

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DELIVERED ON: 26.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE INDIRA BANERJEE, CHIEF JUSTICE
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.Nos.203 to 206 of 2017

O.S.A.No.203 of 2017

Soloman Pappachan ... Appellant

Vs.

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

2.Mr.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 College)
Chennai - 600 032. Respondents

Prayer: Original Side Appeal filed under Order XXXVI Rule (1) of the O.S. Rules R/W Clause 15 of the Letters Patent, praying to set aside the order and decretal order, passed in O.P.No.80 of 2012 dated 25.01.2017, thereby allow the O.S.A.

O.P.NO. 80/2012: Petition is filed under Section 34 of the Arbitration and Conciliation act 1996 to set aside the exparte award of the sole arbitrator the third respondent passed in ACP no.(KMP/VI) 97 of 2010 dated 24.12.2010.

O.S.A.No.204 of 2017

Soloman Pappachan ... Appellant

Vs.

Kotak Mahindra Prime Ltd.,
Represented by its Authorized Officer,
Mr.Chinnamuthu,

Assistant Manager,
No.45, Ceebros Centre,
Mandyth Road, Egmore, Chennai - 600 034.

... Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule (1) of the O.S. Rules R/W Clause 15 of the Letters Patent, praying to set aside the order and decretal order, passed in A.No.2665 of 2010 dated 25.01.2017, thereby allow the O.S.A.

A.No.2665 of 2010: Application filed to appoint an Advocate Commissioner to seize and deliver the vehicle namely HYUNDAI SONATA EMBERA registered No. KL-41-6262 Chassis No.MALEU41FR5M000502J Engine No.G4KC51221016 in contract No.3665403 available at the respondent premises or wherever found and permit the Advocate Commissioner to obtain police aid and to break open the premises.

O.S.A.No.205 of 2017

Soloman Pappachan

Vs.

... Appellant

Kotak Mahindra Prime Ltd.,
Represented by its Authorized Officer,
Mr.Chinnamuthu,
Assistant Manager,
No.45, Ceebros Centre,
Mandyth Road, Egmore, Chennai - 600 034.

... Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule (1) of the O.S. Rules R/W Clause 15 of the Letters Patent, praying to set aside the order and decretal order, passed in A.No.4004 of 2011 in A.No.2665 of 2010 dated 25.01.2017, thereby allow the O.S.A.

A.4004 of 2011: Application praying that this Honourable Court be pleased to set aside the order passed exparte on 28/10/2010 in Appln. No.2665/2010.

O.S.A.No.206 of 2017

Soloman Pappachan

Vs.

... Appellant

Kotak Mahindra Prime Ltd.,
Represented by its Authorized Officer,
Mr.Chinnamuthu,
Assistant Manager,
No.45, Ceebros Centre,
Mandyth Road, Egmore, Chennai - 600 034.

... Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule (1) of the O.S. Rules R/W Clause 15 of the Letters Patent, praying to set aside the order and decretal order passed in A.No.4005 of 2011 in A.No.2665 of 2010 dated 25.01.2017, thereby allow the O.S.A.

A.4005 of 2011: Application filed to direct the respondent herein pay the price of a brand new Hyundai Sonata Embera Car (2006 Model) as on 15/12/2006 (i.e. Rs.13,26,841/-) with interest at 24% per annum calculated there from till the date of realisation.

For Appellant in all appeals : Mr.N.Rajan
For R1 in all appeals : Mr.S.Shaik Ismail
For R2 & R3 in OSA No.203 of 2017 : No appearance

COMMON JUDGMENT

ABDUL QUDDHOSE, J.

The instant appeals have been filed by the Appellant under Section 37 of the Arbitration and Conciliation Act against the order dated 25.01.2017 passed by the learned Single Judge under Section 34 of the Arbitration and Conciliation Act (in short "the Arbitration Act").

2.The Appellant availed loan for the purchase of a vehicle from the first Respondent Company which is a non-banking financial institution. The Appellant availed a loan under a loan agreement dated 18.07.2007 entered into with the first Respondent. The loan amount of Rs.8,92,000/- was repayable by the Appellant to the first Respondent in 48 monthly instalments of Rs.24,887/- each commencing from 05.02.2007 and ending on 05.01.2011. According to the Appellant, post dated cheques were issued in favour of the first Respondent towards the payment of the monthly instalments.

