

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 15th DAY OF MARCH 2018

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. No.2067 of 2009

and

A.No.2347 of 2018

In the matter of Arbitration
and Conciliation Act, 1996

and

In the matter of Agreement
dated 16.11.2006 between
Applicant and Respondent
Agreement No.CHLN280357

Cholamandalam DBS Finance Ltd.,
No.2, NSC Bose Road, Chennai-1.
Rep. by its Assistant Manager (Legal)
Mr.K.Venkateshwaran ... Applicant

-Versus-

1. Ranjeeth Rayon,
F-1, Plot No.32, Vijay Shivlar,
Kannappan Nagar Extension,
Thiruvanmiyur, Chennai-600 042.

(*) 2. Kun Hyundai,
Kun Auto Co Pvt. Ltd.,
Rep. by its Authorised Signatory
C-48, II Avenue, Anna Nagar East,
Chennai 102.

(*) 2nd respondent impleaded as per order
dated 16.06.2010 in A.No. 6945 of 2009 and order
dated 15.03.2018.) ... Respondents

Application praying that this Hon'ble Court be
pleased to appoint an Advocate Commissioner to seize and
deliver the vehicle more fully described in the schedule to
the judge's summons to the applicant from the premises of
the respondent or wherever found with police aid and break
open of premises if necessary.



A.No.2347 of 2018

Kun Hyundai,
Kun Auto Co Pvt. Ltd.,
Rep. by its Authorised Signatory
C-48, II Avenue, Anna Nagar East,
Chennai 102. : Third Party/Applicant

-Vs.-

1. M/s.Cholamandalam DBS Finance Ltd.,
No.2, NSC Bose Road, Chennai-1.
Rep. by its Assistant Manager (Legal)
Mr.K.Venkateshwaran : Applicant/Respondent

2. Mr.Ranjeeth Rayon,
F-1, Plot No.32, Vijay Shivlar,
Kannappan Nagar Extension,
Thiruvanmiyur, Chennai-600 042. : Respondent/Respondent

Application praying that this Hon'ble Court be pleased to direct the 1st respondent herein to pay a sum of Rs.1,83,173/- with interest at 18% per annum.

These Applications coming on this day before this court for hearing the court made the following order:-

A.No.2067 of 2009 was filed by Cholamandalam DBS Finance Ltd. (in short 'company') seeking the appointment of an Advocate Commissioner to seize and deliver the schedule vehicle.

2. The company and one Mr.Ranjeeth Rayon (in short 'borrower') had entered into a loan agreement dated 16.11.2006 for purchase of a Hyundai Accent GLS vehicle bearing Engine No.G4ED3A44966 and Chassis No.MALCHA41CR3M059973, registered as TN 01 W 1200. The borrower availed finance facility of a total sum of Rs.4,48,121/-to be repaid in 48 monthly instalments commencing from 10.11.2006 and running till 10.10.2010.

Each instalment was of an amount of at Rs.9,336/-, the last instalment being of an amount of Rs.9,329/-.

3. Mr.Mohammed Ismail, learned counsel appearing for the company submits that the borrower had been a chronic defaulter from the word go. Since the agreement, according to him, stood determined in the event of defaults in repayment, the company had terminated the same and, at the time of filing the application, was in the process of initiating proceedings for arbitration in terms of Article 17 of the loan agreement. He would submit that pursuant thereto, the proceedings for arbitration have culminated into an award in its favour which the company is not in a position to enforce as the whereabouts of the borrower/respondent are unknown.

4. This Court, vide order dated 30.04.2009 appointed an Advocate Commissioner ex parte to seize the vehicle as prayed for. The warrant issued to the Advocate Commissioner permitted him to seize the vehicle wherever it may be found.

5. The Advocate Commissioner has filed a report into Court [undated] of the month of June, 2009, which sets out the sequence of events leading to the seizure of the vehicle. According to the report filed by the Commissioner, pursuant to warrant dated 30.04.2009, received by him on 12.05.2009, information received by the company was conveyed to him on 21.05.2009 to the effect that the vehicle had been traced at Kottivakkam. Thus on 22.05.2009

he, along with the company representative went to the premises of Kun Hyundai on East Coast Road, Kottivakkam, where the vehicle was said to have been located.

