

CIVIL REVISION

Present: **The Hon'ble Justice Jyotirmay Bhattacharya**

C.O. No. 223 of 2009
Judgment On: 01-04-2010.

Indusind Bank Ltd.
-Vs-
Gadadhar Banerjee

POINTS:

CONSUMER, ARBITRATION-Complainant purchased the vehicle for carrying his livelihood by means of self-employment- Whether he is a consumer under Section 2(1) (d) of the Consumer Protection Act- Complainant is in arrear in repayment of its dues towards the loan transaction- Bank cannot take possession without due process of law- Parties agreed to arbitration- Whether the parties can choose other forum- Arbitration and Conciliation Act, 1996 S8-Consumer Protection Act, S.2(1) (d)

FACTS:

The opposite party purchased a vehicle being registration no. WB 15A/3694 by obtaining a loan of Rs.7,40,000/- from the petitioner bank, repayable in 58 equal monthly installments. The opposite party paid the monthly installments upto February, 2008 and thereafter he failed to pay the installments from March, 2008 onwards. As a result, a sum of Rs.1,64,584/- became due and payable by the complainant to the petitioner bank upto September, 2008. Since the complainant failed to pay the said installments, the petitioner bank repossessed vehicle on 16th August, 2008. The petitioner bank claimed that at the time of such repossession, the bank had no knowledge about the interim order of injunction passed by the District Forum on August, 2008 whereby the petitioner bank was restrained from taking over possession of the vehicle in question other than in due process of law.

Since repossession of the vehicle was taken by the bank in violation of the restraint order passed by the Forum, the complainant filed an application for restoration of his possession of the said vehicle.

HELD:

In the instant case the petitioner has complained that the impugned order was passed by the Forum and/or Commission without jurisdiction, this Court cannot refuse to entertain the instant application to scrutinize the merit of such contention of the petitioner. Thus, the preliminary objection regarding the maintainability of the objection raised by the opposite party stands rejected. Para-7

The complainant claims that he purchased the said vehicle for carrying his livelihood by means of self-employment and as such, on the basis of such pleadings, it cannot be held that the complainant is not a consumer under Section 2(1) (d) of the said Act. Para-13

When the petitioner bank came to know about the order, the bank should have volunteered to restore the possession of the vehicle in favour of the opposite party and thereafter the petitioner should have taken steps for repossession of the vehicle, by following due process of law. When the bank failed to do so, this Court cannot permit the petitioner bank to deprive the complainant from enjoying the vehicle so long as repossession is not taken by the bank by taking due process of law notwithstanding the fact the complainant is in arrear in repayment of its dues towards the loan transaction. As such the learned Forum/Commission did not commit any illegality in passing such direction upon the petitioner bank for restoration of the possession of the vehicle in favour of the complainant. Para-16

The learned Forum/Commission committed illegality by not allowing the petitioner's prayer for reference of the said dispute to the arbitrator for its arbitration as per the arbitration agreement between the parties. When both the parties have decided a particular Forum by agreement, for deciding any dispute touching the agreement, any one of the parties to the said agreement should not have opted for a different Forum by unilaterally giving a go bye to the bilateral agreement, even though the Forum chosen by one of such parties, is otherwise competent to decide the said dispute.

Paras-26 & 27

CASES CITED:

- 1) Burdwan Co-operative Agriculture and Rural Development Bank Ltd. –Vs- Anath Bandhu Dhara 2009 (2) CLJ (Cal) 685
- 2) Secretary, Hirimurugan Co-operative Agricultural Credit Society –Vs- M. Lalitha (dead) through LRS & Ors.(2004) 1 SCC 305.
- 3) Kishore Lal –Vs- Chairman, Employees' State Insurance Corporation
- 4) SBP & Co. –Vs- Patel Engineering Ltd. & Anr. (2005)8 SCC 618
- 5) Rashtriya Ispat Nigam Ltd. –Vs- Verma Transport Company (2006)7 SCC 275

For the Petitioner : Mr. Debnath Ghosh,
Mr. P.K. Srivastava,
Mr. A.K. Usman.

For the Opposite Party: Mr. Subrata Talukdar,
Ms. Arundhuti Das.

