

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.03.2016

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

**CRP (PD) No.1505 of 2013 and
M.P.No.1 of 2013**

IndusInd Bank Ltd.,
Rep by its Branch Manager
Consumer Division
G.Prasanna, S/o P.Gnanaprakash
3-3-27, Bharathi Nagar,
Salem Main Road (Near SLUS Petrol Bunk)
Akkammampet Post, Sankari Taluk.
Now rep. By A.Ganesh Kumar
Executive Legal

(Cause title accepted. Vide order of
this Court dated 22.03.2012 made
in M.P.No.2 of 2013 in CRP SR.
No.100637 of 2012)

.. Petitioner

Vs.

K.Nachimuthu

.. Respondent

Civil Revision Petition filed under Article 227 of the Constitution of
India against the order and decreetal order dated 01.10.2012 made in
I.A.No.999 of 2010 in O.S.No.84 of 2010 on the file of District Munsif
Court, Sankagiri

For Petitioner : Mr.K.Moorthy

For Respondent : Mr.M.Hariharan for
M/s S.Raveekumar

ORDER

The Petitioner/Defendant has focussed the instant Civil Revision Petition as against the Order dated 01.10.2012 in I.A.No.999 of 2010 in O.S.No.84 of 2010 passed by the learned District Munsif, Sankagiri in dismissing the Application.

2. Being dissatisfied with the Order of dismissal dated 01.10.2012 in I.A.No.999 of 2010 in O.S.No.84 of 2010 passed by the Trial Court, the Revision Petitioner/Defendant has projected the present Civil Revision Petition before this Court primarily contending that the Trial Court failed to appreciate that the I.A.No.999 of 2010 in O.S.No.84 of 2010 was filed by the Petitioner/Defendant in terms of the loan agreement dated 24.12.2007 entered into between the parties and further that the Civil Court's jurisdiction is ousted by virtue of the provisions of the Arbitration and Conciliation Act, 1996.

3. The Learned Counsel for the Petitioner/Bank urges before this Court that the Trial Court had overlooked a vital fact that the relief sought for in the main suit as well as the cause of action paragraph

mentioned in the Plaint relates to an arbitral dispute covered under the loan agreement dated 24.12.2007.

4. The Learned Counsel for the Petitioner projects an argument that the Trial Court should not have dismissed the I.A.No.999 of 2010 in O.S.No.84 of 2010 contrary to the tenor and spirit of Sections 5 and 8 of the Arbitration and Conciliation Act, 1996.

5. At this stage, the Learned Counsel for the Petitioner forcefully contends that in terms of the Loan Agreement dated 24.12.2007 entered into between the parties, a Court of Law is bound to refer the dispute to the Arbitrator in terms of the contract and in this regard, the Civil Court lacks jurisdiction to adjudicate upon and determine the disputes pertaining to the contractual obligations.

6. The Learned Counsel for the Petitioner brings it to the notice of this Court that Section 5 of the Arbitration and Conciliation Act, 1996 speaks 'Extent of Judicial Intervention' and in fact no Judicial Authority was intervened except whereso provided in Part (1) of the Arbitration and Conciliation Act, 1996.

7. To lend support to the contention that no Judicial Authority was

intervened except whereso provided in Part (1) of the Arbitration and Conciliation Act, 1996, the Learned Counsel for the Petitioner / Defendant (Bank) relies on the decision of the **Hon'ble Supreme Court reported in AIR 2003 SC 2881** whereby and whereunder it is observed as follows:-

“The language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the lower Courts. If that be so, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred the dispute to arbitration Section 16 has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. It is clear from the language of the Section, that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal. The

Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case.”

8. The Learned Counsel for the Petitioner cites the decision of Hon'ble Supreme Court (**Hindustan Petroleum Corporation Limited V. Pinkcity Midway Petroleums**) reported in (2003) 6 Supreme Court Cases at Page 503 at Special Pages 504 and 505 wherein it is laid down as under:-

“If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration. (Para 14)

The question then would arise: what would be role of civil court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? It is not possible to accept the contention of the respondent that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the civil court before referring the matter to arbitration even in cases where there is admittedly

an arbitration clause. Section 16 of the Arbitration and Conciliation Act makes it clear that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. Therefore, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in clause 40 of them Dealership Agreement and as required under Sections 8 and 16 of the Act.

