IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :13.02.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.552 of 2018

1.K.Muniyasamy,
Prop:M/s: Prabhu Auto Tech Engineering Co,
No:7, Sidco Industrial Estate,
K.Pudur, Madurai – 625 007.
Also at
No.64, Ganeshpuram,
Madurai North,
Pudur North, Madurai – 625 007.

2. P.Saravana Kumar,
S/o:S. Pothiraj,
No:2-150, Kesavasamy Street,
Narayanapuram,
Thiruppalai, Madurai – 625 014. .. Petitioners

vs.

1.M/s: Sundaram Finance,
No:21, Patullos Road,
Chennai – 600 002.

2. Mr.K.Elaiyarani,
Retired Judge & Sole Arbitrator,
No:29A (HIG 977), First Main Road,
Eri Scheme, Mogappair,
Chennai – 600 037. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, as amended in 2015, to set aside the award dated 15.04.2017 passed by the second respondent in ARB NO.KER/SF/043 of 2016.

For Petitioners : No appearance
For Respondents : Mr.S.Suresh

ORDER

There are two petitioners and two respondents.

2. To be noted, while the first respondent company is the claimant before the Arbitral Tribunal, the second respondent, who is a retired District Judge, is the sole arbitrator (Arbitral Tribunal), who passed an arbitral award dated 15.04.2017 bearing reference No.KER/SF/043 of 2016 which shall hereinafter be referred to as 'impugned arbitral award'. Petitioners 1 and 2 before me in the instant 'Original Petition' (hereinafter 'OP' for brevity) are respondents 1 and 2 respectively before the arbitral tribunal.

3. Before I deal with this OP on merits, it is necessary to set out the trajectory of the hearings. Proceedings in the previous hearing, i.e, yesterday (12.02.2019) reads as follows:

> *'No representation for petitioners. Mr.S.Suresh, counsel on record for first respondent is before this Court.*
>
> *As per case filed placed before me, this OP has not*

been admitted.

As there is no representation for the petitioners, list this matter under the caption 'FOR DISMISSAL' on 13.02.2019.'

4. Pursuant to aforesaid proceedings, instant OP is listed under the caption 'FOR DISMISSAL' today. Notwithstanding the obtaining position that the instant OP is listed under the caption 'FOR DISMISSAL' today, the position is no different today. In other words, there is no representation for the petitioners today also. However, Mr.S.Suresh, learned counsel for first respondent who is the contesting respondent is before this Court and he is ready to make submissions on merits. As per the case file placed before me, instant OP has not been admitted.

5. Be that as it may, though the petitioner's counsel has not chosen to come before this Court in spite of instant OP being listed under the caption 'FOR DISMISSAL', I deem it appropriate to examine the instant OP on merits and dispose of the same on merits based on the case file and the papers therein which have been placed before me.

6. Before I do that, it is necessary to set out a brief prefatory note.

7. In a long line of authorities/catena of cases starting from

(i) (1981) 2 SCC 788 (Rafiq and another V. Munshilal and another) (ii) (1996) 6 SCC 62 (Abdur Rahman and others V. Athifa Begum and Others) and (iii) (2014) 4 Law Weekly 791 :: (2014) 5 SCC 723 (Harbans Pershad Jaiswal V. Urmila Devi Jaiswal), it has been held that appeals shall be dismissed only for default if the counsel for appellant does not appear and if the appeal is not prosecuted. This principle applies only to appeals. In other words, it will apply to first appeals under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) and second appeals under Section 100 of CPC. In other words, when the appellant does not appear/pursue/prosecute the appeal it shall not be examined and disposed off on merits. It may apply to other forms of appeals too, but instant OP is not an appeal. Law is well settled that it is not even a revision. Law is also well settled that it is a mere challenge to an award. Besides the settled position of law that instant OP, which is under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) is neither an appeal nor a revision, but a mere challenge to an award, it has also been categorically laid down by the Hon'ble Supreme Court in **Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in **(2009) 17 SCC 796,** that petitions under Section 34 of A & C Act i.e., petitions like the instant OP are summary in nature. It is a special remedy under a special enactment. Besides this, expeditious disposal of such petitions was also highlighted. This shall be referred to as 'Fiza principle'.

