

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.541 of 2018
and Application No.4772 of 2018

Jothi Ramalingam, C. ... Petitioner

versus

1.AXIS Bank Ltd.,
(formerly known as UTI Bank Ltd)
Represented by its Deputy Manager (Legal)
Trishul, Opp Samartheshwar Temple,
Law Garden, Ellisbridge,
Ahmedabad - 380 006
Among other places its Branch Office /
Loan Centre Axis Bank Ltd.,
Asset Sales - Centre,
2nd Floor, Warden House,
340, SIR J.J.Road,
Byculla, East Mumbai,
Maharashtra - 400 008.

2.Samir M.Suryawanshi ... Respondents

PRAYER: Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the ex-parte award dated 10.01.2018 made in Arbitration Case No.LPO/ARB-PL/S1/LOT-7/8972 on the file of the second respondent / Arbitrator.

For Petitioner : M/s.S.Harinyi
For Respondents : Mr.M.R.Uma Vijayan

ORDER

This Original Petition has been filed, challenging the award passed by the learned Arbitrator / second respondent for an amount of Rs.3,36,102/- (Rupees Three Lakhs Thirty Six Thousand One Hundred and Two Only) with interest at the rate of 18% per annum.

2. The brief facts leading to file this Original Petition is as follows;

2.1. The petitioner has applied for a personal loan from the first respondent and the same was sanctioned on 13.12.2014 in Loan Agreement No.PPR008201205666 at Chennai. As there was a default in paying the monthly installments, the first respondent invoked arbitration proceedings and in view of Clause 14 of the Loan Agreement, the venue of arbitration was fixed at Mumbai. Thereafter, the Arbitrator has proceeded to decide the arbitration proceedings and passed an award. Challenging the same, the present Original Petition is filed.

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3. The main contention of the learned counsel for the petitioner is that, though Clause 14 of the Loan Agreement shows that the arbitration

proceedings shall be held at Mumbai / Delhi / Chennai / Kolkata, it cannot be said that the arbitration can be held at any other place because the entire cause of action arose only at Chennai. It is her further contention that the preliminary objections raised by the petitioner to the venue of arbitration has also not been properly dealt with by the learned Arbitrator and no opportunity whatsoever given. Hence, submitted that the entire award is liable to be set aside. In support of her submissions, the learned counsel has relied upon the judgment of the Hon'ble Division Bench of this Court in **CENTRAL WAREHOUSING CORPORATION vs. A.S.A.TRANSPORT** reported in **2008-1-LW640**, a learned single Judge of this Court in **C.R.P.(PD)(MD)No.2034 of 2008 dated 23.07.2009 [THE METAL POWDER COMPANY LIMITED vs. THE GENERAL MANAGER]** and the Hon'ble Supreme Court in **SANSHIN CHEMICALS INDUSTRY vs. ORIENTAL CARBONS & CHEMICALS** reported in **(2001) 3 SCC 341**.

4. Whereas, the learned counsel appearing for the first respondent would contend that Clause 14 of the Loan Agreement has infact agreed between the parties that the venue shall be held at Mumbai / Delhi / Chennai / Kolkata and accordingly, the arbitration proceedings was conducted at Mumbai, as per the terms. It is his further contention that despite several

opportunities, the petitioner did not participate in the proceedings. He also submitted that the learned Arbitrator has perused the entire materials and passed the award. Hence, he prayed for dismissal of this Original Petition.

5. I have perused the entire arbitral award passed by the learned Arbitrator as well as the rival submissions of the parties.

6. No doubt, the petitioner has borrowed personal loan from the first respondent in Chennai and the entire transaction has took place at Chennai. It is relevant to extract Clause 14 of the Loan Agreement hereunder;

"14. All disputes, differences and/or claim or questions arising out of these presents or in any way touching or concerning the same or as to constructions, meaning or effect thereof or as to the right, obligations and liabilities of the parties hereunder shall be referred to and settled by arbitration, to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof, of a sole arbitrator to be nominated by the Lender/Bank, and in the event of death, unwillingness, refusal, neglect, inability or incapability of a person so appointed to act as an arbitrator, the Lender/Bank may appoint a new arbitrator to be a sole arbitrator. The arbitrator shall not be required to give any reasons for the award and the award of the arbitrator shall be final and binding on all

parties concerned. The arbitration proceedings shall be held Mumbai/Delhi/Chennai/Kolkata."

7. On a careful perusal of the same, it is stated that the arbitration proceedings shall be held at Mumbai / Delhi / Chennai / Kolkata. Admittedly, the first respondent is a Bank, which is at Chennai, the entire cause of action arose at Chennai. That being the position, the parties go to the unknown place to place the defence will in fact defeat the very object of the arbitration Act in giving a fair opportunity to the parties.

8. Section 18 of the Arbitration and Conciliation Act, 1996 deals with equal treatment of parties, the parties shall be treated with equality and each party shall be given a full opportunity to present his case. When a person is driven to the place, which is not familiar to the arbitration proceedings is highly difficult for such to present his case.

