

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2019

CORAM

THE HONOURABLE MR. JUSTICE M. SUNDAR

O.P. Nos. 564 to 567 of 2018

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Application Nos. 4847, 4850, 4851 & 4852 of 2018

O.P. Nos. 564 & 567 of 2018

Ekaa Engineers and Infrastructure Private Limited
(Formerly known as "Dithi Infrastructure Private
Limited"),

Having its registered office at No. 80/85,
3rd Main Road, New Tharagupet,
Bangalore - 560 002,
Karnataka.

..Petitioner

Vs.

Daimler Financial Services India Private Limited,
RMZ Milliennia Business Park,
Campus, 3B, Unit 202,
143, MGR Road, Perungudi, Chennai - 600 096.

..Respondent

Prayer: Petition under Section 34 of the Arbitration and Conciliation Act,
1996 to set aside the impugned ex parte award dated 20.01.2018 passed by the
Arbitral Tribunal.

O.P. Nos. 565 & 566 of 2018

Vishwas Construction Industries Private Limited,
 Having its registered office at No.80/85,
 3rd Main Road, New Tharagupet,
 Bangalore - 560 002, Karnataka.

..Petitioner

Vs.

Daimler Financial Services India Private Limited,
 RMZ Milliennia Business Park,
 Campus, 3B, Unit 202,
 143, MGR Road, Perungudi, Chennai - 600 096.

..Respondent

Prayer: Petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the impugned ex parte award dated 20.01.2018 passed by the Arbitral Tribunal.

For Petitioners in
 all the OPs :: Mr.Pawan Jabakh

For Respondent
 in all the OPs :: Mr.D. Pradeep Kumar

COMMON ORDER

This common order will dispose of these four original petitions which have been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' (hereinafter referred to as 'A & C Act' for the sake of brevity). 'Original Petitions' shall hereinafter be referred to as OPs for the sake of convenience and clarity. In singular 'Original Petition' shall be referred to as 'OP' for the sake of brevity. To be noted, in the A & C Act proceedings assailing arbitral awards, i.e, term used for a legal proceeding for setting aside an arbitral

award is 'application', but the nomenclature used in the Registry is 'Original Petition' (O.P.) for convenience.

2. In all the four OPs, there is a sole petitioner and a lone respondent. In all the four OPs, on behalf of the sole petitioner, counsel on record, Mr.Pawan Jabakh and Mr.D. Pradeep Kumar, counsel on record for the sole respondent are before this Court.

3. All the four OPs arise out of a common factual matrix.

4. The scope of a petition under Section 34 of A & C Act is narrow in contradistinction to an appeal, revision or review, as it is a mere challenge to an arbitral award. In the instant case, the scope is narrower in the light of the trajectory of the hearing today.

5. It is also to be borne in mind that Honourable Supreme Court in ***Fiza Developers & Inter Trade Private Limited V. AMCI (I) Private Limited and Another*** reported in **2009 (17) SCC 796** has held that OPs under Section 34 of A & C Act are summary procedures being an extraordinary remedy under an extraordinary provision. In Fiza Developer's principle, Honourable Supreme Court has also held that these are one issue summary procedures. Further to

be noted, Fiza Developer's principle was reiterated by Honourable Supreme Court in *Emkay Global Financial Services Limited V. Girdhar Sondhi* reported in **AIR 2018 SC 3894** and held that Fiza Developer's principle is a step in the right direction, more so, for expeditious disposal of OPs under Section 34 of A & C Act.

6. Drawing inspiration from aforesaid pronouncements of Honourable Supreme Court, this Court, in the prefatory part of this common order has held that scope of a OP under Section 34 of A & C Act is very narrow. Be that as it may, as mentioned supra, in the instant case, scope is narrower in the light of the nature of the grounds raised/submissions made.

7. Therefore, it will suffice to give a bird's eye view of facts or in other words, a thumbnail sketch of facts which are essential (sans unnecessary particulars) for appreciating this order. I do so under the caption 'Factual Matrix in a Nut-shell' infra.

8. **FACTUAL MATRIX IN A NUT-SHELL:**

(a) Subject matter of instant OPs is finance for 29 trucks. To be noted, finance was for 31 trucks in all, but the arbitral awards, which are under challenge in the instant OPs pertain to 29 trucks.

(b) 'Dithi Infrastructure Private Limited' is a company incorporated in India and the name was subsequently changed to 'Ekaa Engineers and Infrastructure Private Limited'. For the sake of convenience, this entity shall be referred to as 'Dithi/Ekaa'. Likewise, 'Vishwas Construction Industries Private Limited' is a company incorporated in India and this company shall be referred to as 'VCPL' for the sake of brevity, clarity and convenience. 'Daimler Financial Services India Private Limited' is also a company incorporated in India and the same shall be referred to as 'Daimler' for the sake of brevity, convenience and clarity.