8. Fiza principle was reiterated by Hon'ble Supreme Court in a very recent judgment rendered on 20.08.2018 i.e., in **Emkay Global Financial Services Limited Vs. Girdhar Sondhi** reported in **(2018) 9 SCC 49.** In Emkay Global case, while reiterating the Fiza principle, Hon'ble Supreme Court held that Fiza principle is a step in the right direction in the light of necessity for expeditious disposal of petitions like the instant OP under Section 34 of A & C Act.

9. Besides this, in ***State of Bihar & Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***2018 9 SCC 472***, Hon'ble Supreme Court held that one year time frame to dispose of petitions under Section 34 of A & C Act adumbrated under sub-section 6 of Section 34 of A & C Act needs to be adhered to and every endeavour has to be made for such disposals.

10. In the above backdrop of obtaining legal position/obtaining legal principles, if the instant OP is dismissed for default/non-prosecution, it will give room for another round of litigation by way of a restoration. After a careful perusal of the trajectory of the hearing before me as well as before the

arbitral tribunal, it comes to light that petitioners have been recalcitrant and reluctant to pursue the matter. Therefore, I am disposing of this instant OP on merits on the basis of papers in the case file placed before me and after hearing Mr.S.Suresh, learned counsel for first respondent.

11. Factual matrix in the instant case is very simple. The case pertains to financial assistance taken by the petitioners from the first respondent company for purchase of a vehicle bearing Reg.No.TN-59-BE-8262 with Engine NO.14CRAIL10IVYC7893, bearing chassis No.MAT483154EYP16218. The total value of the loan is Rs.5,89,500/- and is repayable in 47 monthly instalments. To put it in a nutshell, petitioners committed default after payment of 8 EMIs. Mr.S.Suresh, learned counsel for first respondent company submits that the vehicle was repossessed and sold. Post realisation of sale proceeds, the claim was made for the balance to make good the loan account is his say.

12. It is under such circumstances that the arbitration clause in the loan agreement was invoked.

13. Learned counsel for first respondent company produced the first respondent company's file before me and a perusal of the loan agreement

dated 14.01.2015 therein reveals that arbitration agreement between the parties is in the form of an arbitration clause in the loan agreement. This arbitration clause is Article 22 and the same reads as follows:

"Article 22

Law, Jurisdiction Arbitration

22(a) All disputes, differences and/or claim arising out of this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Managing Director of the Lender. The award given by such an Arbitrator shall be final and binding on the Borrower to this Agreement.

It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred dying or being unable to act for any reason, the Managing Director of the Lender, at the time of such death of the arbitrator or of his inability to act as arbitrator, shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

(b) The venue of arbitration proceedings shall be

at Chennai.

(c)The arbitrator so appointed herein above, shall also be entitled to pass an Award on the hypothecated asset and also on any other security furnished by or on behalf of the Borrower."

14. Pursuant to the aforesaid arbitration agreement between the parties (To be noted, I am referring to Article 22 in the loan agreement which is a clause in the loan agreement as it is an arbitration agreement between the parties within the meaning of Section 7 of A & C Act), the same was invoked vide a letter dated 20.04.2016 being a letter from the first respondent company. Claim was filed. Learned arbitrator has examined the file placed before her and has held that the petitioners are not entitled to the benefits of Debt Relief Act. To be noted, the claim was for Rs.2,01,707/- against the petitioners together with interest @ 24% per annum from 17.03.2016 till the date of realisation. Besides this, claimant also sought for costs of the proceedings. In addition to this, the usual residuary limb of any prayer paragraph also forms part of the claim.

