



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.12.2017

DATED: 06.06.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) Nos.1759 and 1760 of 2005

M/s.Tata Finance Limited,
Incorporated under the provisions of the
Companies Act, 1956 and
having its Registered Office at
Ahura Centre, 82, Mahakali Caves Road,
Andheri (E)
Mumbai-400 093.

.. Petitioner/Respondent
Decree holder in both CRPs

vs

1.Poongodi
2.V.Neelakantan

.. Respondents/Petitioners
Judgment Debtor in both CRPs

Revision has been filed under Section 115 of CPC against the common order dated 09.02.2005 passed in E.A.Nos.1645 and 1646 of 2004 in E.P.Nos.1913 ad 1915 of 2003 in Arb. Case No.164 of 2000 on the file of the IX Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.Om Prakash
in both CRPs Senior Counsel
for M/s.Ramalingam
Associates

For Respondents : Mr.T.D.Panneerselvam
in both CRPs

COMMON ORDER

These Civil Revision Petitions have been filed by the petitioner seeking to set aside the common order dated 09.02.2005 passed in E.A.Nos.1645 and 1646 of 2004 in E.P.No.1913 and 1915 of 2003 in Arbitration Case No.164 of 2000 on the file of IX Assistant Judge, City Civil Court, Chennai.



The petitioner herein is the decree-holder and the respondents are judgment-debtors.

2. E.A.Nos.1645 and 1646 of 2004 have been filed by the respondents under Section 47 of the Code of Civil Procedure, 1908 alleging that the petitioner has filed two Execution Petitions, being E.P.No.1913 and 1915 of 2003, for execution of the Award dated 23.07.2001 passed by the sole Arbitrator in the Arbitration Case No.164 of 2000.

3. E.P.No.1913 of 2003 has been filed by the petitioner against the first respondent for attachment of her movable properties and E.P.No.1915 of 2003 has been filed against the second respondent for arrest and detention.

4. In the claim petition, the respondents alleged that the first respondent has purchased a truck bearing registration No.PY-01 8299, which was financed by petitioner at Chennai. The petitioner has given the amount borrowed by means of cheque at Chennai. The second respondent is the guarantor. The respondents have also given equal monthly instalments by means of post dated cheques at Chennai. Subsequently, the respondents have surrendered the vehicle to the petitioner at Chennai. According to the respondents, no cause of action arose at Bombay to fix the venue of arbitration at Bombay. Therefore, the award was passed without jurisdiction.

5. The case of the respondents is that the petitioner has not maintained proper accounts and despite the request made by the respondents, the petitioner has not given the account details to them. The respondents have never agreed to pay a sum of Rs.6,75,000/- as recorded by the Arbitrator in his Award and the Arbitrator on his own recorded the said statement. If any amount is due by the respondents, the petitioner ought to have filed a suit, but without doing so, the petitioner invoked the arbitration clause in the agreement and obtained an Award from the Arbitrator. According to the respondents, the Award of the Arbitrator is illegal.

6. The further case of the respondents is that in his Award, the Arbitrator stated that the respondents have spent a sum of Rs.10 lakhs for body building and therefore, the petitioner was liable to reimburse the excess money to the respondents. The petitioner while taking possession of the vehicle informed that since possession was taken, no money was due and they would not claim any amount further. The subsequent auction of the vehicle to lesser amount is illegal. Therefore, the claim of the petitioner on the basis of the illegal and/or lesser auction is unenforceable.



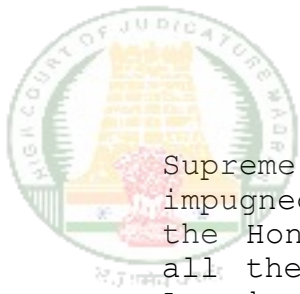
7. The grievance of the respondents is that no amount was due from them and hence, the claim of the petitioner on the basis of the Award passed by the Arbitrator, a panel Advocate of the petitioner, is illegal. According to the respondents, while the agreement was in force, the seizure of the vehicle itself is illegal. While the vehicle was surrendered, the petitioner had informed that no amount was liable to be paid by the respondents. Therefore, the Award of the Arbitrator is not executable.