(c) It is not in dispute that Daimler financed purchase of 29 trucks (hereinafter 'said trucks' for the sake of brevity) by Dithi/Ekaa and VCPL. Finance for 18 of these trucks is covered by a contract dated 30.10.2014 (hereinafter referred to as 'Contract I' for the sake of brevity). Finance for 11 trucks is covered by a contract dated 26.03.2015 (hereinafter referred to as 'Contract II' for brevity). It is also not in dispute that Dithi/Ekaa is the borrower and VCPL is the co-borrower. It is also not in dispute that monies advanced by Daimler for the purchase of aforesaid trucks had to be repaid by Dithi/Ekaa and VCPL in 'equated monthly instalments' ('EMIs' for brevity). I shall advert to these particulars in little more detail infra.

(d) It is also not in dispute that Dithi/Ekaa and VCPL did not honour all the EMIs and defaulted. When Daimler demanded payment, it resulted in re-possession of said trucks and sale of the same by Daimler. It is the case of Daimler that sale of repossessed trucks did not yield enough money for making good the entire liability qua the said trucks. Predicated on this basis, Daimler invoked the arbitration agreement between the parties and claimed loss on sale. To be noted that arbitration agreement between the parties, i.e., 'arbitration agreement' within the meaning of Section 7 of A & C Act is in the form of a clause in Contract I and Contract II is not in dispute before me. In other words, after giving credit to the value for which the said trucks were sold, the shortfall was subject matter of arbitral claims. As mentioned supra, the said trucks (29 in number) are covered by two contracts i.e., Contract I and Contract II. Therefore, two separate claims were made by Daimler.

(e) Details of 18 trucks relatable to Contract I as can be culled out from the case file placed before me is as follows:

<i>S. No</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Engine No.</i>	<i>Chasis No.</i>	<i>Registration No.</i>
1	20112485	Rs.22,15,084/-	400950D0011170	MEC2241CJEP010897	KA 01 AD 8749
2	20112486	Rs.22,15,084/-	400950D0011105	MEC2241CJEP010888	KA 01 AD 8755
3	20112487	Rs.22,15,084/-	400950D0011108	MEC2241CJEP010891	KA 01 AD 8743
4	20112488	Rs.22,15,084/-	400950D0011174	MEC2241CJEP010898	KA 01 AD 8746

<i>S. No</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Engine No.</i>	<i>Chasis No.</i>	<i>Registration No.</i>
5	20112489	Rs.22,15,084/-	400950D0011343	MEC2241CJEP011132	KA 01 AD 8753
6	20112490	Rs.22,15,084/-	400950D0011347	MEC2241CJEP011133	KA 01 AD 8754
7	20112492	Rs.22,15,084/-	400950D0011396	MEC2241CJEP011183	KA 01 AD 8757
8	20112493	Rs.22,15,084/-	400950D0011399	MEC2241CJEP011184	KA 01 AD 8750
9	20112494	Rs.22,15,084/-	400950D0011400	MEC2241CJEP011185	KA 01 AD 8744
10	20112496	Rs.22,15,084/-	400950D0011451	MEC2241CJEP011238	KA 01 AD 8751
11	20112497	Rs.22,15,084/-	400950D0011452	MEC2241CJEP011240	KA 01 AD 8745
12	20112498	Rs.22,15,084/-	400950D0011453	MEC2241CJEP011241	KA 01 AD 8748
13	20112499	Rs.22,15,084/-	400950D0011454	MEC2241CJEP011244	KA 01 AD 8761
14	20112500	Rs.22,15,084/-	400950D0011456	MEC2241CJEP011245	KA 01 AD 8758
15	20112501	Rs.22,15,084/-	400950D0011398	MEC2241CJEP011182	KA 01 AD 8742
16	20112502	Rs.22,15,084/-	400950D0011514	MEC2241CJEP011298	KA 01 AD 8759
17	20112503	Rs.22,15,084/-	400950D0011515	MEC2241CJEP011301	KA 01 AD 8752
18	20112504	Rs.22,15,084/-	400950D0011516	MEC2241CJEP011302	KA 01 AD 8747

(f) Claim made by Daimler with regard to this Contract I, again, as can be culled out from the case file placed before me, is as follows:

