

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.03.2018

Pronounced on : 08-06-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

Civil Miscellaneous Appeal No. 575 of 2014

M/s. Shriram Transport Finance Company Ltd
rep. By its Branch Manager Mr. S. Nagarajan
Registered Office at Mookambika Complex
No.4, Lady Desika Road
Mylapore, Chennai - 600 004 ... Appellant/Respondent/
Claimant

Versus

1. V. Palanisamy
2. S. Chandrasekar ... Respondents/Petitioners/
Respondents

Appeal filed under Section 27 (2) of The Arbitration and Conciliation Act, 1996 against the Order and Decreetal Order made in Arbitration O.P. No. 252 of 2011 dated 31.01.2013 on the file of the first Additional District Court, Salem.

For Appellant : Mr. K.S. Ramakrishnan
For Respondent : Mr. R. Prabhakar for R1
No appearance for R2

JUDGMENT

R. SUBBIAH, J

This appeal is preferred as against the Order and Decreetal Order made in Arbitration O.P. No. 252 of 2011 dated 31.01.2013 on the file of the first Additional District Court, Salem, whereby and whereunder the First Additional District Judge, Salem has set aside the arbitration award passed by the arbitrator in favour of the appellant herein on the ground of limitation.

2. Brief facts which are necessary for disposal of this appeal are as follows:-

3. The appellant is a public limited company incorporated under the Indian Companies Act and they are carrying on business of hire purchase, lease and loan cum hypothecation in respect of LMV/MMV/Heavy goods and passenger vehicle as per the guidelines of Reserve Bank of India. During the course of it's business, the first respondent approached the appellant and entered into a Loan Agreement with the appellant on 01.08.2004 and in pursuance of the same, loan was sanctioned to the first respondent for purchase of TATA TELCO TIPPER HGV Multi-axled Vehicle bearing Registration No. KA 01 AA 0900 for a total agreement value of Rs.10,43,423/-. As per the agreement, the loan amount was payable in 35 monthly instalments at the rate of Rs.29,820/- each for first 34 months and at the rate of Rs.29,545/- towards the 35th instalment. The loan agreement was executed by the first respondent as Borrower/Hypothecator which was guaranteed by the second respondent as a guarantor. As per the agreement, the first instalment is to commence on 01.09.2004 and the last instalment amount is payable on 01.07.2007. According to the appellant, the first respondent has paid a sum of Rs.28,820/- towards first instalment out of which a sum of Rs.17,000/- was adjusted towards insurance payment and the remaining amount of Rs.12,820/- was given credit to the first instalment. After paying the first instalment in part, the first respondent failed and neglected to pay the rest of the instalment amounts. In such circumstance, the appellant sent a notice dated 01.06.2006 to the respondents calling upon them to pay the instalment amount of Rs.6,09,220/- as on 01.05.2006. Though the respondents received the notice dated 01.06.2006, they have neither settled the outstanding amount to the appellant nor issued any reply thereof. Therefore, the appellant invoked the arbitration clause contained in the agreement and filed a claim petition before the Arbitrator on 09.08.2010, claiming a sum of Rs.26,79,850/- with interest at the rate of 36% per annum from the date of claim petition till the date of realisation.

4. The claim petition was resisted by the first respondent by filing a counter contending inter alia that the claim petition was filed with a delay of three years from the date of expiry of the last instalment on 01.07.2007 and therefore, the claim petition is barred by Limitation. The first respondent has filed the counter affidavit by only pointing out the delay in filing the claim petition and not on merits of the claim made by the appellant as regards non-payment of instalment amount.

5. The arbitrator, after hearing the parties to the claim petition, has rejected the defence raised by the first respondent with regard to limitation and held that the claim petition was filed within time. Resultantly, the arbitrator passed an award dated 28.07.2011 directing the respondents to

pay the claim amount of Rs.26,79,850/- jointly and severally with interest at the rate of 9% per annum from the date of claim petition i.e., 09.08.2010 till the date of award namely 28.07.2011 and at 9% per annum from 29.07.2011 till the date of payment with costs of Rs.12,750/- within three months. Aggrieved by the award dated 28.07.2011 of the arbitrator, the respondents herein have filed Arbitration Original Petition No. 252 of 2011 before the learned First Additional District Judge, Salem. The learned First Additional District Judge, Salem, upon considering the rival submissions, set aside the award dated 28.07.2011 passed by the arbitrator and allowed the Arbitration Original Petition filed by the respondents herein on 31.01.2013 on the ground that the Claim Petition filed by the appellant is barred by limitation. It is said order dated 31.01.2013 of the learned First Additional District Judge, Salem which is challenged in this appeal before us.