6. Though police protection was sought, the police did not, according to the Advocate Commissioner, initially offer any help. Be that as it may, upon the insistence of the company's representative, on the ground that he would not be able to trace the vehicle the next day as it would be secerated, the Advocate Commissioner was persuaded to execute the warrant on 23.05.2009. The police were prevailed upon, on the basis of the order of this Court, to offer assistance and protection in this regard.

7. Thus, two police personnel, the company representative and other persons from the company and the Advocate Commissioner proceeded to the premises of Kun Huyndai (Applicant in A.No.6945 of 2009) (in short 'service station'). The representatives of the service station appear to have explicitly conveyed to the Advocate Commissioner that the borrower was liable to pay the service station for the cost of parts and its service in respect of the vehicle entrusted to their custody and that the service station exercised a lien over the vehicle till such time the liability was met in full.

8. Despite the same, the vehicle was seized upon the strength of the order of this Court dated 30.4.2009. The

<https://hcservices.ecourts.gov.in/hcservices/> contents of paragraphs 6 to 8 above are based on the report of the Advocate Commissioner that are undisputed by either

party and thus constitute a faithful rendition of the events that transpired leading to the seizure of the vehicle.

9. The service station has thereafter approached this Court in A.No.6945 of 2009 seeking to be impleaded and also seeking a direction to the company to make good the sum of Rs.1,83,173/- with interest at 18% p.a for the cost of the parts replaced in the subject vehicle and its labour.

10. Impleadment application was ordered on 15.3.2018 and consequential amendments were carried out. The application of Kun Hyundai is numbered as A.No.2347 of 2018.

11. The short issue for determination in the background of the above facts and circumstances is whether the service station is entitled to be reimbursed by the company for the expenditure incurred by it for the repairs and replacement of parts to the subject vehicle.

12. Mr.V.Lakshmi Narayanan, learned counsel appearing for the service station submits that the subject vehicle appeared to have met with an accident and had been left with the service station for extensive repair and replacement of damaged parts. The cost of the parts replaced had been duly met by the service station and the repairs carried out in full. The extent of the expenditure was Rs.1,65,502.84. An invoice evidencing the same is on record.

<https://hcservices.ecourts.gov.in> 12. The vehicle had been entrusted to the service station on 29.09.2009 and the vehicle had been ready for

delivery on 30.11.2008. Despite several attempts there was no move on the part of the borrower to settle the dues nor collect the vehicle from the service station. The crux of his argument is that the service station assumed the position of a bailee upon receipt of the vehicle from the and thus exercised a lien over the vehicle till such time the liability was met and discharged.

14. Attention is drawn to clause 10 of the terms and conditions entered into between the service station and its client [borrower], which provides that the service station shall exercise a lien upon the vehicle till the settlement of all dues payable by the client to it. Various decisions have been relied on by Mr.Lakshmi Narayanan in support of the proposition that the Service Station as a bailee of the vehicle exercises a lien over the asset till the settlement of all dues payable to it. (See *Green V. All Motors Limited* ((1917) 1 K.B.625) and *Tappenden V. Artus and another* ([1963] 3 W.L.R. 685). I must however place on record that Mr.Ismail, appearing for the company also does not, fairly, dispute the position that the service station does exercise a lien over the vehicle.

15. It was during the period that the vehicle was with the service station that this Court passed an order in A.No.2067 of 2009 appointing the Advocate Commissioner on 30.04.2009.

<https://hcservices.ecourts.gov.in/hcservices/> 16. Learned counsel would urge that this Court, having appointed the Advocate Commissioner upon the insistence of

the applicant in A.No.2067 of 2009, has a duty cast upon it to set right the prejudice caused to the company by virtue of its order dated 30.04.2009 appointing the Advocate Commissioner.

17. He would also submit that the company had played a fraud upon the Court by not bringing to the notice of the Court that the vehicle was under repair with the service station, particularly when both company as well as the Advocate Commissioner had been informed by the service station that it exercised a lien over the vehicle.

18. The defences of Mr.Mohammed Ismail appearing for the company are as follows:

(i) Unabashed reliance upon order of this Court dated 30.04.09 whereunder this Court had, in appointing the Advocate Commissioner issued a warrant for the seizure of the vehicle, wherever found. There was thus, according to him, nothing untoward about the action of the Advocate Commissioner in seizing the vehicle from the premises of the service station.

(ii) There is no privity of contract as between the service station and Cholamandalam and as such no relief could be sought in the section 9 proceedings initiated by the company.

