

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 9TH DAY OF MARCH 2018

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. Nos.775 TO 777 of 2018

A. No.775 of 2018

In the matter of Arbitration and
Conciliation Act, 1996

And

In the matter of disputes between
M/s.HDB Financial Services Ltd. And
Mr.G.Raghupathy & Another Arising under
Loan Agreement No.1855169 Dated
29.09.2016

M/s.HDB Financial Services Ltd.
Represented by its Authorised Signatory,
Mr.T.Kathiravan,
Having office at:
New No.128/4F, Old Door No.53 A
4th Floor, M.N.Office Complex,
Greams Road,
Chennai - 600 006.

.. Applicant

Vs.

1.Mr.G.Raghupathy
No.29/30, Perumal Koil Street,
Periya Obulapuram Post, Gummidipoondi,
Thiruvallur HO - 601 201.

2.G.Muthuraman
No.32, Perumal Koil Street,
Periya Obulapuram Post, Gummidipoondi,
Thiruvallur HO - 601 201.

..Respondents

A. No.776 of 2018

In the matter of Arbitration and
Conciliation Act, 1996

And

In the matter of disputes between
M/s.HDB Financial Services Ltd. And
Mr.S C P Dhanapal Arising under Loan
Agreement No.1339690 Dated 09.02.2016.

M/s.HDB Financial Services Ltd.

Represented by its Authorised Signatory,

Mr.T.Kathiravan,

Having office at:

New No.128/4F, Old Door No.53 A

4th Floor, M.N.Office Complex,

Greams Road,

Chennai - 600 006.

.. Applicant

Vs.

Mr.S C P Dhanapal

No.141, N N Lakshmi Sri Street,

Janaki Nagar, Valasaravakkam,

Chennai - 600 087.

..Respondent

A. No.777 of 2018

In the matter of Arbitration and
Conciliation Act, 1996

And

In the matter of disputes between
M/s.HDB Financial Services Ltd. And
Mr.Prakash Sakthivel Arising under Loan
Agreement No.1323022 Dated 31.01.2016.

M/s.HDB Financial Services Ltd.

Represented by its Authorised Signatory,

Mr.T.Kathiravan,
 Having office at:
 New No.128/4F, Old Door No.53 A
 4th Floor, M.N.Office Complex,
 Greams Road,
 Chennai - 600 006.

.. Applicant

Vs.

Mr.Prakash Sakthivel,
 No.244, 4th Cross Street,
 J Nagar, Panayur,
 Chennai - 600 115.

..Respondent

A. No.775 of 2018:

Application praying that this Hon'ble Court be pleased to pass an order of appointment of an Advocate Commissioner to seize and deliver the Construction Equipment JCB 3DX and BACK LOADER bearing Engine No.H00119886 Chassis No.HAR3DXXTT01497223, to the custody of the Applicant available at the First or Second Respondent's premises or wherever found and with whomsoever it is found and permit the Advocate Commissioner to obtain Police aid and to break open the premises.

A. No.776 of 2018:

Application praying that this Hon'ble Court be pleased to pass an order of appointment of an Advocate Commissioner to seize and deliver the Vehicle CRETA 1.6 CRDI bearing Engine No.D4FCGM018485, Chassis No.MALC281RLGM067568 & Registration No.TN 10 AV 3787 to the custody of the Applicant, available at Respondent's premises or wherever found and with whomsoever it is found and permit the Advocate Commissioner to obtain Police aid and to break open the premises.

A. No.777 of 2018:

Application praying that this Hon'ble Court be pleased to pass an order of appointment of an Advocate Commissioner to seize and deliver the Vehicle Toyota Innova bearing Engine No.2KDU479629, Chassis No.MBJ11JV4007452229 & Registration No.TN 14 0600 to the custody of the Applicant, available at Respondent's premises or wherever found and with whomsoever it is found and permit the Advocate Commissioner to obtain Police aid and to break open the premises.

