

RESERVED
STATE CONSUMER DISPUTES REDRESSAL COMMISSION
UTTAR PRADESH LUCKNOW
APPEAL NO. 2780 OF 2012

1. Hinduja Leyland Finance Limited through Manager Legal, Office at A 1595 Indira Nagar, Lucknow
2. Hinduja Leyland Finance Limited through Manager , Office at 167-169 Third Floor, Anna Salai, Saidapate, Chennai
3. Raj Kumar Gupta, representative, Hinduja Leyland Finance Limited Office at 120/71 Lajpat Nagar, Branch Office, Kanpur
4. Rahul, representative, Hinduja Leyland Finance Limited , Office at A-1595, Indira Nagar, Lucknow

Appellants/Opposite parties

Versus

Rajesh Tiwari son of Sri Vishwanath Tiwari resident of 65 Darogabad City and District Unnao

Respondent/Complainant

BEFORE

HON'BLE MR. JUSTICE VIRENDRA SINGH, PRESIDENT

HON'BLE MR. J N SINHA, MEMBER

HON'BLE MR. A.K. BOSE, MEMBER

For the Appellants : Sri Brijendra Chaudhary, Advocate

For the Respondent : Sri Pankaj Tripathi, Advocate

DATED: 30.01.2014

JUDGMENT

MR.JUSTICE VIRENDRA SINGH, PRESIDENT

This appeal has been filed on behalf of the opposite parties/appellants against the order dated 01.12.2012 passed by the District Consumer Forum, Unnao in complaint case no. 123 of 2012 wherein the appellant has been ordered to pay a sum of Rs.2,00,000/- as compensation to the respondent alongwith a sum of Rs.5,000/- as litigation expenses.

Briefly stated the facts in dispute in between the parties remained before the District Consumer Forum are that the respondent/complainant moved an application before the District Consumer Forum Unnao as per

provision under Section 12 of the Consumer Protection Act that the opposite party either be directed to return the vehicle of the complainant or to pay a sum of Rs.2,00,000/- as compensation and a sum of Rs.3,59,400/- already paid to the opposite party be ordered to be paid to the complainant because the truck purchased by the complainant for earning his livelihood was financed by the opposite party and despite the fact that so many times the instalments were paid by the complainant, the alleged truck was taken over in possession by the opposite party by using the force of muskels and gundas. The account of the balance of loan of Rs.17,88,943/- was wrongly shown by the opposite party despite the fact that a sum of Rs.6,03,400/- had already been deposited by the complainant.

The complaint was contested by the appellant/opposite party on this fact that being there no office of the opposite party in the vicinity of Unnao District Consumer Forum, the impugned order passed by the District Consumer Forum, Unnao is beyond the jurisdiction. The complainant was a defaulter in paying the loan of the opposite party. The cheque of the complainant was bounced. The arbitration proceedings were initiated by the opposite party wherein the Receiver Sri Raj Kumar Gupta was appointed by the Arbitrator for taking the vehicle in his possession and in compliance of the order of the Arbitrator the truck was taken in possession. The matter is pending before the Arbitrator. A sum of Rs. 4,30,981/- was due till 31.07.2012 against the complainant. The truck was used for commercial purpose and the complainant is not a consumer.

After hearing of both the parties the District Consumer Forum came to this conclusion that despite the default in payment of the instalments, the opposite party was not entitled to take the possession of the vehicle concerned and thus thereby violating the conditions of the agreement in between the parties the opposite party was deficient in service. It is also held by the District Consumer Forum that to avoid the proper service to the complainant, the opposite party took recourse of arbitration proceedings. It is also held that since the District Consumer Forum has already passed an interim order for delivery of possession of the vehicle to the complainant by

the opposite party and since that order has not been complied with and for which the execution proceedings have been going on there is no need to pass an order for possession of the vehicle by opposite party to the complainant and the complainant is entitled to the tune of Rs.2,00,000/- as compensation and a sum of Rs.5,000/- as litigation charges. Therefore, the District Consumer Forum passed the impugned order accordingly.

We have heard Sri Brijendra Chaudhary, learned counsel for the appellant and Sri Pankaj Tripathi, learned counsel for the respondent.

