IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2023

CORAM :

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Civil Miscellaneous Appeal Nos. 1390 & 1391 of 2023
and
C.M.P. Nos. 13867, 13871, 13872 & 13875 of 2023

1.Mrs. Tamilarasi.P

2.Mr. Umapathy ... Appellants in both the appeals

Versus

M/s.DIMCO Finance Private Limited,
Gaurav vara,
#32, New Avadi Road,
Kilpauk Garden, Kilpauk,
Chennai – 600010. ... Respondent in both the appeals

COMMON PRAYER : Civil Miscellaneous Appeal filed under Section 37(2)(b) of the Arbitration & Conciliation Act, 1996 praying to set aside the orders passed by the learned sole arbitrator in M.P. No. 1 of 2023 in A.C.P.(CNICA DFL) No.13886/6 of 2022 dated 07.06.2023 and in M.P. No. 1 of 2022 in A.C.P.(CNICA DFL) No.13886/6 of 2022 dated 04.04.2023

For Appellants : Mr. S.I. Sharukumar (in both appeals).

For Respondent : Mr. T.R. Ravi (in both appeals).

COMMON JUDGMENT

The above appeals have been filed challenging the orders passed by the learned Arbitrator permitting the respondent herein to repossess the vehicle and for granting police protection to do so.

2.The first appellant had borrowed a sum of Rs.58,00,000/- for purchase of a Mercedes Benz 220D bearing Registration No. TN 10 BP 1233. Admittedly, she had defaulted in repayment of loan. The second appellant is the guarantor for the said loan. The learned Arbitrator has passed the impugned orders after holding that the appellants had defaulted in making payments.

3.This Court while admitting the instant appeal in C.M.A. No. 1390 of 2023 and granting stay in C.M.P. No. 13867 of 2023 had directed the appellants / petitioners to pay a sum of Rs.20,00,000/- to the respondent within a period of four weeks from the date of receipt of a copy of this order. The appellants had not complied with the said order.

4.The learned counsel for the appellants submitted that the orders impugned are not sustainable since it is in violation of the direction issued by the Division Bench of this Court in ***Cholamandalam DBS Finance Limited Vs. Sudheesh Kumar [(2010) 1 LW 951],*** wherein the Division Bench had issued guidelines for seizure of hypothecated vehicles. One of the guide lines is that an Advocate Commissioner must be appointed to seize the hypothecated vehicles.

5.This Court on perusal of the impugned orders finds that in view of the default committed by the appellants, the learned Arbitrator was justified in allowing the applications for repossession and for police protection. Therefore, no interference is called for. However, this Court in ***Flywheel Logistics Solutions Pvt. Ltd., Rep., by its Authorized Representative Vs. Hinduja Leyland Finance Ltd., Rep., by its Authorized Representative and another*** reported in ***(2020) 4 LW 729*** had observed as follows;

> *"34. iv. It would also be necessary that the disposal of these vehicles be done through public auction. Though most of the companies, nowadays, resort to this method there appears to be no uniform procedure adopted for this purpose. Invitation for participation in public auction ensures transparency and it would ensure that the entire*

sale process is free from bias or discrimination andbeyond reproach. A public auction ensures fair price and maximum return and would ensure that the vehicles are not collusively disposed off for paltry sums thus causing legal injury to the debtor.”

Further, in ***Cholamandalam DBS Finance Limited's case (cited supra),*** this Court has observed as follows;

“*The guidelines are:*

a) If the pleadings in the affidavit make out that it is just and convenient to grant interimorders, and if, prima facie, the balance of convenience is in favour of the applicant, then an ex parte order appointing an advocate commissioner may be passed, but simultaneously notice shall be ordered to go to the respondent indicating the date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the Court to also serve private notice on the respondents personally at the time when the vehicle is seized. But, an affidavit must be sworn to by the Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

b) After the advocate commissioner reports to the Court *that the vehicle has been seized, it shall be in the custody of the applicant. This custody is on behalf of the Court, i.e., the applicant will be holding it in custodia legis.*

c) Of course, if even after notice, the borrower does not appear or if it appears to the Court that the borrower is deliberately evading notice, then it is open to the applicant to pray for such reliefs as are necessary, which may even include the sale of vehicle and the matter may be heard ex parte and orders passed in exercise of discretion of Court.

d) The application shall not be closed without hearing the other side after notice is served. Before closing the application, the Court shall also ascertain whether the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then orders shall be passed putting the applicant on terms as laid down in Sundaram Finance's case *(cited supra), because section 9 depends on a close nexus with the initiation of arbitral proceedings;*

e) As regards the expenditure incurred for keeping the vehicle in custody, the applicant shall bear it until the respondent is served and appears. After that, the Court shall hear the parties and pass orders.

f) The remuneration for advocate commissioners appointed by this Court shall be commensurate with the work done, since the financiers will shift this burden only on the already beleaguered borrower.

One other advantage in hearing the respondent before the closing of application is the clue that we get from Firm Ashok Traders' case *[(2004) 3 SCC 155], cited supra, where the Supreme Court encouraged the parties to suggest a solution. If that is really possible, then even at the initial stage, the entire matter will come to a happy resolution. Therefore, it is not only in the interest of natural justice and fairness, but also as a pragmatic measure that we have laid down these guidelines."*

From the above observations, it is clear that whenever repossession is ordered, an Advocate Commissioner has to be appointed to seize the hypothecated asset. The learned Arbitrator has to follow the guidelines issued in the aforesaid two decisions for seizure of the hypothecated vehicles. Therefore, while this Court finds that the order directing seizure of the hypothecated vehicle is justified, is of the view that it is subject to the adherence to the guidelines in the above two decisions. It is open to the learned Arbitrator to pass fresh orders in terms of the guidelines issued in the two decisions. Further, the order of the learned Arbitrator granting police protection to the respondent is justified and no interference is called for. Even if an Advocate Commissioner is appointed the order granting police protection would be justified.

6.Accordingly with the above observations, these Civil Miscellaneous Appeals are disposed of. No costs. Consequently, the connected Miscellaneous Petitions are closed.

21.08.2023
(1/2)

ay
Index: Yes/No

Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

To

1. The Arbitration Tribunal constituted by
   CNICA Sole Arbitrator,
   Chennai.

2. The Section Officer,
   V.R. Section,
   High Court of Madras,

Chennai.

SUNDER MOHAN, J

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C.M.A. No. 1390 & 1391 of 2023
and
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Dated: 21.08.2023
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