8. Refuting the claim petitions, the petitioner has filed counter stating that the petitioner has filed the Execution Petitions for execution of the Arbitration Award dated 23.07.2001 passed by the Arbitrator Mr.B.B.Jain for recovery of a sum of Rs.8,68,690/-. It is stated that the Award passed by the Arbitrator is final and binding on the parties and it is enforceable in the same manner as if it was a decree of the Court. If at all the respondents are aggrieved by the Award, it is open to them to have the Award set aside under Section 34 of the Arbitration and Conciliation Act. The correctness of the Award either on merits or otherwise cannot be challenged before the Executing Court. It is also stated that the grounds available under Section 47 of C.P.C. are not made out. The jurisdiction of the Arbitrator cannot be raised before the Executing Court. According to the petitioner, when the Arbitrator fixed for meeting on 17.01.2001, the second respondent remained absent. On 24.01.2001, a counter claim was made before the Arbitrator. On 18.02.2001, though the second respondent was present, he sought an adjournment and the same was rejected. Then the Arbitrator posted the matter to pass orders on 23.02.2001. The Award was passed in the presence of the second respondent. Therefore, the respondents cannot contend that the Award was ex parte one. It is stated that the claim made by the respondents could have been raised before the Arbitrator and not before the Executing Court.

9. Upon consideration of the oral and documentary evidence, the Executing Court allowed E.A.Nos.1645 and 1646 of 2004 and dismissed E.P.Nos.1913 and 1915 of 2003 filed by the petitioner.

10. I heard Mr.Om Prakash, learned Senior Counsel for M/s.Ramalingam Associates appearing for the petitioner and Mr.T.D.Panneerselvam, learned counsel appearing for the respondents and also perused the materials available on record.

11. The learned Senior Counsel for the petitioner submitted that the impugned order of the Executing Court affects the right of the petitioner in executing the decree consequent to the Award dated 17.08.2004 which was upheld by the Hon'ble



Supreme Court by the order dated 06.12.2004 and in fact the impugned order has overturned the orders of the High Court and the Hon'ble Supreme Court. He submitted that after considering all the facts and circumstances, the Arbitrator has passed the Award. The learned Senior Counsel submitted that the Executing Court has gone beyond the Award which has been upheld by the Hon'ble Bombay High Court and the Hon'ble Supreme Court. He also submitted that the Executing Court erred in holding that the Award was null and void as the Arbitrator has not considered the counter-claim of the respondents in as much as the said ground was never raised by the respondents in the petition filed under Section 47 of the C.P.C.

12. The learned Senior Counsel for the petitioner argued that the Executing Court ought to have considered that as per Clause 25 of the Hire Purchase Agreement, the venue of the arbitration was mutually agreed to be at Bombay and hence the arbitration was properly concluded at Mumbai. He also argued that the Executing Court has allowed Section 47 C.P.C. petitions even though all the grounds raised by the respondents including non-consideration of the counter-claim by the Arbitrator were considered by the Hon'ble Bombay High Court and the Hon'ble Supreme Court before upholding the Award passed by the Arbitrator. The learned Senior Counsel for the petitioner submitted that the Executing Court ought to have considered the cross-examination of PW1-Neelakantan in E.A.Nos.1645 and 1646 of 2004, wherein he had admitted that the Award was challenged by him on various grounds in the Hon'ble Bombay High Court as well as in the Hon'ble Supreme Court, which was rejected by all the Courts.

13. The learned Senior Counsel vehemently argued that the Executing Court ought to have seen that the respondents had participated in the arbitration proceedings under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") and filed application to set aside the Award before the Hon'ble Bombay High Court under the said Act and consequently are estopped from questioning the applicability of the said Act. To fortify his submissions, the learned Senior Counsel cited the decisions in M.M.T.C. Limited v. Sterlite Industries (India) Limited, reported in (1996) 6 SCC 716; Thyssen Stahlunion Gmbh v. Steel Authority of India Limited, reported in (1999) 9 SCC 334 and Natinal Aluminium Co. Ltd. v. Metalimpex Limited, reported in (2001) 6 SCC 372.

