

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 26TH DAY OF OCTOBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.P. No.870 of 2018

and

A.No.7924 of 2018

In the matter of the
Arbitration and Conciliation
Act, 1996

and

In the matter of Deed of
Personal Guarantee dated
22.03.2016 purportedly issued
by the petitioner.

Sheela Gupta
Ramsarovar, 1st Nadiawala Colony
SV Road, Malad
Mumbai 400 064.

: Petitioner/Applicant

-Versus-

1. Nissan Renault Financial Services India Pvt. Ltd.,
ASV Ramana Towers, 5th Floor,
No.52, Venkatanarayana Road,
T.Nagar, Chennai 600 017.

2. Gen Next Motors Limited
Plot No.A/70, TTC Industrial Area, Near Thane,
Belapur Road, Khairane, Navi Mumbai 400 709.

3. Sumit Vinod Gupta
No.130, Motobhoy Mansion, M.K Road
Church Gate, Mumbai 400 020. : Respondents/Respondents

Original Petition praying that this Hon'ble Court be
pleased to:

a) Declare the appointment of Mr.P.Ganesan, Retired District
Judge by the 1st respondent, as the sole arbitrator, in
accordance with the Facility Agreement dated 06.05.2015 as

null and void and appoint a sole arbitrator to adjudicate the disputes between the parties;

b) direct the 1st respondent to pay costs of this petition.

A.No. 7924 of 2018:-

Application praying that this Hon'ble Court be pleased to pass an order of interim stay of the arbitration proceedings pending before the learned sole arbitrator between the applicant/petitioner and the respondents until disposal of the above O.P.

This original petition along with Application coming on this day before this court for hearing the court made the following order:-

The above petition has been filed under Section 11(6) r/w Section 11(8) and Section 14 (1)(a) of the Arbitration and Conciliation Act, 1996 to declare the appointment of Mr.P.Ganesan, Retired District Judge as null and void and to appoint a sole arbitrator to adjudicate the disputes between the parties and to direct the 1st respondent to pay costs of this petition. 1st respondent appointed the learned Retired Judge as the sole arbitrator in accordance with the Facility Agreement dated 06.05.2015.

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2.The petitioner has taken a plea in the collateral proceedings in Application Nos.3759 and 3782 of 2018 which came to be filed by the 1st respondent and disposed on 24.09.2018 that her signatures were forged and therefore she

is not bound by the arbitration clause. This aspect has been left to be decided by the learned arbitrator.

3.The petitioner has prayed for an interim stay of all proceeding before the learned arbitrator in **Application No. 7924 of 2018.**

4.Heard, Mr.T.K.Bhaskar, learned counsel for the petitioner and Mr.B.Anand Johnson, learned counsel for the respondents.

5.After the arbitrator entered upon reference, the petitioner was set ex parte in the arbitration proceeding as the petitioner refused to receive notice from the learned arbitrator. Thereafter, petitioner appeared before the learned arbitrator. Order setting the petitioner ex-parte was set aside by the learned arbitrator.

6.Meanwhile, the 1st respondent filed Application Nos.3759 and 3782 of 2018 for the following relief:-

- i) To direct the respondents from leaving the country without the leave of the Court; and
- ii) To direct the respondents to furnish additional security for Rs.17,98,84,381/- (Rupees Seventeen Crores Ninety eight lakhs eighty four thousand three hundred and eighty one only) failing which

attachment of properties mentioned in the schedule to application.

7. During the pendency of Application Nos. 3759 and 3782 of 2018 before this Court, the petitioner herein filed a Memo dated 13.09.2018 before the learned arbitrator and sought for several details surrounding his appointment to elicit as to who appointed the learned arbitrator and whether the learned arbitrator had received more than three appointments from the advocate of the 1st respondent or by the 1st respondent.

8. The Memo asked for several other details and was ostensibly filed to elicit the details specified in the V and VII Schedule of the Arbitration and Conciliation Act, 1996 read with Section 12(1) and 12(5) of the Act.

9. Elaborate submission were made on behalf of the petitioner in the collateral proceedings in Application Nos. 3759 and 3782 of 2018. It was submitted that once an arbitrator has been appointed, the Court should not entertain the application under Section 9 of the Arbitration and Conciliation Act, 1996, in the light of the decision of the Hon'ble Kolkata High Court in **Tufan Chatterjee Vs. Rangan Dhar** AIR 2016 Cal 213.

