

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE ABDUL QUDDHOSE

O.P.No.382 of 2013

1.Mr.Rajan Narsingh Modi,
Proprietor, M/s.R.N.Transport,
Mount Everest, A-Wing,
1st Floor, Flat No.103/104,
Bhakti Park, Wadala (E)
Mumbai.

2.M/s.Karan Transport
Proprietor, Mr.Vishwanath Modi,
Grain Dept, Between A & 2B,
Shed Road, Reay Road (E),
Mumbai.

3.Vishwanath Modi

.. Petitioners

Vs

1.M/s.Indusind Bank Ltd,
Rep. by Smt.D.Meera,
Having Office at,
116, G.N.Chetty Road,
T.Nagar, Chennai - 600 017.

2.Mr.K.Harish
Arbitrator

.. Respondents

Original Petition filed under Section 34 (2) (a) (iii) & b (ii) of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award passed by the second respondent in KHCP No.75/2009 dated 06.10.09.

For Petitioners : Mr.S.Sivasubramanian

For Respondent 1 : Mr.K.Moorthy

ORDER

The instant petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Arbitral Award dated 06.10.2009 passed against the petitioners.

2. The brief facts leading to the filing of the instant petition is that the petitioners had availed loan from the first respondent for the purchase of the vehicle i.e., Ashok Leyland 2516 bearing Engine No.BPE435571, Chassis No.BPE617153 and Registration No.MH-04-DD-6134, under a loan agreement dated 05.07.2007. According to the first respondent, the petitioners had committed default in the repayment of the loan. In view of the dispute between the parties, the dispute was referred to the Arbitration by the first respondent in accordance with the Arbitration clause contained under the loan agreement dated 05.07.2007. The first respondent appointed the second respondent as the sole arbitrator to decide the dispute between the parties.

3. The second respondent/sole arbitrator acted upon the reference and after issuing notice to both the parties and after considering the materials available on record and after hearing the submissions of the parties, passed the Award dated 06.10.2009 directing the petitioners to pay the first respondent a sum of Rs,10,38,077 within 15 days from the date of receipt of Award, failing which, the first respondent was permitted to seize

the vehicle from the petitioners and sell the same at the best market price, appropriate the sale proceeds to meet the Award amount and return the excess of the sale proceeds, if any to the petitioners.

4. Aggrieved by the Award dated 06.10.2009, the instant petition has been filed by the petitioners.

5. The learned counsel for the petitioners submitted that the primary ground raised for challenge in the instant petition is that no notice was served in the arbitral proceedings by the Arbitrator.

6. This Court by its earlier order directed the Arbitrator to place the record pertaining to the arbitration. As directed by this Court, the Arbitrator has also produced the records pertaining to the arbitration. As seen from the records, it is made clear that the notice was sent by the Arbitrator to the correct address of the petitioners. But the said notice was returned by the postal authorities with an endorsement in Marathi language. The address mentioned in the notice sent by the Arbitrator is the same address which is also disclosed in the instant petition filed under section 34 of the Arbitration and Conciliation Act, 1996 by the petitioners. The address to which the notice was sent to the petitioners by the Arbitrator is also the same address as disclosed in the loan agreement dated 05.07.2007.

7. The findings of the Arbitrator with regard to the service of

notice on the petitioners is found at paragraphs 4 & 5 of the arbitral award which reads as follows:

“4.It must be recorded hereunder that the notices of hearing dated 12.06.2009 sent to the first respondent is first and third address is returned with an endorsement left and second address is returned with an endorsement made in some vernacular language which is not known to this tribunal ad forth and fifth address is returned with an endorsement not known to this tribunal and the same sent to the seond and third respondents is returned with an endorsement left. My proceeding dated 28.07.2009 and 25.08.2009 sent to the first respondent is first and third address is returned with an endorsement left and the second address is returned with an endorsement made in some vernacular language which is not known to this tribunal and same sent to the second and the third respondents is returned with an endorsement left. The service on the first and second respondents is not complete. This tribunal carefully considers the representation the claimant that this tribunal has powers to set the respondent exparte under Section 3(1)(b) of the Arbitration and Conciliation Act, 1996 which reads as follows:

Section 3:

(1) Unless otherwise agreed by parties

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address and

(b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written

communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it"

This tribunal has been provided with the applications given by the respondent for the loan facility apart from the agreement, wherein the respondent has declared that the particulars given are true and also undertake to inform the claimant regarding any change in their residence and to provide any further information that the claimant may require.

The claimant also draws the attention to this tribunal to clause 4.2(1) of the agreement wherein the respondent has agreed to notify in writing to the claimant of any change in their address within a week of such change. Therefore after considering the above aspects have set the respondent ex parte in the proceedings dated 06.10.2009.