These Applications coming on this day before this court for hearing the court made the following order:

Three applications have been filed in terms of section 9 of the Arbitration and Conciliation Act 1996 (the 'Act') seeking the appointment of an Advocate Commissioner to seize and deliver vehicles, for the purchase of which the respondents had entered into loan agreements with the applicant in 2016.

2.Brief details of the agreement and the vehicles purchased thereunder are set out below:

In Application No.775 of 2018, finance facility had been extended under loan agreement No.1855169 dated 29.09.2016 for a sum of Rs.22,00,000/- for the purchase of construction equipment being a JCB 3DX and Back Loader bearing engine No.H0011988 and Chassis No.HAR3DXXTT01497223. The amount was repayable in 46 instalments, the first commencing on 04.12.2016 and the last payable on 04.09.2020. Defaults are stated to have been committed from 03.10.2017 and no payments have been forthcoming thereafter despite demands made by the applicant.

In Application No.776 of 2018, finance facility was extended under loan agreement No.1339690 dated 09.02.2016 for a sum of Rs.10,57,000/- for the purchase of a vehicle, being CRETA 1.6 CRDI bearing engine No.D4FCGMO18485 and Chassis No.MALC281RLGM067568. The amount was repayable in 36 instalments, the first commencing on 04.03.2016 and the last on 04.02.2019. Defaults are stated to have been committed from 26.10.2017 and no payments have been forthcoming thereafter despite demands made.

In Application No.777 of 2018, finance facility was extended under loan agreement No.1323022 dated 31.01.2016 for a sum of Rs.16,65,000/- for the purchase of a Toyota Innova vehicle bearing engine No.2KDU479629 and Chassis No.MBJ11JV4007452229. The amount was repayable in 36 instalments, the first commencing on 04.03.2016 and the last payable on 04.02.2019. Defaults are stated to have been committed from 20.03.2017 and no payments have been forthcoming despite demands in this regard.

3.The agreements with the parties provides for the resolution of disputes by way of arbitration. Ms.S.Rajeni Ramadas, learned counsel for the applicant emphasizes that the applications are all based on awards passed by the learned Arbitrator in favour of the applicant pursuant to proceedings for arbitration. Awards have been passed on 03.01.2018, 23.12.2017 and 01.07.2017.

4. In so far as the applications are based solely on the awards passed that are adverse to the respondents, the awards as well as the records of the Arbitrator were called for to determine, prima facie, the veracity of the same for consideration of the prayer in the present applications.

5. The records of arbitration reveal the following factors:

(i) Notice of Reference to the Arbitrator issued by the counsel for the applicant, strangely, encloses the claim petition even before consent of the Arbitrator along with Disclosure under section 12 has been obtained.

(ii) As confirmed by the learned counsel, the Arbitrators' disclosure under section 12 of the Act dated 13.01.2018, is the standard form of disclosure filed by the Arbitrator in all matters including the present. The disclosure is identical in all three cases except for the specifics of dates of hearing. For purposes of illustration, the Disclosure filed in proceedings in A.No.775 of 2017 is extracted below and the dates and sequence of events set out in A.No.775 of 2018 are taken as illustrative of the facts in all the applications for the purpose of this order.

'CIRCUMSTANCES DISCLOSING PAST AND PRESENT RELATIONSHIP WITH ANY OF THE PARTIES-

I have no relationship with or interest in any of the parties to the proceeding or to the subject matter in the dispute like financial business, professional or of any other kind which is likely give rise to justifiable doubts as to my independence or impartiality.

So far I have conducted more than 2 arbitration proceedings in which the claimant is a party. Most of them are proceeded ex parte or settled amicably.

At present 20 outgoing matters pending before me. However, considering the nature of dispute of simple loan transaction such matters can be disposed-off mainly on the basis of documents, it is my experience that in most of the matters the respondents are either not interested to contest and proceed ex parte or without written statement or

settled amicably, however few matters are contested, but I have never been biased in any of the above cases. As such based on past experience and looking to the nature of work in which I am involved I do not find any difficulty to disposed-off the present proceeding within one year.

