

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 633 OF 2009

Aidek Tourism Services Pvt. Ltd.,)
A private limited company incorporated)
under the Companies Act, 1956 having its)
registered office at 12, Kalindas Udyog)
Bhavan, Century Bazar Lane, Prabhadevi)
Mumbai 400 025) **..... Petitioner**

VERSUS

Aditya Birla Nuvo Ltd.,)
a public limited company incorporated)
under the Companies Act, 1956 having)
its registered office at Apeejay, 2nd Floor,)
Shahid Bhagat Singh Road, Fort,)
Mumbai 400 001) **..... Respondent**

Mr.Mangal Bhandari, i/b. Ms.Pranjali Bhandari for the Petitioner.

Mr.J.P.Sen, Senior Advocate, a/w. Mr.Cyrus Bharucha, Ms.Bhavna Singh,
Mr.D.J.Kakalia, Mr.H.E.Desai, Mr.Paresh Patkar, i/b. Mulla & Mulla & Craigie
Blunt Caroe for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 27th JULY, 2016

PRONOUNCED ON : 24th AUGUST, 2016

JUDGMENT :

By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioner has impugned the arbitral award dated 23rd March, 2009 as modified by an order dated 22nd May, 2009 and the impugned additional award dated 30th November, 2013 as corrected by an order dated 9th January, 2014. Some of the relevant facts for the

purpose of deciding this arbitration petition are as under :

2. It was the case of the respondent that the petitioner approached the respondent for taking 10 Tata Estate Cars on hire purchase basis. The parties entered into another Hire Purchase Agreement on 10th March, 1995 in respect of the 10 cars bearing Nos.MH-06-3236, MH-06-3229, MH-06-3230, MH-06-3227, MH-06-3224, MH-06-3226, MH-06-3225, MH-06-3223, MH-06-3228 and MH-06-3231. The total agreement valued was Rs.56,49,156/-, including interest which was to be paid in monthly installments of Rs.1,56,921/- over a period of 36 months from 10th March, 1995 to 10th February, 1998. It was the case of the respondent that the petitioner committed default in making payment of the installments under the said Hire Purchase Agreement dated 10th March, 1995. The respondent accordingly took possession of four cars. The petitioner filed criminal complaint against the respondent with various police authorities in respect of repossession of the vehicle by the respondent. The petitioner raised debit notes on the respondent on account of hire charges alleged to be due and payable on repossession vehicle.

3. It is the case of the respondent that on 11th November, 1997, the respondent forwarded the Hire Purchase Agreements to the petitioner, including a copy of the agreement which was in respect of Hire Purchase Agreement dated 10th March, 1995 in respect of 10 Tata Estate Cars. It is the case of the respondent that on 11th May, 1999, the petitioner addressed a letter to the respondent and admitted having taken money from the respondent and requested for re-schedulement of the amounts due.

4. On 28th July, 2000, the respondent vide its advocate's letter terminated the said Hire Purchase Agreement dated 10th March, 1995. On 19th

March, 2000, the respondent advertised for sale of the repossessed vehicle to which the petitioner objected vide advocate's letter dated 27th September, 2000. The respondent sold car bearing No.MH-06–3226 for Rs.37,333/- and MH-06–3225 for Rs.37,334/- respectively.

5. The dispute arose between the parties. The respondent invoked the arbitration agreement and approached Indian Merchant Chambers under the provisions of the arbitration agreement.

6. The Indian Merchant Chambers by its letter dated 13th July, 2001 sought the consent of the petitioner to appoint an arbitrator. The petitioner vide its advocate's letter dated 24th August, 2001, raised its objection to the jurisdiction of the learned arbitrator to try and entertain the claim and consent to the appointment of the retired Chief Justice of India as a sole arbitrator without prejudice to the rights and contentions of the petitioner.

7. The parties had four other transactions which were the subject matter of other four references made by the respondent. All five references were heard together by the learned arbitrator appointed by the Indian Merchant Chambers. It was agreed between the parties that the evidence in five matters would be led in common and hence the entire documentary and oral evidence would be relied upon in all five matters.