<i>S.No.</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Interest Rate</i>	<i>Repayable Amount</i>	<i>Installment Amount & Tenure</i>	<i>Installment Commencing & Ending</i>
1	20112485	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
2	20112486	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
3	20112487	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
4	20112488	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
5	20112489	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
6	20112490	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018

<i>S.No.</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Interest Rate</i>	<i>Repayable Amount</i>	<i>Installment Amount & Tenure</i>	<i>Installment Commencing & Ending</i>
7	20112492	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
8	20112493	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
9	20112494	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
10	20112496	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
11	20112497	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
12	20112498	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
13	20112499	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
14	20112500	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
15	20112501	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
16	20112502	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
17	20112503	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018
18	20112504	Rs.22,15,084/-	10.51%	Rs.27,24,534/-	Rs.59,229/- for all 46 installments	11/01/2015 to 11/11/2018

(g) Likewise, details of 11 trucks relatable to Contract II and the loan amount are as follows:

<i>S.No.</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Chasis No.</i>	<i>Engine No.</i>	<i>Registration No.</i>
1	20115977	Rs.24,11,170/-	MEC2241CCFP016097	400950D0016359	KA01AE2559
2	20115978	Rs.24,11,170/-	MEC2241CCFP016147	400950D0016410	KA01AE2569
3	20115979	Rs.24,11,170/-	MEC2241CCFP016152	400950D0016416	KA01AE2561
4	20115980	Rs.24,11,170/-	MEC2241CCFP016201	400950D0016468	KA01AE2568
5	20115981	Rs.24,11,170/-	MEC2241CCFP016241	400950D0016512	KA01AE2572
6	20115982	Rs.24,11,170/-	MEC2241CCFP016243	400950D0016516	KA01AE2560

<i>S.No.</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Chasis No.</i>	<i>Engine No.</i>	<i>Registration No.</i>
7	20115983	Rs.24,11,170/-	MEC2241CCFP016196	400950D0016457	KA01AE2562
8	20115984	Rs.24,11,170/-	MEC2241CCFP016290	400950D0016575	KA01AE2570
9	20115985	Rs.24,11,170/-	MEC2241CCFP016289	400950D0016570	KA01AE2571
10	20115986	Rs.24,11,170/-	MEC2241CCFP016344	400950D0016629	KA01AE2563
11	20115987	Rs.24,11,170/-	MEC2241CCFP016342	400950D0016628	KA01AE2564
	Total	Rs.2,65,22,870/-			

(h) Claim made by Daimler with regard to this Contract II (11 trucks)

is as follows:

<i>S.No.</i>	<i>Agreement No.</i>	<i>Loan Amount</i>	<i>Interest Rate</i>	<i>Repayable Amount</i>	<i>Installment Amount & Tenure</i>	<i>Installment Commencing & Ending</i>
1	20115977	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
2	20115978	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
3	20115979	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
4	20115980	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
5	20115981	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
6	20115982	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
7	20115983	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
8	20115984	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
9	20115985	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
10	20115986	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019
11	20115987	Rs.24,11,170/-	10.76%	Rs.29,80,202/-	Rs.64,787/- for all 46 installments	18/05/2015 to 18/03/2019

(i) There is also no dispute or disagreement that a sole arbitrator was appointed and he entered upon reference. As Dithi/Ekaa and VCPL did not respond to the notice from the sole arbitrator/arbitral tribunal, they were set ex parte and two separate arbitral awards, both dated 20.01.2018 came to be passed by the arbitral tribunal. While the arbitral award relating to Contract I has been made in Arbitration Case No. 201 of 2017, arbitral award relating to Contract II has been made in Arbitration Case No. 202 of 2017. Borrower and Co-Borrower have filed independent OPs laying challenge to each of the arbitral awards. Challenge laid to arbitral award in Arbitration Case No. 201 of 2017 by Dithi/Ekaa is O.P. No. 564 of 2018 and the OP laying challenge to the same arbitral award by co-borrower VCPL is O.P. No. 565 of 2018. Likewise, challenge to arbitral award made in Arbitration Case No. 202 of 2017 relating to Contract II by VCPL is O.P. No. 566 of 2018 and by Dithi/Ekaa is O.P. No. 567 of 2018. That is how there are four OPs before me.

9. Having set out the factual matrix in a nut-shell, (which as mentioned supra is a bird's eye view of the facts or in other words, a thumbnail sketch of the factual matrix) I now proceed to set out the grounds on which the two aforesaid arbitral awards, both dated 20.01.2018 (hereinafter referred to as 'impugned arbitral awards') were assailed before me.