14. Per contra, the learned counsel appearing for the respondents submitted that the Award was passed by the Arbitrator without jurisdiction as no cause of action arose at Bombay. He submitted that no proper accounts were given by the petitioner despite notice given. The Arbitrator has failed to



consider the counter-claim made by the respondents. The learned counsel for the respondents argued that the petitioner while taking possession of the vehicle informed the respondents that since possession was taken, no money was due and they would not claim any amount further. Therefore, the reference to Arbitrator is legally not sustainable and the Executing Court was right in entertaining and allowing the claim petitions filed by the respondents under Section 47 of the C.P.C. In support of his submissions, the learned counsel cited the decisions in Paramjeet Singh Patheja v. ICDS Ltd., reported in 2006 (6) CTC 357 and the unreported order of the Madras High Court in M/s.Manipal Finance Corporation Ltd. v. Sreyaa Srippal (I.P.Nos.139 of 2002, 17 of 2005, 22 and 134 of 2006, dated 20.7.2009).

15. Though the petitioner has raised an objection as to the maintainability of the claim petitions before the Executing Court, the petitioner has not shown any proposition of law that the Executing Court is ousted from entertaining the claim petition under Section 47 of the C.P.C.

16. In Union of India Vs. M/s Jagat Ram Trehan and Sons reported in AIR 1996 Delhi 191, a Division Bench of Delhi Court negatived the contention that an Arbitral Award must be objected to in accordance with the provisions of the Arbitration Act (in that case of the year 1940) and that it was not open to raise the question in execution proceedings and held that Section 47 of the CPC applies to execution proceedings taken pursuant to a decree making an award a rule of Court and it is open to the Executing Court under Section 47 to declare that the award is passed without jurisdiction and therefore the decree passed thereupon is null and void and not executable.

17. In Bijendra Kumar Vs. Pradeep Kumar, reported in MANU/DE/4013/2014, a Division Bench of the Delhi High Court held that if an arbitral award is based on an illegal and void agreement, objection in that regard can be taken in proceedings for execution thereof, if not decided in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 and if the Executing Court finds merit therein, can dismiss the execution proceedings.

18. In the light of the above, if this Court examines the given facts and circumstances of the case on hand, it is seen that the Executing Court was right in holding that it had jurisdiction to decide all issues raised by the parties relating to the executability, discharge, satisfaction of the decree and thus, has rightly overruled the objection raised by the petitioner.



19. It appears that on 23.07.2001, the Arbitrator has passed an Award in Arbitration Case No.164 of 2000 in favour of the petitioner for a sum of Rs.8,68,690/-. On a cursory reading of the Award, I find that the Arbitrator has issued notice dated 10.08.2000 to the parties fixing the preliminary meeting on 15.09.2000. On 15.09.2000, the respondents have not appeared before the Arbitrator as they unclaimed the notice and thereafter, the Arbitrator fixed the next meeting on 22.11.2000 with a direction to the respondents to file their reply within four weeks from the date of service of the statement of claim. On 22.11.2000, the petitioner has submitted the claim before the Arbitrator.

20. It appears that on 23.11.2000, Advocate Shri S.Shrinivasan with one Shri K.Sampath, Auditor for respondent No.2 and the Officer-Legal of the petitioner were present and after hearing both sides, the Arbitrator fixed the next meeting on 17.01.2001. But on 17.01.2001, none represented the respondents and the Arbitrator has passed the following order:

- (1) Respondents to file their reply within - 2 weeks and effect service thereof upon Tata Finance Limited.
- (2) Tata Finance Limited to file their rejoinder within - 2 weeks thereafter.

