

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

% Judgment delivered on: 17.08.2015

+ **FAO 19/2015**

PHOOL KUMAR

..... Petitioner

Versus

MAHINDRA AND MAHINDRA

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Bhagat Singh, Advocate

For the Respondent: Mr. Vardhman Kaushik, Advocate

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1 This is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the Act). The appeal is essentially directed the order dated 06.01.2014, passed by the learned Additional District Judge (in short the ADJ). The appellant being aggrieved has preferred this appeal.

BACKGROUND FACTS

2. In order to dispose of this appeal, the following broad facts are required to be noticed :-

2.1 The appellant evidently had taken a loan from the respondent for the purposes of purchasing a vehicle. It is the case of the appellant that in this behalf, financial assistance to the extent of Rs.7 Lakhs, was extended by the respondent, on 31.10.2011.

2.2 I may only note at this juncture that the record shows that respondent had taken a stand before the learned ADJ that an amount of Rs.9,65,712/- had been advanced in the form of a loan to the appellant.

2.3 Be that as it may, the loan was admittedly given to the appellant by the respondent for purchase of a vehicle. The make of the vehicle, as per the appellant was TATA MANZA (whereas the respondent has described the vehicle as, TATA INDIGO MANZA ELAN QU). In so far as the registration number of the vehicle is concerned, both parties are ad idem. The Registration number of the vehicle, as per the record, before me, is: DL4C AL 3279. The vehicle, according to the respondent, bears the Engine No.101A20000153496 and chasis no.MAT613053BLE13815 (hereinafter referred to as the subject vehicle).

2.3 Apparently, the appellant defaulted in paying the equated monthly instalments, which, prompted the respondent to initiate arbitration proceedings in terms of the loan agreement executed between them.

2.4 It is while the arbitration proceedings were in progress, that the respondent filed an application under Section 9 of the Act, on which, the learned ADJ vide order dated 15.01.2013 directed issuance of summons. The summons in the petition was made returnable on 23.01.2013.

2.5 On 23.01.2013, the learned ADJ proceeded to dispose of the application accompanying the Section 9 petition by appointing a receiver and directing re-possession of the subject vehicle. Pertinently though, in this very order, the learned ADJ had indicated that the receiver would inform the appellant that he had the option of resolving the dispute amicably via mediation under the aegis of the mediation cell, situate in the Tis Hazari Courts, at Delhi. A direction was also issued that the receiver would hand over a copy of the order passed, to the appellant, at the point in

time when, he re-possessed the subject vehicle. The order also indicated that the matter would “come up on the date fixed for service report of the respondent.”

2.6 It is not in dispute that the receiver appointed by the ADJ took possession of the subject vehicle, on 11.02.2013. This aspect was recorded in the impugned order dated 06.01.2014.

2.7 Moving on with the narrative, the respondent, it appears, moved an application before the ADJ, on 13.03.2013, for permission to sell the subject vehicle. The ADJ recorded on that date, that the respondent had filed a report of the receiver indicating therein that he had re-possessed the subject vehicle. Accordingly, notice in the application was issued to the appellant and the matter was posted for 30.03.2013. In the interregnum, the receiver was directed to file an affidavit indicating therein, that the copy of the interim order dated 23.01.2013 had been handed over to the appellant, and that, the appellant had not made any offer to pay the outstanding instalments.

2.8 On 30.03.2013, after the first call, the appellant entered appearance via his counsel, who, was informed, that the matter had been posted for further proceedings on 08.04.2013.

2.9 On 08.04.2013, the learned ADJ recorded the fact that the subject vehicle had been repossessed and, based on the submission of the counsel for parties that there was a possibility of arriving at a settlement in the matter, referred them to the mediation cell, at the Tis Hazari Courts, Delhi. Parties were accordingly, directed to appear before the mediator on 09.05.2013 at 2.00 p.m. and report the outcome to the court on 28.05.2013. It was indicated that if, settlement, was not reached, the matter would be taken up for reply and arguments. On this date, counsel for both parties

were present before the ADJ.