10. **GROUND OF CHALLENGE:**

(a) Though the caption to the main OPs are generic and though the caption says that each of the OPs has been filed under Section 34 of A & C Act, Mr. Pawan Jabakh, learned counsel for petitioners in all the four OPs made it clear that the ground of challenge is under Section 34(2)(a)(iii). I deem it appropriate to extract Section 34 (2)(a)(iii) of A & C Act. I do so and the same reads as follows:

'34. Application for setting aside arbitral award:-(1)...

(2) An arbitral award may be set aside by the Court only if -

(a) the party making the application furnishes proof that -

(i)

(ii)

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or...'

(b) Elaborating on the grounds of challenge, learned counsel made submissions, which can be described as a three-fold attack qua the impugned arbitral awards. The three grounds on which the impugned arbitral awards are assailed can be broadly summarised as follows:

(i) Petitioners i.e, Dithi/Ekaa and VCPL were not given proper notice of the arbitral proceedings.

(ii) The arbitral tribunal has set the petitioners Dithi/Ekaa and VCPL ex parte in the first hearing itself and the arbitral tribunal has thus caused infraction of well established principles of natural justice.

(iii) Though impugned arbitral awards pertain to 29 trucks, a composite reference has been made and this is impermissible.

11. Having set out the grounds on which impugned arbitral awards were assailed before me, I now proceed to discuss the grounds and test the same in the light of the scope of Section 34 of A & C Act (which has already been alluded to supra by me) under the caption 'DISCUSSION AND DISPOSITIVE REASONING' infra.

12. **DISCUSSION AND DISPOSITIVE REASONING:**

(a) As would be evident from the narrative thus far, the first ground of attack is that the petitioners in the instant OPs were not given proper

notice of arbitral proceedings. It is the specific and categorical case of the petitioners that they were given no notice at all. This is articulated in paragraph No. 4C of the OPs before me and paragraph No.4C reads as follows:

'4.

C. *The Petitioner submit that the only communication received by the Petitioner in relation to the purported arbitral proceedings was the letter dated 5th October, 2015 issued by the Respondent to the Petitioner and Mr.Rajarajan, the Sole Arbitrator invoking the arbitration clause and nominating Mr.Rajarajan as Sole Arbitrator to adjudicate disputes arising out of the Loan Agreement. The Petitioner state that apart from this letter, there has been no communication received by the Petitioner either from the Respondent or the Arbitrator in relation to the constitution of the Arbitral Tribunal or the proceedings conducted before the Arbitral Tribunal until the receipt of the ex-parte arbitration award passed by the Arbitral Tribunal dated 20th January 2018 received by the Petitioner on 3rd February 2018. The Petitioner categorically reiterates that from October 2015 till February 2018, no communication or letters with respect to the arbitral proceedings were received by the Petitioner.'*

(b) Owing to this specific and categoric stand, my predecessor learned Judge, on 23.07.2018 (at the inception of the instant OPs) passed an order and the proceedings/orders read as follows:

"The learned counsel for the petitioner has filed the affidavit of service for having served the notice on the respondent.

2.Registry is directed to verify whether any counsel has entered appearance on behalf of the respondent.

3.Since the primary ground for challenge in the instant petition is that no notice was served on the petitioner in the Arbitral Proceedings, the Arbitrator, Mr.R. Raja Rajan, Advocate having office at No.28, Appa Kannu Street, Lloyds Road, Royapettah, Chennai -14 is directed to produce the Arbitral records pertaining to the Arbitration before this Court on the next hearing date.

5.Registry is directed to issue notice to the Arbitrator, calling upon him to produce the Arbitral records before this Court on the next hearing date."

In response to the aforesaid proceedings/orders made by my predecessor, learned Arbitrator (sole arbitrator who constituted the arbitral

tribunal) has sent the entire arbitral records under cover of a letter dated 27.08.2018 and the same is before me.

(b) I had the benefit of perusing the arbitral records sent under cover of the aforesaid letter by the learned Arbitrator. A perusal of the arbitral records reveal that the arbitrator has infact sent notice to both Dithi/Ekaa and VCPL. This is notice dated 03.03.2017. It is also seen that this notice from the arbitrator has been mailed by Registered Post with Acknowledgement Due and the postal acknowledgement cards also form part of the arbitral records placed before me. A persual of postal acknowledgement cards reveal that the notice has been duly served on Dithi/Ekaa as well as VCPL on 24.04.2017. To be noted, postal seal does not have imprint with the kind of clarity that is desirable. Therefore, both learned counsel assisted me in examining the same inter alia with a magnifying glass and both learned counsel had no disagreement that postal acknowledgement cards reveal that notice of the arbitrator has been duly served on both entities on 24.04.2017. In other words, there is no dispute or disagreement that the date of service as in the postal acknowledgement cards is 24.04.2017.

