IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :28.03.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.Nos.701 and 702 of 2012

M/s.Sehgal Travel Service,
Rep. By its Proprietor,
No.108-109, Parvesh Business Centre - 1,
Plot No.02, Karkardooma Cumminty Centre,
New Delhi. .. Petitioner in both OPs

vs.

1. M/s. IndusInd Bank Ltd.
   having its registered Officer at
   115 & 116, G.N.Chetty Road,
   T.Nagar, Chennai - 600 017.

2. Mr.Gurudeep Singh,
   Proprietor of Shunty Travel Service,
   D - 51, Tagore Garden Extn., New Delhi.

3. Mr.D.Saravanan, Advocate and
   Sole Arbitrator,
   C/o. M/s. IndusInd Bank Ltd.
   having its registered office at
   115 & 116, G.N.Chetty Road,
   T.Nagar, Chennai - 600 017. ... Respondents in both OPs

Common Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, that this Court may be pleased to set aside the Award dated 06.08.2010 passed by the 3rd respondent in Award Nos.183/2010 and 182/2010 and pass further or other orders.

For Petitioner : Dr.P.Jagadeesan

For Respondent : Mr.P.Suresh Srinivasan

COMMON ORDER

This common order will dispose of both the instant 'Original Petitions' ('OPs' for brevity). To be noted, while referring in singular, 'Original Petition' shall be referred to as 'OP'.

2. Instant OPs have been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' hereinafter 'A & C Act' for brevity. For the sake of convenience and clarity 'OP.No.701 of 2012' shall be referred to as 'senior OP' and 'OP.No.702 of 2012' shall be referred to as 'junior OP'.

3. In senior OP, an arbitral award dated '06.08.2010 being award No.183 of 2010' (hereinafter 'impugned award-I' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole arbitrator has been assailed. In junior OP, an arbitral award dated '06.08.2010 made in award No.182 of 2010' (hereinafter 'impugned award-II' for brevity) by the same AT has been assailed. Sole arbitrator, who constituted the AT has been arrayed as respondent No.3 in both senior and junior OPs.

4. Both OPs, in simple terms, pertain to finance of a truck i.e., Chasis. To be noted, one Chasis in each of the OPs. In senior and junior OPs, borrower is the petitioner,

the finance company which financed the purchase of truck is the first respondent and the guarantor is the second respondent. As already mentioned supra, the sole Arbitrator, who constituted the AT has been arrayed as respondent No.3 in both OPs.

5. As the instant OPs turn on a very narrow compass and as the instant OPs are under Section 34 of A & C Act, a thumb nail sketch of facts will suffice.

6. Facts in senior OP:

6.1. On 27.08.2007, a loan agreement No.DD007714H dated 27.08.2007 was entered into between the finance company, borrower and guarantor. Loan amount is Rs.13,70,000/-. The Chasis/Truck, which is subject matter of the loan agreement, is TATA 1512/52 (Model 2007, Engine No.592515 and Chasis No.13232). The loan amount has to be repaid in 46 monthly instalments of Rs.38,200/-. In March of 2008, finance company filed an application under Section 9 of the A & C Act before District Court, Tis Hazari, Delhi, vide case No.768 of 2008 with a prayer to appoint one of the employees of the finance company as receiver for taking possession and seizing the Chasis.

6.2.On 21.08.2008, learned District judge, Tis Hazari, Delhi, appointed one of the employees of the finance company as receiver for repossession.

6.3. On 03.03.2009, learned District judge, Tis Hazari, Delhi, further recorded submission of finance company that the vehicle has not been repossessed, made the interim order absolute and held that there is an arbitration clause in the loan agreement between the parties and the submission of counsel for finance company that finance company has already initiated arbitral proceedings had been recorded. Recording this, learned District judge, Tis Hazari, Delhi, has disposed of the application under Section 9 of A & C Act.

6.4. Thereafter, it is not in dispute that parties entered into a fresh 'Memo of Understanding dated 23.03.2010' (hereinafter 'MOU' for brevity). A sum of Rs.6 lakhs was paid against the loan and the finance company sold the Chasis to a third party, got the body built vehicle registered and a fresh hire purchase agreement with third party also had been entered into.