It is contended on behalf of the appellant that the vehicle in question has never been repossessed by the opposite party himself but it was taken in possession by the Receiver appointed by the Sole Arbitrator in compliance of the Arbitrator's order dated 04.07.2012 as per provisions under Section 17 of the Arbitration Act. The respondent/complainant was having the remedy to proceed under the provision of Section 37 of the Arbitration Act before the court of law against the order passed under Section 17 of the Arbitration Act and the District Consumer Forum Unnao was not having any power to decide the facts in dispute in between the parties which were already taken up by the Arbitrator. The District Consumer Forum wrongly held that the vehicle was taken into possession by Sri Raj Kumar Gupta near Ganga Ghat which is situated in District Unnao while it is crystal clear on the record that the vehicle in question was taken in possession in District Kanpur city giving no jurisdiction to the District Consumer Forum Unnao. It is also wrongly held by the District Consumer Forum that the opposite party/appellant could not prove that the respondent/complainant was owner of trucks more than one while in Consumer Case no. 56/2011 (Rajesh Tiwari versus Indusind Bank) the complainant himself had declared that he also owned the other truck. Since the respondent is not ready to repay the financial help rendered by the appellant to the respondent, therefore, there should have been not so much liberal approach of the District Consumer Forum in favour of the complainant. The entire facts and circumstances on record show that the complainant is a habitual defaulter. The District Consumer Forum cannot held that the order passed by the Arbitrator under

Section 17 of the Arbitration Act is illegal and the Arbitrator has no power and the appellant filed the arbitration proceedings to be evasive for the deficiency in service. The lawful possession of the truck has been wrongly held by the District Consumer Forum to be unlawful. Since on the day of 15.06.2012 the respondent was liable to deposit a sum of Rs.17,88,943/-, therefore, in default of payment of said amount the truck was validly repossessed by the appellant through arbitration.

Learned counsel for the respondent contended that the respondent was financed by the appellant on 30.01.2011 for a sum of Rs.17,85,000/- which was to be paid by 30.01.2011 to 07.10.2014. To secure the repayment, the respondent had handed over post dated cheques to the appellant as per the terms of the agreement and it was obligatory on the appellant to submit those cheques for encashment within validity period of the cheques. The respondent paid Rs.5,03,400/- to the appellant till 31.07.2012 but the appellant continuously demanded cash payment and never shown to respondent any account or bounced cheque or any other report in this respect. On the assurance of the appellant that the statement of account shall be shown to the respondent, a cheque for Rs.1,00,000/- was given by the respondent to the appellant on 31.07.2012 but even after the vehicle was captured illegally by mussel power of unauthorised persons by the appellant and the vehicle was not released even on the request of the respondent. The vehicle was purchased by the respondent for self employment and livelihood and it is wrongly contended that it was purchased for commercial purpose.

It is further submitted on behalf of the respondent that no doubt there is an arbitration clause in the agreement in between the parties but since the Consumer Court provides the additional facility to the complainant and which is not in derogation of provisions of any other law therefore, the Arbitration Clause in agreement between the parties cannot restrict the proceedings before the Consumer Court. The acceptance of the proposal for finance of the vehicle was communicated at the address of the complainant/respondent at Unnao. Demand notices were also served on the complainant by post at Unnao. Various payments were made by respondent

through cheques and Demand Drafts at Unnao. Therefore, the District Consumer Forum Unnao was competent to pass the impugned order. The respondent is entitled to get back the excess deposited amount from the appellant and to get returned the vehicle. The impugned order is very much perfect in the eyes of law as well as on facts of the case and the appeal is liable to be dismissed.

In the light of the contentions of both the parties we have gone through the facts and circumstances on record. The appellants/opposite parties have referred the following citations :-

1. **AIR 1995 SC 1428 , Laxmi Engineering Works versus PSG Industrial Institute** Wherein it is held that a person who buys the goods and use them exclusively for the purpose of earning his livelihood by means of self employment is within the definition of 'consumer' and where the purpose for which the person has bought the goods is commercial within the meaning of the definition of expression 'consumer' in Section 2 (d) of the Consumer Protection Act is always a question of fact to be decided on the facts and circumstances of each case.
2. **AIR 2004 SC 1344 , M.D. Army Welfare Housing Organization versus Sumangal Services Private Limited** Wherein it is held that the Arbitrator as per provisions under Sections 13, 41 (b) of the Arbitration Act (10 of 1940) has no power to pass interim order as the power of Arbitrator is a limited one and it is well settled that for the purpose of obtaining an interim order a party to the arbitration proceedings during the pendency of an arbitral proceeding can only approach a Court of law in terms of Section 41 (b) and not otherwise.
3. **III (2012) CPJ 4 (SC) , Suryapal Singh versus Siddha Vinayak Motors and another -** Wherein it is held that under the Hire Purchase agreement, it is the financier who is the owner of the vehicle and the person who takes the loan retains the vehicle only as a bailee/trustee,

therefore, taking possession of the vehicle on the ground of non payment of the instalment has always been upheld to be a legal right of the financier.