(c) This takes us to the notice dated 03.03.2017 which was sent by the sole arbitrator. It reads as follows:

"Daimler Financial Services India Private Limited,
 RMZ Milliennia Business Park,
 Campus, 3B, Unit 202,
 143, MGR Road, Perungudi,
 Chennai - 600 096 rep. by its
 Manager Legal Mr.Navin Ajwani

..Claimant

Vs.

1. Dithi Infrastructure Pvt. Ltd., (Borrower)
 rep. by its Director/s
 No.80/85, 3rd Main Road,
 New Tharagupet,
 Bangalore - 560 002,
 Karnataka.
2. Vishwas Construction Industries Pvt.
 Ltd (Co-Borrower),
 rep. by its Director/s,
 No.80/85, 3rd Main Road,
 New Tharagupet,
 Bangalore - 560 002,
 Karnataka.

..Respondents

Sir,

Sub: Take Notice that I have been appointed as Sole Arbitrator by M/s. Daimler Financial Services India Pvt. Ltd., the Claimant herein, in terms of the Arbitration Clause in the above said Loan Agreement between the claimant and Respondents and also as per the provisions of Arbitration and Conciliation Act, 1996. there is no circumstances exist that give rise to justifiable doubts as to my independence or impartiality in resolving the dispute referred. The Claimant has filed their Claim Statement and the following documents on 03/03/2017.

1. Copy of the Board Resolution
2. Copy of the Loan Agreement
3. Copy of the Unattested Deed of Hypothecation
4. Copy of the Legal Notices
5. Copy of the Letter of Reference to Arbitration
6. Copy of the Statement of Account.

Take further notice that the above matter stands posted to 29/04/2017 at 10.30a.m. at the venue of No.28, Appa Kannu Street; Lloyds Road, Royapettah, Chennai - 600 014, For your appearance either in person or through your authorized representative and to submit your objections, if any, failing which Arbitration proceedings will be commenced and Arbitral award will be passed on merits by setting the Respondents ex - parte.

Dated at Chennai at this 03rd day of March, 2017

Sd/-

Mr.R. RajaRajan
Sole Arbitrator

Copy to

1. Daimler Financial Services India Private Limited,
RMZ Milliennia Business Park,
Campus, 3B, Unit 202,
143, MGR Road, Perungudi,
Chennai - 600 096 .
2. Dithi Infrastructure Pvt. Ltd., (Borrower)
rep. by its Director/s
No.80/85, 3rd Main Road,
New Tharagupet,
Bangalore - 560 002,
Karnataka.

3. Vishwas Construction Industries Pvt.
Ltd (Co-Borrower),
rep. by its Director/s,
No.80/85, 3rd Main Road,
New Tharagupet,
Bangalore - 560 002,
Karnataka."

Therefore, the ground raised in paragraph No. 4C which has been extracted and reproduced supra is clearly not available to the petitioners.

(d) As would be evident from the narrative thus far, ground 4C is the pivotal and primordial ground on which these four OPs are predicated. Therefore, under normal circumstances, this would have been the end of the matter. However, learned counsel for petitioners, very persuasively and politely, but articulately requested me to consider the other grounds of challenge though they have not been adequately articulated in the petitions. Therefore, I embark upon the exercise of examining the other two grounds of challenge also. In other words, while I have mentioned that the challenge to the impugned arbitral awards is three-fold, only aforesaid paragraph No.4C has been amply articulated in the petition and the other two grounds were eloquently articulated in the hearing by learned counsel for petitioners. As I am dealing with those two grounds also, certain aspects of the matter touching upon dispositive reasoning qua the first ground of attack will also be dealt with infra while dealing with second and third grounds of attack.

(e) I examined the records of the arbitral tribunal very carefully. Though it was not projected before me by way of an argument, I noticed that the aforesaid notice from the learned arbitrator dated 03.03.2017 has been mailed only on 22.04.2017. This leaves me wondering as to why a notice dated 03.03.2017 and duly signed by sole arbitrator should be mailed/despached only on 22.04.2017. This is more so as the first date of hearing is 29.04.2017. This means that the noticees/petitioners before me received the notice of hearing very close to the date of hearing though the notice is more than 6 weeks prior in point of time. Be that as it may, as the learned sole arbitrator is not before this Court and as he has chosen to send the arbitral records under cover of a letter, this left me wondering as to what at all could be the reason for despatching a notice dated 03.03.2017 only on 22.04.2017. However, what saves the situation for Daimler is that the notice has been duly served on both entities i.e, Dithi/Ekaa and VCPL on 24.04.2017 well before the first date of hearing which was on 29.04.2017 and the noticees did not respond. To be noted, noitcees did not even seek rescheduling. However, I deem it appropriate to observe that such delay in despatch of notices by arbitral tribunals are clearly avoidable.

