

Item No.16 to 18
19.11.2024
Court. No. 12
CP/GB

FMAT 80 of 2024
With
CAN 1 of 2024
With
FMAT 81 of 2024
With
CAN 1 of 2024
With
FMAT 82 of 2024
With
CAN 1 of 2024

Tata Motors Finance Limited
VS
Ismail Saikh

*Mr. Prabhat Kumar Srivastawa,
Ms. Ankita Singh*

...for the Appellant.

*Mr. Sanjit Kumar Mal,
Mrs. Gitashree Maity*

...for the Respondent.

1. All the appeals are heard together as they involve common questions of law and fact.
2. The respondent opposite party in the appeal is the plaintiff.
3. Ismile Saikh, the respondent has instituted a suit for declaration and permanent injunction against appellant for a decree directing the appellant to supply all the documents and to issue a no due certificate in respect of the vehicle being no.WB-45-5373 truck purchased on loan from the appellant.
4. In the said proceeding, the appellant filed an application under Section 8 of the Arbitration and Conciliation Act 1996 and prayed for dismissal of the suit or permanent stay of suit or for the dispute to

referred to arbitration. The contention of the appellant before the learned trial court was that in terms of the loan agreement, a sum of Rs.23,92,524/- was disbursed to the plaintiff as loan. The said agreement was executed on 29th November, 2020. The vehicle in question was purchased out of the said money. The loan agreement contained an arbitration clause. In view of the failure on the part of the plaintiff to pay an equated monthly installment (EMI) as per the agreement, the arbitration clause in loan agreement was invoked and an award was passed in favour of the appellant. The plaintiff by his misrepresentation filed the suit. It is submitted that the subject matter of the suit is covered by the arbitration clause in the agreement and the parties are required to be referred to arbitration.

5. The plaintiff opposed the reference on that plea that the loan agreement was never executed and the dispute is not arbitrable.
6. The defendant in the said proceeding had disclosed the agreement that was executed and signed by the plaintiff. It is submitted that an award has been passed in favour of appellant.
7. Section 5 of the Arbitration and Conciliation Act, 1996 creates a specific bar for accepting and entertaining any application by a judicial authority in relation to matters governed by part-I of the Arbitration and Conciliation Act, 1996. Section 8 mandates a judicial authority before which an action is brought in a matter which is a

subject of an arbitration agreement shall be referred to arbitration unless the court finds that prima facie there is no valid arbitration agreement between the parties. It however disabled a party to make an application if such party submit its first statement on the substance of the dispute. In the instant case admittedly a loan agreement was executed between the parties on 29th November, 2020 and out of the funds disbursed a vehicle was purchased by the respondent. The appellant alleged that the plaintiff initially had paid such instalment but subsequently failed to make payment of Equated Monthly Instalment (EMI) as per the loan agreement. In view there of the arbitration clause in the loan agreement was invoked and in such a proceeding an award has been passed in favour of the appellant, before the trial court. We do not find any reasons and serious challenge was thrown to the loan agreement as it is an admitted position that money was received as loan by the respondent out of which the vehicle was purchased. At the stage of deciding of an application under Section 8 the court is not required to consider the merits of the claims and the attention is confined to the existence of an arbitration agreement. In view of the fact that the loan agreement contains an arbitration clause the parties are required to be referred to arbitration. Where the dispute between the parties have already culminated in an award matters little at this stage. It is to be decided by the arbitrator if raised. In

view of the existence of the arbitrator agreement the suit is clearly barred. The arbitration clause giving paramount right to the appellant to appoint an arbitrator of his choice is again not a matter to be considered at this stage. We are not deciding an application for appointment of an arbitrator.

8. Mr. Mal has submitted that in view of the unilateral choice with regard to the appointment of the arbitrator in the arbitration agreement, the said agreement is *non est* and not acceptable. The competence of the arbitral tribunal can always be raised and decided by the arbitral tribunal. The arbitrator is required to make a declaration in terms of Section 12(5) read with 7th Schedule. The learned single Judge has considered Section 12(5) of the Arbitration and Conciliation Act to hold that the appointment of an arbitrator would be bad-in-law and make the arbitration agreement nonest. However this issue is not required to be gone into at this stage. It is needless to mention that a party who has an interest in the outcome of the dispute cannot nominate the learned arbitrator. The position of law on unilateral appointment of an arbitrator is no more res integra in view of the decisions of the Hon'ble Supreme Court in the matter of ***HRD Corporation versus GAIL*** reported in ***(2018) 12 SCC 471***, ***Perkins Eastman Architects DPC versus HSCC (India) Ltd.*** reported in ***2020(20) SCC 760***, ***Ram Kumar versus Shriram Transport Finance Co. Limited***

reported in **2022 SCC OnLine Del 4268** and the decision of this Court in the matter of ***Yashovardhan Sinha versus Satyatej Vyapaar Pvt. Ltd.*** reported in **(2022) 3 CHN 305 (Cal)**. An award rendered by a person ineligible to act as an arbitrator would be of a little value and cannot be considered as an arbitration award under the Arbitration and Conciliation Act as held in ***Ram Kumar*** (supra).

9. An application for setting aside of the award is also pending. Mr. Mal has submitted that in challenging the award this point was urged. We are not required to decide the said issue in this proceeding. We are not expressing any opinion on the said issue.
10. Mr. Mal has submitted that the award has not decided all the issues between the parties.
11. In view thereof, the appeal succeeds and the impugned order is set aside.
12. There shall be no order as to costs.
13. Urgent photostat certified copy of this order, if applied for, be given to the parties on an urgent basis upon compliance of usual formalities.
14. Photocopy of this order duly countersigned by the Assistant Court Officer, shall be retained with the records of all the appeals barring FMAT 80 of 2024.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)