

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.07.2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.P.Nos.327 to 343 of 2011

1. M/s.Hemant Automobiles Pvt. Ltd.
Rep. By its Director Mr.Hitesh A. Mittai
2. Ms. Shushilakumari A. Mittai
both are having address at
Hemant Tyre Shop,
Opp. Himalaya Mail,
Drive-in Road, Ahmedabad. .. Petitioners

Vs.

1. Mr.D.Saravanan, Advocate
Sole Arbitrator,
New No.346, Old No.161,
1st Floor, Thambu Chetty Street,
Opp. High Court, Chennai – 600 001.
2. M/s.Indusind Bank Ltd.,
Rep. By its Executive-Legal,
'Sudarsan Building,
No.86, Chamiers Road,
Chennai – 600 18
and Presently at
No.116, G.N.Chetty
T.Nagar, Chennai – 600 017. .. Respondents

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 02.01.2008 passed in Arbitral Claim Petition No.458 of 2996 Case No.27 of 2011 by the first Respondent.

For Petitioners : Mr.B.SatishSundar

For Respondents : Mr.S.R.Sundar
for Mr.K.Moorthy

COMMON ORDER

Challenge has been made in this petition as against the award passed by the Arbitrator dated 02.01.2008.

2. The main contention of the learned counsel for the petitioner is that commencement of the Arbitral proceedings has not be done as per Section 21 of Arbitration and Conciliation Act and notice has not been issued. Therefore, the entire Award has to be set aside. Further, it is his contention that the notice sent to subsequent hearing under section 4 of the Arbitration and Conciliation Act cannot be pressed into service since Arbitral Proceedings itself is not according to law. Therefore, it is his contention that the entire Award has to be set aside. In the event of sending back the matter, the venue of the Arbitration shall be fixed at Abmedabad. In support of his contentions he relied upon the judgement in **Alupro Building Systems Pvt. Ltd., Vs. Ozone Overseas Pvt. Ltd. Reported in Manu/DE/0495/2017.**

3. Whereas, the learned counsel for the respondent would contend that even assuming that notice under section 21 has not been received, the fact that the notice for subsequent hearings has been sent to the petitioner. But the notice for the subsequent hearing dates on 7.11.2007 and 12.12.2007 have been refused to be received by the petitioners. Therefore, it is his contention that having received such notice, the petitioner has not made any objection with regard to the non receipt of notice under section 21 of the Arbitration and Conciliation Act. Therefore, he shall be deemed to have waived such objection as per Section 4 of the Arbitration and Conciliation Act. Hence, it is his contention that the Award cannot be set aside. In support of his contentions, he relied upon the following judgements :

Pushpa P. Mulchandani and others Vs. Radhakrishin Tahiliani and others reported in Manu/MH/1432/2007

Associated Constructions Vs. Mormugao Port Trust reported in Manu /MH/0842/2010

Delhi Metro Rail Corporation Ltd. Vs. Delhi Airport Metro Express Private Limited [FAO (OS) 58/2018 & CM Nos.13434/2018, 17581/2018 & 31531/2018]

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4. Heard the learned counsel for the petitioners and the learned counsel for the first respondent and perused the records.

5. No doubt Section 21 of the Arbitration and Conciliation Act makes it clear that the Arbitration proceedings commences on the date on which the request referred to arbitration is received by the respondent. The Single Judge of the Delhi High Court in **Alupro Building Systems Pvt. Ltd., Vs. Ozone Overseas Pvt. Ltd.** reported in **Manu/DE/0495/2017** has held as follows :

25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act as an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of [Section 11](#) (6) of the Act, without the notice under [Section 21](#) of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under [Section 11](#) of the Act is such failure by one party to respond.

29. Of course, as noticed earlier, parties may agree to waive the requirement of such notice under [Section 21](#). However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of [Section 43](#) (1) of the Act, how is such date of commencement to be fixed if the notice under [Section 21](#) is not issued? The provision talks of the 'Respondent' receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By

overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of [Section 21](#), thus frustrating an important element of the parties consenting to the appointment of an arbitrator.

6. The learned counsel appearing for the respondent would submit that in **Pushpa P. Mulchandani and others Vs. Radhakrishin Tahiliani and others reported in Manu/MH/1432/2007**, the Bombay High Court has held that if the Award is set aside by any illegality, the Court can direct Arbitral proceedings to resume proceedings. Similarly in **Associated Constructions Vs. Mormugao Port Trust** reported in **Manu /MH/0842/2010**, the Bombay High Court has held as follows :

15. Mr.Shetty then submitted that it is only the Court setting aside an award that can permit a fresh arbitration under the same arbitration agreement. He based his submission upon the observation of the Supreme Court extracted above: It can only quash the award leaving the parties free to begin the arbitration again if it is desired.” He submitted that the term “It” implies that it is only the Court that sets aside the award that can leave the parties free to begin the arbitration again.

