IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.06.2018

DELIVERED ON : 28.06.2018

CORAM

THE HON'BLE Mr.JUSTICE ABDUL QUDDHOSE

OP No.130 of 2016

The Oriental Insurance Co. Ltd.,
Divisional Office III,
Rosy Towers, Second Floor,
No.7, Uttamar Gandhi Salai,
Nungambakkam,
Chennai – 600 034. ... Petitioner

Versus

1.M/s.Shriram Transport Finance Co. Limited,
Represented by its Director, Mr.S.Venkatakrishnan,
Mookambika Complex,
No.4, Lady Desika Road,
Mylapore, Chennai – 600 004.

2.Justice K.Venkataraman,
Former Judge, High Court, Madras,
L-125, 17th Street,
Anna Nagar East,
Chennai – 600 102. ... Respondents

PRAYER: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 read with order 43 Rule 1, 2, 3 and 6 of the Rules of the High Court, Madras, Orignal Side, 1956, to allow the above petition with costs and set the arbitral award dated 30.10.2015 passed by the second respondent.

For Petitioner ... Mr.Venkataraman
for M/s.Nageswaran & Narichania

For Respondents ... Mr.K.Hari Shankar for R1

ORDER

The instant petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Arbitral Award dated 30.10.2015. The Arbitrator under the impugned Award directed the petitioner to pay the following amounts to the first respondent.

a.A sum of Rs.1,41,16,050/- towards cancellation of the policy,

b.A sum of Rs.9,70,998/- towards cash deposit account balance that remains unpaid,

c.Rs.35,00,047/-towards third party premium refund on account of revision in the premium, totalling Rs.1,85,87,095/-

d.Pre-award interest at the rate of 9% per annum for the above said amount from the date of filing of O.P.No.904 of 2010 before the High Court, Madras till the award is passed by the Arbitral Tribunal.

e.To pay interest at the rate of 9% per annum towards the post award interest on the sum of Rs.1,85,87,095/- plus interest so arrived as per clause (d) of the award from the date of award till the payment.

f.A sum of Rs.1,00,000/- towards the costs."

2.The first respondent was earlier known as M/s.Shriram Investments Limited, which entered into three Memorandum of Understandings (hereinafter referred to as "MOUs") with the petitioner by which the petitioner authorized the first respondent/claimant to issue cover notes to their customers for granting insurance coverage to New Motor Vehicles, renewal of policies and new policies in respect of second hand vehicles against own damage and third party risks.

3.Consequent to the change of name of first respondent/claimant company, MOU dated 20.04.2006 and MOU dated 18.12.2006 were entered into between the parties. Though as per the MOUs the first respondent/claimant has to provide bank guarantee towards the premium, the first respondent/claimant was asked to provide cash deposit by the petitioner which was also agreed upon.

4.During the course of transaction of issuing cover notes, several cover notes/policies issued were cancelled, due to various reasons which was intimated to the petitioner by the first respondent with the request to credit the cash deposit amount held with the petitioner, upon cancellation request made by the first respondent/claimant. According to the first respondent, the petitioner/insurance company failed to refund the cash deposit amount to the first respondent after the expiry of the last MOU dated 18.12.2006 on 17.12.2009.

5.The first respondent/claimant on 31.12.2009 made a request for referring the dispute relating to refund of the sums payable under the MOUs to a Sole Arbitrator. On 29.01.2010, the petitioner sent a communication rejecting the request for arbitration on the ground that there is no cause of action and the claim is barred by limitation. By reply dated 02.03.2010, the first respondent/claimant informed the petitioner that there exists a cause of action and that the claim is not barred by limitation. In that reply, the petitioner was asked to nominate an Arbitrator. But the petitioner sent a reply dated 10.03.2010, rejecting the said request. The first respondent/claimant thereafter, nominated the Arbitrator and intimated the same to the petitioner. Upon the petitioner raising protest against the Arbitration, the Arbitrator nominated by the first respondent/claimant withdrew from acting as an

Arbitrator. Thereafter, the first respondent/claimant filed O.P.No.904 of 2010 before this Court for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. The Hon'ble Chief Justice of this Court by his order dated 28.08.2014 after giving a finding that the disputes between the parties are arbitrable appointed the 2nd respondent a former Judge of this Court as the Sole Arbitrator to decide the dispute on merits. The Sole Arbitrator acted upon the reference and issued notice to both the parties.

