

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.01.2017

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

O.P.No.80 of 2012

and

A.Nos.2665 of 2010, 4004, 4005 and 6063 of 2011

Soloman Pappachan

.. Petitioner

vs

1.M/s.Kotak Mahindra Prima Ltd.,
Represented by its Authorized Officer,
Mr.Chinnamuthu,
Assistant Manager,
No.45, Ceebros Center,
Mandyth Road, Egmore, Chennai - 600 034.

2.T.Krishnakumar

3.V.Inbavijayan,
Sole Arbitrator,
Counsel for National and International
Commercial Arbitration (CNICA),
No.64 (Old No.110 & 111), Mount Road, Basement
Guindy (Between ABT Maruthi & Chellammal Collge,
Chennai - 600 032.

.. Respondents

Prayer: Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the exparte award passed by the third respondent herein passed in A.C.P.No.(KMP/VI).97 of 2010 dated 24.12.2010.

For Petitioner : Mr.N.Rajan

For Respondents : Mr.D.Sathyaraj
Mr.Sheik Ismail (For R1)

ORDER

Heard Mr.N.Rajan, learned counsel for the petitioner/borrower and Mr.D.Sathyaraj, learned Counsel appearing for the 1st respondent Finance Company.

2.This order will cover O.P.No.80 of 2012 as well as A.Nos.4004 of 2011 and 4005 of 2011.

3.The facts are that the borrower availed a loan from the respondent Finance Company for purchase of a used car. This cannot be disputed as the loan agreement was entered much after the borrower became the owner of the vehicle, as is evident from the Certificate of Registration which shows that the vehicle was registered in the name of the borrower as early as on 06.01.2007, whereas the hypothecation was only on 22.01.2007. Thus, the Court concludes that this finance arrangement is for a used car. The borrower having committed default in payment of the monthly installments beyond the 13th

installment, the Finance Company invoked their right under the provisions of the hypothecation agreement and filed an application in A.No.2665 of 2010 before this Court to appoint an Advocate Commissioner to seize and deliver the vehicle available at the respondent premises or wherever found and permit the Advocate Commissioner to obtain police aid, etc. Pursuant to the order passed by the Court on 29.04.2010, the learned Advocate Commissioner had seized the vehicle and has handed over the vehicle to the Finance Company who in turn have sold the vehicle and filed a claim petition before the learned Arbitrator claiming the differential amount. The borrower having not appeared before the learned Arbitrator, an exparte award was passed which is put to challenge in O.P.No.80 of 2012.

4.The borrower has filed three applications praying to set aside the order dated 29.04.2010 in A.No.2665 of 2010 and re-deliver the vehicle and for other incidental reliefs. The submission of the learned counsel for the borrower is that the finance company is guilty of suppression of material facts before this Court when they moved the application in A.No.2665 of 2010 as they deliberately failed to bring to the notice of this Court about the legal action initiated by the borrower in issuing a legal notice apart from having filed a suit in O.S.No.1075 of 2008 before the District Munsif Court, Ernakulam praying for a declaration to declare that the submission of a cheque for collection ignoring

the notice issued by the plaintiff/borrower as illegal and for a permanent prohibitory order not to present other cheques.

5.The learned counsel made elaborate submission on more than three occasions and has drawn the attention of this Court to the address of the borrower and pointed out that the Finance Company was aware of the correct address of the borrower but they had given the wrong address of the borrower and seized the vehicle from the dealer in whose custody the vehicle was entrusted because the borrower had certain issues with the dealer with regard to manufacturing defects in the vehicle and also on the alleged ground that the dealer has suppressed the fact and sold an older model vehicle as if it is 2007 Model. Therefore, it is submitted that this mischief which has occurred has also been perpetuated while initiating arbitration proceedings which resulted in an exparte award and therefore the appointment of Advocate Commissioner requires to be recalled and the exparte award passed by the learned Arbitrator also requires to be set aside.