5. It must be recorded hereunder that this Tribunal is of the firm opinion that the respondents is absconding himself with a view to defeat the very object of reference. It must be recorded hereunder that as early in the proceedings dated 25.08.2009 this tribunal had clearly stipulated that the respondents will be set ex parte and an award will be passed, if no counter is filed. Neither the respondents nor any of his representatives has appeared and filed any counter, even bothered to send any communication, and hence I was constrained to set the respondents ex parte on 06.10.2009."

8. As seen from the findings of the Arbitrator, the petitioners were given sufficient opportunities by the Arbitrator and only thereafter, they were set ex parte on 06.10.2009. The Arbitrator has also referred to Section 3 of the Arbitration and Conciliation Act and held that since the notice was sent to the last known address of the petitioners, it amounts to deemed service of notice on the petitioners.

9. Admittedly, the petitioners committed default in the repayment of the loan under the loan agreement. The Arbitrator has also passed the Award based on Exhibits which were marked by the first respondent before him which included the loan agreement dated 05.07.2007 and statement of account dated 20.05.2009.

10. This Court is of the considered view that the Award passed by the Arbitrator is a well reasoned Award which does not call for any interference under Section 34 of the Arbitration and Conciliation Act, 1996. This Court is also of the view that the Award does not suffer any patent illegality and there is no merit in the instant petition.

11. The Hon'ble Supreme Court in a Catena of decisions starting from *Renusagar Power Company Ltd vs. General Electric Company 1994 Supp (1) SCC 644* to the recent *Associated Builders Vs DDA (2015) 3 SCC 49* has held only under the following grounds the Arbitral Award can be challenged under Section 34 of the Arbitration and Conciliation Act:

- (a) Procedure contemplated under Arbitration and Conciliation Act was not followed by the Arbitrator.
- (b) The Arbitral Award is a non speaking Award.
- (c) The Arbitrator has transgressed his jurisdiction.
- (d) The Arbitral Award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if:-

- (a) it is contrary to the fundamental policy of Indian law, or
- (b) it is contrary to the interests of India,
- (c) it is contrary to justice or morality,
- (d) it is patently illegal, or
- (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

- (a) it disregards orders passed by superior courts, or the binding effect thereof, or
- (b) it is patently violative of statutory provisions, or
- (c) it is not in public interest, or
- (d) the arbitrator has not adopted a “judicial approach”, i.e. has not acted in a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

- (e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or
- (f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or
- (g) the principles of natural justice have been violated.

(v) Insofar the “patent illegality” has to go to the root of the matter. Trivial illegalities are inconsequential.

- (vi) Additionally, an award could be set aside if
- (a) either party was under some incapacity, or
 - (b) the arbitration agreement is invalid under the law,

Or

- (c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or
- (d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

- (e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

- (f) the arbitral procedure was not in

*accordance with the agreement of the parties,
or in accordance with Part I of the Act, or
(g) the award contravenes the Act, or
(h) the award is contrary to the contract
between the parties.*

*(vii) "Perversity", as a ground for setting aside an
arbitral award, has to be examined on the touchstone
of the Wednesbury principle of reasonableness. It
would include a case in which*

- (a) the findings, in the award, are based on no
evidence, or*
- (b) the Arbitral Tribunal takes into account
something irrelevant to the decision arrived
at, or*
- (c) the Arbitral Tribunal ignores vital evidence
in arriving at its decision.*

(viii) At the same time,

- (a) a decision which is founded on some
evidence, which could be relied upon,
howsoever compendious, cannot be treated
as "perverse",*
- (b) if the view adopted by the arbitrator is a
plausible view, it has to pass muster,*
- (c) neither quantity, nor quality, of evidence
is open to re-assessment in judicial review
over the award.*

*(ix) "Morality" would imply enforceability, of the
agreement, given the prevailing mores of the day.*