9. Section 20 (2) of the Act deals with the place of arbitration shall be determined by the arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties. The very object of the entire arbitral proceedings is to give full opportunity and also

take into consideration of the convenience of the parties. Admittedly, in this case, the entire cause of action arose at Chennai and the parties are at Chennai and also the default committed at Chennai, therefore, claiming a person, the place which is unknown to him and his right in fact taken away from giving full opportunity to present his case. Therefore, I am of the view that merely on Clause 14 of the Act, which is not specified in a particular place and refer to so many places it should be construed that the venue shall be in accordance with the cause of action. In this regard, in the case of **C.R.P.(PD)(MD)No.2034 of 2008 dated 23.07.2009 [THE METAL POWDER COMPANY LIMITED vs. THE GENERAL MANAGER]**, the learned single Judge of this Court, has held as follows;

"10. A reading of Section 20 of the Arbitration and Conciliation Act, 1996, would show that the convenience of both parties will have to be seen. The said convenience of both parties will have to be determined by the arbitral Tribunal in accordance with the clause 20 sub-section (2) of the Act. Sub-section (3) of the said Act provides that notwithstanding sub-section (1) and sub-section (2), the arbitral Tribunal may meet at any place as it considers appropriate for consultation among its members for hearing witnesses, experts or the parties, or for inspection of documents, goods or

other property."

10. Similarly, the Hon'ble Division Bench of this Court in **CENTRAL WAREHOUSING CORPORATION vs. A.S.A.TRANSPORT** reported in **2008-1-LW640** has held as follows;

"16. In respect of the other point - venue of the arbitration proceedings, it is not as if the appellant Corporation is having office or officers only at Delhi. When the dispute has arisen at Chennai, there is no valid or acceptable reason for appointment of an arbitrator at Delhi directing the contractor, the respondent herein to appear before him at Delhi or bear the travelling and boarding expenses of the arbitrator, who is stationed at Delhi. It is not only against Section 20(1) of the Act, but against the very purpose of the enactment. The cause of action arose at Chennai. The parties as well as the witness are at Chennai. The appellant is also having office and officers to adjudicate the dispute at Chennai. The appellant would have very well appointed an arbitrator who is stationed at Chennai. That would have given a real opportunity as intended in law to the respondent to have his dispute adjudicated. In this case, the award passed is one against the last limb of Section 34(2)(a)(iii)

of the Act. Hence, the award is liable to be set aside on that ground also."

11. The Hon'ble Supreme Court in **SANSHIN CHEMICALS INDUSTRY vs. ORIENTAL CARBONS & CHEMICALS** reported in (2001) 3 SCC 341 has observed as follows;

"8. Besides, bearing in mind the object behind the Arbitration and Conciliation Act, 1996, as has been indicated by this Court in the case of Konkan Rly. Corpn. Ltd. v. Mehul Construction Co. (2000) 7 SCC 201 which is in consonance with the UNCITRAL Model Law, it would not be conducive to interpret the decision of the Joint Arbitration Committee with regard to the venue to be an interim award, conferring a right of challenge to an aggrieved person under Section 34 of the Act.

9. Mr.Desai's contention that the question of venue is of utmost importance, since the arbitral proceeding will be conducted in accordance with the rules applicable to the place where the arbitration proceeding is conducted and consequently, denial of a right to appeal against the same is never contemplated of, requires consideration. It is undoubtedly true that if the

arbitration is to be held in India, then the proceeding will be conducted in accordance with the rules applicable in India and if the arbitration is to be held in Japan, it has to be conducted in accordance with the rules of the Japan Commercial Arbitration Association and as such the decision on the question of venue is of utmost importance. But the further contention that an aggrieved party has no right to assail the same, once the said decision is not assailed at this stage, does not appear to be correct. The ultimate arbitral award could be assailed on the grounds indicated in sub-section (2) of Section 34 and an erroneous decision on the question of venue, which ultimately affected the procedure that has been followed in the arbitral proceeding, could come within the sweep of Section 34(2) and as such it cannot be said that an aggrieved party has no remedy at all."

12. Having regard to the above judgments, I am of the view that the learned Arbitrator should have heard the preliminary objections raised by the petitioner and taking note of the fact that the entire cause of action arose at Chennai and also seen the convenience of the parties. On going through the award, in paragraph 6, infact the next date of hearing, the learned Arbitrator

requested the advocate for claimant to indicate the next date of hearing to the respondent through mail. Only on the instructions of the learned Arbitrator, the advocate for the first respondent that they sent a mail, the case was adjourned to 09.01.2018. Similarly, only on the basis of reply of the first respondent counsel that mail served to the petitioner, the matter has been proceeded and ex-parte award was passed against the petitioner even without verifying whether notice has been properly served.

13. Even assuming that as per Clause 14 of the Loan Agreement, Mumbai also be the venue of the arbitration. No opportunity is being given in respect of the subsequent hearing date, the learned Arbitrator has proceeded to decide the issue. On a perusal of the award shows that only on the instructions of the advocate for the first respondent service is believed. Such finding, I am of the view that certainly leads the fact that there was no notice served to the petitioner to the further date of hearing. Therefore, in all aspects, the petitioner has not given proper opportunity.

14. In such view of the matter, this Court is of the view that the award is liable to be set aside. Accordingly, the award dated 10.01.2018 made in Arbitration Case No.LPO/ARB-PL/S1/LOT-7/8972 is set aside and the **Original**

Petition stands allowed. Liberty is granted to the first respondent to appoint fresh Arbitrator, at Chennai to proceed further, as per law. Consequently, **connected Application is closed.** However, there is no order as to costs.

01.08.2019

Speaking Order/Non Speaking Order

Index : Yes / No

Internet : Yes

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