3.Admittedly, the Appellant committed default in the payment of the monthly instalments to the first Respondent. According to the Appellant, the reason for committing default was that the vehicle developed snags frequently because of its defective quality. In view of the frequent repairs on account of its defect, the Appellant had to redeliver the vehicle back to the Dealer either for complete repair or for replacement on 10.07.2007.

4.According to the Appellant, despite repeated request, the Dealer of the vehicle failed to repair the vehicle to his satisfaction nor did they replace the vehicle. The Appellant filed a private complaint against the Dealer before the Chief

Judicial Magistrate, Court, Trissur, Kerala which was numbered as C.C.No.66 of 2007. The Appellant also filed a consumer complaint before the Consumer Dispute Redressal Forum, Trissur against the Dealer, its officials the Regional Transport Officer, the District Collector and the Manufacturer on 27.10.2007. According to the Appellant, a Lawyer's Notice dated 04.02.2008 was sent by the Appellant to the first Respondent requesting them not to present the post dated cheques issued for the purpose of repayment of the monthly instalments. The first Respondent also issued a legal notice dated 05.05.2008 to the Appellant under Section 138 of the Negotiable Instruments Act in respect of the dishonoured cheques. According to the Appellant, a reply notice dated 29.05.2008 was sent to the first Respondent by the counsel for the Appellant disclosing the new address of the Appellant.

5.It is the case of the Appellant that a suit O.S.No.1075 of 2008 was filed by the Appellant against the first Respondent before the Munsif Court at Ernakulam for a declaration that the presentation of the cheque No.660 for collection by the first Respondent ignoring the notice issued by the Appellant is illegal and for a permanent injunction restraining the first Respondent from presenting the cheques bearing Nos.662 to 694 for collection till the dispute pertaining to the car is resolved. According to the Appellant, in the suit O.S.No.1075 of 2008, the new address of the Appellant i.e., House No.405-B/III, Kunnukara Panchayat, Pullikal House (formerly Vellore House) Ariyoor P.O. Kunnukara Village, North Parur Taluk, Ernakulam District, was furnished mentioning the old address as the former address. It is also stated by the Appellant, that in the suit, it was specifically stated that the car was delivered to the Dealer on 10.07.2007 for repairs or for replacement. According to the Appellant, the suit was filed on 04.07.2008.

6.According to the Appellant, a reply notice dated 29.08.2008, was sent by the Appellant to the first Respondent to another notice dated 08.08.2008 sent by the first Respondent under Section 138 of the Negotiable Instruments Act. According to the Appellant, in the reply notice dated 29.08.2008, the new address of the Appellant was once again furnished and the fact that the custody of the vehicle was with the Dealer was reiterated.

7.According to the Appellant, suppressing all the above mentioned facts including the custody of the vehicle in the hands of the Dealer, the first Respondent filed application in A.No.2665 of 2010 before this Court under Section 9 of the Arbitration Act seeking appointment of an Advocate Commissioner to seize and deliver the hypothecated vehicle available in the Appellant's premises or wherever found. According to the

Appellant, the said application was filed in the month of April 2010 disclosing the old address of the Appellant as per the loan agreement.

8.By an order dated 29.04.2010, this Court passed an Order in application No.2665 of 2010 appointing an Advocate Commissioner to seize the vehicle from the premises of the Appellant or wherever found. The Advocate Commissioner appointed by the learned Single Judge of this Court seized the vehicle from KTC Auto Mobiles Private Limited, the Dealer and handed over custody of the same to the first Respondent.

9.After seizure of the vehicle from the Appellant, the learned Single Judge of this Court passed final order on 28.10.2010 in application No.2665 of 2010 and has observed as follows:

"It is reported that the respondent has been served. But the respondent has not chosen to appear before this Court either in person or through a pleader. Hence, this application stands closed."

"But however, Arbitration proceeding shall go on before selling the vehicle, notice shall be caused to the respondent."