6.5. It is the case of the petitioner that though a statement was made on 03.03.2019 itself before the District Court, Tis Hazari, Delhi that arbitration proceedings had been commenced, the petitioner had not received any notice.

6.6. When things stood as above, the petitioner to

the shock and surprise received notice in an execution petition that has been launched by the finance company in the District court, i.e., Tis Hazari, Delhi. It is submitted that the petitioner entered appearance in the execution petition and obtained a certified copy of impugned award-I. In other words, it is the specific case of the petitioner that Section 31(5) of the A & C Act had not been breached by AT.

6.7. It is also the case of the petitioner that no notice, much less proper notice of appointment of the arbitrator was received by the petitioner. It is also the case of the petitioner that no notice, much less proper notice of arbtiral proceedings was received. It is petitioner's case that *inter alia* owing to this the petitioner was unable to present his case before AT.

7. Facts in junior OP:

7.1. On 27.08.2007, loan agreement No.DD007713H dated 27.08.2007 was entered into between the finance company, borrower and guarantor. Loan amount is Rs.13,70,000/-. The Chasis/Truck, which is subject matter of the loan agreement, is TATA 1512/52 of Model 2007 (Engine No.70H62592586 and Chasis No.412073HSZ013247). The loan amount has to be repaid in 46 monthly instalments of Rs.38,200/-. In March of 2008, finance company has filed an application under Section 9 of the A & C Act before

District Court, Tis Hazari, Delhi, in case No.239/2008 with a prayer to appoint one of the employees of the finance company as receiver for taking possession and seizing the Chasis.

7.2. On 30.04.2008, learned District Judge, Delhi, appointed one of the employees of the finance company as a receiver for repossession.

7.3. On 07.03.2009, learned District judge, Delhi, has disposed of interim measures proceedings under A & C Act.

7.4. Thereafter, it is not in dispute that parties entered into a fresh 'Memo of Understanding dated 23.03.2010' (hereinafter 'MOU' for brevity). A sum of Rs.6 lakhs was paid against the loan and the finance company sold the Chasis to a third party, got the body built vehicle registered and a fresh hire purchase agreement with third party had also been entered into.

7.5. It is the case of the petitioner that the petitioner had not received any notice regarding the commencement of arbitration proceedings.

7.6. When things stood as above, the petitioner to his shock and surprise received notice in an execution petition that has been launched by the finance company in the District court, Tis Hazari, Delhi. It is submitted that the petitioner entered appearance in the execution petition and obtained a certified copy of the impugned award-II. In other words, it is the specific case of the petitioner that Section 31(5) of A & C Act had not been breached.

7.7. It is also the case of the petitioner that no notice, much less proper notice of appointment of arbitrator was received by the petitioner. It is also the case of the petitioner that no notice, much less proper notice of arbtiral proceedings was received. It is petitioner's case that *inter alia* owing to this, petitioner was unable to present his case before AT.

8. Today, Dr.P.Jagadeesan, learned counsel for petitioner and Mr.P.Suresh Srinivasan, learned counsel representing the counsel on record for first respondent finance company are before this Court.

9.In the light of earlier proceedings of this Court, the records of the AT pertaining to two arbitrations, which are the subject matter of instant OPs, are also before this Court and this Court had the benefit of perusing the records of AT in both arbitrations.

10. As already mentioned supra, instant OPs and the entire matter turns on a very narrow compass.

11. With regard to the specific and pointed attack to the impugned award-I as well as impugned award-II that the petitioner was not given notice much less proper notice of appointment of arbitrator, learned counsel for finance company referring to the impugned award-I and impugned award-II submitted that the date of commencement of arbitral proceedings is 24.04.2010, but there is nothing to support this.

12. A perusal of impugned award-I and impugned award-II reveal that 24.04.2010 has been shown as date of reference to arbitration. This by itself certainly cannot become date of commencement of arbitral proceedings within the meaning of Section 21 of A & C Act. Therefore, the question that arises is as to whether the petitioner was put on notice and more particularly proper notice of appointment of arbitrator.