3. On 28.05.2013, the matter was adjourned to 18.07.2013 based on the submission of the counsel for the respondent that the matter was pending before the mediator. On this date though, the appellant was not represented.

3.1 It is the case of the appellant that on 22.05.2013 (while proceedings for mediation were on) he got to know that the arbitrator has passed an exparte award dated 09.05.2013 in favour of the respondent.

3.2 Consequently, according to the appellant, the respondent refused to settle the matter via the mediation process.

3.3 On 18.07.2013, the learned ADJ recorded that the matter could not be settled. The ADJ also proceeded to record that the report of the mediation cell had been received. Consequently, the learned ADJ went on to observe that since, arbitration proceedings were in progress, the learned arbitrator would take a decision with regard to the re-possessed vehicle (i.e. the subject vehicle) at the time of passing of the award. The petition was disposed of, as according to the learned ADJ, nothing further remained to be done in the matter.

3.4 On 30.08.2013, the appellant moved an application for modifying and / or recalling the order dated 18.07.2013. In addition to this main relief sought in the application, certain other reliefs were sought by the appellant. On the said date, notice in the application was issued which was accepted by the respondent's counsel, who was present in court at that time. The application of the appellant was posted for arguments on 16.09.2013. Furthermore, the learned ADJ directed the authorised representatives of both parties to remain present in court on the next date.

3.5 On 16.09.2013, the learned ADJ, allowed the appellant's application

for recalling the order dated 18.07.2013. Though, there was no elaborate discussion in the order, there was, however, reference to the assertion of the appellant that the said order had been procured by the respondent by concealing important facts relating to the matter. For the sake of convenience, the said order is extracted hereinafter:

“..... Respondent has filed an application for recalling of order dated 18.07.13 and to restore the petition on the basis that the said order has been procured by the petitioner by concealing the important facts relating to the matter. The application is allowed and the petition is restored to its original number.

To come up for reply and arguments on 22.10.13. Advance copy of reply be supplied at least 7 days before next date of hearing....”

3.6 As is evident from the extract culled out above, since, order dated 18.07.2013 was recalled, the ADJ, granted time to the appellant to file a reply and posted the matter, on 22.10.2013, for arguments.

3.7 On 22.10.2013, the reply of the appellant to the petition under Section 9 of the Act was taken on record. Furthermore, the respondent's affidavit in support of its submission that the loan agreement had been signed and executed within the territorial jurisdiction of the court, was also taken on record. The matter was consequently posted for arguments on 30.11.2013.

3.7 On 30.11.2013, arguments were heard and the matter was posted for orders / clarification on 16.01.2014.

4. It is, in this background, that the impugned order dated 16.01.2014, came to be passed.

SUBMISSION OF COUNSELS

5. Mr. Bhagat Singh, who appears for the appellant, has assailed the

impugned order on the ground that there is a serious error committed by the learned ADJ, in as much as, in the said order, it is recorded, right at the beginning, that it would dispose of, the appellant's application for modifying or recalling order dated 18.07.2013 and / or restoring the petition, which was disposed of, by the said order.

5.1 The learned counsel argued that the order dated 18.07.2013, was recalled on 16.09.2013 and therefore, all that the learned ADJ, was called upon to do, was to deal with the respondent's petition under Section 9 of the Act. According to the learned counsel, there was complete non-application of mind by the learned ADJ, in passing the impugned order.

6. On the other hand, the learned counsel for the respondent, submitted that the record would show that the appellant had failed to pay the outstanding dues. It was submitted that in the impugned order the learned ADJ had recorded that the appellant was in arrears to the tune of Rs.3 Lakhs and since, the subject vehicle had already been re-possessed, no favourable orders could be passed in his favour. The learned counsel in support of his submission, drew my attention to the fact that the respondent had already obtained an award in his favour, the challenge with regard to which was pending adjudication before the concerned court at the behest of the appellant.