6. The learned counsel appearing for the appellant submitted that as per the agreement dated 01.08.2004 entered into between the appellant and the first respondent, the instalment amount payable by the first respondent towards the loan availed by him spread over a period of 35 months. The first instalment is payable on 01.09.2004 and the last instalment is payable on 01.07.2007. As per the agreement, the first respondent paid a sum of Rs.28,820/- towards first instalment out of which a sum of Rs.17,000/- was adjusted towards insurance payment and the remaining amount of Rs.12,820/- was given credit to the first instalment payable by the first respondent. Except this amount, the first respondent failed and neglected to pay the instalment as per the terms of the agreement. Therefore, on 01.06.2006, a notice was sent by the appellant calling upon the respondents to pay the outstanding amount. In the meantime, first respondent filed a suit in O.S. No. 16 of 2005 before the District Munsif Court, Sankari for permanent injunction restraining the appellant from seizing the vehicle. The said suit was dismissed on 23.07.2009 holding that as per Section 8 of the Arbitration and Conciliation Act, 1996 and in view of clause contained in Article 10, clause 14 of the agreement dated 01.08.2004, the suit is not maintainable. Immediately after dismissal of the suit on 23.07.2009, within three years, the appellant has filed the Claim Petition before the Arbitrator on 09.08.2010.

7. The learned counsel for the appellant would contend that as per Section 14 of The Limitation Act, the proceedings which are initiated with the bonafide intention in the Court having no jurisdiction can be excluded for the purpose of calculating the period of limitation. According to the learned counsel for the appellant, the suit was filed by the first respondent without bonafide intention and without initiating any

arbitration proceedings and therefore, the arbitration proceedings initiated by the appellant soon after the dismissal of such suit filed by the first respondent is maintainable and the period during which the suit was pending can be excluded for the purpose of calculating the period of limitation. Even though the learned arbitrator has rightly considered this aspect, the learned First Additional District Judge, Salem has erroneously rendered a finding that the claim petition is not maintainable and therefore set aside the well considered award passed by the arbitrator. The learned counsel for the appellant also submitted that the appellant, as per the agreement entered into with the first respondent on 01.08.2004, is entitled to recover the outstanding amount within a period of three years from the date of last instalment payable by the first respondent. In the present case, as per the agreement dated 01.08.2004, the last instalment is payable on 01.07.2007. The appellant has, within a period of three years, appointed the named arbitrator by making a reference for arbitration on 28.06.2010, on which date, summons were issued by the arbitrator to the respondents for the hearing on 09.08.2010. Therefore, according to the learned counsel for the appellant, within three years from the last date of instalment i.e., 01.07.2007, on 28.06.2010, the arbitration proceedings were initiated by the appellant and therefore, the claim petition is maintainable. In this regard, the learned counsel for the appellant placed reliance on Section 21 of The Arbitration and Conciliation Act, 1996 which categorically indicate that "unless and otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent." As per Section 21 of The Arbitration and Conciliation Act, the arbitral proceedings were initiated and commenced by the appellant on 28.06.2010, on which date, the learned Arbitrator had issued summons to the respondents. Therefore, the date of reference made on 28.06.2010 to the learned arbitrator has to be construed as the date of commencement of the arbitration proceedings as per Section 21 of the Arbitration and Conciliation Act, 1996 and consequently the claim petition filed by the appellant is maintainable. The learned counsel for the appellant also invited the attention of this Court to clause 14 of the hire purchase agreement wherein the name of the arbitrator, in case of reference of any dispute, is clearly indicated. The appellant made reference to the very same arbitrator whose name was prominently mentioned in clause 14 of the hire purchase agreement dated 01.08.2004. The court below, without considering the aforesaid aspects has erroneously set aside the award passed by the learned arbitrator and prayed for allowing this appeal.