15. A perusal of the case filed placed before me reveals that the first petitioner is the borrower and the second petitioner is the guarantor. There can be no two opinions or two views about the obtaining contractual

position that the liability of the borrower and guarantor are co-extensive.

16. A perusal of the impugned award reveals that the first respondent before the arbitral tribunal (first petitioner before me) alone entered appearance through a counsel. This is articulated in the impugned award. It is submitted that 8 EMIs were paid by borrower. This is articulated in sub-paragraph (i) of paragraph 4 of the impugned arbitral award, which reads as follows:

> *'4.i The respondent submitted that the he made a payment of Rs.1,02,440/- towards the monthly installments from the month of January, 2015 to August 2015 for a period of 8 months and the respondent also spent the amount of Rs.30,000/- for the body set up and also the respondent has made the initial deposit of Rs.65,000/- towards the vehicle.'*

The respondents have also submitted that they are not liable to pay the claim amount as according to them, the seized vehicle was sold for Rs.3,15,000/-. However, claim itself is after adjusting the sale proceeds. To be noted, as mentioned supra, the loan value is Rs.5,89,500/-. Most importantly, a perusal of the impugned award reveals that the respondents have not appeared before the arbitral tribunal and participated in the proceedings in spite of several opportunities being given. This is articulated in sub-paragraph

(iv) of paragraph 4 of the arbitral award, which reads as follows:

'4.iv Since even after given several opportunities the respondents had not appeared to conduct the proceedings.'

17. On behalf of the claimant, Senior Manager (Legal) was examined as P.W.1. and as many as 10 documents were marked as Exs. A1 to A10. While Ex.A1 is loan agreement dated 14.01.2015, Ex.A2 is the letter of guarantee dated 14.01.2015 executed by the second petitioner. With regard to Exs.A3 to A10, an enumeration of the same together with a short explanation as to what the exhibits are has been articulated in paragraph 9 of the impugned arbitral award and the same reads as follows:

'9.The letter dated 21/08/2015 sent by the claimant to the respondents asking them to pay the installments is balance amount due is marked as Ex.A3. The Acknowledgement cards are marked as Ex.A4 and Ex.A5 respectively. The letter dated 24/03/2016 sent by the claimant to the respondents intimating the sale of vehicle and asking the respondents to pay the balance amount due is marked as Ex.A6. The letter sent by the claimant to the Managing Director requesting for appointment of an Arbitrator is marked as Ex.A7. The e-mail letter from the Managing Director appointing an Arbitrator is marked as Ex.A8. The Computation statement showing the details of additional finance charges and the statement of accounts are marked as Ex.A9 and Ex.A10 respectively.'

18. Further, a perusal of the impugned arbitral award reveals that

the arbitral tribunal after appreciation of aforesaid oral and documentary evidence, has come to the conclusion that the first respondent before me i.e., claimant is entitled to the claim amount of Rs.2,01,707/- and that the petitioners are jointly and severally liable to pay the same. With regard to interest, arbitral tribunal has awarded interest @ 18% per annum from 08.08.2016 till the date of full realisation. Besides this, costs have been quantified and set out in paragraph 12 of the impugned arbitral award, which reads as follows:

> *"12. The Respondents shall pay to the claimant the cost of Rs.4000/- as Arbitrator's fees and Rs.500/- for her expenses and Rs.150/- for value of non-judicial stamps for engrossing this Award."*

19. This takes us to the challenge to the impugned arbitral award.

20.The caption in this instant OP says it is under Section 34 of A & C Act, but does not specify the exact sub-sections therein under which the challenge has been made. However, as I am examining the matter on merits, I examined the petition, particularly, the grounds set out therein and embarked upon the exercise of finding out whether the grounds set out in the OP will fit into any of the pigeon holes or narrow lanes which are grounds of challenge available to a party and which have been adumbrated in Section 34 of A & C

Act.