10. In the said proceedings, the petitioner's submissions were as follows:-

"(i). The learned counsel for the petitioner submitted that both section 9 and 17 of the Act have been amended to reduce the burden of the High Court/district courts and at the same time giving more teeth to the orders of the arbitral tribunal's and have made them enforceable in the same manner as an order of a civil court. Learned counsel drew my attention to the Law Commission Report which deals with the amendments to the Act.

(ii). He therefore submitted that the applicant can work out the remedy before the arbitrator himself in view of the Constitution of the arbitral tribunal.

(iii). The learned counsel for the petitioner referred to the latest decision of the Hon'ble Supreme Court in **Alka Chandewar vs. Shamshul Ishrar Khan** (2017) 16 SCC 119 wherein the court has clarified that orders of the arbitral tribunal are deemed to be orders of the court for all purpose and would be enforced under Civil Procedure Code, 1908 in the same manner as if they were orders of the court.

(iv). The learned counsel for the petitioner also referred to several other decisions rendered in the context of meaning of the expression "entertain" to mean to admit rendered in the context of sales tax in **Laxmi Ratan Engineering Works Ltd's vs. Asst Commissioner Sales Tax** AIR 1968 SC 488.

(v) However, no relief is granted against the 3rd respondent in view of the dispute on the ground of forgery raised by her which cannot be gone into at this stage. Hence the applications against the 3rd respondent are dismissed."

11. After, considering the submission of the parties, by a common order on 24.09.2018, Application Nos. 3759 and 3782 of 2018 were disposed with the following directions:-

- "i) 1st and 2nd respondent (**R2 and R3 herein**) shall furnish security to the applicant for an amount of Rs. 17,98,84,381/- within a period of 4 weeks from today), and
- ii). The Arbitral Tribunal shall hereinafter proceed further under Section 17 of the Act and also endeavour to complete the proceeding as quickly as possible preferably within one year from the date its constitution in accordance with law unless the mandate is extended by the parties or by an order of the Court."

12. No order was passed against the petitioner on the ground that the petitioner had raised serious objection

regarding execution of the documents fastening her with the liability for the debts due from the 2nd and 3rd respondent to the 1st respondent. Objections of the petitioner has been left open for the learned arbitrator to decide the case on merits.

13.Immediately after the orders came to be passed in Application Nos.3759 and 3782 of 2018 on 24.09.2018, the petitioner filed a Memo dated 25.09.2018 before the learned arbitrator.

14.The petitioner requested for adjournment for a period of four weeks on the ground that the petitioner had filed the present petition before this Court challenging the validity of his appointment and that the same was being numbered and will be listed for hearing in due course.

15.On 28.09.2018, the learned arbitrator passed an order pursuant to the memo dated 13.09.2018 indicating the backgrounds of the case stating that the particulars called for had already been sent to the petitioner earlier but were returned unclaimed. However, in the interest of justice, particulars were called for earlier were being furnished.

16. These information have been filed by the petitioner in the additional typeset though they were within the knowledge of the petitioner as it is evident from para 14 of the present petition filed on 25.09.2018, which reads as under:

"It is submitted that as per the Arbitration (Amendment) Act, 2015, Section 12 of the Act has been amended and Schedules V, VI and VII have been introduced. As per the newly inserted sub-Section (5), no person whose relationship with the parties or counsel falls under any of the categories mentioned under Schedule VII shall be eligible to be appointed as an arbitrator. Therefore, 1st respondent and the persons mentioned under Schedule VII having become ineligible to act as an arbitrator, any appointment made by such persons of an arbitrator is bad in law. It is settled law that an action which cannot be done or is prohibited cannot be done by taking recourse to a nominee. The sole arbitrator having been appointed by the 1st respondent through its Authorised Signatory who is ineligible to make such appointment, the same goes to the very root of the appointment and appointment is ex-facie invalid. The appointment of the sole arbitrator stands vitiated in terms of Section 12(5) of the Act. In these circumstances, the petitioner is constrained to approach this Court for declaring the appointment of sole arbitrator as illegal, the arbitrator's

termination of mandate and consequently, appointment of an independent arbitrator by this Court."