I therefore, accept my appointment and direct the respondent to raise its objection, if any as to my appointment within 7 days from the date of receipt of this letter in light of the above circumstances. If respondent does not raise any objection within the time stipulated above it shall be deemed that respondent has accepted my appointment as Sole Arbitrator.

If no objection is raised as to my appointment, the following direction shall observed by the claimant:

a) The claimant to file its statement of claim on the first date of hearing stating their facts; the point at issue and relief and remedy sought.

Parties to appear before me on 28, October, 2017 in the above mentioned matter for hearing between 11.30 am to 1.30 pm at the following address:

Sivanandha Apartments, No.1B/1C, East Park Road,
3rd Floor, Shenoy Nagar, Chennai-600 030 (Tamil Nadu).

The parties are hereby directed to remain present in the proceedings on the above mentioned date, time and place, in person or through their authorize representative or Advocates. On failure to remain present in the proceedings, on the part of either of the parties, the matter shall proceed further, without any reference to the parties. No written communication in lieu of personal appearance would be entertained in any respect.'

(iii) The first instalment in respect of which default has been committed was due on 03.10.2017. The Award of the learned Arbitrator

is dated 03.01.2018.

(iv) The disclosure filed reveals that even as on the date of the disclosure the learned Arbitrator was engaged in 20 matters relating to the same party.

(v) Identical Disclosures have been addressed to all the respondents before me, one in Bombay and two in Malappuram. The learned Arbitrator states in the Disclosure/Notice of hearing that if there is any objection to his appointment, it shall be stated within one week from date of receipt thereof.

(vi) The matter was posted on 28.10.2018 when the party was to appear either in person or through representative and in the event of default, the defaulting party was to be set exparte. The learned Arbitrator also makes it clear that no written communication in lieu of personal appearance would be entertained.

(vii) The record of proceedings of hearing dated 28.10.17 reveals the absence of the respondent on the said date.

(ix) On 28.10.2017, the learned Arbitrator takes on file the claim statement, though the same was stated to be enclosed by the claimant even with the Notice of Reference, and serves the same upon the respondent posting the matter on 05.12.2017 for respondents' written statement.

(x) On 05.12.2017, there is no appearance by the respondent. Though the proceedings state that a notice of hearing has been issued to the respondents that has been returned unserved, there is neither proof for service of the same available in the records and nor returned cover or AD card with appropriate endorsement.

(xi) The matter was posted to 16.12.2017 for the written statement of

the respondents. The notice states that continued default of appearance on the next hearing would result in the respondent being set ex parte.

(xii) Since the respondents did not appear thereafter, they were set ex parte and the matter heard in their absence within a period of 60 days from the date of default and award passed.

6. The Court makes it clear that what has been summoned and what is stated to be produced by the learned counsel are the complete records of the Arbitrator.

7. I am conscious of the fact that the present application is one filed under section 9 of the Act seeking interim relief. A detailed examination of the records of the Arbitrator is however undertaken since the sole basis of the application is the Award passed by the Arbitrator and as such, this Court believes that, prima facie, the Award is liable to be tested for consideration of the prayer in these applications.

8. The applicant states in the application that '*the Arbitration Proceedings has been initiated and Mr.Dharmaraj retired District Judge has been appointed as sole Arbitrator and Award has been passed on 03.01.2018. As per the Award, a sum of Rs.24,32,018/- as on 19.12.2017 is due to be paid by the respondents*'. No other ground is raised and this is the sole ground upon which the prayer for appointment of Advocate Commissioner is made. The applications, all listed together, reveal that awards have been passed by the same learned Arbitrator in all matters and the records were thus called for to examine, prima facie, the procedure adopted as well as the award itself.

