



CNICA Arbitration Reporter

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EDITOR'S DESK



The year 2010 as expected has commenced for CNICA in its most desired manner. I am happy to share with one and all that CNICA has entered into Co-operation agreement with ICLP Arbitration Center, Srilanka

On 11.01.2010, I had the opportunity to meet Mr.Garry Soo, Secretary General and Mr.Dennis Cai, Asst. Secretary General of Hong Kong International Arbitration Center. We spoke of the current trend in ADR and the possibility of extending bilateral services between the two institutions. Draft Co-Operation agreement has been forwarded. We hope that the agreement would be executed in the near future.
Regards,
G.Ashokapathy



Mr.Dennis Cai, Mr.Garry Soo, Mr.G.Ashokapathy
Asst G.S. HKIAC, G.S. HKIAC, G.S. CNICA

CASE STUDY

COURT :

HIGH COURT, MADRA

Parties to the Case :

**M/s.Cholamandalam DBS Finance Ltd.,
VS**

Mr.Sudheesh Kumar

Case No:

O.S.A.No.362 of 2009

Judgment Date

10.12.2009

FACTS OF THE CASE

The appellant/company and the respondent/borrower entered into a loan agreement for extending financial assistance for the purchase of a vehicle, which agreement provided for the resolution of dispute by arbitration. The appellant filed an Application under Section 9 of the Arbitration and Conciliation Act, 1996 for appointment of an advocate commissioner to seize and deliver the financed vehicle alleging that there was chronic and wilful default. An ex parte order was passed by the Ld. Single Judge and the vehicle was seized by the Advocate Commissioner, based on which the application was closed without hearing the respondent/borrower. Thereafter, the respondent filed an application praying for release of the vehicle. The learned single Judge, referred to the order of attachment obtained before the District Court, Ernakulam and held that since the attachment order is in force and the respondent's rights are protected, it is not necessary for the appellant to have the custody of the vehicle and accordingly, ordered the return of the vehicle, against which the appellant/ company preferred an appeal before the Division Bench.

The Hon'ble Division Bench has drawn the following guide lines, where the Advocate commissioners are appointed to seize the vehicles and report to Court, after referring to various judgments, concerning financier's right to seize and sell the vehicle, reported in

(1) 1988-I-L.W.-109 (Mercantile Credit Corporation Ltd. Messrs. v. V.Amaravathi)

(2) 1993-I-MLJ-284 (Paramasivam v. The T.N. Indl. Invt. Corpn. Ltd.)

(3) 1999-1-L.W.-267 (Sri Rama Machinery Corporation Limited, etc. v. Standard Chartered Bank, etc. & another)

(4) 2006 (1) CTC 670 (The Managing Director, Orix Auto Finance (India) Ltd. v. Jagmander Singh)

(5) 2007-1-L.W.-880 (Manager, I.C.I.C.I. Bank Ltd. v. Prakash Kaur & Others)

(6) M/s.Sundaram Finance Ltd. v. M/s.NEPC India Ltd. (A.I.R. 1999 SC 564)

(7) (2004) 3 SCC 155 (Firm Ashok Traders v. Gurumukh Das Saluja)
(8) (2007) 7 SCC 125 (Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.), and
(9) a judgment of the Supreme Court of United States also in 416 U.S. 600 (Mitchell v. W.T. Grant Co.), on creditors' rights of replevin actions.

RATIO DECIDENDI

The Guidelines enumerated by the Division Bench is herewith extracted; -

"a) If the pleadings in the affidavit make out that it is just and convenient to grant interim orders, 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."

We thank Mr.V.Govindarajan, Asst. Vice President, Legal Indus Ind Bank, for providing the copy of the aforesaid judgment.

We appreciate your inputs, suggestions and contributions. We would publish articles provided to us and request for contribution of the same. We shall also appreciate if you could furnish us the email address persons interested in receiving our reporter.