THE COURT:

1. This application under Article 227 of the Constitution of India is directed against an order dated 14.1.2009 passed by the State Consumer Disputes Redressal Commission, West Bengal in S.C. Case No.RC/08/072 by which the order No.10 dated 12th September, 2008 passed by the learned

District Consumer Disputes Redressal Forum, North 24-Parganas, in Complaint Case No.176 of 2008 was affirmed. The petitioner namely Indusind Bank Ltd. was aggrieved by the said order. Hence, the instant application was filed by the said bank before this Court. In fact, two applications were disposed of by the Forum and/or the Commission by their respective orders as aforesaid. In one of such applications the complainant prayed for issuance of direction against the petitioner bank to make over possession of the vehicle No.WB-15A/3694 to the complainant as the said bank took over the possession of the said vehicle from the complainant by force and in violation of an interim order of injunction passed by the Forum by which the petitioner bank was restrained from taking over possession of the said vehicle other than in due process of law. Such prayer of the complaint was allowed by the Forum and the said order was also maintained by the Commission in appeal.

2. The other application was filed by the petitioner bank praying for dismissal of the said complaint on the ground of want of locus of the complaint to maintain such complaint case before the Forum and/or for referring the dispute to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. The said application was rejected by the Forum and the said order was maintained by the Commission.

3. In this context, the instant application under Article 227 of the Constitution of India has been filed by the petitioner bank.

4. **A: Maintainability point**

A preliminary objection was raised as to the maintainability of such proceeding before this Court on the ground that since an alternative remedy by way of revision before the National Commission is provided in the Act itself, this Court should not have entertained the instant application under Article 227 of the Constitution of India. In support of such contention Mr. Talukdar, learned Advocate appearing for the complainant/opposite party relied upon a decision of this Hon'ble Court in case of Manager, Burdwan Co-operative Agriculture and Rural Development Bank Ltd. –Vs- Anath Bandhu Dhara reported in 2009 (2) CLJ (Cal) 685 wherein it was held that when a remedy by way of revision before the National Commission is available to the petitioner under Section 21(b) of the Consumer Protection Act, 1986, an application under Article 227 of the Constitution of India cannot be entertained, before exhausting the remedy by way of revision before the National Forum as per Section 21(b) of the said Act.

5. In reply to the said submission of Mr. Talukdar, Mr. Ghosh, learned Advocate appearing for the petitioner submitted that availability of an alternative remedy by itself cannot be a ground for the High Court to refuse to exercise its jurisdiction particularly when an order was passed by an authority without jurisdiction. According to Mr. Ghosh Section 8 of the Arbitration and Conciliation Act, 1996 bars jurisdiction of the Forum and/or the Commission to decide any dispute which is covered under the arbitration agreement between the parties and particularly when one of the parties to the agreement applies for such reference to arbitration for resolution of such dispute under Section 8 of the said Act. He, thus, submitted that entertainment of this application under Article 227 of the Constitution of India cannot be denied merely because of availability of alternative remedy by way of revision under Section 21(b) of the said Act as the legality of the

impugned order is under challenge in this application on the ground of competence of the Forum/Commission to pass such order. Or in other words, when the jurisdiction of the Forum to proceed with the said complaint case and/or to pass the impugned order is under challenge, the High Court cannot refuse to entertain an application under Article 227 of the Constitution of India merely because of availability of alternative remedy by revision before National Forum. In support of such submission he relied upon a decision of the Hon'ble Supreme Court in the case of Committee and Management & Anr. –Vs- Vice Chancellor & Ors. reported in (2009)2 SCC 630.

6. On perusal of the said decision this Court finds that the Hon'ble Supreme Court has decided therein that availability of an alternative remedy by itself may not be a ground for High Court to refuse to exercise its jurisdiction under certain circumstances which are as follows :-

1. In a case where such alternative remedy would not be an efficacious one.
2. When an order has been passed by an authority without jurisdiction.
3. When an order has been passed by an authority in violation of the principles of natural justice.

7. Since in the instant case the petitioner has complained that the impugned order was passed by the Forum and/or Commission without jurisdiction, this Court cannot refuse to entertain the instant application to scrutinize the merit of such contention of the petitioner. Thus, the preliminary objection regarding the maintainability of the objection raised by the opposite party stands rejected.