9. It is too well settled a position that the pleadings constitute the basis upon which the prayer in a section 9 application is to be considered. The pleadings, in this case, rely solely on the award passed and thus, my emphasis on the said award and the procedure adopted in passing the same.

10. The purpose of the statutory Declaration under section 12 of the Act is to ensure that the parties have full knowledge and satisfaction about the independence of the arbitrators appointed, particularly in a situation such as the present where the authority to appoint the Arbitrator is unilaterally given to the applicants as per the arbitration agreement. All the more that the procedure for appointment be transparent and in accordance with provisions of law, equity and fairplay.

11. The 5th schedule to the Act sets out various situations where the appointment of the arbitrator is liable to be questioned on the ground of impartiality or lack of independence. Clauses 22 and 25 of the 5th schedule state thus:

THE FIFTH SCHEDULE

[See section 12 (1) (b)]

*The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:
Arbitrator's relationship with the parties or counsel*

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

.....

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration

on a related issue involving one of the parties or an affiliate of one of the parties.

12. No doubt the challenge to appointment in terms of the 5th schedule as extracted above is one to be raised before the Arbitrator in the course of the arbitration proceedings itself. The judgments of the Supreme Court in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*, (2017 (4) SCC 665) and *HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.)* (2017 (9) TMI 56) make this position amply clear.

13. The judgements confirm that a challenge to the appointment of an arbitrator on the ground of plurality/multiplicity of matters involving the same party is liable to be raised by the parties before the Arbitrators under section 13 of the Act and cannot be considered by this Court. Assuming that such challenge is rejected, the proceedings for arbitration would continue and the objecting party is entitled to reiterate the objections in a challenge under section 34 of the Act after passing of an award.

14. However, the position is different in the case of a bar under the 7th schedule and it is only in cases that attract the bar set out in section 12(5) read with the 7th schedule that the Court will entertain a direct challenge. This distinction, as between section 12(3) read with the 5th schedule and section 12(5) read with the 7th schedule is settled by the Supreme Court in the aforesaid two judgments. Thus the applicant would argue that it was not for this court exercising jurisdiction under section 9 of the Act to take into account any deficiency in procedure relating to appointment of Arbitration.

15. However, the lack, prima facie, of opportunity provided to the respondents, and the irregularities in issuance of notices are factors that I cannot, but, take into consideration as a prima facie case has to be made even for admission of the application and consideration of the prayer sought. Even though a challenge to the irregularity in procedure adopted for the appointment of arbitrator would fall within the domain of the Arbitrator, the non-adherence, prima facie, to the principles of natural justice are writ large on an examination of the records of arbitration.

16. In all, the procedure adopted in the proceedings for dispute resolution does not, prima facie, inspire confidence.

17. Ms.Rajeni as well as other learned counsel present in Court and appearing in similar matters confirm that a Financial Institution normally maintains a panel of arbitrators from which an Arbitrator is drawn. The normal practice is for a single arbitrator to deal with several matters involving the same Institution as the Disclosure filed in the present case reveals.

18. As an offshoot to the above submission, an argument is made relying upon Explanation 3 to the 5th schedule stating thus:

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

19. According to the applicant the above Explanation would stand attracted and justifies the frequent appointment of the same

individuals as Arbitrators by the company. The argument is rejected for the reason that the issue raised in the arbitration is a pure money claim and not a specialized subject requiring the intervention of an expert in a particular field. The very fact that the Arbitrator appointed in the present cases is a learned District Judge would establish that the pre-requisite for appointment is a judicious approach to dispute resolution and nothing more. The exception carved out by Explanation 3 would thus not be available in the present case.

20. In the circumstances as noticed by me above, I believe, prima facie that the manner of conduct of the present proceedings leaves much to be desired.

21. The process of Arbitration calls for a certain sanctity to be maintained in procedure. Two fundamental requirements thereof are the impartiality and independence of the Arbitrator and adherence to the principles of natural justice. In all three cases before me, I am of the categorical view that the procedure as set out in the Act particularly as relating to the appointment of the Arbitrator as well as adherence to the principles of natural justice have not been met.