(f) There is one other aspect of the matter which saves the situation with regard to the plea that the arbitral tribunal ought not to have set the aforesaid entities ex parte in the first listing itself. Having received the notice of hearing on 24.04.2017, (though there was delay in despatching the notice) the two entities/petitioners have not made any effort whatsoever even to write to the learned Arbitrator seeking an adjournment/rescheduling or making any other request which would have been permissible. There is no dispute or disagreement before me that this has not been done. This is more so, in the light of ground No.4C in the petitions, i.e, OPs which has been extracted supra. To be noted, had the petitioners even written to the sole arbitrator, the complexion of this matter could have well changed. On the contrary, the petitioners did not do anything till the ex parte impugned arbitral awards were ultimately served on them on 02.02.2018. This is clearly articulated in paragraph No.4C, which has been extracted and reproduced supra. Thereafter, the petitioners have come up with the instant OPs laying challenge to the impugned arbitral awards.

(g) The second aspect of the matter is that there has been exchange of correspondence between the petitioners i.e. Dithi/Ekaa and Daimler prior to the sole arbitrator entering upon reference. This exchange of correspondence between the parties has been placed before me as part of common typed set

of papers dated 18.06.2018. This Court is informed that this is a common typed set of papers for all the four OPs. One communication of utmost importance is a reply notice sent by Dithi/Ekaa to Daimler dated 12.12.2017 and the most relevant portion therein reads as follows:

"3. Our Client states that it has, for a substantial period of the tenure of the Loan Agreement, regularly paid the monthly instalments and honoured its obligations under the Loan Agreement. This is a matter of record. However our client informs, due to certain regulatory orders restraining the operations of Our Client in 2015, Our Client was unable to pay the instalment amounts after August 2013 and use the vehicles purchased using funds provided by DFSIPL."

(h) All that has been averred in this reply notice is that there was a specific understanding between the parties to the effect that said trucks shall be sold in 'as is where is' condition by Daimler and the sale proceeds would satisfy the loan amount. However, there is no document even to show prima facie that such agreement crystallised between the parties. Be that as it may, admittedly there is nothing in writing to show that even such an arrangement was arrived at between the parties.

(i) To be noted, as mentioned supra, the claim of Daimler itself is what has been described as loss on sale. In other words, the shortfall between the sale proceeds realised by selling the said trucks and the actual loan amount due from the petitioners i.e., Dithi/Ekaa is the arbitral claim that has been made before the arbitral tribunal by Daimler which has culminated in the impugned arbitral awards.

(j) In support of the statement that the arbitral tribunal ought not to have set the petitioners ex parte in the first hearing itself, Mr. Pawan Jabakh, learned counsel pressed into service a judgment of the Division Bench of this Court rendered in *S.A. Fasludeen and Ors. V. Siyauddin and Ors* reported in **2018-1-L.W. 233** (which shall be referred to as Fasludeen's case). However, what was placed before me is Manu/TN/4209/2017. My attention was drawn to paragraph Nos. 26, 27 and 31 of the said judgment, which read as follows:

26. The award of an Arbitral Tribunal might be set aside by recourse to a Court under Section 34 of the 1996 Act. Section 34(2) (iii) of the 1996 Act provides that an arbitral award may be set aside by the Court on the ground that the applicant for setting aside had not been given proper notice of the appointment of an Arbitrator

or of the arbitral proceedings or was otherwise unable to present his case.

27. The language of Section 34(2)(iii) of the 1996 Act makes it amply clear that the Arbitral Tribunal is not only obliged to give notice of the appointment of the Arbitral Tribunal, but also give the parties notice of the dates of arbitral proceedings to enable the parties to appear and make their submissions.

...

31. May be, as contended by the learned Senior Counsel appearing on behalf of respondents 1 to 3, the conduct of the appellants evinced an intention not to participate. However, that was inconsequential. Notice of the dates of the proceedings are mandatory, unless of course the next date is fixed in course of proceedings duly attended by all the parties. Moreover, the appellants are right in their submission that once an additional affidavit/claim was allowed to be filed, the pleadings should have been supplied to the appellants.