10.According to the Appellant, the first Respondent did not send any notice to the new address of the Appellant about the sale of the vehicle as directed by this Court. According to him, the first Respondent sent a notice dated 16.03.2011 to the new and correct address of the Appellant only after the sale of the vehicle informing the Appellant that the vehicle was sold to the highest bidder for an amount of Rs.2,76,000/- and after the sale of the said vehicle an amount of Rs.10,93,456.72 was still outstanding.

11.According to the Appellant, the first Respondent has destroyed the only evidence of the defective car by seizing and selling the car without the knowledge of the Appellant as all notices were sent to the old address of the Appellant.

12.According to the Appellant, he filed three applications before the learned Single Judge of this Court in the month of April 2011, which are as follows:

(i).Application No.2839 of 2011, to condone the delay of 121 days in filing the application to set aside the ex parte order dated 28.10.2010.

(ii).Application No.4004 of 2011, to set aside the ex parte order dated 28.10.2010.

(iii).Application No.4005 of 2011, to direct the first Respondent to pay the price of a brand new Hyundai Sonata Embr Car i.e., Rs.13,26,841/-.

13. According to the Appellant, the condone delay application was allowed by the learned Single Judge and the other two applications were listed for hearing.

14. According to the Appellant, a common counter affidavit was filed by the first Respondent to the applications filed by the Appellant stating that the new address mentioned in the suit filed by the Appellant is not a proper way of communicating the new address to the first Respondent. In the counter affidavit filed by the first respondent, it was also stated that an ex parte Arbitration Award was passed against the Appellant on 24.12.2010.

15. According to the Appellant, having come to know about the Arbitration Award dated 24.12.2010, passed against him only in the counter affidavit filed by the first Respondent on 12.09.2011, he filed a petition O.P.No.80 of 2012 on 10.10.2011, under Section 34 of the Arbitration Act, to set aside the Arbitration Award dated 24.12.2010. According to the Appellant, in the Arbitration proceedings it is seen that only the old address of the Appellant was given by the first Respondent. The Arbitrator has stated in the Award that the postal endorsement made in the envelope of the notice show that the Respondents were out of India and refused. According to the Appellant, there is no indication, which of the two Respondents refused to receive the notice. It is also stated by the Appellant that the Arbitrator in his Award apart from directing the Appellant to pay the outstanding amount has also directed the Appellant to handover the vehicle covered under the loan agreement and the first Respondent was permitted to sell the vehicle and adjust the sale proceeds towards the Award amount. According to the Appellant, it can be inferred that the first Respondent has not informed the Arbitrator that the vehicle has been seized by the Advocate Commissioner on 01.06.2010. According to him, it is also pertinent to note that the pendency of the Arbitration proceedings was disclosed to the learned Single Judge of this Court during the pendency of Application No.2665 of 2010. According to the Appellant, from the above mentioned facts, it is evident that the first Respondent has seized the vehicle from a known place by obtaining an order from the learned Single Judge of this Court under Section 9 of the Arbitration Act and has destroyed the only material evidence of the defective car by selling the same in connivance with the Dealer and also obtained an ex parte Award without proper notice to the Appellant.

16. By a common order dated 25.01.2017, the learned Single Judge disposed of O.P.No.80 of 2012 and Application Nos.4004, 4005 of 2011 filed by the Appellant. O.P.No.80 of 2012 was filed by the Appellant under section 34 of the Arbitration Act,

to set aside the Arbitration Award dated 24.12.2010. Application No.4004 of 2011 was filed to set aside the ex parte order passed against the Appellant on 28.10.2010. Application No.4005 of 2011 was filed to direct the first Respondent to pay the price of a brand new Hyundai Sonata Empra Car i.e., Rs.13,26,841/-. As per the common order dated 25.01.2017, the learned Single Judge confirmed the Arbitration Award dated 24.12.2010 but took judicial notice of the fact that the amount realised from the sale of the vehicle was considerably low and has modified the Award by directing the Appellant to pay Rs.10,00,000/- to the first Respondent in full quit. However, the learned Single Judge made it clear that this concession is available to the Appellant only if the entire amount is paid within a period of four months from the date of receipt of a copy of the order failing which, the Award stands confirmed in its entirety and the first Respondent is entitled to execute the Award in the manner known to law. By the common order, the learned Single Judge dismissed Application Nos.4004 of 2011 and 4005 of 2011.