6.The learned counsel appearing for the Finance Company submitted that there has been no suppression of facts. The suit which was earlier filed in O.S.No.1075 of 2008 was for an injunction not to present the cheques for collection and there was no interim injunction granted by the Civil Court and

with regard to the suit in O.S.No.393 of 2011 filed before the Sub Court, Ernakulam in which the Finance Company was impleaded as second defendant, notice was received much after the Finance Company moved this Court by way of an application in A.No.2665 of 2010. Further, it is submitted that in the plaint in O.S.No.393 of 2011 the borrower has admitted knowledge of the arbitration proceedings as well as the award whereas in the present proceedings, filed to set aside the award, a false statement has been made by the borrower that they had knowledge of the award only when a typed set of document dated 12.09.2011 was served on them by the Finance Company while hearing the applications in A.Nos.4004 of 2011 and 4005 of 2011.

7.I have heard the learned counsel appearing for the parties and perused the materials placed on record.

8.In my considered view that the borrower seeks to confuse two issues. Firstly, with regard to the money claim made by the Finance Company by exercising their right to present the cheques given by the borrower towards the equated monthly installments. The second is with regard to the power of the Finance Company exercisable under the provisions of the hypothecation agreement, which includes the power to repossess the vehicle in the event of default. Nowhere in the hypothecation agreement it is stated that the vehicle

can be repossessed only from the borrower. In fact in the application A.No.2665 of 2010 which was ordered by this Court is to seize the vehicle wherever it is found with the aid of the police protection, if required. The borrower on his own volition intimated the location of the vehicle to be in the custody of the dealer. Therefore, nothing much flows out of it in favour of the borrower to state that the vehicle ought not to have repossessed from the dealer. Therefore, on the said ground the order in A.No.2665 of 2010 cannot be recalled.

9. With regard to the address of the borrower, I find that there has been confusion in more than one place, but the fact remains, the borrower himself has furnished about the new as well as the old address. No doubt the notice issued under Section 138 of Negotiable Instrument Act dated 15.05.20085 was sent to the borrower in the new address. However, while sending a reply to the counsel for the Finance Company, the borrower to give both the old and new address. Thus, in my considered view this aspect has not caused any prejudice to the borrower so as to vitiate the award or the procedure adopted by the learned Arbitrator. The borrower does not dispute the fact that he has defaulted in payment of the loan. The product price as could be seen from the application form was Rs.12,50,000/- as on 18.01.2007, loan advanced was Rs.8,92,000/- payable in 48 installments. Thus the vehicle financed being for a

used vehicle and the borrower having committed default, on the grounds set out by the borrower neither the order passed in A.No.2665 of 2011 nor the award passed by the learned Arbitrator can be set aside.

10.This Court while exercising jurisdiction under Section 34 of the Act cannot convert itself into an Appellate Court and examine and re-appreciate the evidence which was available before the learned Arbitrator. Hence the award to the extent indicated above requires to be confirmed. Considering the factual circumstances of the case and taking note of the fact that the vehicle which was repossessed in the year 2011 was sold much later and the amount which was realised was considerably low, this Court deems it to appropriate to modify the award to the extent indicated herein below.

11.Accordingly, the Original Petition in O.P.No.80 of 2012 is disposed of by confirming the award and the amount payable by the borrower is fixed at Rs.10,00,000/- (Rupees Ten Lakhs only) in full quit. However, this relief will be available to the borrower only if the entire amount is paid within a period of four months from the date of receipt of a copy of this order, failing which, the award stands confirmed in its entirety and the Finance Company is entitled to execute the award in the manner known to law.

T.SIVAGNANAM,J.

cse

12.For all the above reasons, the petitioner has not made out any case for setting aside and recalling the order. Hence, A.Nos.4004 of 2011 and 4005 of 2011 are dismissed.

25.01.2017

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O.P.No.80 of 2012
and A.Nos.2665 of 2010, 4004,
4005 and 6063 of 2011

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