8. The Indian Merchant Chambers addressed a letter dated 24th September, 2001 to the solicitors representing the respondent calling upon them to forward either the original or photocopy of the arbitration agreement.

9. Pursuant to the liberty granted by the learned arbitrator, the respondent filed the statement of claim on 4th July, 2001 and claimed an amount of Rs.44,99,820/- alongwith interest on Rs.18,87,318/- w.e.f. 5th April, 2001. In the said statement of claim, the respondent annexed the typed copy of an agreement of Hire Purchase Agreement dated 29th August, 1994. The petitioner herein filed the written statement in the said proceedings. The petitioner herein filed the amended written statement on 5th April, 2003 after taking inspection of the original documents given by the respondent on 1st February, 2002. On 30th May, 2003, the Indian Merchant Chambers conveyed the order passed by the learned arbitrator that a liberty was granted to the respondent to file supplementary pleadings to the said amendment within two weeks. The respondent, however did not file any reply to the amended written statement. It is the case of the petitioner that in the said amended written statement filed by the petitioner herein, it was specifically pleaded by the petitioner that the Hire Purchase Agreement was forged and fabricated.

10. On 10th June, 2003, the learned arbitrator framed issues, which included the issue “whether the claimants proved the agreement dated 10th August, 1995 ?” and “whether the transaction between the claimants and the respondent was Hire Purchase Agreement or a finance agreement ?”.

11. On 28th September, 2004, the learned arbitrator had observed that it appeared to him that it was serious doubt as to whether the documents Exhibits “X-1” to “X-5” were duly stamped. The learned arbitrator accordingly directed the Indian Merchant Chambers to send those five agreements to the Superintendent of Stamps having its office at Old Custom House, Fort, Mumbai for adjudication of correct stamp duty and directed that the hearing would be taken after the receipt

was received from the Superintendent of Stamps. Insofar as this matter is concerned, the document which was marked as Exhibit 'X-1" is the subject matter of the present arbitration petition.

12. Some time in the month of March, 2007, a former Judge of this Court is appointed as a sole arbitrator in place of the erstwhile arbitrator, who had resigned.

13. In a meeting held on 29th November, 2007, the respondent through its learned senior counsel tendered five agreements in evidence on behalf of the respondent herein which were marked as "X- 1 to X- 5" for identification due to inadequate stamp duty. The learned arbitrator in the said meeting recorded that since the issue of inadequate stamp duty on such five agreements have been resolved and adequate stamp duty was paid, the photo copies of the said five agreements were taken on record in the arbitral reference and the question of admitting them in evidence shall be considered later on. In the said meeting, the learned arbitrator refused to take in evidence a copy of the criminal proceedings sought to be tendered by the petitioner through its counsel.

14. Before the learned arbitrator, both the parties examined their witnesses, who was extensively cross-examined by opposite party. Both the parties filed written submissions before the learned arbitrator.

15. On 23rd March, 2009, the learned arbitrator made an award directing the petitioner to pay a sum of Rs.44,99,820/- with interest on the principal sum of Rs.18,87,318/- at the rate of 12% p.a. from 5th April, 2001 till payment.

16. Being aggrieved by the said award dated 23rd March, 2009, the petitioner herein filed this arbitration petition under section 34 of the Arbitration Act.

17. During the pendency of these arbitration proceedings, the petitioner filed chamber summons in this petition *inter-alia* praying for an amendment of the arbitration petition. By an order dated 3rd December, 2012, this Court allowed the said chamber summons and granted liberty to the petitioner to amend the arbitration petition by adding paragraphs 6-A to 6-L and paragraphs 13 (yy-A) to 13 (yy-K).