(iii) The company came to know of the fact that the vehicle was in the custody of the service station only

<https://hcservices.ecourt.gov.in/hcservices> dated 30.04.2009 and there was thus no basis for the allegation of fraud.

(iv) The vehicle was not in a running condition and was, in fact, towed away by Cholamandalam and thus there is no basis to the claim of expenditure incurred by the service station.

19. No decisions have been cited by the learned counsel for the applicant in A.No.2067 of 2009.

20. Heard learned counsel.

21. It is true that there is no privity of contract as between Cholamandalam and the service station and also true that there is no arbitration clause as between the parties. However, I believe that the service station is entitled to maintain this petition since the relief sought arises directly from operation of the order of this Court dated 30.04.2009 particularly seeing as this Court, sits in equity jurisdiction. According to me the maintainability of the application is thus not in question and I reject the argument of Cholamandalam to this effect.

22. As regards the merits of the claim, I first address the arguments to the effect that there is no basis for the expenditure claimed. An invoice for a sum of Rs.1,83,173/- has been annexed to the application. The break-up provided is a sum of Rs. 1,47,113/-towards parts, and Rs.15,726.10 towards labour. Mr.Ismail questions the incurrence of expenditure when the vehicle was not in a running condition when it was seized and had to be towed

23. One cannot lose sight of the elapse of time between 30.11.2008 when the vehicle is stated to have been made ready for delivery by the service station and 22.05.2009 when the seizure was actually effected. In fact, a technical valuation report has been obtained from the Surveyor/valuer suggested by Cholamandalam, which reveals the following:

TECHNICAL (VALUATION) REPORT dated 02.02.2010 of K.P.Senthil Kumar, Approved Valuer, the Vehicle was found to be in an Ideal condition since 30.05.20009. I have suggested the value that the above vehicle in as is where condition Rs.90,000/- .

Note: I have gone through entire M/s.Kun Hyundai Bill given to me.

They have been carried out by complete engine work. All items should be fitted with internal items. Hence, I am not able to give confirmation of the above items whether replaced or not and also about the labour charges incurred. Now the vehicle was in Ideal condition.

24. The report states that the battery and the key were missing. Naturally so, considering that the vehicle was idling for a period of nearly six months. It is thus that the car has been towed away and this does not imply, as Mr.Ismail would urge that the vehicle had not been repaired at all. The objection raised to the quantification of expenditure is thus rejected.

25. This Court, entertaining A.No.226 of 2010 filed by the service station for reopening and setting aside the order in Application No.2067 of 2009 dated 30.04.2009 has passed an order dated 05.02.2010 after hearing both sides as follows:

‘.....8. I would call up and recollect that in view of the provisions of the Indian Contract Act, the applicant, who as per his affidavit claiming to be the bailee in possession of the vehicle and also carried out repairs, was entitled to exercise lien over it and in such a case, he is having a right of hearing before this Court.

9. Whereas, the learned counsel for the first respondent herein would submit that they were under the impression that the vehicle was simply kept in the shed of the applicant and that was why it was seized. There is an issue to be decided by this Court, because only as per the order of this Court, the Advocate Commissioner with the help of police seized the vehicle from the custody of the applicant. As such, the truth or falsity of the matter could be gone into only while hearing the other related applications.’

26. There was a long hiatus in the matter thereafter and finally, on 27.01.14 a direction was issued by this Court for the disposal of the asset in the following terms:

‘Since the borrower/owner of the vehicle has not chosen to appear and also since the vehicle was taken possession by the applicant long time back and hereby permit the applicant to sell the vehicle in a transparent manner after ensuring proper advertisements and file a report before this Court, within three weeks.

Post after three weeks’.

27. Mr. Ismail, quibbles that the car was sold in 2014 for a paltry sum of Rs.45,000/- only. But then it is the company that is to be blamed. After all, the vehicle was seized in 2009, and there was no order of stay by this Court for the disposal of the vehicle. There was thus nothing that prevented the company from disposing the vehicle when it was in a better condition and would have fetched a far better price. In fact, in the words of the valuer suggested by the company, the vehicle, in June 2009 was 'in an ideal condition'.

28. Further, though this Court, in the order extracted above specifically calls for a report of the company after disposal of the car, admittedly no such report has been filed.