6.Since the petitioner failed to appear before the Arbitrator despite service of notice, the Arbitrator after hearing the first respondent/claimant and after considering the materials available on record, passed an Arbitral Award dated 30.10.2015 in favour of the first respondent/claimant against the petitioner.

7.Aggrieved by the Arbitral Award dated 30.10.2015, the petitioner has filed the instant application to set aside the Arbitral Award.

8.Heard, Mr.Venkataraman, learned Counsel appearing for the petitioner and Mr.Hari Shankar, learned Counsel appearing for the first respondent.

9.The learned counsel for the petitioner drew the attention of this Court to the three MOUs dated 28.01.2005, 20.04.2006 and 18.12.2006 and he referred to the various clauses under the respective MOUs and submitted that under the MOUs, the first respondent is authorised to issue only cover notes to their customers and not authorised to issue and cancel insurance policies on behalf of the petitioner. The learned counsel for the petitioner submitted that the first respondent has cancelled the insurance policies issued to their customers in violation of terms and conditions of the MOUs. In view of the breach of contract, the learned counsel for the petitioner submits that the first respondent is not entitled for refund of any amount under the MOUs. The learned Counsel for the petitioner further submitted that each of the MOUs is an independent contract and gives right to a separate cause of action and a single claim cannot be made for the MOUs dated 28.01.2005, 20.04.2006 and 18.12.2006.

10.The claim was made by the first respondent before the Arbitrator only in the year 2010 and hence, according to the learned Counsel for the petitioner, the claim made before the Arbitrator is barred by law of limitation.

11.The learned counsel then submitted that there is no valid arbitration agreement between the parties for deciding the entire refund of deposit allegedly lying with the petitioner under the three separate MOUs dated 28.01.2005, 20.04.2006 and 18.12.2006 respectively. According to the learned Counsel each of the Memorandum of Understanding is an Independent contract and since there is an arbitration clause in each of the contracts, separate arbitration if at all, can alone be initiated against the petitioner for the claims arising out of each of the MOUs. But the first respondent has initiated a single arbitration proceeding for all the claims put together, but, according to the petitioner is not in accordance with law, as cause of action is independent for each of MOUs.

12.The learned counsel for the petitioner then drew the attention of this Court to Section 64VB (3) of the Insurance Act,1938 and submitted that only an Insurance Company can issue and cancel an Insurance Policy and, refund of premium can be paid only to the insured and not to an agent, like that of the first respondent/claimant.

Section 64VB(3) of the Insurance Act, 1938 reads as follows

> ...(3)Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money-order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

13.According to the learned counsel for the petitioner, the Arbitrator has failed to take note of this important statutory provision before passing the Award in favour of the first respondent.

14.The learned counsel for the petitioner finally concluded by submitting that the Arbitrator has gone beyond the scope of the MOUs by directing the petitioner to pay the award amount to the first respondent/claimant.

15.According to the learned counsel, the Award is patently illegal as it has gone beyond the terms of the MOUs and the claim made by the first respondent is also barred by the law of limitation.

16.The learned Counsel for the petitioner submitted that once an insurance policy has been lawfully issued by the petitioner in lieu of cover notes issued by the first respondent/claimant, the first respondent/claimant right to act for its customers automatically ceases and it is only the insured who can approach the petitioner for any refund of money payable under the insurance policy and not the first respondent/claimant who is only an agent. The learned Counsel for the petitioner relied upon the following Authorities.

(i) ***AIR 2015 SC 290*** in the case of ***HDFC Bank Limited vs. Kumari Reshma and others***.

(ii) ***AIR 2015 SC 270*** in the case of ***Harsha and Company vs. Union of India and others***.