18. By an order dated 18th April, 2013 as corrected by an order dated 12th June, 2013, this Court remanded the matter under section 34(4) of the Arbitration Act and directed the learned arbitrator to consider the averments made by the petitioner by virtue of amendments permitted by this Court in the arbitration petition. This Court granted a liberty to both the parties to lead oral evidence by way of affidavits. The respondent filed affidavit dated 31st August, 2013 of an ex-employee Mr. Krishna Gopal Ajmera in lieu of examination in chief. The petitioner filed affidavit in lieu of examination in chief dated 10th September, 2013 of its Director Mr. Vishal Kedia. Both these witnesses were extensively cross-examined. The learned arbitrator framed additional issues and heard both the parties. On 30th November, 2013, the learned arbitrator made an additional award and rejected the contentions raised by the petitioner. On 9th January, 2014, the learned arbitrator passed further orders on the application dated 27th December, 2013 filed by the respondent under section 33 of the Arbitration Act. The petitioner thereafter impugned the additional award dated 30th November, 2013 as corrected by the order dated 9th January, 2014 by carrying out amendment in this arbitration

petition.

19. Mr.Bhandari, learned counsel appearing for the petitioner reiterates the submissions made by him in Arbitration Petition No. 629 of 2009 and 630 of 2009 which are common in this petition and have made additional submissions which were not advanced in those two arbitration petitions.

20. It is submitted by the learned counsel for the petitioner that the printed agreement for hire purchase which was originally dated 10th March, 1994 was corrected as 10th March, 1995 in the printed agreement of the said document annexed to the statement of claim. He submits that the said hire purchase agreement had seven stamp papers of value of Rs.20,300/- annexed to the main document, with an endorsement beginning at first stamp paper as “This forms an integral part of the Agreement made at 10th this March day of 1994 between Birla Global Finance Limited, a company” He submits that all the seven stamp papers were dated 8th March, 1995. The rubber stamp on all the pages were of Birla Growth Fund Limited but Schedule A was a printed sheet of Birla Global Finance Ltd. whereas Schedule B had no rubber stamp, nor printed name of any of the claimant. He submits that the document is dated 10th March, 1994 and is pre-dated and is thus bad in law, void and unenforceable. He submits that the said hire purchase agreement is thus fabricated, void and is unenforceable in law and thus the learned arbitrator could not have awarded any claim based on such fabricated, void and unenforceable agreement.

21. It is submitted by the learned counsel that the invoice for the Indian vehicles which were subject matter of this arbitration were dated 14th March, 1995. There were several discrepancies in the typed copy of the hire purchase agreement

annexed to the statement of claim including the date of agreement wrongly mentioned as 10th March, 1995. There was wrong description of the rubber stamp, omission of schedule (b) etc.

22. It is submitted by the learned counsel that the only witness on behalf of the respondent to the said agreement was Mr.Pawan Gupta who admitted several mistakes in making of the said documents in his cross examination and was thus an unreliable witness. The learned arbitrator however ignored all such glaring admission of mistakes admitted in his cross examination while dealing with his evidence in the impugned award.

23. It is submitted by the learned counsel that since the petitioner had demonstrated that the said hire purchase agreement dated 10th March, 1994 was fabricated, void and unenforceable and was a disputed agreement, the learned arbitrator could not have marked the said document and could not have taken the same in evidence without perusing the original thereof.

24. It is submitted by the learned counsel for the petitioner that the evidence of the said witness Mr.Pawan Gupta could not have been considered by the learned arbitrator on the ground that a note which was marked as Ex.R-1 was recovered from the said witness showing the answers which he was asked to give during the course of his cross examination. He submits that the learned arbitrator ought to have considered the credibility of such witness while dealing with his evidence in the impugned award which is totally ignored by the learned arbitrator.

25. It is submitted by the learned counsel for the petitioner that the original transaction was for a loan of Rs.60,74,820/- as mentioned in the schedule

to the hire purchase agreement with equated monthly installment of Rs.1,68,745/-. The entire transaction was changed because of the refund of excise duty resulting in change of the loan amount and also the amount of equated monthly installments. He submits that the change in the loan amount and the amount of equated monthly installment resulted in novatio and thus since no fresh agreement was executed between the parties and no amendment was carried out to the original agreement, the learned arbitrator could not have allowed the claims made by the respondent based on the documents pertaining to the original transaction which was novated in view of the change of loan amount and also the equated monthly installment.

