view, this clause is void because as far as the present case is concerned, no part of the cause of action has arisen in Mumbai. The vehicle was purchased within the State of Tripura. It was financed within the State of Tripura. No part of the cause of action has arisen in Mumbai. Merely because the petitioner company is incorporated in Mumbai and has its head office in Mumbai, is no ground to hold that any part of the cause of action has arisen in Mumbai.

18. It would also be totally unjust to give the power to the finance company to appoint an 'arbitrator' of its choice. This would be violative of the principles laid down in Sections 11 and 12 of the Arbitration and Conciliation Act, 1996, especially Section 12(1) which provides that a person who is approached to become an arbitrator must disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. This clause is not strictly applied in government transactions because government servants are expected to be impartial but this cannot be expected from the finance companies and, therefore, I am of the opinion that the venue of the

arbitration proceedings should be in Tripura as well as the arbitrator should be appointed by this Court.

19. In view of the above discussion the petition is allowed. I hereby appoint Mr. R K P Singh, Advocate to be the sole arbitrator to decide the dispute between the parties. The parties are directed to submit their claims and counter-claims to him within a period of 1(one) month from today latest by 17th April, 2015. Mr. R K P Singh is requested to dispose of the matter, as early as possible and latest by **31st August, 2015**. The fees of Mr. R K P Singh is fixed as Rs.20,000/- to be paid equally by both the parties i.e. Rs.10,000/- each on or before the next date i.e. 17th April, 2015. The arbitrator while deciding the case can also decide whether one party should bear the cost of the other party or not.

20. With the aforesaid directions the petition is disposed of.

21. A copy of this judgment be circulated to all judicial officers in the State and placed on the personal file of the officer who passed the impugned order. A copy be also sent to the trial Court to dispose of the suit in light of the aforesaid order. A copy of this judgment be also sent to the concerned judicial officer who passed this order and a copy be kept in his service record.

CHIEF JUSTICE

Sukhendu