(Paras 15 and 16)

9. He also seeks in aid of the decision of **Hon'ble Supreme Court (Branch Manager, Magma Leasing and Finance Limited and Another V. Potluri Madhavalata and Another)** reported in (2009) 10 Supreme Court Cases at Page 103 at Special Page, 114 wherein at **Paragraph Nos.17 and 18**, it is observed and held as follows:-

"17. Section 8 reads thus:

"8. Power to refer parties to arbitration where there is an arbitration agreement – (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall

not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied:

- (a) that there exists an arbitration agreement;*
- (b) that action has been brought to the court by one party to the arbitration agreement against the other party;*
- (c) that the subject-matter of the suit is same as the subject-matter of the arbitration agreement;*
- (d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and*
- (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.*

18. Section 8 is in the form of legislative command to the court and once the prerequisite conditions as aforestated are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfilment of the conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration. There is nothing on record that the prerequisite conditions of Section 8 are not fully satisfied in the present case. The trial court, in the circumstances,

ought to have referred the parties to arbitration as per arbitration Clause 22”.

10. Per contra, the Learned Counsel for the Respondent/Plaintiff supported the Order of the Trial Court passed in I.A.No.999 of 2010 in O.S.84 of 2010 and submits that the said Order need not be disturbed at this distance point of time.

11. It is to be borne in mind that Clause No.14.0 of the Loan Agreement dated 24.12.2007 entered into between the Lender (Revision Petitioner/Defendant) and the Borrower and Co-Borrower deals with events which shall constitute 'Events of Default'. Clause No.15.0 of the Agreement speaks of 'Lender's Rights'. In reality Clause No.15.2 of the Agreement speaks of 'Lender's Rights' as under:-

“15.2. Upon occurrence of an Event of Default, the Borrower shall be bound to return the Asset to the Lender at such location, as the Lender may designate, in the same condition in which it was originally delivered to the Borrower, ordinary wear and tear excepted. The Borrower shall not prevent or obstruct the Lender from taking the possession of the Asset. For this purpose the Borrower covenants & confirms that the Lender's authorized representatives, servants, officers and agents will have unrestricted right of entry and shall be entitled to forthwith, or at any time without

notice to the Borrower, to enter upon the premises, or garage, or godown, where the vehicle(s) are lying or kept, and to take possession or recover and receive the same and if necessary to break open any such place. The Lender will be well within its rights to use tow-van or any carrier to carry away the Asset. The Borrower shall be liable to pay any towing charges and other such expenses incurred by the Lender for taking the possession of the Asset, cost of safe keeping of the asset and for its sale etc., If the Lender takes possession of the Hypothecated Asset, the Lender shall not be responsible for any loss or deterioration or damage to the Hypothecated Asset whether by theft, fire, rain, flood, earthquake, lightning, accident or any other cause whatsoever.”

12. That apart Clause 23.0 of the Loan Agreement dated 24.12.2007 under the caption 'Law, Jurisdiction and Arbitration' (a to e) reads as under:-

“(a) All disputes, differences and / or claim arising out of or touching upon this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of the arbitration and Conciliation act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Lender. The award given by such an Arbitrator shall be final and binding on the Borrower and Co-

borrower to this agreement.

(b) Dispute for the purpose of Arbitration includes default committed by the Borrower as per Clause 14 of this Agreement. It is a term of this agreement that in the event of such an Arbitrator to whom the matter has been originally referred to dying or being unable to act for any reason, the Lender, at the time such death of the arbitrator or of his inability to act as arbitrator, shall appoint another to act as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

(c) The venue of Arbitration proceedings shall be at Chennai

(d) The arbitrator so appointed herein above, shall also be entitled to pass an Award on the hypothecated asset and also on any other securities furnished by or on behalf of the Borrower / Co-borrower.

(e) All notices and other communications on the Lender and the Borrowers shall be to the following address:

For Lender : Corp. Off. - Retain : Indusind Bank Ltd., 86, Sudarsan Building, Chamiers Road, Chennai – 600 018.

