

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2019

CORAM :

The HON'BLE MR.JUSTICE M.DURAI SWAMY

C.R.P.No.4596 of 2013

and M.P.No.1 of 2013

M/s.Kotak Mahindra Prime Limited,
No.39, Montieth Road,
Egmore, Chennai - 600 008.

... Petitioner

Vs.

M.Mohan

... Respondent

Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 18.11.2013 in I.A.No.14692 of 2013 in O.S.No.2201 of 2013 passed by the II Assistant Judge, City Civil Court, Chennai.

For Petitioner : Ms.S.Rajeni Ramadass

For Respondent : Mr.V.Karunakar

O R D E R

Challenging the order passed in I.A.No.14692 of 2013 in O.S.No.2201 of 2013 on the file of the II Assistant Judge, City Civil Court, Chennai, the defendant has filed the above Civil Revision Petition.

2.The respondent/plaintiff filed the suit in O.S.No.2201 of 2013 to direct the defendant to pay a sum of Rs.5,28,661/- together with interest towards the damages suffered by him.

3.The petitioner/defendant filed an application in I.A.No.14692 of 2013 under Section 8 of the Arbitration and Conciliation Act, 1996, to refer the relief sought for in the suit for arbitration by invoking Clause - 31 of the Loan Agreement dated 19.09.2011. The respondent/plaintiff filed his counter and opposed the petition stating that he had issued legal notices on many occasions and the petitioner/defendant never suggested the arbitration clause nor came forward to refer the same for arbitration. Further, the respondent/plaintiff has stated that the petitioner/defendant having failed to nominate an Arbitrator for adjudicating their claim, are taking a different stand now. Further, the respondent contended that his action cannot be adjudicated in an arbitral proceeding and only

the Civil Court has jurisdiction to award damages.

4.The trial Court, taking into consideration the case of both parties, dismissed the petition finding that the Arbitrator is not a Competent person to ascertain and decide about the quantum of damages and the damages for mental agony suffered by the respondent. Challenging the order passed by the trial Court, the defendant has filed the above Civil Revision Petition.

5.The learned counsel appearing for the petitioner submitted that in view of Clause - 31 of the Loan Agreement dated 19.09.2011, the trial Court should have allowed the application and referred the matter to an Arbitrator. Further, the learned counsel submitted that as per Clause - 31 all disputes, differences and/or claim arising out of the Loan Agreement or in any way touching or concerning the same or as to constructions, meaning or effect thereof or as to the rights and liabilities of the parties shall be settled by arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Therefore, according to the learned counsel for the petitioner, the relief sought for in the suit very much comes within the purview of Clause - 31 of the Loan Agreement and therefore, the matter should have been referred for arbitration.

6.Countering the submissions made by the learned counsel for the petitioner, the learned counsel appearing for the respondent/plaintiff submitted that since the plaintiff had prayed for damages, the same can be decided only by a Civil Court and not by an Arbitrator. Further, the learned counsel submitted that even if the dispute is covered by Arbitration Agreement, all disputes relating to the right in rem are to be adjudicated by the Courts and Tribunals, being unsuited for arbitration.

6.1.In support of his contention, the learned counsel appearing for the respondent relied upon a judgment reported in (2011) 5 Supreme Court Cases 532 [Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others] wherein the Hon'ble Supreme Court held as follows:

"...

35.The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded

either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

...

42. The distinction between disputes which are

capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court. In Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. [(1999) 5 SCC 688] this Court held: (SCC pp. 689-90, paras 4-5)

"4.Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

5.The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application." (emphasis supplied)"

7.On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it is not in dispute that the petitioner and the respondent entered into a Loan Agreement dated 19.09.2011 for the purchase of a vehicle. It was alleged that the respondent/plaintiff committed default in repaying the loan amount to the petitioner/defendant and therefore, the vehicle was sold and the sale proceeds were adjusted towards the loan account. The respondent/plaintiff contended that he was willing to pay all the amounts claimed by the petitioner/defendant and in spite of the same, they sold the vehicle.

8.On a perusal of the Loan Agreement dated 19.09.2011, it could be seen that Clause - 31 speaks about the arbitration. On a reading of Clause - 31, it is clear that all disputes, differences and/or claim arising out of the Loan Agreement or in any way touching or concerning the same or as to constructions, meaning or effect thereof or as to the rights and liabilities of the parties shall be settled by arbitration to be held in

accordance with the provisions of the Arbitration and Conciliation Act, 1996. From the reading of Clause - 31, it is clear that all disputes between the parties should be referred for arbitration under the Arbitration and Conciliation Act, 1996. In spite of the same, the respondent filed the suit claiming damages. In the counter filed by him before the trial Court, in more than one place, he has stated that the petitioner has not named the Arbitrator, therefore, he has filed the suit claiming damages. When the respondent/ plaintiff is claiming damages, he should have asked the petitioner/ defendant to name the Arbitrator as per the Loan Agreement. The respondent cannot expect the defendant to name an Arbitrator without raising a dispute seeking for appointment of an Arbitrator.