8. Let me now consider the merit of this revisional application in the facts of the instant case.

9. Admittedly the opposite party purchased a vehicle being registration no. WB 15A/3694 by obtaining a loan of Rs.7,40,000/- from the petitioner bank, repayable in 58 equal monthly installments. The opposite party paid the monthly installments upto February, 2008 and thereafter he failed to pay the installments from March, 2008 onwards. As a result, a sum of Rs.1,64,584/- became due and payable by the complainant to the petitioner bank upto September, 2008. Since the complainant failed to pay the said installments, the petitioner bank repossessed vehicle on 16th August, 2008. The petitioner bank claimed that at the time of such repossession, the bank had no knowledge about the interim order of injunction passed by the District Forum on August, 2008 whereby the petitioner bank was restrained from taking over possession of the vehicle in question other than in due process of law.

10. Since repossession of the vehicle was taken by the bank in violation of the restraint order passed by the Forum, the complainant filed an application for restoration of his possession of the said vehicle.

B: Locus of the opposite party to maintain the complaint before the Forum, as consumer.

11. The petitioner bank contended that since the said vehicle was purchased by the complainant for a commercial purpose, the complainant cannot be regarded as a consumer within the meaning of the expression 'consumer' as defined in Section 2(1)(d) of the said Act and as such, the complainant cannot seek any remedy before the Forum under the Consumer Protection Act, 1986.

12. Mr. Talukdar, learned Advocate submitted that when a complainant purchases a truck to earn his livelihood by means of self-employment, the complainant should be regarded as a consumer under Section 2(1)(d) of the said Act notwithstanding appointment of a driver to ply the said truck. In support of such submission he relied upon a decision of the Hon'ble Supreme Court in the case of Madan Kumar Singh (dead) through L.R. –Vs- District Magistrate, Sultanpur & Ors. reported in (2009)9 SCC 79 wherein it was held that when the borrower bought a truck to be used exclusively for the purpose of earning his livelihood for means of self-employment, such purchaser would fall in the category of consumer as he purchased the said vehicle for earning his livelihood by means of self-employment. It was further held therein that even if he has to employ a driver for running the said truck, it would not have changed the matter in any case, as even then the appellant would have continued to earn his livelihood from it and, of course, by means of self-employment. It was further held therein that the way in which the 'consumer' has been defined in the said Act makes it clear that Parliament wanted to exclude the scope of the definition of the persons who obtain goods for resale and also those who purchase goods with a view to use such goods for carrying on any activity for earning. It was further held therein that the immediate purpose is distinct from the ultimate purpose of purchase; sale in the same form or after conversion, and a direct nexus with profit or loss would be the determinants of the character of a transaction – whether it is for a commercial purpose or not. It was, thus, concluded that the buyers of goods and commodities for self-consumption in economic activities in which they are engaged would be 'consumers' as defined in the Act.

13. Thus, by taking into consideration the principle laid down by the Hon'ble Supreme Court in the aforesaid decision, this Court has no hesitation to hold that the complainant is a consumer as per the

provision contained in Section 2(1)(d) of the said Act and for deficiency in service under Section 2(1)(g) of the said Act, a complainant can avail of the remedies of the said Act. It is not the claim of the bank that the complainant purchased the said vehicle for resale or he purchased the said vehicle with a view to use the said vehicle for carrying on any activity for earning. On the contrary, the complaint claims that he purchased the said vehicle for carrying his livelihood by means of self-employment and as such, on the basis of such pleadings, it cannot be held by this Court that the complainant is not a consumer under Section 2(1)(d) of the said Act.

14. Thus, this Court holds that neither the Forum nor the Commission committed any illegality by rejecting the contention of the petitioner regarding the maintainability of the complaint on account of the want of locus of the complainant.

15. C: Opposite Party's claim for restoration of possession of the vehicle

Let me now consider as to how far the learned Forum/Commission was justified by directing the petitioner bank to restore the possession of the said vehicle in favour of the complainant in the facts of the instant case.

16. I have already indicated above that such repossession of the vehicle was taken by the bank in violation of the restraint order passed by the Forum on 5th August, 2008. Though the petitioner claims that the petitioner had no knowledge about the restraint order at the time when the bank took over repossession of the said vehicle on 16th August, 2008, but fact remains that such repossession was taken in violation of the said restraint order passed by the Forum. Even after coming to know about the said restraint order the petitioner bank did not take any step to challenge the restraint

order before any higher Forum. The said restraint order is still in force and as such, the petitioner bank cannot be allowed to retain the possession of the said vehicle by disregarding the said restraint order. In my view, when the petitioner bank came to know about the said order, the bank should have volunteered to restore the possession of the said vehicle in favour of the opposite party and thereafter the petitioner should have taken steps for repossession of the said vehicle, by following due process of law. When the bank failed to do so, this Court cannot permit the petitioner bank to deprive the complainant from enjoying the said vehicle so long as repossession is not taken by the bank by taking due process of law notwithstanding the fact the complainant is in arrear in repayment of its dues towards the loan transaction. As such, this Court holds that the learned Forum/Commission did not commit any illegality in passing such direction upon the petitioner bank for restoration of the possession of the vehicle in favour of the complainant.