21. In the Award, the Arbitrator has stated that the first respondent has filed her counter-claim dated 20.01.2001, wherein she had taken the plea that no part of cause of action has arisen at Mumbai as the Hire Purchase Agreement was entered at Chennai and entire transaction, including signing the agreement, was done at Chennai and the initial monthly instalments were also paid and realised at Chennai. The Award also states that the second respondent has filed his written statement/counter-claim dated 20.01.2001 stating that he never stood as guarantor for the repayment of the amount advanced to the first respondent.

22. In paragraph 14 of the Award, the Arbitrator held as under:

"14. After perusing the documents place before me by both the parties including State of Claim, Hire Purchase Agreement, Proposal Form, Demand Notice and other correspondence relied by Claimant and the Written Statement with Counter Claim filed by respondent No.1 and 2 and compilation of documents relied by the respondent No.1 and also after going through the Draft Issues filed by the claimants and Respondent No.1 and 2, with consent of the parties I have settled and finalised the following issues in the meeting dated 9.3.2001."



23. After settling eight issues, the Arbitrator has given opportunity to the parties to proceed with the arbitration proceedings. On 18.07.2001, when the proceedings started, the second respondent was present and sought an adjournment by stating that a suit has been filed before the City Civil Court, Chennai. The filing of the suit before the City Civil Court, Chennai by the respondents was denied by the Officer-Legal of the petitioner and stated that she had not received any summon in the suit. Since there was no stay from the Court of law, the Arbitrator has proceeded to conduct the arbitration proceedings.

24. The contention of the respondents is that no cause of action arose at Bombay to fix the venue of arbitration at Bombay and therefore, the Award has been passed without jurisdiction.

25. On the other hand, the learned Senior Counsel appearing for the petitioner submitted that the parties agreed to have the disputes settled at Bombay. Therefore, the respondents have not right to question the jurisdiction of the Arbitrator.

26. It is pertinent to refer to the arbitration clause, which reads as under:

"25. All disputes differences and/or claim arising out of these presents or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by Arbitration to be held in Bombay in accordance with the provision of the Arbitration Act, 1940, or any statutory amendments thereof and shall be referred to the sole arbitration of a person to be nominated by the Owners. In the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, the Owners may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned and may be made a Rule of the High Court of Judicature at Bombay or any other Court of competent jurisdiction within the City of Bombay."

27. Admittedly, the execution of the agreement has not been disputed by the respondents. Reading of Clause 25 of the agreement would reveal that Clause 25 confers rights upon the claimants/owners to appoint and refer the dispute to the sole Arbitrator and the arbitration to be held in Bombay.

28. If really, the respondents are aggrieved by the proceedings of the Arbitrator, they ought to have challenged the



proceedings before the Court of law alleging that the Arbitrator was acting without jurisdiction and therefore, he cannot proceed with the arbitration proceedings. No such proceeding was initiated by the respondents for staying of the arbitral proceedings. On the other hand, as stated supra, upon notice, the respondents have participated in the proceedings before the Arbitrator and submitted their counter-claims. After submitting their counter-claim only, the respondents have wantonly failed to appear before the Arbitrator and allowed the Arbitrator to proceed with the matter.

29. In the case on hand, the respondents are husband and wife. The borrower is first respondent-wife and the second respondent-husband stood as guarantor for the loan advanced to the first respondent. When the respondents entered appearance before the Arbitrator and submitted their counter-claims, they cannot plead that behind their back the Arbitrator has passed an Award and the Award of the Arbitrator is ex parte one.

30. In its order, the Executing Court observed that the Award does not contain the list of the documents relied on by the Arbitrator. It had also held that when the Award was tested, it was proved that the proposition of law followed by the Arbitrator is apparently wrong and the Award passed on that basis must be treated as error apparent on the face of record and so the Award becomes inexecutable.

31. Admittedly, no list of witnesses and documents is appended to the Award. But on a perusal of the Award, I find that the Arbitrator has discussed the evidence of the petitioner (Claimant) and the documents relied upon by her. It appears that in the award, the Arbitrator has extracted the counter-claim submitted by the respondents, but he has not dealt with the counter-claim elaborately.