4. **II (2010) CPJ 163 (NC) , Surendra Kumar Agarwal versus Telco Finance Limited and another** Wherein it is held that where the borrower had defaulted several times in making the payment on the dates when it was due and the Hire Purchase Agreement contains the clause that the financier was authorised to repossess the vehicle in case of default in repayment of loan the financier can repossess the vehicle.

On the other side the respondent/complainant has referred the following citations

1. **2009(4) SPR 113 (SC), Madan Kumar Singh versus District Magistrate, Sultanpur and others** Wherein the Hon'ble Apex Court has held that where a person bought truck for a consideration which was paid by him exclusively for the purpose of earning his livelihood by means of self employment then that person would fall in the category of 'consumer'.
2. **2009 (4) CPR 305 (NC), The Secretary, Orissa Khadi and Village Industries Board versus Sri Abhimanyu Sahoo and others** Wherein Hon'ble National Commission has held that once loan is sanctioned then loanee shall come within definition of consumer and release of money would be stopped only in case of violation of terms given in sanction letter.
3. **2011 NCJ 337 (NC) Sapna Photostat versus Excel Marketing Corporation and another** Wherein Hon'ble National Commission has held that a person who carries on a business for the of earning his livelihood through self employment is very much covered under the ambit of the definition of 'consumer' and if a person indulges in a commercial activities for purposes of earning his livelihood by means of self employment comes within definition of 'consumer'.

4. **2009 (2) CPR 42 , Sri Kamal Kumar Guleria versus VC Guru Jambheshwar University , Hissar (Haryana)** Wherein Himanchal Pradesh State Consumer Disputes Redressal Commission has held that where part of cause of action arose within the territorial jurisdiction of a particular District Consumer Forum, it will have jurisdiction to entertain and adjudicate upon a complaint.
5. **2011 NCJ 407 (NC) , Union of India and another versus Savitaben Sumanbhai Patel and others** Wherein the Hon'ble National Commission has held that Section 3 the Consumer Protection Act provides additional remedy to the consumer, as such District Consumer Foras are competent to entertain claims covered and filed under relevant Section i.e. Section 28 of the Railways Act.
6. **2006 (1) CPR 55 (NC) M/s Shriram Transport Finance Co. Ltd versus Surekha Khanoji Khemnar** Wherein the Hon'ble National Commission has held that where debtor is not paying instalment and the vehicle forcibly taken without intervention of the Court and the debtor deposited the amount due in District Consumer Forum, the direction given by the Forum to return the vehicle is not improper as per provisions under Section 21 (b) , 15 r/w 13 (3-B) of the Consumer Protection Act and if the financier by using his muscle power takes away the vehicle and does not want to return it even on deposit of claimed unpaid amount , it would just mean exploitation of the poor consumer and interim direction of the District Consumer Forum to return the vehicle is just and equitable.
7. **2009 (2) CPR 238 (NC) , Tata Motors Limited versus Indrasen Choubey and others** Wherein the Hon'ble National Commission has held that it is impermissible for the money lender/ financier/banker to take possession of the vehicle for which loan is advanced by use of force and if vehicle was repossessed by use of force and sold without informing the complainant it would be unjust to direct the consumer to pay balance amount as alleged by the financier to be outstanding.