22. The haste displayed by the applicant in enclosing the claim even with the Reference to Arbitration is unsavory and indicates a certain liberty taken with the Arbitrator that militates against his independence. The Disclosure itself reveals the involvement of the learned Arbitrator in multiple matters involving the same applicant.

23. In all cases, there is no proof of any notice issued to the borrowers after service of the statutory Disclosure/ notice of hearing by the Arbitrator in the records produced. In fact, in A.No.777 of 2017 corresponding to Arbitration Proceedings No. HDB(BO-

COB0)-0523/February, 2017, the records produced do not contain the acknowledgement of receipt of even the statutory disclosure/notice of hearing upon the respondents. However, the learned Arbitrator states in the record of proceedings dated 29.03.2017 that a copy of '1 HN was served on the last known address of the respondent but none for the respondent/s has appeared nor any communication is received.' I am unable to fathom how this statement could have been recorded in the light of there being no acknowledgement card or even proof of issuance of notice to the respondents.

24. There are also discrepancies in the dates of hearing as recorded in the award and as seen from a verification of the records itself. To me, it appears clear that the approach is mechanical and the procedure adopted is one of rote.

25. One cannot simply ignore these deficiencies in consideration of the prayer for seizure and re-possession of the asset, particularly since the entire application rests solely on the strength of the Award passed and no other ground has either been pleaded or argued.

26. The importance of the pleadings have been reiterated manifold by this Court in several decisions. In the present case, the pleadings reveal that the basis of the application is only the award. No doubt there is an award - however as I have noticed in the earlier paragraphs, prima facie, the procedure followed does not appear to be in consonance with the provisions of the Act or fair play.

27. In addition to Ms. Rajeni Ramadas, the submissions of Mr. Umashankar, Mr. Mohammed Ismail, Mr. Pradeep Kumar and Mr. Santhosh

Nagarajan who appear for other Financial Institutions in similar matters were specifically sought on the aspect of the procedure normally followed by the companies and Arbitrators appointed by them in the conduct of Arbitrations.

28. The uniform impression that I am left with after hearing the submissions of the learned counsel is that the Arbitrators are drawn from a very small pool and it is usual that a single arbitrator will deal with multiple cases involving the same financial institution.

29. The miniscule number of Arbitrators available in rotation with the company is inversely proportional to the large number of disputes and this obviously leads to a circumstance where the same Arbitrator is called upon to officiate very frequently. The borrowers, many of whom are situated in far flung parts of the country, have to contend with the distance involved as well as the summary procedure adopted by the applicant and the Arbitrator.

30. While the arbitration agreement no doubt binds both parties, it is high time that a central authority be identified to maintain a data base of Arbitrators, region wise that may be drawn from by the companies to conduct their proceedings for arbitration. This court suggests that an Institution such as the Nani Palkhiwala Arbitration Centre or any other appropriate Institution be engaged to collect the data available with companies such as the applicant and collate the same into a data base from which the Arbitrators may be drawn. This will also ensure that some distance is maintained, and seen to be maintained, between the Arbitrators and the appointing companies. The present ills such as the conduct of proceedings for arbitration

in the premises of the company itself and repeated references to the same Arbitrators, to name a few, can thus be avoided, or at least minimized. This will ensure a fair and transparent approach to the process of arbitration.

31. As far as the present applications are concerned, the same are dismissed as no prima facie case is made out to warrant or justify an admission. Liberty is granted to the applicant to take such measures to execute/enforce the award as may be desired in accordance with law.

32. The submissions made by all learned counsel are appreciated.

Sd./- A.S.M.J.

19.03.2018

//Certified to be true copy//

Dated at Madras this the th day of 2018.

COURT OFFICER (O.S.)

TPY/20.03.2018

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