17. Aggrieved by the common order dated 25.01.2017 of the learned Single Judge, the instant appeals have been filed. Since the appeals arise out of a common order, we are disposing of the appeals by a common judgement.

18. Mr. N. Rajan, learned Counsel for the Appellant after narrating the facts leading to the filing of these appeals made the following legal submissions:

(a) No notice was received by the Appellant either in Application No.2665 of 2010 filed by the first Respondent before this Court under Section 9 of the Arbitration and Conciliation Act for seizure and sale of the vehicle or in the Arbitration proceedings before the Sole Arbitrator. According to him, on this ground the order passed in Application No.2665 of 2010 and the Arbitration Award dated 24.12.2010 has to be set aside.

(b) The vehicle purchased by the Appellant from the Dealer under a loan from the first Respondent was defective and only due to that reason, the Appellant did not pay the monthly instalments to the first Respondent on the due dates. According to him, the first Respondent has seized the vehicle from the Dealer and sold the same for a paltry price without notice to the Appellant, which according to him, violates the terms and conditions of the loan agreement.

(c) Despite furnishing the new address of the Appellant in the consumer complaint as well as in exchange of notices and in the private complaint, the first Respondent continued to send notices to the old address, which according to him, cannot be considered as sufficient service of notice. According to him, both the Arbitrator and the learned Single Judge of this Court, who passed the order appointing an Advocate Commissioner to

seize and deliver the vehicle to the custody of the first Respondent have erred in accepting service of notice at the old address of the Appellant as proper service.

19. From the facts leading to the filing of the instant appeals, the following issues for consideration by this Court emerge:

(a) Whether due notice was served on the Appellant in the Arbitration proceedings and in Application No.2665 of 2010 filed by the first Respondent for appointment of an Advocate Commissioner to seize and deliver custody of vehicle from the Appellant.

(b) Whether the Appellant has the right to stop making the payment of the monthly instalments to the first Respondent under the loan agreement in view of the defective quality of the vehicle.

20. We have perused the Arbitration Award dated 24.12.2010, which was challenged by the Appellant in O.P.No.80 of 2012 under Section 34 of the Arbitration and Conciliation Act, 1996. The Arbitrator in paragraph No.4 of the Award has recorded the fact that notice in the Arbitration proceedings was sent to the last known address (mailing address/habitual address/place of business) of the Appellant as contemplated under Section 34 of the Arbitration and Conciliation Act. The Arbitrator has also recorded the fact that the notice sent to the Respondent at the address mentioned in the claim petition was returned with the postal endorsement "Out of India" and "Refused". The Arbitrator has also recorded the fact that paper publication was effected in a local daily by way of substituted service on the Respondent in the claim petition. The Appellant in the instant appeal is the first Respondent in the Arbitration claim.

21. Only after due notice was sent to the last known address of the Appellant and after effecting paper publication by way of substituted service, the Arbitrator had set the Appellant ex parte on 18.12.2010. It is an admitted fact that the Appellant did not intimate the first Respondent about the change of his address by way of a separate communication. Even in the notices sent by the Appellant, he has not specifically mentioned about the shifting of his residence to the new address excepting for mentioning the old address along with the new address which according to us, is not proper intimation of the new address to the first Respondent.

22. The Appellant has admittedly, committed default in the payment of the instalments under the loan agreement. The defective quality of the vehicle has got nothing to do with the payment to be made by the Appellant to the first Respondent under the loan agreement.

23. Insofar as, the defective quality of the vehicle, the Appellant has to redress his grievance only against the Dealer/Manufacturer and not against the financier. The Arbitrator has set the Appellant ex parte on 18.12.2010 only after effecting paper publication. The financier who has lent money to the Appellant has to be repaid in accordance with the terms and conditions of the loan agreement. The defective quality of the vehicle cannot be an excuse for the non-payment of the monthly instalments under the loan agreement to the first Respondent.

24. The learned Single Judge while dismissing the application filed by the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996, based on the records accepted the findings of the Arbitrator that proper service of notice was effected in the Arbitration proceedings on the Appellant. The Arbitrator has also passed an Award relying upon the statement of accounts filed by the first Respondent, which discloses the details of the default committed by the Appellant in the payment of the instalments to the first Respondent under the loan agreement.