For Borrower: The residential address stated in the schedule or the property address described in the schedule.”

13. One cannot remain oblivious of a fact that the purpose of submitting a dispute to an Arbitration is that such dispute shall not be

heard and determined by a 'Judicial Authority'. However, if an individual brings an action, which is a subject matter of an 'Arbitration Agreement' the 'Judicial Authority' is to refer the parties/litigants to a arbitration, if a party to the arbitration agreement applies to it, in the manner prescribed in this provision. Also that, the Arbitration and Conciliation Act, 1996 is a 'Giant Step Forward' in the direction of an 'Alternative Dispute Resolution System'. In fact, only a dispute which is specifically and mutually agreed to be resolved through arbitration, the same can be a subject matter of arbitration; and upon satisfaction of the same, the dispute can be referred to the Arbitrator / Arbitral Tribunal, as the case may be. Moreover, Section 8 of the Act uses the term 'Judicial Authority' and not the 'Court'.

14. The 'Judicial Authority' before making a reference under Section 8 of the Act would have to be satisfied subjectively with the subject matter of action before him / it and the subject matter of Arbitration Agreement are identical and may examine the said arbitration agreement with care and caution before giving a finality in this regard. Further, unless the 'Judicial Authority' before whom the Petition / Application is filed under Section 8 of the **Act, is a 'Court' as defined within the meaning of Section 42 read with Clause (e) of Section 2 of**

the Arbitration and Conciliation Act, 1996, the 'Judicial Authority' shall not entertain subsequent proceedings arising under the Arbitration Agreement in view of Section 42 of the Act.

15. At this stage, this Court significantly points out that 'Judicial Authority' cannot act mechanically while exercising his / its power to refer the parties to an arbitration. Merely because the arbitration agreement was produced before it as a logical corollary, it is necessary for 'Court Of Law' or 'Judicial Authority', to go into the facts of the case, arrive at a conclusion as to whether the parties are to be referred to an arbitration or not, in the considered opinion of this Court.

16. The term 'Judicial Authority' is found in Sections 5 and 41(2) of the Part I of the Act, 1996. Further, **Lord Saville observed in his address... 'Arbitration and the Court's at the Denning Lecture 1995,** the following :-

“ It can be said on the one said that if parties agree to resolve their disputes through the use of a private rather than a public tribunal, then the court system should play no part at all, save perhaps to enforce awards in the same way as they enforce any other rights and obligations to which the parties have agreed. To do otherwise is unwarrantably to interfere with the parties' right to conduct their affairs as they

choose.

The other extreme position reaches a very different conclusion. Arbitration has this in common with the court system; both are a form of dispute resolution which depends on the decision of a third party. Justice dictates that certain rules should apply to dispute resolution of this kind. Since the state is in overall charge of justice, and since justice is an integral part of any civilised democratic society, the courts should not hesitate to intervene as and when necessary, so as to ensure that justice is done in private as well as public tribunals. (vide Redfern & Hunter, on International Arbitration, fifth edition, 2009 at page 463)

17. In this connection in the decision **Regina John M'Evoy V. Dublin Corporation, (1878) 2 LR Ir.371**, it is observed as follows:-

“ The term ' Judicial' does not necessarily mean acts of a Judge or Legal Tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances and imposing liability or affecting the rights of others”.

18. It cannot be gainsaid that after a reference of the subject matter of agreement made by the 'Judicial Authority' to 'Arbitration' under Section 8 of the Act, 1996, nothing remains to be determined in action as per decision of **Hon'ble Supreme Court Sukanya Holdings Pvt., Ltd., V. Jayesh H.Pandya and another reported in AIR 2003**

Special Court 2253.

19. Besides the above, it may not be out of place for this Court to make a significant mention that the Respondent/Plaintiff had filed O.S.No.84 of 2010 on the file of learned District Munsif, Sankari praying for passing of an Decree and Judgment as under:-

(a) Declaring the notice issued by the 2nd defendant dated 26.12.2009 is illegal, unenforceable and ultra virus;

(b) Granting permanent injunction against the defendants and their men from taking any further action based on the illegal and unenforceable notice dated 26.12.2009;

(c) Awarding cost of the suit.

