

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.02.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.726 of 2011

1.Anand Viswanathan

2.TRM Image Equity Pvt. Ltd
No.3/1, Veena Apartments
No.27/13, 2nd Main Road
R.A.Puram, Chennai 600 028. ... Petitioners

vs.

1.Kotak Mahindra Bank Ltd.
4th Floor, Ceebros Centre
Montieth Road, Egmore
Chennai - 600 008.

2.N.C.Vijairagavan
Golden Demure
AH-Block
Door No.87, Fifth Street
Anna Nagar, Chennai -40. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 24.08.2009 passed by the 2nd respondent in Arbitration Case No.449 of 2008.

For Petitioners : Mr.D.Vivekanandan

For respondents : Mr.V.Balasubramani for R1
R2- Arbitrator

ORDER

There are two petitioners and two respondents in the instant 'Original Petition' (hereinafter 'OP' for brevity).

2. Instant OP has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' (hereinafter 'A & C Act' for brevity).

3. A perusal of Section 34 of A & C Act reveals that grounds for setting aside Arbitral awards have been adumbrated therein and the term used in Section 34 is 'application'. However, as this Registry is assigning the nomenclature 'OP' to such proceedings seeking to set aside Arbitral awards and therefore, the instant proceedings is being referred to as 'OP' for the sake of convenience and clarity.

4. Second respondent before me constituted the Arbitral Tribunal as sole arbitrator and passed an Arbitral award dated 24.08.2009, which is being sought to be set aside in the instant OP. This Arbitral award dated 24.08.2009 made by the second respondent constituting the Arbitral Tribunal as a sole arbitrator shall hereinafter be referred to as 'impugned Arbitral award' for the sake of convenience and clarity.

5. Mr.D.Vivekanandan, learned counsel on record for two petitioners and Mr.V.Balasubramani, learned counsel on record for the contesting first respondent are before me.

6. Instant OP is listed under the caption 'FOR FINAL DISPOSAL/ARGUMENTS' today.

7. As would be evident from the narrative thus far, impugned Arbitral award is nearly a decade old (it is dated 24.08.2009) and the instant OP though is of the year 2011, it comes to light from the case file placed before me that instant OP was also filed/presented in this Court more than a decade ago. To be precise, it was presented on 09.10.2009.

8. Be that as it may, from the submissions made before me today, it comes to light and emerges clearly that the entire matter turns on a very narrow compass.

9. Learned counsel for two petitioners submits that the pivotal and primordial ground of attack is under sub clause (iii) of Clause (a) of sub Section 2 of Section 34 of A & C Act. In other words, it is learned counsel's say that the pivotal and primordial attack qua impugned Arbitral award is under Section 34 (2) (a) (iii) of A & C Act.

10. A perusal of Section 34(2)(a)(iii) reveals that challenge to the impugned Arbitral award in the instant OP is primarily on the ground that petitioners were otherwise unable to present their case. For the purpose of elaboration, it can be set out that sub-clause (iii) supra

i.e., Section 34(2)(a)(iii) visualised three kinds of situation, one situation is where a party making an application for setting aside an arbitral award not being given proper notice of the appointment of an arbitrator, second situation is such a party not being given proper notice of the arbitral proceedings and the third situation is, the party being otherwise unable to present his case.

11. Learned counsel for petitioners submits that their case is predicated on a primordial and pivotal point which can be neatly packaged and snugly fitted into the third situation contemplated under Section 34(2)(a)(iii).

12. Elaborating on the aforesaid submission, learned counsel for petitioners adverted to Clause 11.16 of the loan agreement between the petitioners and the first respondent which is the fulcrum of the entire matter. Clause 11.16 reads as follows:

'11.16. Unless the same falls within the jurisdiction of the Debts Recovery Tribunal established under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, any and all claims and of or in connection with this Agreement or its performance shall be settled by arbitration by a single Arbitrator to be appointed by the Bank. The arbitration shall be held in Chennai in provisions of the Arbitration and Conciliation Act, 1996.'