26. It is submitted by the learned counsel for the petitioner that though the hire purchase agreement was labelled as a hire purchase agreement, the same was actually a loan agreement. He submits that the transaction had commenced on 10th March, 1995. The cheques towards equated monthly installments were taken from the petitioner with respect to that date i.e. 10th March, 1995 which was prior to the date of invoice i.e. 14th March, 1995 for the purchase of the cars. He submits that unless the respondent would have become owner of the cars first, the respondent could not have entered into hire purchase agreement with the petitioner prior to the date of invoice dated 14th March, 1995. He submits that the transaction between the parties thus could be only a loan transaction and not hire purchase transaction. He submits that the respondent thus could not have taken repossession of the vehicles and its prayer for handing over the delivery of the vehicles was thus not maintainable.

27. Learned counsel for the petitioner placed reliance on various clauses of the hire purchase agreement in support of his submission that the said transaction was actually not a hire purchase transaction but was a loan transaction.

It is submitted that the respondent herein had not claimed any depreciation on the cars and the hire charges received by the respondent were not entirely treated as income in the books of accounts of the respondent. He submits that the respondent has sold three vehicles at a price which was lesser than the price offered by the price bidder which resulted in financial loss to the petitioner. He submits that though the insurance amount was recovered for three vehicles by the respondent, the equated monthly installment was not re-calculated by the respondent.

28. It is submitted by the learned counsel for the petitioner that the claims made by the respondent were barred by law of limitation. He submits that the claims made by the respondent before the learned arbitrator was for recovery of the unpaid monthly installments under the said hire purchase agreement. He submits that the last monthly installment due as claimed in the statement of claim was 10th February, 1998. He submits that the last date for making the claim was thus 10th February, 2001 whereas the statement of claim was affirmed on 4th July, 2001 and was filed with the Indian Merchant Chamber on 11th July, 2001 which was ex-facie barred by law of limitation.

29. The learned counsel for the petitioner invited my attention to paragraph 29 of the statement of claim and would submit that the only averments in the statement of claim regarding limitation was that the claim filed by the respondent was within time. It is submitted that though the respondent during the course of arguments urged that the limitation for invoking arbitration agreement was extended in view of the alleged admission of the liability in the letter dated 11th May, 1999 addressed by the petitioner herein, there was no pleading in that regard in the statement of claim. He submits that the petitioner had raised a specific plea of bar of limitation in paragraphs 4 and 53 of the statement of claim.

The onus to prove that the claim was within time was upon the respondent (original claimant).

30. It is submitted by the learned counsel for the petitioner that though the respondent had furnished the inspection of the documents on 1st February, 2002, even at that stage, the respondent did not rely upon the letter dated 11th May, 1999 and did not give inspection thereof. He submits that though the petitioner had amended the written statement based on such inspection and when the said Mr. Pawan Gupta was examined as the first witness of the respondent had filed affidavit of evidence on 13th March, 2003, the said letter dated 11th May, 1999 was neither produced nor referred in the said affidavit. He submits that the admission of the documents took place on 10th June, 2003. The further examination in chief of Mr. Pawan Gupta commenced on 10th June, 2003 followed by his cross examination on the same day. The said letter dated 11th May, 1999 was sought to be tendered for the first time on 11th June, 2003.

31. It is submitted that the petitioner had objected to the respondent tendering the said letter dated 11th May, 1999 on the ground that the said letter was a 'without prejudice' letter. The learned arbitrator however held that the admissibility of the said letter would be decided later on. He submits that the said letter was shown to Mr. Vishal Kedia who was examined as a witness of the petitioner during the course of his cross examination. He submits that since the said letter was not referred to and relied upon in the pleadings or in the affidavit of evidence filed by the witness examined by the respondent, had no opportunity to deal with the said letter. He submits that the provisions of Limitation Act, 1963 are applicable to the arbitration proceedings. He submits that the principles of Order 7 Rule 6 of the Code of Civil Procedure, 1908 applies to the arbitration

proceedings and since there was no pleadings about the alleged acknowledgement of liability, the learned arbitrator could not have considered the letter dated 11th May, 1999 as acknowledgment of liability and could not have considered that the period of limitation was extended based on the said letter.