9. The contention of the respondent that the relief sought for is a right in rem, which is a right exercisable against the world at large and not a right in personam which is an interest protected solely against specific individuals, cannot be accepted. The respondent/plaintiff has prayed for damages which cannot be termed as a right in rem. He has claimed damages for monetary loss and for mental agony suffered by him. This cannot be termed as a right in rem. When the respondent's claim is a right in personam, following the ratio laid by the Hon'ble Supreme Court in the judgment relied upon by the learned counsel for the respondent, the dispute can be referred for arbitration.

10. In these circumstances, I am of the considered view that as per Clause - 31 of the Loan Agreement, the trial Court should have referred the dispute for arbitration. The reasoning given by the trial Court for dismissing the application filed under Section 8 of the Arbitration and Conciliation Act, 1996 are without any basis. The fair and decreetal order passed by the trial Court are liable to be set aside. Accordingly, the same are set aside. The application in I.A.No.14692 of 2013 in O.S.No.2201 of 2013 stands allowed. Invoking Clause - 31 of the Loan Agreement dated 19.09.2011, the petitioner/defendant shall nominate an Arbitrator to decide the relief sought for in O.S.No.2201 of 2013 within a period of three weeks from the date of receipt of a copy of this order.

11. With these observations, the Civil Revision Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

va

Sd/-

Assistant Registrar

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Sub Assistant Registrar

To

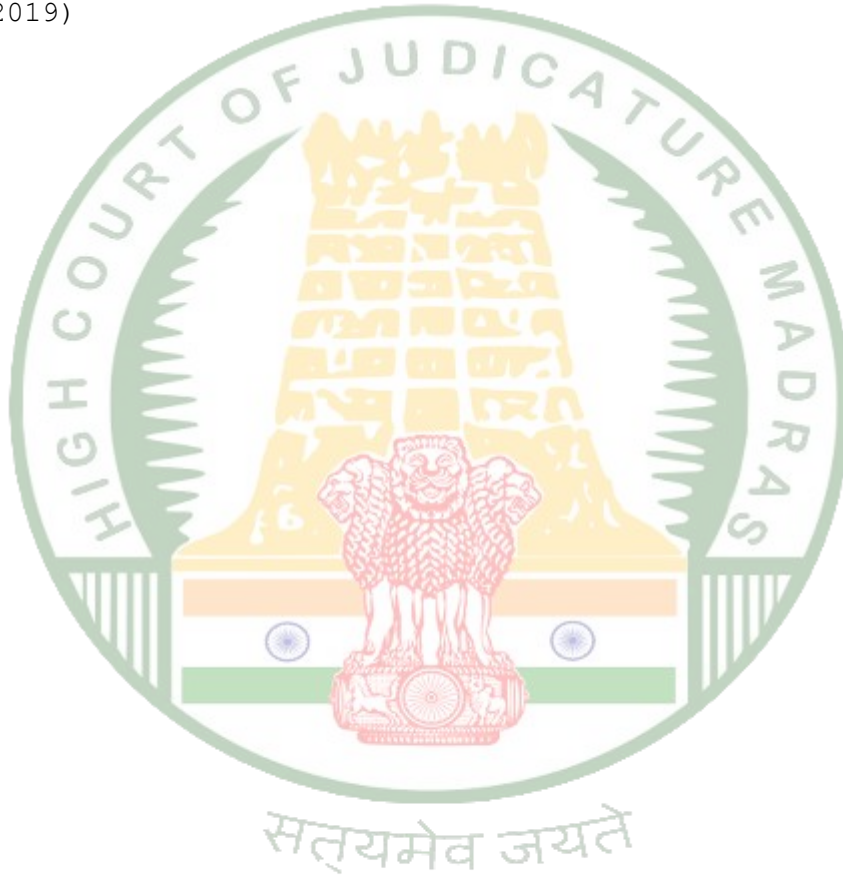
The II Assistant Judge, City Civil Court, Chennai

+1cc to Mr.S.Rajeni Ramadass, Advocate, SR.No.92857

+1cc to Mr.V.Karunakar, Advocate, SR.No.93285

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Kak(11/11/2019)



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