13. There is no dispute or disagreement before me between the two learned counsel that Clause 11.16 supra is the arbitration agreement between the parties in contest before me. In other words, 11.16 supra is the arbitration agreement between the contracting parties in the instant case, within the meaning of Section 7 of the A & C Act and there is no dispute or disagreement about this as far as the two counsel before me are concerned.

14. It has become necessary to record that the loan agreement containing aforementioned clause 11.16 has not been filed as part of the typed set of papers by both sides, but the same has been placed before me in Court in the hearing of instant OP and both counsel agree that this covenant i.e., clause 11.16 is the arbitration agreement between the contesting parties herein.

15. To be noted, this clause 11.16 i.e., covenant is the arbitration agreement within the meaning of Section 7 of A & C Act is not in dispute and there is no disagreement before me in this regard.

16. This takes us to the submission before me with regard to the primordial ground on which impugned Arbitral award is assailed. Before I deal with that, considering that the instant OP is a proceeding under Section 34 of A &

C Act, which has been held by the Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796 as a one issue summary procedure, it may not be necessary to delve into factual details in great detail. To be noted, Fiza Developers principle was reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in (2018) 9 SCC 49 and while so reiterating, Hon'ble Supreme Court held that Fiza Developers principle is a step in right direction qua expeditious disposal of Section 34 challenges.

17. Suffice to say that there is a loan transaction between the petitioners and the first respondent. (I am informed that first respondent before me is a private bank and petitioners 1 and 2 are co-borrowers). To be noted, while first petitioner is a natural person, second petitioner is a private limited company i.e., juristic person and this Court is also informed that the first petitioner is on the Board of second petitioner company.

18. Terms of the loan have been encapsulated/adumbrated in the aforesaid loan agreement.

19. Complaining that the repayment of loan in accordance with the various clauses, covenants and recitals adumbrated in the loan agreement has not been adhered to by

the petitioners, first respondent before me invoked the arbitration Clause i.e., 11.16 referred to supra.

20. Second respondent, who constituted the Arbitral Tribunal as a sole arbitrator, entered upon reference and put the parties on notice.

21. Petitioners before me went before the Arbitral Tribunal and filed counter affidavit dated 20.06.2009.

22. Adverting to the counter affidavit dated 20.06.2009 and more particularly, paragraph 18 of the counter affidavit, learned counsel for petitioners submitted that petitioners 1 and 2, who are respondents 1 and 2 respectively before the Arbitral Tribunal, specifically sought leave of the Arbitral Tribunal to let-in oral evidence on their side, but the Arbitral Tribunal had not given them opportunity to let-in oral evidence. It is also pointed out that while the counter statement is dated 19.06.2009, the Arbitral Tribunal held hearings only on two days viz., 13.02.2009 and 20.06.2009, as it is evident from the impugned Arbitral award itself and the impugned Arbitral award came to be passed on 24.08.2009.

23. This takes us to the nature of the arbitration agreement between the parties.

24. Obtaining legal position is that an arbitration agreement between contracting parties is a private arrangement and no elucidation is required in this regard. In other words, the Arbitral Tribunal itself is a creature of a contract and not creature of statute. It is a private Tribunal.

25. Be that as it may, what is of relevance is Section 24 of A & C Act, which deals with hearing and written proceedings, captioned 'Hearings and written proceedings'. As impugned arbitral award was made on 24.08.2009, to be fair to the Arbitral Tribunal (considering the nature of the ground on which it is assailed), I deem it appropriate to look at Section 24 as it read on the date on which impugned arbitral award was made. Section 24 of A & C Act without the 23.10.2015 amendment brought in by Act 3 of 2016 reads as follows:

'24. Hearings and written proceedings

(1) Unless otherwise agreed by the parties, the arbitral Tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

PROVIDED that the arbitral Tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party,

unless the parties have agreed that no oral hearing shall be held:

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral Tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to, the arbitral Tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral Tribunal may rely in making its decision shall be communicated to the parties.'