(d) Granting such other relief or relief's as this Hon'ble Court may deem just and necessary in the circumstances of the case and thus render justice."

20. At this juncture, a mere running of the eye over the contents of Paragraph 13 of the Plaint filed by the Respondent/Plaintiff indicates that the Cause of Action for the suit arose on 24.12.2007 when the Respondent/Plaintiff had executed Hire Purchase Agreement in favour of the Defendants and availed the loan amount and agreeing to repay the said loan in 48 monthly instalments vide Hire Purchase Agreement No.TNAA01048 on several dates, when the Respondent/ Plaintiff paid

the monthly instalments to the Defendants, lastly on 30.11.2009 paid the monthly instalment towards the loan amount and on 23.12.2009 when the servants of the 3rd defendant came to the house of the Respondent/Plaintiff and scolded the Plaintiff and family members with filthy words before public and gave deadly threaten to the Plaintiff's family, when the 3rd Defendant seized the suit property on 26.12.2009 in an illegal manner with the rowdy elements etc.,

21. It is to be noted that Section 5 of the Arbitration and Conciliation Act, 1996 brings out clearly the aim of the new act viz., 'Encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the Court's intervention should be minimal as per decision of **Hon'ble Supreme Court (P.Anand Gajapathi Raju V. P.V.G. Raju) reported in A.I.R. 2000 Supreme Court at Page 1886.**

22.To put it precisely, Section 8 of the Arbitration and Conciliation Act, 1996 enjoins 'Power to refer parties to Arbitration where there is an Arbitration Agreement'. As seen from the language employed under Section 8 of the Arbitration and Conciliation Act, it can safely be said

that it is peremptory. It is, therefore, obligatory on the part of a Court of Law to refer the parties to Arbitration in terms of their Arbitration Agreement as per decision of **Hon'ble Supreme Court P. Anand Gajapathi Raju V. P.V.G.Raju reported in A.I.R. 2000 Supreme Court at Page 1886.**

23. In order to provide an opportunity to the Plaintiff of being heard in respect of an Application under Section 8 of the Arbitration and Conciliation Act, 1996, a Party, who seeks to refer the dispute to an Arbitrator is to make a written application for that purpose so that the Plaintiff, who has filed a suit, knows exactly the grounds on which reference is sought. As such, the ingredients of Section 8(2) of the Act indicate that the Application that is visualised by Section 8(1) of the Act is a Written Application and not merely an Oral Application as per decision of **Hon'ble Supreme Court Garden Finance Limited V. Prakash Industries Limited reported in A.I.R 2002 Bombay 8.**

24. On a careful consideration of the contentions advanced on respective sides and also this Court bearing in mind that the dispute between the parties is an arbitral one, viz., covered under the Loan Agreement dated 24.12.2007 and also this Court going to by the tenor

and spirit under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 and also taking note of the attendant facts and circumstances the present case in an integral manner comes to an resultant conclusion that the observations / views expressed by the Trial Court interalia to the effect that based on Loan Agreement and its contents the subject matter in issue was to be referred to Arbitration was not to be accepted etc., while dismissing I.A.No.999 of 2010 in O.S.No.84 of 2010 filed by the Petitioner/Defendant are per se not legally valid in Law.

25. Viewed in that perspective, this Court interferes with the Order dated 01.10.2012 passed in I.A.No.999 of 2010 in O.S.No.84 of 2010 passed by the Trial Court and sets aside the same to prevent an aberration of justice and to promote substantial cause of justice. Consequently, the Civil Revision Petition succeeds.

26. In the result, the Civil Revision Petition is allowed leaving the parties to bear their own costs. The Order dated 01.10.2012 in I.A.No.999 of 2010 in O.S.No.84 of 2010 passed by the learned District Munsif, Sankari is set aside by this Court for the reasons assigned in this Civil Revision Petition. Consequently, I.A.No.999 of 2010 in O.S.No.84 of 2010 is allowed. Connected Miscellaneous Petition is

closed.

01.03.2016

Index:Yes/No
Internet:Yes/No
ssd

M.VENUGOPAL, J.

ssd

To
The District Munsif Court,

Sankari

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