25. This Court, under Section 34 of the Arbitration and Conciliation Act, 1996 cannot reappraise and reappraise evidence as it is not a Court of appeal. The learned Single Judge has modified the Arbitration Award by passing a conditional order directing the Appellant to pay Rs.10,00,000/- in full quit within a period of four months from the date of receipt of order, failing which, has confirmed the Award in its entirety. This conditional order passed by the learned Single Judge was not complied with by the Appellant and instead he has filed the instant appeals.

26. The Award passed by the Arbitrator is a reasoned Award and we do not find any illegality in the said Award. Unless the Arbitration Award

1) is contrary to: सत्यमेव जयते

(a) Fundamental policy of Indian Law; (or).

(b) Interest of India; (or)

(c) Justice or morality.

2) is patently illegal

3) is so unfair and unreasonable that it shocks the conscience of the Court, the Arbitration Award cannot be set aside under Section 34 of the Arbitration and Conciliation Act, 1996. The Arbitration Award which is under challenge does not come within any of the above referred parameters to attract Section 34 of the Arbitration and Conciliation Act. The learned Single Judge has rightly dismissed the applications filed by the Appellant. For the same reasons, the appeals filed against the dismissal of Application Nos.2665 of 2010, 4004 of 2011 and 4005

of 2011 also does not deserve any merit. Accordingly, all the appeals are dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

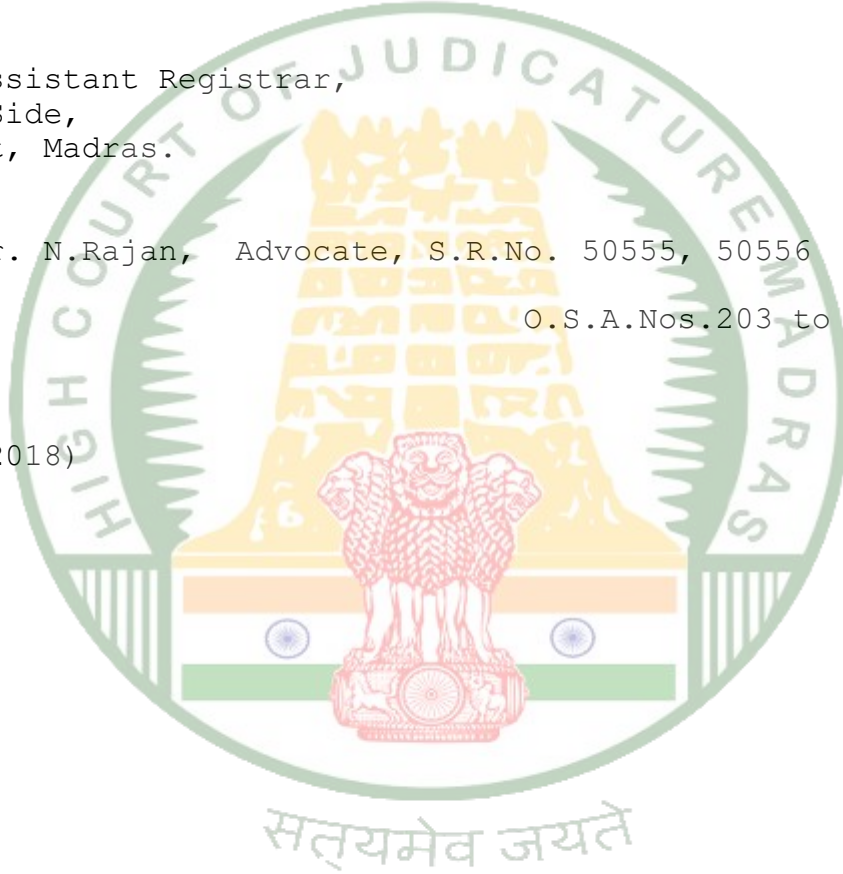
pam
TO

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

+4cc to Mr. N.Rajan, Advocate, S.R.No. 50555, 50556

O.S.A.Nos.203 to 206 of 2017

SSI (CO)
GN (07/09/2018)



WEB COPY