16. There is nothing in the judgment of the Supreme Court that even remotely suggests the same. In fact the Supreme Court did not consider this aspect. The Supreme Court has not specified as to the manner in or the stage at which the parties are free to begin the arbitration again. Having held that the parties are free to begin arbitration again here is nothing in the Act, the judgment or in principle that warrants restricting the enforcement of this right to any particular stage, point of time or proceeding.

17. Mr.Shetty also submitted that the observations of the Supreme Court and the Division Bench of this Court in the case of Pushpa Mulchandani (supra) indicate that after an Award is set aside a fresh arbitration can begin again only with the consent of both the parties.

18. The submission is based on the erroneous presumption that the exercise of the right to begin the arbitration again is dependent upon a fresh arbitration agreement. An arbitration agreement, can be entered into only with the consent of the parties. Once an arbitration agreement is entered into it may be invoked by any of the parties unilaterally. If one of the parties refuses to abide by the arbitration agreement, the other party is entitled to invoke or enforce it under the said Act. Where an award is set aside as in the above case, the commencement of

the arbitration again is pursuant to and under the existing arbitration clause. The same is neither based on nor dependent upon a fresh arbitration agreement between the parties.”

and finally held that the matter can be remitted to Arbitration once again for afresh adjudication.

7. The learned counsel appearing for the respondent would contend that in case of remitting back the matter, the venue for Arbitration can be fixed at Ahmedabad. Such contention cannot be countenanced in this petition wherein the Award has been challenged on the ground that no notice has been issued. Now the petitioner cannot make a choice of venue. Therefore, I am of the view that, as already stated, notice under section 21 of the Arbitration and Conciliation Act has not been issued and no evidence whatsoever is forthcoming to substantiate the service of notice under section 21 of the Arbitration and Conciliation Act, which is a condition precedent for invoking Arbitration proceedings. Proceedings based on non compliance of mandatory condition and such an Award is nothing but vitiated by manifest error and the same is liable to be set aside.

8. Accordingly, these Original Petition are allowed and the Awards of the sole Arbitrator are set aside. No cost. The respondent is at liberty to invoke

Arbitration afresh as per condition of the agreement between the parties and issue necessary referral notice within four weeks from the date of receipt of a copy of this Order. The petitioner is at liberty to raise all his defence in the Arbitration proceedings. The Arbitrator is at liberty to get back the records sent by him.

15.07.2019

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Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

To

1. Mr.D.Saravanan, Advocate
Sole Arbitrator,
New No.346, Old No.161,
1st Floor, Thambu Chetty Street,
Opp. High Court, Chennai – 600 001.

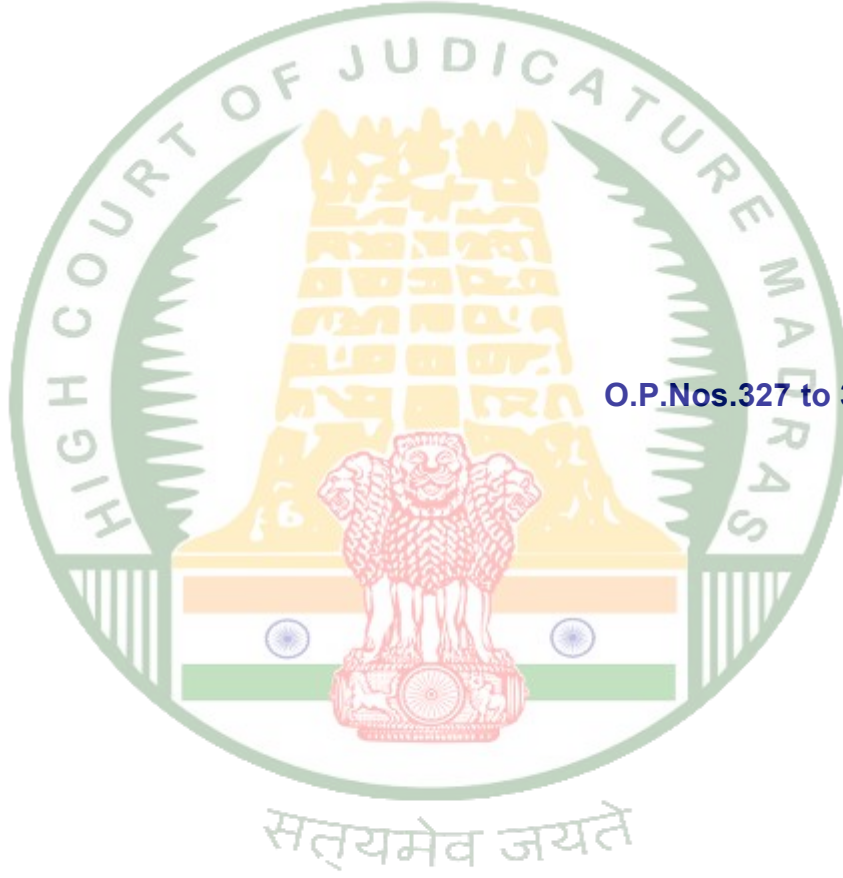
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