17.D: Reference to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996

Let me now consider as to how far the learned Forum/Commission was justified in rejecting the petitioner's application under Section 8 of the Arbitration and Conciliation Act, 1996 in the facts of the instant case.

18. Several decisions were cited by the Counsel appearing for the respective parties on the question as to whether the proceeding before the Forum can be continued in the facts of the instant case because of Section 8 of the Arbitration and Conciliation Act, 1996 .

19. Mr. Talukdar, learned Advocate submitted that Section 3 of the Consumer Protection Act, 1986 provides that the provision of the said Act shall be in addition to and not in derogation of the

provisions of any other law for the time being in force. He contended that the entire scheme of the Act was enacted for creation of an additional avenue for giving speedy redressal of the grievances of the consumer in respect of a consumer dispute either arising from a defect in the goods purchased as per Section 2(1)(f) of the said Act or for deficiency in the service as per Section 2(1)(g) of the said Act. He, however, did not dispute that arbitration is not an avenue for redressal of such dispute between the parties as per the arbitration agreement entered between the parties. He, thus, contended that when two avenues are open to the consumer for redressal of his grievances, he may opt for any one of such avenues. Accordingly, he submitted that even if it is found that the dispute between the parties is covered by the arbitration agreement and such dispute can be resolved by arbitration as per the said agreement, but, still then, a party to such contract cannot be precluded from seeking remedy under the Consumer Protection Act which is an additional forum created by the beneficial legislation namely the Consumer Protection Act, 1986 in addition to the Forum available to the parties for resolution of their dispute by way of arbitration. To support such submission he relied upon the following decisions of the Hon'ble Supreme Court:-

- i) In the case of Secretary, Hirimurugan Co-operative Agricultural Credit Society –Vs- M. Lalitha (dead) through LRS & Ors. reported in (2004)1 SCC 305.
- ii) In the case of Kishore Lal –Vs- Chairman, Employees' State Insurance Corporation.

20. Relying upon the said decisions Mr. Talukdar submitted that the Forum and/or the Commission did not commit any illegality in rejecting the petitioner's application under Section 8 of the Arbitration and Conciliation Act, 1996.

21.Mr. Ghosh, learned Advocate repudiated such submission of Mr. Talukdar by submitting that it has been held by the Constitutional Bench of the Hon'ble Supreme Court in the case of SBP & Co. –Vs- Patel Engineering Ltd. & Anr. reported in (2005)8 SCC 618 that Section 8 of the Arbitration and Conciliation Act contemplates a judicial authority before which an action is brought in a matter which is subject to the arbitration agreement, on the terms specified therein to refer the dispute to arbitration. It was further held therein that a judicial authority as such, is not defined in the Act and as such, it would certainly include the Court as defined in Section 2(e) of the said Act and would also include other Courts and may even include a special Tribunal like Consumer Forum.

22.Mr. Ghosh further relied upon another decision of the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. –Vs- Verma Transport Company reported in (2006)7 SCC 275 to show the fine distinction made therein regarding the scope of operation of Section 34 of the Arbitration Act, 1940 (repealed Act) and the scope of operation of Section 8 of the Arbitration and Conciliation Act, 1996. Paragraph 25 of the said decision is extracted hereunder :-

“Para 25 : Section 8 of 1996 Act contemplates some departure from Section 34 of 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority which was the hallmark of Section 34 of the 1940 Act has been taken away under the 1996 Act. The direction to make reference is not only mandatory but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitrator award remain unhampered by such proceeding.”

23. Relying upon the aforesaid decisions Mr. Ghosh submitted that in view of the aforesaid decision of the Hon'ble Supreme Court the Forum and/or the Commission ought to have referred the said dispute to arbitrator for its resolution by arbitration.