21. To be noted, there are as many as 11 grounds that have been set out in the petition as (a) to (k) and the same read as follows:

'a) The award passed by the Learned Arbitrator is against Law, facts of the Case and is done by way of collusion between the Respondents.

b)The Learned Arbitrator has failed to appreciate the Case and has passed the Award against the petitioners without applying her mind even after receiving the Objections & Statement of Defense from the Petitioners in I.A.No: 12 of 2017.

c)The Learned Arbitrator failed to noted that no Proof of Records with regard to the Sale of the Hypothecated Vehicle for a sum of Rs.3,15,000/- were produced by the 1st Respondent.

d)It is submitted that the Petitioner was paying the EMIs duly till the month of August, 2012, on the month of which the 1st Respondent/Claimant without having any proper Reason or Cause recalled the Entire Loan Amount. Subsequently pleas of the Petitioner of Re-Schedule and One Time Settlement were also never considered by the 1st Respondent/Claimant and the Hypothecated Vehicle, the major source of Income of the Petitioner, was forcefully & illegally taken away by the 1st

Respondent/Claimant.

e)The Learned Arbitrator failed to note that the Sale of the Hypothecated Vehicle by the 1st Respondent/Claimant is a Flawed One and also illegal because No Approved Valuer was consulted and No Bids were invited from the Interested Parties for the above Sale.

f)The Learned Arbitrator ought to have seen that if an Approved Valuer was consulted for fixing the Market Value and Proper Bids were invited prior to the Sale of the Hypothecated Vehicle, the Vehicle would have brought much higher Value than the said Rs.3,15,000/-. In fact, the Vehicle was used for was only Two Thousand Kilometers, the Purchase Cost on 12.01.2015 was Rs.5,31,000/-. Even after deducting a Depreciation of 10% p.a. Vehicle would have been sold for a sum of Rs.4,77,990/-. Thus there would be no Liability to be claimed from the Petitioner.

g)The Learned Arbitrator ought to have seen that as stated supra that Claim of the 1st Respondent/Claimant was fictitious and imaginary caused by the 1st Respondent/Claimant Company.

h)The Learned Arbitrator failed to consider the Amount of Rs.65,000/- paid as Down Payment and Rs.30,000/- incurred for Body Building of the Hypothecated Vehicle by the Petitioner.

i)The Learned Arbitrator erred in awarding the claim petition of the 1st Respondent as the same is not at all in accordance with Law and further the entire Award is liable to be *set aside by this Hon'ble Court. The Learned Arbitrator also erred in awarding interest on the alleged claim.*

j)The Petitioner reserves his right to raise further points in the above petition at the time of Final Hearing.

k)The Petitioner further submits that this Hon'ble Court has Jurisdiction to entertain the present petition in as much as the Agreement pertaining to the present Dispute was entered into at Chennai, the alleged Dispute raised the Arbitral Proceedings conducted and the award passed at Chennai within the Jurisdiction of this Hon'ble Court.'

22. A perusal of the grounds reveals that they are generic and more in the nature of grounds that can be raised in a regular first appeal under Section 96 of CPC. This is clearly impermissible as even in cases where a party complains that the award is vitiated by patent illegality appearing on the face of the award, the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

23. In any event, on a careful perusal of the impugned award, I am unable to find any patent illegality on the face of the award. From the petition placed before me, I do not find any incapacity for the petitioners. That the petitioners have been recalcitrant is clear from the trajectory before

this Court. The award, to my mind, is not in conflict with the public policy of India. I am unable to find anything attracting the other grounds adumbrated in Section 34 of A & C Act.

24. In the light of the narrative supra, I am convinced that the instant OP is bereft of merits and deserves to be dismissed.

25. The instant OP is dismissed. However, considering the simple nature of the loan transaction and taking into account the fact that the arbitral tribunal has acceded to the claim of the first respondent before me (claimant before arbitral tribunal) with costs, I refrain from imposing costs.

26. This petition fails and is dismissed.

13.02.2019

mp/nv

M.SUNDAR.J.,

mp/nv

<u>O.P.No.552 of 2018</u>

13.02.2019