17. By a letter dated 18.05.2018, the learned arbitrator had indicated that he was appointed by the Managing Director of the 1st respondent to adjudicate the claim of Rs.18,11,02,881/-. The said letter also informs that he is an arbitrator for the 1st respondent on more than two occasions. The learned arbitrator has also enclosed a copy of the cover showing returned and unclaimed cover by the petitioner herein.

18. In the aforesaid collateral proceeding, the petitioner had argued that once an arbitrator has been appointed, the Court cannot proceed with Section 9. In fact, this Court passed an order partially disallowing the reliefs claimed by the 1st respondent herein on the strength of the submissions advanced on behalf of the petitioner herein.

19. The petitioner has now filed the present petition to terminate the mandate of the learned arbitrator and seeks to dilate the arbitral tribunal. In the collateral proceeding in Application Nos.3759 and 3782 of 2018 which came to be concluded on 24.09.2018, the petitioner submitted that the

Court should reject the application filed by the 1st respondent under Section 9 of the Arbitration and Conciliation Act, 1996 in view of the appointment of the arbitrator.

20. It is thus clear that the submission made in Application Nos. 3759 and 3782 of 2018 and in the present petition are diametrically opposite. *Prima facie*, the Petitioner is prevaricating the arbitration proceeding and has filed the present petition to stifle the arbitration proceedings. The present petition is not a *bona fide* appears to be filed by giving extra meaning to the decision of the Hon'ble Supreme Court in **Trf Limited Vs. Energo Engineering Projects Limited** (2017) 8 SCC 377.

21. It has been submitted that as per Clause 24 of the Personal Guarantee Agreement dated 22.03.2016, only the 1st respondent is entitled to appoint an arbitrator and the said clause does not allow the individual officers of the 1st respondent herein to appoint an arbitrator. In this case, the Managing Director has appointed the learned arbitrator. Clause 22 of Personal Guarantee Purportedly executed by the petitioner reads as under:

"In the event of any dispute of differences arising directly or indirectly out of this Deed or otherwise, the Parties undertake to use all reasonable endeavours to resolve such disputes amicably. If disputes and differences cannot be settled amicably then all disputes and differences arising between the Parties hereto in connection with this Deed or the Interpretation hereof or anything done or omitted to be done pursuant hereto or the performance or non-performance of this Deed shall be referred to the arbitration of a single arbitrator to be appointed by the Lender and the arbitrator's award shall be final and binding on both the parties hereto. The arbitration shall be held at the place where the registered office of the Lender is situated and the expenses of the arbitration shall be borne by the Borrower Guarantor. The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 or such other law relating to arbitration as may be in force in India at the relevant time. The language of arbitrator shall be English."

22. It is submitted by learned counsel for the petitioner Mr. T. K. Bhaskar that the learned arbitrator was appointed by the Managing Director and is therefore incompetent to adjudicate the disputes between the parties in view of Section 12(5) read with Schedule VII to the Act

23. The learned counsel for the petitioner further submitted that if the Managing Director himself is disqualified to act as an arbitrator, he cannot also appoint an arbitrator.

24. According to him, the 1st respondent should have referred to an institution for appointment of an arbitrator instead of its Managing Director appointing the learned arbitrator.

25. The learned counsel for the petitioner further submitted that the petitioner has questioned the very basis applicability of arbitration clause on the ground that the agreement has been forged with her signature.

26. This argument was also available to the petitioner when Application Nos. 3759 and 3782 of 2018 was argued as is evident from the sequence date of events. Instead, the petitioner has staggered the submission and had made it a ground in this petitioner to de-stabilize the arbitration proceeding.

27. The learned counsel for the petitioner also relied on the following decisions in support of his submissions which follow the views of the Hon'ble Supreme Court in the said case:

(i) **C.P. Rama Rao Vs. National Highways Authority of India** 2017 SCC OnLine Del 9020

(ii) **Akrabad Filling Station and Others Vs. Bharat Petroleum Corporation Ltd., and Others**

(iii) **APR construction Ltd., Vs. Union of India**
dated 24.09.2018

28.The learned counsel for the respondents reiterates the contentions of the respondents and the application filed by the petitioner is liable to be dismissed as not maintainable.

29.The decision **C.P.Rama Rao versus National Highway authority of India** cited by the learned counsel for the petitioner has followed the decision of the Honourable Supreme Court in **TRF Ltd case.**

30.From para-13 of the said case, it is discernible that the facts of the case and situation were identical to the one that fell for consideration before the Hon'ble Supreme Court in **TRF Ltd case.** Under the agreement there "**The chairman of the authority or the nominee shall be the sole arbitrator.**"

31.Thus, the same person could act both as an arbitrator as well as an appointing authority under agreement.