32. It is submitted by the learned counsel for the petitioner that in any event the said letter dated 11th May, 1999 which was one of the letter in continuation of the earlier letter which were marked as without prejudice, the learned arbitrator ought to have considered the total chain of correspondence and ought to have come to a conclusion that the said letter dated 11th May, 1999 was also a without prejudice letter and thus the contents thereof could not have been considered as admission of liability. He submits that the entire award on the issue of limitation and while deciding the claims made by the respondent based on such alleged admission of liability is vitiated. Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of the ***Church of Christ Charitable Trust & Educational Charitable Society vs. Ponniamman Educational Trust, (2012) 8 SCC 706*** and several other judgments.

33. Mr. Sen, learned senior counsel for the respondent on the other hand invited my attention to the letter dated 14th August, 1994 authorizing Mr. Ram Niranjan Kedia, late partner of the then partnership firm to avail the hire purchase facility from the respondent. Reliance is also placed on the sanction letter dated 24th August, 1994 issued by the respondent which was acknowledged by the then partnership firm which sanction letter reproduced the commercial terms on which the vehicles were to be given on hire purchase basis to the said partnership firm. On 10th March, 1995 the parties entered into with the hire purchase agreement with the petitioner in respect of 10 Tata Estate cars.

34. The learned senior counsel submits that the respondent had paid Rs.46,93,830/- to the United Motors (India) Limited towards the purchase of the said 10 Tata Estate cars and relied upon the bank statement of the respondent showing the said amount having been debited to their account by the State Bank of India. Reliance is also placed on the invoice issued by the United Motors (India) Limited on 14th March, 1995 showing sale of those vehicles to the respondent by the said company. He submits that the insurance policies were issued by National Insurance Co.Ltd. in respect of seven cars which also made reference to the fact that those cars were under hire purchase facility from the respondent. It is submitted by the learned senior counsel that the said United Motors (India) Limited informed the petitioner about the excise rebate of Rs.3,28,908.60. The finance amount was accordingly reduced from Rs.46,93,380/- to Rs.43,64,921/- and consequently monthly installments were reduced from Rs.1,68,745/- to Rs.1,56,921/-.

35. It is submitted by the learned senior counsel that the learned arbitrator has not awarded the claim on the basis of the amount mentioned in the original hire purchase agreement but had allowed the claim on the basis of the reduced amount of equated monthly installments which were known to the petitioner and on the basis of which the claim was made by the respondent before the learned arbitrator. He submits that merely because the new agreement was not entered into between the parties for recording the terms of the reduction of amount of equated monthly installment, that would not make the agreement void. He submits that the petitioner had paid some of the installments to the respondent based on the revised amount of equated monthly installments computed after the excise rebate was granted in respect of those vehicles.

36. Insofar as submission of the learned senior counsel for the petitioner that the invoice in respect of the said vehicles were of the later date and thus there could not have any transaction of hire purchase prior to the date of the invoice is concerned, it is submitted by the learned senior counsel for the respondent that the transaction was already entered into between the parties earlier. Merely because the invoices were issued by the said United Motors (India) Limited, the nature of transaction would not be changed. The petitioner had issued post dated cheques in respect of the said hire purchase transaction admittedly in favour of the respondent. The petitioner had althroughout treated the said transaction as hire purchase transaction in the correspondence as well as in their books of accounts and other financial documents including the balance-sheet etc.