REASONS

7. I have heard the learned counsel for the parties and perused the record carefully.

8. The reason that I have recorded the proceedings before the ADJ, in great detail, is that, at first blush, some amount of confusion was caused on account of the fact that the impugned order made reference to the order dated 18.07.2013 which, already stood recalled, vide order dated

16.09.2013.

8.1 A careful perusal of the record would, however, show that as a matter of fact, while passing the order dated 16.09.2013, the learned ADJ was in effect, dealing with the application of the appellant which had not one but several prayers, contained in it; the prayer for recall of order dated 18.07.2013 being the main prayer:-

- “..a). Modify and / or recall the Order dated 18th July 2013 and restore the present petition;
- (b). Grant an opportunity of hearing to the Respondent;
- (c). Accept the undertaking of respondent as stated in para 6 hereinabove.
- (d). Issue directions / order to the receiver to deliver back the possession of TATA MANZAA Car having registration no.DL 4C AL 3279 unto respondent forthwith.
- (e). Thereafter, dismiss the present petition with heavy costs for playing fraud upon the court.
- (f). Pass any other or such orders as this Hon’ble Court may deem fit and proper in the interest of justice...”

8.2 The prayers extracted above would show that on 16.09.2013, the ADJ, in effect, only granted prayer (a) whereby, order dated 18.07.2013 was recalled. As indicated above, by order dated 18.07.2013, the learned ADJ had based on the assertion of the counsel for the respondent that arbitration proceedings were in progress, disposed of its petition under Section 9 of the Act; leaving the final decision with regard to the re-possessed (subject) vehicle to the learned arbitrator.

8.2 Therefore, when the impugned order dated 06.01.2014 was passed, the learned ADJ was dealing not only with the respondent’s petition under Section 9 of the Act but was also dealing with the remaining prayers of the appellant’s application which, inter alia, sought return of the re-possessed subject vehicle, based his willingness to furnish an undertaking set out in

paragraph 5 (incorrectly stated as paragraph 6 in the prayer clause of the application) that he neither had any intention to dispose of or sell nor will he sell or dispose of, the subject vehicle.

8.3 This aspect is quite clear if, one were to peruse carefully the first paragraph of the impugned order. For the sake of convenience, the said part of the impugned order is set out hereinafter :-

“...Vide this order, I shall dispose off application of the respondent for modifying or recall the order dated 18.07.2013 and restore the petition. Applicant has also prayed for grant of opportunity of hearing to him as well as accepting his undertaking. Applicant has also prayed for directing the Receiver to deliver back the possession of Tata Manzaa Car having Registration no.DL4C AL 3279...”

(emphasis is mine)

8.4 As indicated above, the ADJ also dealt de novo with the respondent's petition under Section 9 of the Act.

8.5 After hearing the parties, the learned ADJ, came to the conclusion that since dues were outstanding against the loan advanced qua the subject vehicle, “no favourable orders could be passed in favour of the appellant.” Accordingly, the appellant's application was dismissed.

8.6 Having regard to the record and the submissions made before me by the learned counsel for the parties, I am not inclined to interfere with the order of the learned ADJ. The appellant prima facie is liable to pay moneys to the respondent. The subject vehicle has already been re-possessed. In fact, the respondent has obtained an award in his favour, the sustainability of which is under challenge and is pending adjudication before the competent court.

9. Thus, having regard to the aforesaid facts and circumstances, the appeal is dismissed. It is, however, made clear that the dismissal of the

appeal will not impact the final adjudication of the petition filed by the appellant to challenge the arbitral award dated 09.05.2013, passed by the arbitrator.

11. In these circumstances, the interlocutory application, being: CM No.1150/2015 filed for condonation of delay of 133 days in re-filing the appeal has been rendered infructuous. There shall, however, be no orders as to costs.

AUGUST 17, 2015
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RAJIV SHAKDHER, J.