29. In the facts and circumstances of the present matter, I have no doubt, and in fact, Mr. Ismail does not question this, that the service station did have a subsisting lien over the vehicle at the time of seizure of the same from its premises. The officials of the service station have brought the factum of subsisting lien to the notice of the company. However, it is apparent that the company has persisted with the efforts to recover the vehicle from the service station on the strength of this Courts' order, passed when the whereabouts of the vehicle were unknown.

30. The actions of the company and its representatives to seize the vehicle and to enforce its own claim at all

costs, is apparent from the report of the Advocate Commissioner where the authorized representatives of the company insist upon the execution of the warrant on 22.05.2009 itself, apprehending that the vehicle may otherwise be secreted. The vehicle having been found in a service station, there was no question that the same would be secreted. The proper course of action would have been to obtain appropriate directions from this Court, in the light of the peculiar situation created by the lien held by the service station over the vehicle.

31. The icing on cake is the statement of the respondent before this Court on 30.04.2009 to the effect that the respondent was of the impression that the vehicle had merely been parked in the garage of the service station 'when the report of the Advocate Commissioner clearly indicates otherwise'. Thus conflicting stands have taken by the company over the years. In the light of the circumstances as noted and discussed above, I am of the view that the service station is entitled to the sum of Rs.1,83,173/- as prayed for. The Company shall pay the amount of Rs.1,83,173/- within a period of two weeks from the date of receipt of a copy of this order.

32. Needless to say the company is at liberty to pursue all modes of recovery as available to it and in accordance with law to recover the outstanding from the

borrower. The observations made in the course of this order

shall not stand in the way of any proceedings as aforesaid,
being initiated by the company.

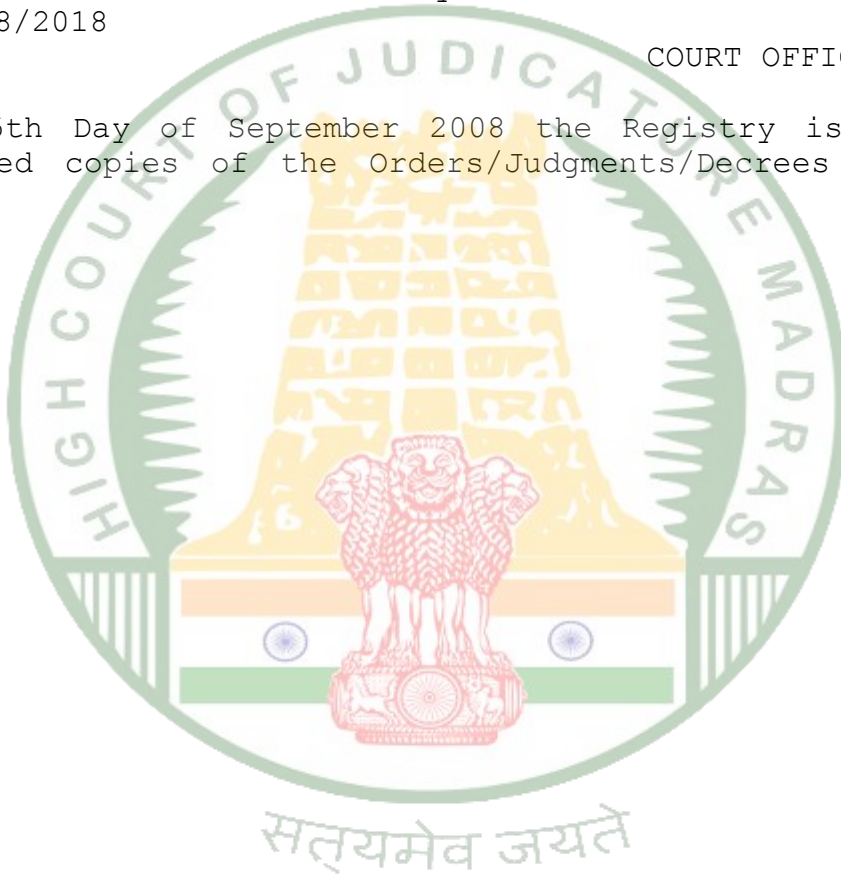
Sd./-A.S.M.J
15.03.2018

//Certified to be true copy//

Dated at Madras this the day of 2018
JJ 30/08/2018

COURT OFFICER(O.S.)

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format.



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