However, what is to be noticed is paragraph No.28 , which reads as follows:

28. In our view, the learned Single Judge patently erred in proceeding on the basis that once

notice of constitution of the arbitral proceedings and the first date of hearing had been given, there was no obligation on the part of the Arbitral Tribunal to give any further notice to the appellant."

Besides this, Fasludeen's case turns on an entirely different factual matrix. Fasludeen's case is one where it was a dispute within a family i.e, primarily siblings and it was a case where the award called in question therein was pronounced after the demise of one of the arbitrators in a three member arbitral tribunal. In my considered opinion, Fasludeen's case can at best be an authority for the proposition that an arbitral award cannot be pronounced by a three member arbitral tribunal after the demise of one of its members i.e, one of the learned arbitrators. This is articulated in paragraph No. 32 of the said judgment which reads as follows:

"32. In any event, upon the death of one of the Arbitrators, it became impossible for the Arbitral Tribunal to function, since it had expressly been agreed that the Arbitral Tribunal would be constituted of three Arbitrators."

(k) Besides this, learned counsel for petitioners also pressed into service a judgment of Division Bench of Kerala High Court in ***Impex Corporation and Others V. Elenjikal Aquamarine Exports Limited*** reported in ***AIR 2008 Kerala 119*** and another judgment of a Division Bench of Delhi

High Court in *Power Grid Corporation of India Limited V. Electrical Manufacturing Company Limited and Others* reported in **2008 (3) ARBLR 239 (Delhi)**. These two judgments have only persuasive value. Though these two case laws have only persuasive value as far as this Court is concerned, I still examined both case laws. With regard to Impex Corporation case of Kerala High Court, after referring to Section 18 of A & C Act, Honourable Kerala High Court held that violation of basic principles of natural justice is violation of statutory provisions covered under Sections 18 and 24 of A & C Act. Learned counsel drew my attention to paragraph No.5 and the relevant portion in paragraph No.5 is as follows:

"5. ...It shows that sufficient advance notice must be given regarding dates of oral hearing and inspection of documents and pleadings filed by one party shall be communicated to the other party. Admittedly even the claim statement was given to the appellants after they were declared ex parte and therefore, no notice was send to the appellants."

A perusal of the facts in the judgment of Kerala High Court reveals that it is completely distinguishable on facts. There are several other issues such as a direct junior of arbitrator appearing before the arbitrator turning on bias and other issues. However, with regard to parties being put on notice, the facts have been culled out in paragraph No.4 and the most relevant portion of

paragraph No.4 reads as follows:

"4. ...The proceedings dated 12.11.1999 shows that appellants were declared ex parte on that date. According to the appellants they were not informed of the posting on 12.11.1999. On 20.12.1999, even though its advocate with representative of the appellants went to the arbitrator's office, arbitrator was out of station and proceedings were adjourned and adjourned date of posting was not intimated. On 3.1.2000 advocate of appellant sent a registered letter requesting the arbitrator to inform the date. In the reply to the above, by letter dated 7.1.2000 appellants were informed that arbitration was completed and by proceedings dated 12.11.1999 the appellants were declared ex parte and the copy of the same was sent to the appellants by registered post as well as by courier and that the arbitration proceedings scheduled on 20.12.1999 was adjourned to 3.1.2000 on which day the respondent/claimed adduced evidence and the proceedings closed and the case was reserved for award..."

Therefore, this shows that Impex Corporation case is one where the party invoking Section 34 of A & C Act took every effort to go before the arbitrator but in vain unlike the instant case where the petitioners admittedly

did nothing after receipt of notice of hearing dated 03.03.2017 from the arbitrator on 24.04.2017 until ex parte awards i.e, impugned arbitral awards were ultimately served on the petitioners.

(l) This takes us to Delhi High Court's judgment in Power Grid Corporation case. This case was pressed into service to buttress learned counsel's submissions that omission to give notice to a party before proceeding ex parte is a serious irregularity and this procedure amounts to misconduct. It was held that it is a salutary principle of natural justice that nobody should be condemned unheard. There is no difficulty in accepting the time-honoured principle that nobody should be condemned unheard is one of the salutary principles underlying natural justice. I would add that it is not only a salutary principle, it is even a sublime philosophy underlying natural justice, but this does not help the petitioners in the instant case as Power Grid Corporation case is completely distinguishable on facts. A perusal of the facts in Power Grid Corporation case reveals that the parties went before the arbitrator and requested the arbitral tribunal for an audience but they were refused audience and it can even be culled out from the narration of facts that it is appellant's case that they were not allowed to present their case saying audience will not be given unless they make payment to arbitrators towards their share of the arbitrators' fee. This is articulated in paragraph No. 5 of Power Grid