8. Countering the submissions of the counsel for the

appellant, the learned counsel for the first respondent would contend that the date on which default was committed by the first respondent in paying the loan amount alone has to be taken into account for the purpose of reckoning and calculating the period of limitation for filing the claim petition. According to the learned counsel for the first respondent, Article 6 of the agreement dated 01.08.2004 indicates the lenders right and remedies on default by the borrowers. Clause 6.1 specifically provides that "upon occurrence of any one or more events of default (i) the entire balance of loan, interest thereon together with all other dues and charges becoming so liable to be paid under the agreement, shall immediately stand payable to the lender." Therefore, as per clause 6 (1) (i) of the agreement, the date of default alone will be the criteria for computing the period of limitation to initiate arbitration proceedings and not the last date of instalment as has been contended by the learned counsel for the appellant. Even according to the appellant, the first respondent did not pay any amount except the first instalment on 01.09.2004 and therefore, the arbitration proceedings ought to have been initiated within three years from the date of such default in payment of the loan amount. In this regard, the learned counsel for the first respondent relied on the decision reported in the case of (M. Gopal and another vs. Sri Vetrivel Chit Funds Pvt Ltd., Sathuvachavadi, Vellore) reported in 1997 2 MLJ 239 wherein the Division Bench of this Court has held that the cause of action available for initiating recovery proceedings commences from the date of default in payment and limitation commences only from that date. The learned counsel for the first respondent, by placing reliance on the above decision, would contend that the court below, by applying the correct proposition of law held that the claim petition filed by the appellant is barred by limitation and it needs no interference by this Court.

9. Keeping the submissions made by the counsel for both sides, we have carefully perused the materials placed on record. Upon appreciation of the rival contentions, the only question which arise for our consideration in this appeal is as to whether the Order passed by the learned First Additional District Judge, Salem, setting aside the award passed by the learned Arbitrator by holding that the claim petition filed by the appellant is beyond the period of limitation, is legally sustainable or not.

10. For the purpose of disposal of this appeal, certain facts are required to be reiterated. A hypothecation agreement was entered into between the appellant and the first respondent on 01.08.2004, as per which the appellant sanctioned loan of Rs.10,43,423/- to the first respondent for purchase of TATA TELCO TIPPER HGV Multi-axled Vehicle bearing Registration No. KA

01 AA 0900. The loan amount so extended by the appellant was to be paid by first respondent in 35 instalments commencing from 01.09.2004 till 01.07.2007. Even according to the appellant, the first respondent paid the first instalment of Rs.28,820/- out of which a sum of Rs.17,000/- was adjusted towards insurance payment and the remaining amount of Rs.12,820/- was given credit to the loan account of the first instalment. It is the contention of the appellant that except this payment, the first respondent did not pay any other instalment and thus, failed and neglected to honour the terms of agreement. However, for the reasons best known, the appellant did not swiftly take any action as against the first respondent for recovery of loan amount immediately after default was committed in payment of the loan amount. Even though the first respondent committed default from the second instalment which falls due on 01.10.2004, the appellant, in our opinion, had slept over their right to initiate recovery proceedings against the first respondent, for the reasons best known. The appellant waited for a period of about 20 months and thereafter, sent a notice dated 01.06.2006 calling upon the respondents to clear the outstanding amount. Here again, the appellant, except by sending the notice dated 01.06.2006, did not take further action for recovery of the loan amount. The appellant, being a financial institution could have initiated recovery proceedings against the respondents for non-payment of the dues soon after they committed default in payment of the loan amount from second instalment by invoking the clauses contained in the agreement dated 01.08.2004. Even as per the agreement dated 01.08.2004, there are several clauses incorporated to secure the financial interest of the appellant company but those clauses were not invoked by the appellant to initiate recovery proceedings against the respondents. We are of the view that the cause of action for the appellant to initiate recovery proceedings arose soon after the first respondent committed default in payment of the loan amount and there is no reason for the appellant to wait till the period of 35 months to expire to initiate recovery proceedings. This portrays absolute slackness and inaction on the part of the appellant company to initiate recovery proceedings against the respondents for which the appellant company alone has to be blamed.