24. By giving anxious considerations to the aforesaid decisions cited at the Bar, this Court holds that the decisions cited by Mr. Talukdar are not authorities on the subject as to whether the Forum under the Consumer protection Act can still proceed with the complaint case when the defendant prays for a reference under Section 8 of the Arbitration and Conciliation Act for resolution of such dispute by way of arbitration as per the arbitration agreement between the parties. In those cases the Hon'ble Supreme Court considered the jurisdiction of the Consumer Forum vis-à-vis specific remedies under other Acts such as Co-operative Societies Act and/or ESI Act etc. In those cases the Hon'ble Supreme Court held that unless there is clear bar under those Acts for seeking any remedy under the Consumer protection Act, it cannot be held that the proceeding before the Consumer Protection Act is not maintainable. In one of such decisions it was also held that when claim for damages cannot be granted by the Forum available under other Acts appropriately, then also seeking remedy before the Forum under the Act of 1986 cannot be denied to the party who approached the said Forum seeking such remedy.

25. In those cases the jurisdiction of the Consumer Forum vis-à-vis Section 8 of the Arbitration and Conciliation Act was neither an issue before the Hon'ble Supreme Court nor the same was decided therein.

26. Thus, when this Court finds that the Constitutional Bench of the Hon'ble Supreme Court in clear terms held in SBP & CO. –Vs- Patel Engineering Ltd. (supra) that Section 8 of the Arbitration and Conciliation Act is applicable before the special Tribunal like Consumer Forum and when the Hon'ble Supreme Court in the subsequent decision in the case of Rashtriya Ispal Nigam Ltd. & Anr. (supra) held that when the dispute before the Forum is arbitrable under the Arbitration and Conciliation Act, 1996 as per the arbitration agreement executed between the parties, the Forum has no option but to refer the said dispute to arbitration as Section 8 of the said Act is a mandatory provision which mandates a reference unlike the provision contained in Section 34 of the 1940 Act which simply contemplated stay of the suit, this Court has no hesitation to hold that the learned Forum/Commission committed illegality by not allowing the petitioner's prayer for reference of the said dispute to the arbitrator for its arbitration as per the arbitration agreement between the parties.

27. When both the parties have decided a particular Forum by agreement, for deciding any dispute touching the agreement, this Court feels that any one of the parties to the said agreement should not have opted for a different Forum by unilaterally giving a go bye to the bilateral agreement, even though the Forum chosen by one of such parties, is otherwise competent to decide the said dispute.

28. Accordingly, this part of the impugned order stands set aside. The petitioner's prayer for such reference under Section 8 of the said Act stands allowed as the dispute regarding deficiency of service arises out of the arbitration agreement executed between the parties is arbitrable as per the said arbitration agreement. The learned District Consumer Redressal Forum is, thus, directed to refer the said dispute to the arbitrator for its arbitration as per the arbitration agreement between the parties.

29. Though the learned Advocate for the petitioner bank informed this Court that already the dispute was referred to the arbitrator by his client and an award was also passed by the learned arbitrator, but since no material has been placed before this Court in support of such statement and furthermore since the petitioner bank still insists upon the Forum/Commission and/or this Court for reference of the dispute to arbitration, this Court refuses to take note of this part of the submission of the petitioner bank and for similar reason this court also refused to take note of the submission of the learned Advocate of the petitioner bank that the vehicle is now in the custody of the receiver appointed by the Court in a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996.

30. Be that as it may, it is clarified that since the possession of the vehicle was taken from the custody of the petitioner in violation of the order of injunction and the order of the appointment of the receiver was obtained from a Court without disclosing the restraint order passed by the Forum, this Court directs that whoever is in possession of the said vehicle presently, must restore the possession of the said vehicle by delivering the said vehicle to the opposite party within two weeks from date without any fail and for implementation of this part of the order the petitioner bank is directed to inform the Forum about the name and address of the receiver in whose custody the vehicle presently remains and the particulars of the proceeding in which receiver was appointed should be disclosed to the opposite party within a week from date so that the opposite party can approach the very same Court to inform the text of this order immediately thereafter and the said proceeding can also be regularized in terms of this order. The petitioner is also directed to intimate

the said receiver about the text of this order so that this order is carried out strictly by the receiver, in the event the receiver, in fact, is in possession of the said vehicle presently.

31. The revisional application is, thus, disposed of.

32. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.

(Jyotirmay Bhattacharya, J.)