26. A perusal of proviso to Section 24 A & C Act reveals that Arbitral Tribunal should hold oral hearings at an appropriate stage of the proceedings, when a request is made by a party. This is contained in the proviso to Section 24(1) of A & C Act. To be noted, Section 24(1) as such gives elbowroom for the Arbitral Tribunal to decide whether oral hearings has to be held at all, but that is controlled by the proviso. Proviso has to be construed strictly.

27. Be that as it may, even with regard to proviso, it is clear that it is imperative on the part of the Arbitral Tribunal to hold oral hearing, if a request is made by a

party and the only exception to this rigour is when parties have agreed that no oral hearings shall be held. A perusal of undisputed clause 11.6 in the loan agreement, which is the arbitration agreement between the parties, reveals that the parties i.e., 'party' within the meaning of Section 2 (1) (h) of A & C Act, have certainly not agreed that no oral hearings shall be held.

28. Under such circumstances, when the petitioners before me have made a specific and categoric plea in paragraph 18 of the counter statement request for letting in oral evidence, it is imperative on the part of the Arbitral Tribunal to hold oral hearings in accordance with proviso to Section 24(1) of A & C Act, is learned petitioners counsel's say.

29. A perusal of the impugned Arbitral award reveals that arbitration itself was held on two days viz., 13.02.2009 and 20.06.2009. This is contained in paragraph 3 of the impugned Arbitral award, which reads as follows:

'3. Venue and dates of hearing: As per the agreement, the venue is at Chennai and the proceedings were held at Conference Room, 1st Floor, South India Hire Purchase Association 47 Whites Road, Chennai 600 014 on dates: a) 13.2.2009 b) c) 20.6.2009.'

30. As mentioned supra, counter statement of petitioners before me is dated 19.06.2009 and there is a clear reference to the counter statement of the petitioners before me in the impugned Arbitral award. However, a perusal of the impugned Arbitral award reveals that no oral hearings has been held. There is no dispute or disagreement before me that the impugned Arbitral award came to be passed without holding oral hearings.

31. In the normal circumstances, it can be held that the matter rests here. The reason is, oral hearings as envisaged under Section 24 of A & C Act is clearly for the presentation of evidence or for oral argument. To be noted, the expression as occurring in Section 24(1) of A & C Act is 'oral hearings for the presentation of evidence or for oral argument'. This expression makes it clear that oral hearings if any can be for two purposes. One is, for presentation of evidence and the other is, for oral arguments. It can obviously be for both also in a given case. Therefore, the expression 'oral hearings' occurring in the first proviso to section 24(1) of A & C Act should necessarily be construed to mean oral hearings for the presentation of evidence or for oral argument, i.e., two purposes set out herein. As the petitioners in the instant case have clearly sought for permission to let in oral

evidence, particularly in paragraph 18 of the counter statement before Arbitral tribunal, it follows as a sequittur that if the request had been acceded to, it would have resulted in holding oral hearings. Be that as it may, proviso makes it mandatory for Arbitral tribunal to hold oral hearings if a request in this regard is made by a party and the only exception is when parties had agreed (in the arbitration agreement) that no oral hearings shall be held. As already alluded to supra, the parties in the instant case have not agreed that no oral hearings shall be held, but what is of importance is arbitration clause is silent on this aspect. When arbitration clause is silent on this aspect, I am of the considered view that it should at best be left to the discretion of the Arbitral tribunal to decide whether oral hearings are necessary.