11. Yet another fallacy we have noticed is that the first respondent has filed a suit in O.S. No. 16 of 2005 before the District Munsif Court, Sankari for permanent injunction restraining the appellant from seizing the vehicle which was under hypothecation. It appears that the appellant had contested the suit filed at the instance of the first respondent, which ultimately ended in dismissal on 23.07.2009. At this stage, it is pertinent to mention that the suit filed by the first respondent in O.S. No. 16 of 2005 for permanent injunction

restraining the appellant from seizing the vehicle, has nothing to do with the right of the appellant to initiate recovery proceedings against the respondents. The suit filed by the first respondent, either decreed or dismissed, will have no bearing or effect on the appellant in initiating recovery proceedings against the first respondent. While contesting the suit filed by the first respondent, the appellant ought to have taken some efforts to secure their financial interest by initiating appropriate recovery proceedings on the basis of the hypothecation agreement dated 01.08.2004, within the period of limitation, but that was not done by the appellant. Therefore, the argument of the learned counsel for the appellant that the provisions contained under Section 14 of the Limitation Act to exclude the time bona fide spent in court having no jurisdiction has to be rejected inasmuch as the appellant did not launch prosecution against the respondents in a Court which has no jurisdiction, rather, they have contested the suit filed by the first respondent which caused an adverse impact in their right to sue against the respondents.

12. The suit filed by the first respondent for bare injunction against the appellant was dismissed on 23.07.2009 with an observation that as per Section 8 of the Arbitration and Conciliation Act, 1996 and in view of clause contained in Article 10, clause 14 of the agreement dated 01.08.2004, the suit is not maintainable. Even thereafter, the appellant did not swiftly take any proceedings. Rather, after about 10 months from the date of dismissal of the suit filed by the first respondent, the appellant had chosen to invoke the arbitration clause contained in the agreement dated 01.08.2004 and made a reference for arbitration before the sole arbitrator on 28.06.2010. On the basis of such reference, the arbitrator sent summons to the respondents for the hearing on 09.08.2010.

13. On appreciation of the above factual matrix, we are of the view that the cause of action arose for the appellant to initiate arbitration proceedings or other recovery proceedings to secure their financial interest commence only from the date on which the respondents failed to honour their payment commitment as per the agreement dated 01.08.2004. In this case, the respondents failed and neglected to pay the loan amount from the second instalment, which falls due on 01.10.2004, on which date, the cause of action commences for the appellant to take action against the respondents for the default committed by them in paying the loan amount. It is also not the case of the appellant that after committing default from the second instalment, the respondents had subsequently paid any amount towards the loan amount. Therefore, the period of limitation for the purpose of taking any action against the respondents for the default committed by them commences from 01.10.2004, on

which date, the entire amount becomes due and hence, within three years therefrom, the appellant ought to have taken legal steps to recover the loan amount from the respondents. In this case, the appellant had invoked the arbitration clause contained under the agreement dated 01.08.2004 and made a reference to the arbitrator only on 28.06.2010. Therefore, the claim petition filed by the appellant before the learned Arbitrator is hopelessly barred by the Law of Limitation. In order to lend support to this conclusion, we are fortified by the decision of the Honourable Supreme Court, relied on by the learned counsel for the first respondent, in the case of (Sundaram Finance Limited vs. Noorjahan Beevi and another) reported in (2016) 5 MLJ 535 (SC) wherein it was held as follows:-

"20.The rights of the parties have to be determined as per the terms and conditions of the agreement dated 20.09.1983. The terms of the agreements as noted by the High Court and referred to by us as above clearly indicate that on committing a breach of terms and conditions of the agreement, the rights shall accrue to the plaintiff to sue for balance instalments and the damages for breach of contract. Thus, the right to sue shall not stand differed till either sale which took place on 20th May, 1985 or till the last date of payment of the instalment that is 20th September 1986. Both the courts below have rightly taken the view that Limitation shall start running from the date the hirer defaulted in making payment that is on 20.05.1984 and suit has been filed beyond three years from the above date was clearly barred by time....."

14. The learned counsel for the first respondent also relied on the decision of the Division Bench of this Court in the case of M. Gopal and another vs. Sri Vetrivel Chit Funds Pvt Ltd., Sathuvachavadi, Vellore) reported in 1997 2 MLJ 239 wherein the Division Bench of this Court has held that the cause of action available for initiating recovery proceedings commences from the date of default in payment and limitation commences only from that date. In Para No.15, it was held as follows:-

"15.The limitation for the suit to recover such amount commences from the date the default is committed. Article 37 governs the period of limitation. Therefore, from the date of commission of the default, the suit shall have to be filed within three years. Section 25 of the Act cannot be interpreted as having the effect of postponing the starting point of limitation. It is only an enabling provision which if availed by the foreman, he will be entitled to claim the entire amount and he can leave

such availment within the period of three years."

