

26.09.2022
SL No.19
Court No.8
(gc)

**FMA 1174 of 2022
CAN 1 of 2022**

**Tata Motors Finance Ltd.
Vs.
Samed Ali Khan**

Mr. Pratip Mukherjee,
Mr. Sayak Ranjan Ganguly,
Ms. Srijani Ghosh,
...for the Appellant/Petitioner.

In spite of service, the respondent is not represented, nor any accommodation is prayed for on behalf of the respondent.

In view of our earlier order dated 23rd September, 2022, we propose to hear the appeal and the application together and disposed of by this common order.

The learned Counsel for the appellant submits that the learned Trial Judge, disregarding the agreement between the parties which specifically referred to an arbitral clause as the agreed mode of settlement was discussed, has effectively passed an order of injunction restraining the appellant from realizing the Equated Monthly Installments (EMI's) to be paid by the respondent in terms of a hire purchase agreement.

From the impugned order, it appears that the learned Trial Judge restrained the Finance Company to take possession of the vehicle in question due to default and was satisfied with an apprehension expressed by the respondent that the Finance Company due to some

default may take coercive steps and forcibly take possession of the vehicle in question.

The learned Counsel for the appellant has submitted that on 16th August, 2022, the appellant appeared and filed the application under Sections 5 and 8 of the Arbitration and Conciliation Act by which a dispute was raised with regard to the jurisdiction of the Trial Court to hear the suit or pass any consequential orders in relation to the said suit. The grievance of the appellant is that without deciding the said application, the interim order is still in operation. However, there is no dispute that the respondent has complied with the order dated 27th July, 2022 and has paid the amount as directed by the Trial Court.

The Court should not rewrite a contract between the parties or restructure the loan amount unless it is agreed upon by and between the parties. If there are supervening circumstances, the Court may in exercise of its equitable jurisdiction relieve the party from hardship and may in appropriate cases absolve the party from paying any penalty, provided the Court is satisfied with his best conduct. However, these are the factors that are required to be taken into consideration when a prayer is made requiring extension of the installment period or for rescheduling of the loan account because of circumstances, like Covid Pandemic. On earlier occasion, we have heard these kinds of matter and in appropriate

cases, we have directed the Finance Companies not to levy any penal charges because of the Covid Pandemic.

The learned Counsel for the appellant submits that in the instant case, no such penalty was imposed during Covid period. However, more fundamental issue is with regard to the jurisdiction of the Court to decide the suit when there is an existence of arbitration clause. Prima facie, it appears that the hire purchase agreement contains an arbitration clause.

In our view, the Trial Court ought to have taken into consideration the said arbitration agreement between the parties and ought to have decided the said application prior to the hearing of the injunction application. We have been informed that the learned Trial Court has fixed the matter on 16th November, 2022. Since the respondent has complied with the order dated 27th July, 2022, we are not inclined to interfere with the order for the present. However, we direct the learned Trial Court to dispose of the application under Sections 5 and 8 of the Arbitration and Conciliation Act before deciding the injunction application.

The learned Counsel for the appellant has submitted that as on date more than Rs.4,00,000/- is due and payable.

The learned Trial Court when decide the injunction application and the application under Sections 5 and 8 of the Arbitration and Conciliation Act shall have due regard

to the said fact and decide the matter in accordance with law.

With the aforesaid observation, the appeal being FMA 1174 of 2022 and the application being CAN 1 of 2022 stands disposed of.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)