32. It is to be noted that as against the Award of the Arbitrator in Arbitration Case No.164 of 2000, dated 24.07.2001, the respondents have filed Arbitration Petition No.54 of 2004 before the Hon'ble Bombay High Court challenging the service of the copy of the Award. By an order dated 28.06.2004, the learned Single Judge of the Hon'ble Bombay High Court held as under:

"It is clear from the letter of the Arbitrator dated 6.8.2001 that the award dated 24.7.2001 made by the Arbitrator was sent to the petitioners by Registered Post A.D., but the packet came back to the Arbitrator with an endorsement "Refused". Copy of the letter of the Arbitrator has been produced by the Respondent.

The grievance was made that the original of the



WEB COPY

envelope having an endorsement has not been produced. It appears that the letter was written to the advocate of the Petitioners seeking inspection of the original record by letter dated 19th March 2004. The Petitioner's advocate was informed that the original record is in Chennai Court where execution proceeding as also insolvency proceeding are going on to which the Petitioner is a party and therefore he should seek inspection of the record in that Court.

Nothing is placed on record to show that whether inspection of the record at Chennai court has been taken by the Petitioner or not. There is also no counter affidavit filed by the Petitioner. The material on record clearly indicates that the award was served on the Petitioner in July, 2001, whereas the Petition has been filed in the year 2004. It is clearly barred by law of limitation. Petition is, therefore, rejected."

33. Aggrieved by the order of the learned Single Judge in Arbitration Petition No.54 of 2004, the respondents have preferred an appeal, being Appeal No.507 of 2004, before the Hon'ble Bombay High Court. By the judgment dated 17.08.2004, a Division Bench of Hon'ble Bombay High Court held as follows:

"Heard.

2. The learned counsel for the appellant submits that there was no adequate proof that the award was served upon the appellant in July, 2001 as held by the learned Single Judge.

3. It appears that the letter dated 6th August, 2001 sent by the Arbitrator to the present respondent that copy of the award dated 24th July, 2001 was transmitted to the present appellants but the envelope returned back with the postal remark "refused". There appears to be not much controversy that the copy of the awarded dated 24th July, 2001 was sent by the Arbitrator to the present appellants by registered post with acknowledgement due as well as under postal certificate. From the letter dated 6th August, 2001 sent by the sole Arbitrator to the present respondent it transpires that the copy of the award which was sent by registered post was returned with the remark "refused". In so far as the copy of the award sent under a postal certificate is concerned, the said envelope did not return undelivered. The learned counsel for the appellant did not challenge the correctness of the appellants' address as reflected from the postal receipt. We are afraid,



WEB COPY

the envelop under postal certificate having been sent at the correct address of the appellants and not received undelivered, presumption has to be drawn that the said envelop was received by the addressee.

4. The appellants miserably failed to rebut the presumption by reliable material that the copy of the award dated 24th July, 2001 was not received by them. In this view of the matter, the impugned order cannot be faulted. Appeal is dismissed, in limine."

34. Aggrieved by the judgment of the Division Bench of the Hon'ble Bombay High Court, the respondents have preferred the Special Leave to Appeal (Civil) No.24207 of 2004 before the Hon'ble Supreme Court. By the judgment dated 06.12.2004, the Hon'ble Supreme Court dismissed the S.L.P. preferred by the respondents.

35. As held by the Division Bench of Hon'ble Bombay High Court, after passing the Award, the Arbitrator has sent the copy of the Award to the respondents and they have voluntarily refused to receive the Award. Since there was no rebuttal evidence to prove that the respondents have not received the copy of Award, the Division Bench has held that the presumption by reliable material shows that the copy of the award dated 24th July, 2001 was received by the respondents.