13. In the light of the narrative supra, it will be clear that finance company had submitted before the

appropriate Court in Delhi on 03.03.2009 itself that arbitral proceedings had already been commenced. Therefore, in this view of the matter also 24.04.2010 cannot be a date of commencement of arbitration proceedings.

14. A further perusal of the impugned award-I and impugned award-II reveal that there is nothing to show that finance company, which invoked the arbitration clause in the loan agreements, had sent notice to the petitioner and second respondent (borrower and guarantor) putting them on notice about the appointment of the 3rd respondent as sole arbitrator. There is no other material before this Court to show that finance company had sent a notice to the petitioner and second respondent (borrower and guarantor) putting them on notice about the appointment of 3rd respondent as sole arbitrator.

15. Learned counsel for petitioner submitted that even on 03.03.2009 in the concerned Court in Delhi, the finance company had filed a memo putting the petitioner on notice about the appointment of sole arbitrator, but there is nothing to show that even this was done. It is also asserted by the petitioner that this was not done.

16. It comes to light from the narrative supra that

the parties have entered into a MOU on 23.03.2010.

17. A perusal of MOU reveals that there is no arbitration clause in the MOU.

18. Learned counsel for finance company pointed out that there is a clause in MOU that it is without prejudice to the loan agreements. On a demurer, even if this position is accepted, the problem presents itself in another form for the finance company. That is, a perusal of the impugned awards reveal that the finance company, as claimant, has not brought to the notice of AT about the subsequent MOU or the transactions thereunder. This according to learned counsel for petitioner clearly tantamounts to inducing the making of an award by suppression, which is fraud, as the finance company has gained/benefited from such suppression.

19. Be that as it may, it is also the specific case of the petitioner that entire loan agreements were not given to the petitioner and loan agreement upto clause 20.2 alone had been given to the petitioner. In other words, truncated loan agreements had been given and that part of loan agreement, which contained the arbitration clause was not given to the petitioner. There is nothing on record to show that the entire loan agreements were given to the petitioner. However, this is not of much significance, as

there are two factors which weighed in favour of the petitioner in the instant case. One is, the petitioner has not been given notice, much less proper notice of the appointment of arbitrator and the finance company, as claimant, has induced the making of impugned awards i.e., impugned award-I and impugned award-II by not bringing to the notice of AT MOUs i.e., by suppressing subsequent MOUs.

20. It is also to be noted, that the impugned awards are *ex-parte* awards and notices sent to the petitioner have been returned unserved with postal endorsement. This Court had the benefit of perusing the arbitral records.

21. In senior OP, notice sent to the petitioner has been returned with the postal endorsement 'The office is permanently locked'. To be noted, this endorsement is in Hindi. Another notice has been returned with the endorsement 'Dhookhan chod gayee' meaning 'left the shop'. Likewise, with regard to the two notices sent in the junior OP, the endorsements are 'office permanent bandh rahatha hai' and 'Dhookhan gayee' meaning 'office is permanently closed' and 'left the shop' respectively. It was pointed out that this would be sufficient service within the meaning of Section 3 (1) (a) of A & C Act. Though, this is acceptable (with regard to proper notice of arbitrable proceedings), the difficulty is with regard to not sending

notice regarding appointment of arbitrator which has already been alluded to supra. The other difficulty is suppression of MOU. Therefore, both impugned awards are hit by Section 34(2)(a)(iii) (first limb) and are in conflict with public policy of India as awards obtained by suppression which in this case graduates as 'fraud'.

22. This Court has also taken note of the fact that trucks have been sold to the third parties, moneys realised and refinance has also been made with the third parties by the finance company.

23. Owing to all that have been set out supra, both OPs are allowed and impugned awards are set aside. However, considering the nature of the matter and trajectory of the hearing, parties are left to bear their respective costs.

Sd./-M.S.J
28.03.2019

//Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 01/07/2019

COURT OFFICER(O.S.)

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