37. In support of this submission, learned senior counsel invited my attention to the various financial documents of the petitioner which were forming part of the record before the learned arbitrator showing the transaction between the petitioner and the respondent as hire purchase transaction and showing the payment of hire purchase installment to the respondent in respect of those transactions. Learned senior counsel placed reliance on those financial documents of the petitioner also to show that the liability of the petitioner towards the respondent in respect of the said hire purchase agreement were clearly admitted in the balance-sheet and other financial documents of the petitioner. It is submitted that the learned arbitrator has rightly placed reliance on those documents while allowing the claims made by the respondent.

38. Insofar as submission of the learned senior counsel for the petitioner that the contents of some of the paragraphs of the written submissions filed by the

respondent were in-verbatim adopted by the learned arbitrator in the impugned award as part of the reasons while allowing the claims made by the respondent is concerned, it is submitted that the learned arbitrator having found the submissions made by the petitioner totally untenable and frivolous, he having accepted the submission made by the respondent referred such submission in the impugned award. He submits that the allegations made by the petitioner against the learned arbitrator are totally frivolous and not in good taste.

39. It is submitted by the learned senior counsel that the hire purchase transaction in this matter took place in the year 1995 admittedly and not in the year 1994. There was a mistake in mentioning the year of 1994 on record before the learned arbitrator. The petitioner cannot be allowed to take advantage of the mistake committed in mentioning the year of the transaction in the proceedings. The petitioner had issued various cheques based on the transactions having been taken place in the year 1995 and not 1994.

40. The learned senior counsel reiterated the submissions made on the other issue raised by the petitioner including the issue of limitation which were made in the Arbitration Petition Nos. 629 of 2009, 630 of 2009, 631 of 2009 and 632 of 2009 as a part of the submissions in this matter.

41. Learned senior counsel also placed reliance on the judgment of Supreme Court judgment in case of **Sardar Trilok Singh & Ors. vs. Satya Deo Tripathi, (1979) 4 SCC 396** and in case of **Indian Bank vs. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550**.

REASONS AND CONCLUSIONS :-

42. Mr.Bhandari, learned counsel appearing for the petitioner submits that the submissions already made by the petitioner in Arbitration Petition Nos.629 of 2009 and 630 of 2009 are adopted by the petitioner as part of the submissions in this petition also. Learned counsel for the petitioner also made few additional submissions for consideration of this Court which were responded by the learned senior counsel for the respondent. The additional submissions made by both the parties are considered by this Court in the later part of the judgment.

43. Insofar as the submission of the learned counsel for the petitioner that the respondent had affixed stamp paper of Rs.20,300/- on the hire purchase agreement is concerned, in my view, there is no substance in this submission made by the learned counsel for the petitioner. It is not the case of the petitioner that the said document was insufficiently stamped even after payment of Rs.20,300/-.

44. Insofar as the other alleged discrepancies sought to be pointed out by the learned counsel for the petitioner in the said document is concerned, none of these alleged discrepancies were urged before the learned arbitrator by the petitioner nor the same were confronted with to the witness examined by the respondent and thus cannot be allowed to be raised for the first time in these proceedings.

45. Insofar as the submission of the learned counsel for the petitioner that in view of reduction in the original amount and in the equated monthly installments, the respondent could not have relied upon the documents under the

original transaction is concerned, this Court has already rejected this contention in Arbitration Petition No.632 of 2009 on the ground that the learned arbitrator had not allowed the claim based on the original amount. There is thus no substance in this submission of the learned counsel for the petitioner.

46. Insofar as the issue of limitation raised by the learned counsel for the petitioner in this petition is concerned, the same is identical to the issue of limitation raised in Arbitration Petition No.632 of 2009 which is already rejected by this Court in the said judgment. For the reasons recorded in the said judgment, the plea of limitation raised by the petitioner is rejected.

47. For the reasons recorded aforesaid and the reasons recorded in Arbitration Petition Nos.629 of 2009 and 630 of 2009 on the issues which are reiterated by the petitioner in this petition, in my view the petition is totally devoid of merits.

48. I therefore, pass the following order :-

- a). Arbitration Petition No.633 of 2009 is dismissed.
- b). No order as to costs.

[R.D. DHANUKA, J.]