17.According to the learned Counsel for the petitioner, the MOUs having come to an end, the first respondent/claimant cannot invoke the Arbitration clause contained under the respective MOUs.

18.The learned Counsel for the petitioner further submitted being an *ex parte* Arbitration Award and considering the merits in favour of the petitioner, this Court can remand the matter back to the Sole Arbitrator for fresh consideration and direct the Sole Arbitrator to consider the defences raised by the petitioner on merits and in accordance with law. According to the learned Counsel for the petitioner, once an opportunity is given to defend the claim, the petitioner has a fair chance to establish that the claim cannot be granted in favour of the first respondent/claimant.

19.Per contra, the learned Counsel for the first respondent/claimant submitted that the insurance policies were never issued by the first respondent/claimant nor cancelled by them. The petitioner issued only cover notes to their customers and requests for issuance/cancellation of policies were alone sent to the petitioner. The learned Counsel for the respondent drew the attention of this Court to the various letters sent by the first respondent/claimant enclosing a statement giving details of the insurance policies of their customers which are required to be cancelled by the petitioner.

20.The learned Counsel for the first respondent/claimant also drew the attention of this Court to the acknowledgment made by the petitioner acknowledging the receipt of the letters of request sent by the first respondent /claimant for cancellation of the policies. All the letters sent by the first respondent/claimant together with the statements were marked as exhibits before the learned Arbitrator. According to the learned Counsel for the first respondent/claimant, the documents marked as exhibits before the learned Arbitrator will clearly reveal that the first respondent/claimant never cancelled the insurance policy but only made a request to the petitioner to cancel the same. The learned Counsel for the first respondent/claimant has acted according to the terms and conditions of the MOUs and in accordance with law. There is no breach of the contract committed by the first respondent/claimant under the MOUs.

21.The learned Counsel for the first respondent/claimant submitted that the first MOU dated 28.04.2005 was renewed on 20.04.2006 by the second MOU which was further renewed on 18.12.2006 by the third MOU. According to the learned Counsel for the first respondent/claimant, the second and third MOUs are only renewal contracts and are not independent contracts as claimed by the petitioner. After the first respondent/claimant decided not to renew the contract for a further period after the expiry of the third MOU on 18.12.2009, the first respondent/claimant made the claim for refund of the sums payable under the MOUs from the petitioner.

22.The learned Counsel for the first respondent/claimant further, submitted that this Court under Section 34 of the Arbitration and Conciliation Act, cannot remand the matter, back to the learned Arbitrator for fresh consideration. He relied upon the judgment of the Hon'ble Supreme Court in the case of ***Mcdormott International Inc. vs Burn Standard Co. Ltd. and Others*** reported in ***2006 11 SCC 181***. He referred to paragraph No.52 of the said judgment which reads as follows:

"52.The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if is is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

23.Relying upon paragraph No.52 of the said judgment, the learned Counsel for the first respondent/claimant submitted that there is no power to remand the matter, back to the learned Arbitrator under Section 34 of the Arbitration and Conciliation Act.

24.The learned Counsel for the first respondent/claimant drew the attention to the paragraph No.1 under the impugned Arbitral Award and submitted that the petitioner was given several opportunities to defend the claim by the learned Arbitrator. But, despite those opportunities being given, the petitioner failed to defend the claim and only thereafter an *ex parte* Award was passed. Paragraph No.1 of the impugned Award dealing with the non appearance of the petitioner on various dates despite service of notice is extracted below:

> *"1.This Arbitral Tribunal was constituted in pursuance of the orders of the Hon'ble Chief Justice, High Court, Madras, dated 28.08.2014, made in O.P.No.904 of 2014. After receipt of the order from the High court, Madras by a letter dated 15.10.2015 it was intimated that the first sitting will be held on 29.10.2014 at the residence of the Arbitrator. However, though the claimant is represented by the Advocate, there was no representation on behalf of the respondent. Hence the next hearing was fixed on 18.11.2014 the same was intimated to the respondent. But even on 18.11.2014 there was no representation on the side of the respondent, even though the notice was served on them. Therefore the next hearing was fixed on 02.12.2014. This was intimated to the respondent to the respondent, by a communication dated 18.11.2014. it has been further informed to the respondent that if there is no representation on the said date, the claimant will be asked to file claim statement and the matter will be decided in their absence. However even on 02.12.2014, there was no representation on behalf of the respondent and hence it was set exparty and the claimant was directed to file claim*