“Immorality”, however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

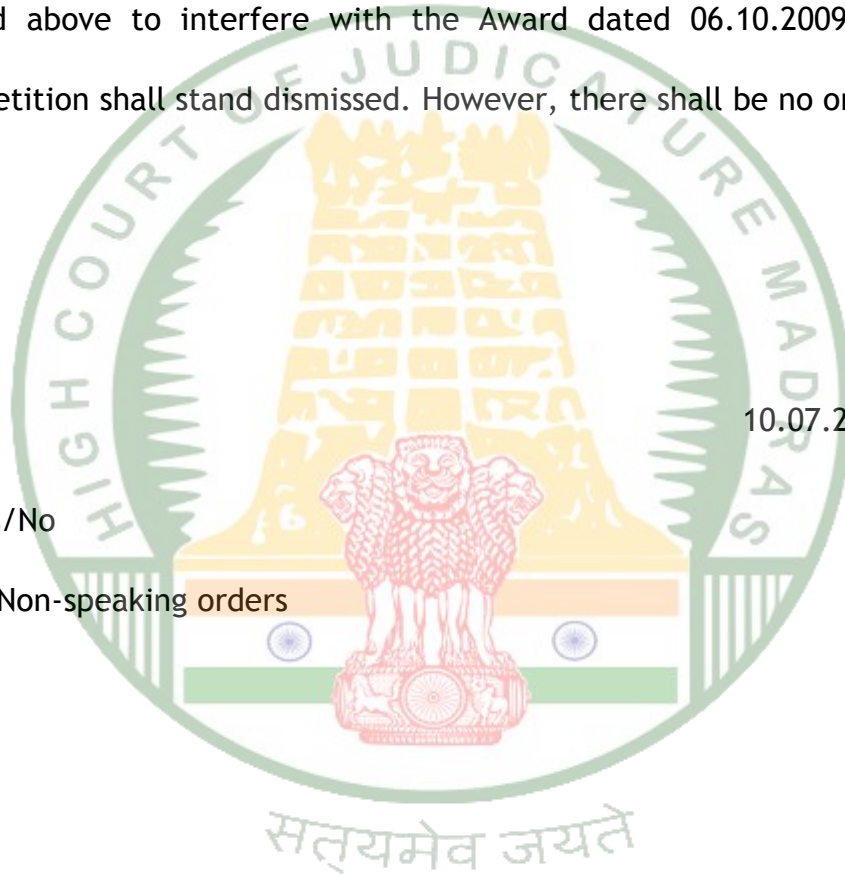
13. The petitioners have not satisfied any of the grounds mentioned above to interfere with the Award dated 06.10.2009. Hence, Original Petition shall stand dismissed. However, there shall be no order as to costs.

10.07.2018

Index: Yes/No

Speaking/Non-speaking orders

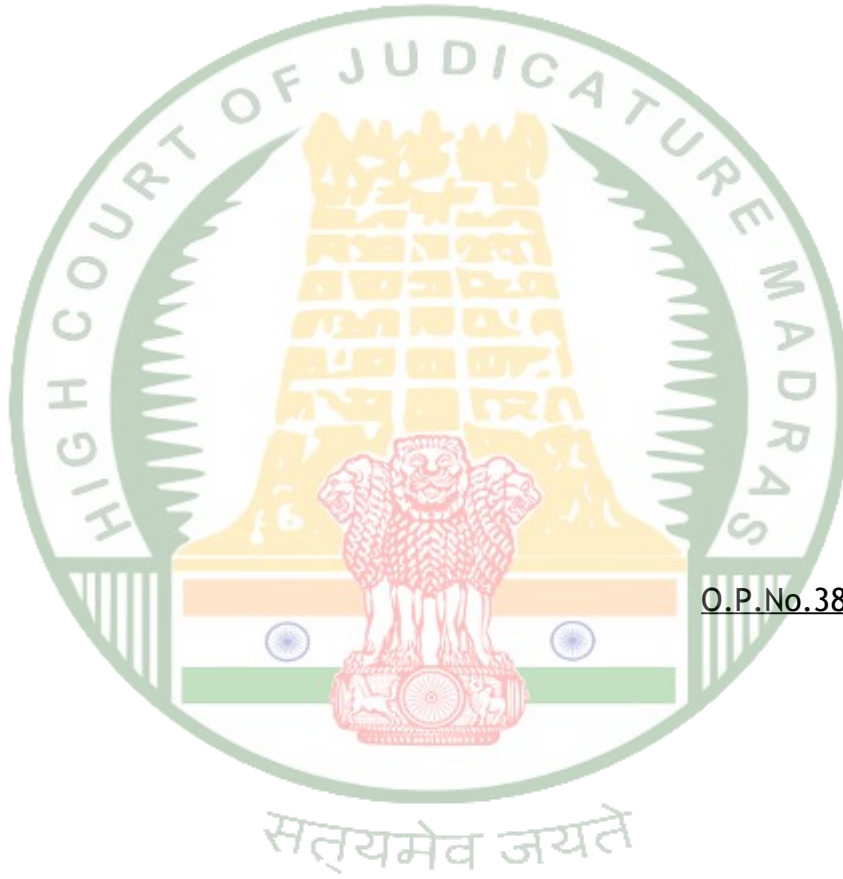
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ABDUL QUDDHOSE, J.

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O.P.No.382 of 2013

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10.07.2018