8. **2009 (4) CPR 283 (NC) , Standard Chartered Bank versus H S Saini** Wherein the Hon'ble National Commission has held that bank taking possession of the vehicle by force in case of the consumer committed default in payment of loan instalment constitutes deficiency in service.
9. **2009 (2) CPR 400 (NC) M/s Kotak Mahindra Prime Ltd versus Sidharth Gaiind and another** Wherein the Hon'ble National Commission has held that where the finance company repossess the vehicle from original owner for default in instalments and sold car directly , it would constitute deficiency in service as the car is sold with defective title.
10. **2009 (3) CPR 201 (NC), HDFC Bank Limited vs Balwinder Singh**

Wherein the Hon'ble National Commission has held that act of the bank repossessing vehicle which it had financed on default of payment of certain instalments with held of mussel man amounts to serious deficiency in service.
11. **2009 (3) CPR 205 (NC) M/s Capital Trust Ltd versus Sanjay Dutt and another** Wherein the Hon'ble National Commission has held that the financier repossessing vehicle by use of force where there was default in payment of certain instalments by purchaser under hire purchase agreement would constitute deficiency in service.
12. **2010 (1) CPR 480 MD M/s Jaryal Motors Finance Company Private Limited versus Kewal Ram** Wherein Himanchal Pradesh State Consumer Disputes Redressal Commission has held that the financier cannot take recourse of extra illegal means under guise of terms of loan agreement for repossession of vehicle.
13. **2010 (1) CPR 253, VC ING Vysya Bank, Rural Banking versus Prasad M. Cheriyan** Wherein Kerala State Consumer Disputes Redressal Commission, Thiruvananthapuram has held that forcible repossession of financed vehicle from its absolute owner is deficiency in service.

After going through the entire facts and circumstances on record and the law as is aforesaid in the aforesaid citations we are of this view that no doubt the financier/appellant/opposite party in this case was not having any right to take the vehicle in its possession by using mussel power but here in this case before us the position is otherwise as the appellant had repossessed the vehicle out of the possession of the complainant in the proceedings legally invoked by him under the Arbitration Act and by the order of the Arbitrator the vehicle was repossessed by the financier. So it cannot be held that the repossession of the vehicle concerned was under the guise of mussel power of the financier.

So far as the question of power of Arbitrator is concerned, this Commission and the District Consumer Forum did not have any power to hold that the Arbitrator was not having any power to pass any interim order under the provisions of the Arbitration Act because such type of issue may only be raised and be decided by the competent court having jurisdiction in this regard and we prima facie find that the District Consumer Forum committed error thereby holding otherwise in this regard. More so once the proceedings had been started before the Arbitrator as per agreement in between the parties, wherein the Arbitration Clause was provided, the Consumer Forum was not competent to enter into the dispute which has already been adjudged before the Arbitrator. In this respect the proper Forum for pleading his case was available to the respondent/ complainant before the Arbitrator concerned before whom the matter in dispute had already been entertained. The District Consumer Forum did not take notice of it and committed error thereby passing the impugned order.

So far as the question of this fact is concerned that the complainant was not a consumer, we have on record an other consumer case no. 56 of 2011 (Rajesh Tiwari versus Indusind Bank) instituted by the complainant thereby challenging the repossession of the truck done by the bank which shows that the respondent/complainant before us is not a consumer as the Hon'ble Supreme Court has already explained in the case of "Laxmi Engineering Works versus PSG Industrial Institute cited in 1995 AIR SC 1428 that a person who purchases an auto rickshaw to ply it himself on hire

for earning his livelihood would be a consumer and similarly a purchaser of truck who purchases it for plying it as a public carrier by himself would be a consumer and a person who purchases a lathe machine to operate it himself for earning his livelihood would be a consumer but as against such persons if a person purchases an auto rickshaw , a car or a lathe machine or other machine to be plied or operated exclusively by another person would not be a consumer.

Here in this case before us since the complainant/respondent is having at least two trucks, it cannot be said that the alleged truck despite being used for commercial purpose was meant for his personal use to earn his livelihood. The District Consumer Forum did not take notice of this fact and wrongly held the complainant as consumer and passed erroneously the impugned order.

So far as the another question of jurisdiction is concerned, we need not to go exhaustive on this point as to whether the truck was repossessed in the vicinity of Kanpur or in the vicinity of Unnao. We are of this view that since the complainant was not a consumer, nor was entitled to move before the District Consumer Forum for the facts which were found adjudged before the Arbitrator. We are convinced that the impugned order is beyond jurisdiction and is liable to be set aside.

ORDER

The aforesaid appeal is hereby allowed. The impugned order dated 01.12.2012 is set aside.

(JUSTICE VIRENDRA SINGH)
PRESIDENT

(J.N. SINHA)
MEMBER

(A.K. BOSE)
MEMBER

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