statement on or before 17.12.2014. The claim statement and supporting documents were filed on behalf of the claimant. On 27.12.2014, the respondent was intimated about the claim statement filed by the claimant and directed respondent to file counter statement filed by the claimant and directed respondent to file counter statement on or before 09.02.2015. Further the respondent was informed that if not filed by them, the matter will be decided on merits in the next sittings on 17.02.2015. However there was no respondent on the respondent side. On 17.02.2015 issues were framed after hearing the counsel for the claimant and Arguments were also heard. The claimant was directed to file written arguments. After filing of written arguments, certain clarification was required from the claimants Advocate. Hence the hearing was fixed on 16.09.2015 for clarification. The counsel clarified the particulars required by the Arbitrator."

25.From the materials available on record, it is clear that the first respondent/claimant has not issued/cancelled the insurance policies to their customers on behalf of the petitioner but, they have only issued cover notes. As and when there is a necessity to issue/cancel insurance policies for their customers, the first respondent/claimant has only issued a request to the petitioner enclosing the statement disclosing the details of the insurance policies required to be cancelled by the petitioner. In the Arbitral proceedings, the first respondent/claimant has marked all these documents as exhibits. The exhibits marked before the learned Arbitrator will clearly reveal that the first respondent/claimant did not cancel the policy but only made a request to the petitioner to cancel the policies as and when the need arises. The first respondent/claimant has acted only in accordance with the terms and conditions of the MOUs and the learned Arbitrator has rightly awarded the claim in favour of the first respondent/claimant.

26.Insofar as, the MOUs are concerned, each of the MOU is a renewal of the earlier one. The contention of the petitioner that each MOUs gives right to separate cause of action cannot be countenanced since the second MOU dated 20.04.2006 is the renewal of the first MOU dated 28.04.2005 and the third MOU dated 18.12.2006 is only a renewal of the second MOU dated 20.04.2006. Therefore, this Court does not agree with the contention of the petitioner that disputes arising out of each of the MOUs gives right to a separate cause of action and hence a single claim cannot be made arising out of all the three MOUs put together.

27.This Court also finds from the impugned Award that several opportunities were given to the petitioner to defend the claim made by the first respondent/claimant. There is a clear finding by the learned Arbitrator that notices for the hearings on 29.10.2014, 18.11.2014, 02.12.2014, 17.12.2014, 27.12.2014 and 17.02.2015 were duly served on the petitioner but despite receipt of those notices, the petitioner has failed to appear before the learned Arbitrator to defend the claim made by the first respondent/claimant. Therefore, this Court is of the considered view that the learned Arbitrator has duly followed the procedure under the Arbitration and Conciliation Act for service of notice on the petitioner. Only after giving several opportunities, the petitioner was set *ex parte* on 02.12.2014 and an *ex parte* Award came to be passed on 30.10.2015 and hence, no further opportunity can be given to the petitioner by this Court to defend the claim made by the first respondent/claimant.

28.This Court is in agreement with the contention of the learned

Counsel for the first respondent/claimant that this Court under Section 34 of the Arbitration and Conciliation Act does not have the power to remand the matter back to the Sole Arbitrator for fresh consideration as held by the Hon'ble Supreme Court in the case of ***Mcdormott International Inc. vs Burn Standard Co. Ltd. and Others*** reported in ***2006 11 SCC 181.***

29.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.

30.The petitioner has not satisfied any of the grounds mentioned above to interfere with the Award dated 30.10.2015, passed by the second respondent Arbitrator in favour of the first respondent/claimant.

31.Accordingly, the petition shall stand dismissed. However, there shall be no order as to costs.

28.06.2018

Internet:Yes

Index:Yes

Speaking order/Non-speaking order

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ABDUL QUDDHOSE, J.

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