32. This court reminds itself that Arbitral tribunal being a creature of contract (in contradistinction to being creature of a Statute) is clearly a private tribunal which can evolve its own procedure without being bound by 'The Code of Civil Procedure, 1908' ('CPC' for brevity) or for that matter 'The Indian Evidence Act, 1872' ('Evidence Act' for brevity). Under such circumstances, if an arbitration clause, (i.e., arbitration agreement within the meaning of Section 7 of A & C Act) in which it has not been explicitly articulated/covenanted that parties have agreed that no

oral hearings shall be held, is to be construed in such a manner that oral hearings become mandatory the moment a party asks for oral evidence to be let in (as the arbitration agreement is silent) that will dilute the complete discretion vested in the Arbitral tribunal qua evolving its own procedure without being bound by CPC or Evidence Act. Therefore, in my considered opinion, the expression 'unless the parties have agreed that no oral hearing shall be held' occurring in the first proviso to section 24(1) of A & C Act will mean cases where parties have explicitly covenanted that they agree that no oral hearings shall be held and not to cases where the arbitration agreement /clause is silent on this aspect of the matter.

33. Therefore, I put to learned counsel for petitioners as to what at all could have been established by the petitioners, if an opportunity of letting in oral evidence had been given.

34. Learned counsel took me through paragraphs 9 and 10 of counter statement, which read as follows:

'9. With regard to the averments made in para-5 & 6 the respondents have signed several blank documents which are converted to the convenience of the claimant. The Respondents were asked to sign several blank agreements

which were done based upon trust and the coercion of the claimant that without that money would not be disbursed. But to the shock and dismay of the respondents the claimant has unlawfully filled up all the blank papers and utilized to their whims and fancies claiming an exorbitant and falsely claim for which the respondents are not liable. Even the interest rate is unfair and not agreed upon besides being usurious. The Respondents have also issued several blank postdated cheque as security in favour of the bank for the repayment of installments. The respondents in good faith entered into agreements which were all pre-prepared and there was no question of any negotiability or equity. Further, the respondent did not have any bargaining power what so ever and it was a case of printed contract that had to be signed. The respondents believing that the claimant would act fairly and without any unfairness, proceeded to sign the contract, but still had the feeling that there was no bargaining power since several of the clauses were truly unconscionable and were opposed to public policy. These are all aspects that need to be looked into by the Hon'ble Arbitrator and hence it is being raised before the Hon'ble Arbitrator for consideration.

10. With regard to the averments made in para 7 & 8, the respondents state that they have been repaying the monthly installments without any default and the respondents were honoring the commitment without any default on

the respondents side but, on the contrary the claimant, has started collecting enormous amounts using the respondents blank post dated cheque contrary to the assurance given by the bank. Usurious interest rates are charged by the claimant.'

35. Adverting to paragraphs 9 and 10 of the counter statement, learned counsel submitted that if petitioners had been given an opportunity to let in oral evidence, the petitioners would have been able to establish before the Arbitral Tribunal that several blank documents have been converted into documents supporting the claim and that these blank agreements were signed based on trust by the petitioners. It was also pointed out in paragraph 10, which has been sufficiently articulated by the petitioners, that they have been paying the monthly instalments and honoring the commitment without any default. It is submitted that the petitioners 1 and 2, as respondents 1 and 2 respectively before the Arbitral Tribunal, in the course of oral hearings would have also had documents marked to establish that they have been paying the monthly instalments without any default or delay and that blank papers/documents, which were signed by them have been converted to the advantage of the claim. It is also submitted that certain postdated cheques, issued as security, have been presented and dishonouring of the same

have also been made part of the claim. Learned counsel submits that the petitioners would have been able to establish all this. Therefore, the petitioners are able to show that prejudice has certainly been caused to the petitioners owing to Arbitral Tribunal not permitting them to let in oral evidence, though a specific request has been made in this regard, particularly when there is no agreement between the parties that no oral hearings shall be held. It is the further submission of learned counsel for petitioners that petitioners (respondents before Arbitral Tribunal), did not file documents along with counter statement, as they had sought for oral evidence. If the Arbitral tribunal had responded to the counter statement and held that the request for oral evidence is negatived and if they had probably given time to petitioners, then that would have been the end of the matter. Thereafter, it would have been the look out of respondents before Arbitral tribunal (petitioners before me) to seek permission to file documents. As that did not happen, petitioners' argument that they were unable to present their case has force and deserves to be accepted.