32.In **Akrabad Filling Station and Others versus Bharat petroleum Corporation Ltd** 2018 (8) ADJ 233 also Clause 19 (a) provided that any dispute or difference of any nature

whatsoever, any claim, cross claim, counter claim or set off of the company against the Licensee or regarding any right, liability, act omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the **Sole Arbitration of the Director (Marketing) of the company or of some other officer of the company who may be nominated by the Director (Marketing).**

33. In **APR construction Ltd versus Union of India**, again the arbitration clause contained in the General Conditions of Contract (GCC) of the railways contemplated appointment of gazette officers of railways as arbitrators by the General Manager of the Railways.

34. In the said case, the appointment of the sole arbitrator was made on 27.11.2014 prior to the amendment to the Act. The court considered the scope of an amended section 11 of the Act.

35. Thus, it is clear that none of the decisions cited by the learned counsel for the petitioner are relevant to the facts of the case as in all the cases the employees was the arbitrator under the clause.

36. In fact, the decision of the Hon'ble Supreme Court in **TRF Ltd** case cannot be applied without examining the facts and circumstances of the case. The Hon'ble Supreme Court has clearly observed in para-52 background of the case. "We are singularly concerned with the issue, whether The Managing Director, after becoming ineligible by operation of law, is still eligible to nominate an arbitrator". At the cost of repetition, we may state that when there are two parties, one party may nominate an arbitrator and the other party may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstances can be called in question is the procedural compliance and the eligibility of the their arbitrator depending upon the norms provided under the Act and the schedule appended thereto. But, here is a case where the Managing Director is "named sole arbitrator" and he has been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is a subtle distinction."

37. It is in this background, the decision of the Hon'ble

Supreme Court came to be passed. *In all these judgements, an employee adorned the cloak of an arbitrator and in view of the disqualification under Section 12(5) read with Schedule VII of the Act pursuant to the amendment in 2015, it was held that such a person who was to be the arbitrator cannot nominate another person to be an arbitrator even if the agreement provided for such an eventuality.*

38. Therefore, the challenge to the appointment made by the 1st respondent by selectively reading the passage from the decision of the Hon'ble Supreme Court in TRF case is neither proper nor can be applied to the facts of the case for terminating the mandate of the learned arbitrator and to substitute with a new arbitrator. If at all, if the petitioner has any grievance, the procedure prescribed under sections 13 and 15 of the Act should have been followed. In case an arbitrator passes an award, remedy is available to the petitioner is to challenge the award under 34 of the Arbitration and Conciliation Act, 1996.

39. Before parting, I would like to make it clear law on the unilateral appointment of a sole arbitrator by one of the party to the contract has to be amended, as the other party

like in the present petition may have a lurking suspicion of bias by the arbitrator. The arbitration is to be held at the place where the registered office of the Lender is situated and the expenses of the arbitration shall be borne by the Borrower Guarantor and does raise a distrust. However, as the law stands today, the petitioner's grievance though does raise an genuine concern cannot be accepted. The conduct of the petitioner in stifling the arbitration proceeding is also not desirable by seeking dismissal of Application Nos.3759 and 3782 of 2018 on the ground of the arbitrator being appointed and now to terminate the mandate of the arbitrator.

40. I am of the view that the petition is not maintainable based on the averment contained in the petition and the conduct of the petitioner. The case of the petitioner that the arbitrator appointed by the Managing Director of the respondents is contrary to the view of the decision of the Hon'ble Supreme Court in **Trf Limited Vs. Energo Engineering Projects Limited** (2017) 8 SCC 377 is not correct. The petitioner has neither made out a case for the reliefs as prayed for on the strength of the averments and the case laws cited.

41.The decision of the Hon'ble Supreme Court is an authority for it states and not what has been inferred by the Petitioner. The petitioner has read the said decision as if it were a statute and has sought to give a different meaning which was now in the contemplation of the Hon'ble Supreme Court.

42.I am of the view that both the petition and application filed by the petitioner are liable to be dismissed. No costs.

Sd/-C.S.N.J

26.10.2018

//Certified to be a true copy//

Dated this the day of 2018
JJ 14/12/18

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From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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