36. Challenging the Award dated 24th July, 2001, the respondents have not filed any petition as per the provisions of the said Act. Instead of challenging the notice of sending copy of the Award by the Arbitrator, the respondents ought to have challenged the Award as per the procedure laid down in the said Act. But the respondents have failed to do so. Only when the petitioner filed E.P.Nos.1913 and 1915 of 2003, the respondents have filed claim petitions under Section 47 of the C.P.C. stating that without jurisdiction the Arbitrator has passed the Award and the Award of the Arbitrator is inexecutable.

37. The learned Senior Counsel for the petitioner vehemently contended that the Executing Court has unsettled the settled law laid down by the Hon'ble Supreme Court in National Aluminium Company Limited, supra, on the question of applicability of Arbitration and Conciliation Act to the arbitration commencing after coming into force of the new Act, 1996.



38. The Executing Court, in its order, held that "on perusal of the entire award there is no whisper or finding that the award was passed by following the procedure and under the Act 1996. When there is no such finding, and when condition 25 of the agreement proved that arbitration was referred under the Act 1940, the award passed now, must be presumed to be passed under the Act 1940. In such circumstances, the award passed under Act 1940, without approval of the court under section 17 of the Act 1940, does not reach the status of decree and so unenforceable."

39. In Sterlite Industries (India) Limited, supra, the Hon'ble Supreme Court held as under:

"11. ... We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of sub-section (1) of Section 10 is satisfied and sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore, is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Section 11 of the New Act."

40. In Thyssen Stahlunion GMBH, supra, the Hon'ble Supreme Court held as under:

"1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

2. The phrase 'in relation to arbitral proceedings' cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming decree under Section 17 thereof and also appeal arising thereunder.

3.



WEB COPY

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

5 to 7 "

41. In National Aluminium Company Limited, supra, the Hon'ble Supreme Court held:

"9. I have examined the request of NALCO. I find there is an arbitration agreement between the parties which relates to international commercial arbitration. Arbitration would be governed by the Act though the arbitration was entered into before the enforcement of the Act which was 25.1.1996."

42. Clause 25 of the agreement provides that the arbitration be held in accordance with the provisions of the Arbitration Act, 1940 or any statutory amendments thereof. The aforesaid wordings clearly shows that after the amendment in the Arbitration Act, the provisions of the new Act i.e., Arbitration and Conciliation Act, 1996 would apply in the place of old Act, 1940. But while allowing the petitions filed under Section 47 of the C.P.C., the Executing Court held as follows:

"For the reasons stated above, this court concludes that the award passed under the Act 1940 after the new Act came into force is illegal and as it is not approved by the Court, it is unenforceable. Even assuming that arbitrator can proceed to decide under the new Act, irrespective of the fact of referring the arbitration under the old Act, without further oral or written agreement or consent, of the parties to follow the procedure of the new Act, the act of the Arbitrator in deciding the arbitration under the new Act is without jurisdiction and having assumed jurisdiction passing award without considering the counter-claim made by the petitioners is unenforceable."

43. In the case on hand, admittedly, the arbitration proceedings commenced only after the new Act, 1996 came into force. Therefore, as held by the Hon'ble Supreme Court, the new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act come into force. As such, this Court finds no reason warranting interference with the arbitral award.



44. For the foregoing reasons, both the revisions are allowed and order passed in E.A.Nos.1645 and 1646 of 2004 in E.P.No.1913 and 1915 of 2003 in Arbitration Case No.164 of 2000, dated 09.02.2005 is set aside. The execution petitions are restored to the file of the Executing Court for proceeding in accordance with law for enforcement of the arbitral award. No costs.

Sd/-

Assistant Registrar(CS-iii)

//True Copy//

Sub Assistant Registrar

vs

To

1. The IX Assistant Judge,
City Civil Court, Chennai.

2. The Section Officer,
V.R. Section, High Court, Madras.(2 copies)

+4cc to Mr.T.D.PANNEERSELVAM, Advocate, S.R.No.35738 & 35739

+4cc to Mr.Ramalingam & Asso Advocate, S.R.No. 35217 & 35218

Pre-delivery order made in
C.R.P.(NPD) Nos.1759 and 1760 of 2005

NMI (CO)
TR(12/06/2018)