36. In the light of the narrative supra, I am convinced that learned counsel for petitioners has been able to neatly package his challenge to the impugned Arbitral award under third limb of 34(2)(a)(iii) to show that petitioners

were unable to present their case.

37. To be noted, the instant case is based not only on the peculiar facts and circumstances of the case, but it is also owing to the peculiar trajectory of the hearing before the Arbitral tribunal. The counter filed by the petitioners before me (respondents before Arbitral tribunal) is dated 19.6.2009 and proof of delivery has been filed though it does not give the date. Assuming that it was received on the same day, i.e., 19.6.2009, a perusal of the impugned Arbitral award reveals that there were only two hearings (as mentioned supra), i.e., on 13.02.2009 and 20.6.2009. Relevant portion of the impugned Arbitral award is paragraph 3 which has already been extracted and reproduced supra elsewhere in this order.

38. Before I conclude, it is necessary to refer to ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796, wherein Hon'ble Supreme Court held that proceedings under Section 34 of A & C Act are one issue summary procedures.

39. As the petitioners have been able to demonstrate that the impugned Arbitral award is hit by the vice of leaving the petitioners in a predicament of not being able to present their case within the meaning of third limb of

Section 34(2)(a)(iii), I am convinced that the impugned Arbitral award is liable to be set aside.

40. This OP is allowed. Considering the nature of the submissions made, parties are left to bear their respective costs.

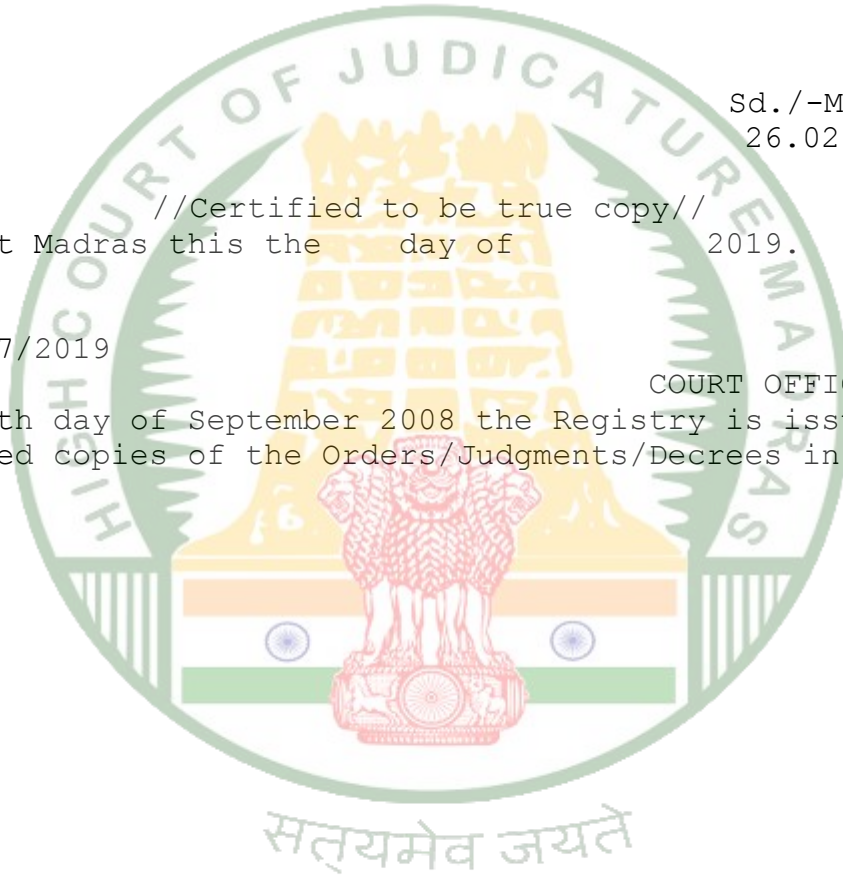
Sd./-M.S.J
26.02.2019

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Dated at Madras this the day of 2019.

JJ 04/07/2019

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