15. In the light of the above settled legal propositions, we hold that the cause of action for the appellant to sue the respondents arose within three years from the date on which they have committed default in payment of the loan amount. In other words, the period of three years start commencing from the date on which the respondents failed to repay the loan amount as per the agreement with the appellant. Even as per the agreement entered into between the appellant and the respondents on 01.08.2004, the entire amount would become due on commission of default in payment by the respondents. In this regard, reference can be made to Article 6.1 of the agreement dated 01.08.2004, which reads as follows:-

"Article 6

Lender's rights and remedies in default by the borrowers

"6.1 Upon occurrence of any one or more "events of defaults"

i) The entire balance of Loan, interest thereon together with all other dues and charges becoming so liable to be paid under the Agreement, shall immediately stand repayable to the lender."

16. It is seen from Article 5 of the agreement dated 01.08.2004 that what will be construed as events of default is clearly mentioned. As per Article 6.1 mentioned above, whenever any default is committed by the borrower, then the entire balance of loan amount, together with interest thereon along with other dues and charges shall become liable to be paid by the borrower immediately. Therefore, even as per the agreement dated 01.08.2004, the three years period, as provided under Article 37 of The Limitation Act, has to be reckoned only from the date on which the respondents committed default in payment of loan amount from the second instalment. Accordingly, we answer the question framed for our consideration in this appeal as against the appellant.

17. In the result, we confirm the Order and Decreetal Order made in Arbitration O.P. No. 252 of 2011 dated 31.01.2013 on the file of the first Additional District Court, Salem. The Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1. The I Additional District Judge
Salem.

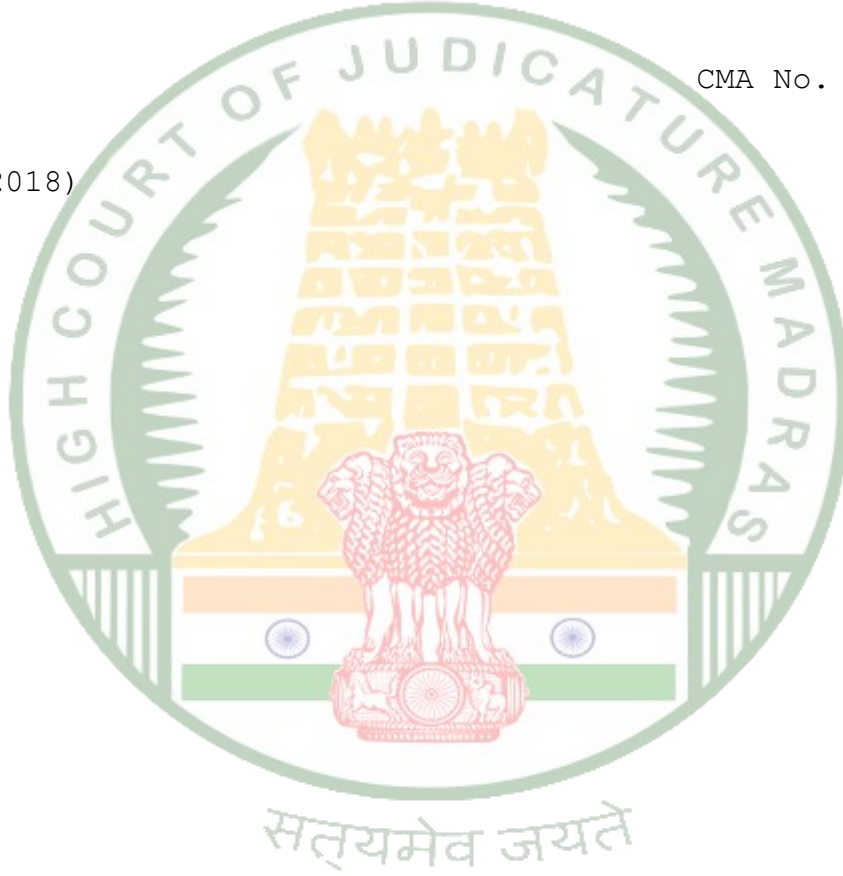
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+1cc to Mr.R.PRABAKAR, Advocate, S.R.No.36244

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Judgment in
CMA No. 575 of 2014

KJI (CO)
TR(20/06/2018)



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