

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.06.2016

Coram:

The Hon'ble Mr. Justice A.SELVAM  
and  
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.435 of 2008  
and  
M.P.No.1 of 2008

M/s.TVS Finance and Services Ltd.,  
(formerly known as  
M/s.Harita Finance Limited)  
Jayalakshmi Estate  
No.8, Haddows Road  
Chennai 6 ... Appellant/1st Respondent

vs.

1. Aerupula Narahari Rao  
2. Aerupula Babu Rao  
3. Aerupula Krishna Rao  
4. Aerupula Chandrasekara Rao  
5. Aerupula Rajeshwara Rao ... Respondents 1 to 5/Petitioner  
6. Y.K.Rajagopal  
Advocate & Arbitrator  
(given up)

... 6th Respondent/2nd Respondent

This Appeal is preferred under Order XXXVI Rule 1 of  
O.S.Rules r/w Clause 15 of the Letters Patent Act against the  
order of this Court dated 8.8.2008 in O.P.No.846 of 2007.

For Appellant : Mr.A.Abdul Hameed for  
M/s.Anand, Abdul & Vinoth  
Associates

For Respondents : No appearance for R1 to R5  
R6 - given up

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED  
BY A.SELVAM, J.)

This Original Side Appeal has been directed against the  
order dated 8.8.2008 passed in O.P.No.846 of 2007 by the learned  
Single Judge of this Court.

2. The appellant herein and M/s.Anand Agros Limited have entered into a hire purchase agreement and since there is a default in paying monthly installment, as per agreement, the appellant has invoked arbitration proceedings, wherein the respondents 1 to 5 have also been impleaded as guarantors of the principal debtor. The arbitrator after considering the divergent contentions raised on either side has passed an award dated 26.2.2007 and the same has been challenged by the respondents 1 to 5 herein, as petitioners in O.P.No.846 of 2007 on the file of this Court.

3. The learned Single Judge, after considering the divergent contentions raised on either side, has come to a conclusion that the petitioners are not parties to the agreement entered into between the appellant herein and M/s.Anand Agros Limited and ultimately set aside the arbitration award dated 26.2.2007 by way of passing the impugned order and in order to set aside the same, present Original Side Appeal has been preferred by the first respondent as appellant herein.

4. The learned counsel appearing for the respondents has not made his appearance and under such circumstances, this Original Side Appeal has been disposed of on merits on the basis of the contentions put forth on the side of the appellant/first respondent.

5. The learned counsel appearing for the appellant/first respondent has fairly conceded that the respondents 1 to 5/petitioners are not parties to the agreement, which has come into existence between the appellant/first respondent and M/s.Anand Agros Limited. Under such circumstances, they cannot be treated as guarantors and the learned Single Judge, after considering the main contention put forth on the side of the respondents 1 to 5/petitioners has rightly set aside the award dated 26.2.2007, but the learned Single Judge has erroneously set aside the entire award and at the most, the arbitral award can be set aside only in respect of the petitioners/respondents 1 to 5.

6. The learned counsel appearing for the appellant/first respondent has drawn the attention of the court to the decision reported in 2011 (1) SCC 320 (S.N.Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Limited and others), wherein at paragraphs 8 to 10, it is observed as follows:

"8. Thus, there can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes

with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.

9. There is no dispute that the loan agreements among the first respondent (lender), the second respondent (borrower) and the third respondent (guarantor) contained a provision for arbitration. The said provision for arbitration is extracted below:

" In the event of any dispute, question or difference arising out of or in connection with this agreement and the respective rights and obligations of the parties hereunder, the same shall be referred to the arbitration in accordance with the provisions of the Arbitration Act, 1940".

But the appellant was not a party to the same. In fact, the appellant's letter of guarantee for Rs.75 Lakhs was given on 27.10.1995, prior to the dates of the two loan agreements. It is also not in dispute that the letter dated 27.10.1995 given by the appellant to the first respondent did not contain a provision for arbitration; and that except the said letter dated 27.10.1995, the appellant did not execute any document or issue any communication.

10. An arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement. Therefore, there was no arbitration agreement as defined under Sections 7(4)(a) or (b) of the Act, insofar as the appellant was constrained, though there was an arbitration agreement as defined under Section 7(4)(a) of the Act in regard to the second and third respondents. As the letter dated 27.10.1995 does not refer to any document containing an arbitration clause, there is also no arbitration agreement between the first respondent and the appellant as contemplated under Section 7(5) of the Act."

7. From a close reading of the decision reported supra, it is easily discernible that unless guarantors are parties to the

agreement entered into in between the creditor and debtor, they cannot be made liable.

8. In the instant case, as fairly conceded on the side of the appellant/first respondent, the respondents 1 to 5/petitioners are not parties to the concerned agreement. Under such circumstances, the learned Single Judge has rightly found that the petitioners/respondents 1 to 5 herein are not at all responsible for the amount due from the principal debtor. Therefore, on the basis of the clear admission made on the side of the appellant, coupled with the decision reported in 2011 (1) SCC 320, this Court is of the view that there is no merit in the appeal and the same deserves to be dismissed. However, as rightly pointed out on the side of the appellant/first respondent, the learned Single Judge has erroneously set aside the entire arbitral award and to that extent, the order of the learned Single Judge is liable to be modified.

In fine, this Original Side Appeal is allowed in part. The order passed by the learned Single Judge in O.P.No.846 of 2007 is modified as follows:

"The arbitral award dated 26.2.2007 passed in Claim No.54 of 2003 is set aside, insofar as the respondents 1 to 5/petitioners are concerned. In other aspects, the Arbitral Award is confirmed."

No costs. The connected Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar(CS VII)

//True Copy//

To

1.The Sub Assistant Registrar,  
Original Side,  
High Court, Madras.

+1cc to M/S.A.K.Mylsamy & Associates, Sr.36070  
+1cc to M/S.Anand Abdul, Advocate Sr.36406

O.S.A.No.435 of 2008

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srg 19/07/2016