Corporation case and the relevant portion of the said judgment reads as follows:

"5. ...None appeared before the Arbitrators for either respondent No.1 or the appellant and thereafter meeting was fixed for 20.04.1993 to continue till 23.04.1993. In the meanwhile, on 09.04.1993, the appellant appeared through counsel and made a request to the Arbitrators to adjourn the proceedings as the matter could be settled and also that they intended to challenge the appointment of Arbitrators. On the adjourned date of 20.4.1993, the appellant appeared through their Deputy Manager (Law) and the counsel, but as per the appellant they were not allowed to present their case unless the appellant made payment to the Arbitrators towards their share of Arbitrator's fee..."

Therefore, Power Grid Corporation case is clearly distinguishable on facts as that is a case where the parties have taken every effort to go before the arbitrator unlike the instant case.

(m) This takes us to the last of the grounds of attack namely, there should not have been a composite arbitral reference.

(n) A perusal of the impugned arbitral awards i.e, two awards, both dated 20.01.2018 reveal that there is a clear reference to contracts dated 30.10.2014 and 26.03.2015 in each of the awards, which are being described as Contract I and Contract II in the instant order. In this context, Mr.D. Pradeep Kumar, learned counsel on record for respondent submitted that there are two distinct agreements one with regard to 20 trucks (18 out of these 20 trucks form subject matter of one arbitral award) and another for 11 trucks. It is his specific case that while one agreement for 20 trucks is dated 30.10.2014 (Contract I), the other agreement for 11 trucks is dated 26.03.2015 (Contract II). However, there is a reference to loan agreement number for each truck. According to him, if it was a composite reference, Daimler could have made one common reference for all 29 trucks. The very fact that Daimler has made two separate references and invited two awards will show that it is not a composite reference.

(o) In support of his theory that composite reference is impermissible, learned counsel for petitioners pressed into service a judgment of Honourable Supreme Court dated 10.10.2017 made in Arbitration Petition No. 30 of 2016 (*M/s. Duro Felguera, S.A. V. M/s. Gangavaram Port Limited*). A perusal of two separate, but concurring judgments delivered by two Honourable Judges of Supreme Court reveal that Gangavaram was a case where there were

separate agreements, but referable to another principal agreement. In the instant case, there are no such issues. Therefore, Duro Felguera principle does not help the petitioners in the instant case. In any event, petitioners have not gone before the arbitral tribunal in this regard. Furthermore, the petitioners are not in a position to show that any prejudice has been caused to them owing to such reference. To be noted, as mentioned supra, the loan transaction as well as default have been clearly admitted by the petitioners. In any event, in the absence of petitioners being able to show any prejudice, it may not be necessary to delve further into this aspect of the matter.

(p) With regard to the arbitral tribunal setting the petitioners ex parte in the first listing, a perusal of the impugned arbitral awards reveal that the sole arbitrator entered upon reference on 03.01.2017. Most critical aspect of this matter is, this is post 23.10.2015 when large scale amendments were made to A & C Act.

(q) Before dealing with that, it may be necessary to place on record that a letter dated 05.10.2015 nominating the sole arbitrator has been placed before me. Mr. D. Pradeep Kumar, learned counsel on record for respondent submits that based on that letter, it appears that there have been some other developments and therefore, ultimate reference was only on 03.01.2017. Be

that as it may, I proceed on the basis of the recording made by sole arbitrator wherein and whereby the date of reference is 03.01.2017 (as it is not factually disputed). The most relevant amendment which is relatable to this plea is introduction of Section 29-A in A & C Act, which reads as follows:

"29-A. Time-limit for arbitral award - (1)

The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation:- For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the

period so specified, extended the period.

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previous appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties

under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

A perusal of Section 29-A of A & C Act reveals that a strict timeline has been laid down by A & C Act for disposal of arbitral disputes by the arbitral tribunals. In fact, the desirability of disposing of within six months, though a one year period is provided is also highlighted in various sub-sections adumbrated under Section 29-A of A & C Act. More important is the rigour of Section 29-A. A perusal of Section 29-A reveals that if an arbitrator is to take more time than what is prescribed, it cannot be without specific judicial orders from the Court.

(r) In such circumstances and in the light of amendments to A & C Act, all aimed at expeditious disposal and speedy disposal qua Alternate Dispute Resolution Mechanisms ('ADR Mechanisms' for brevity), in the factual matrix of the instant case, I am unable to find that there is sufficient ground for judicial intervention under Section 34 of A & C Act, particularly, in the light of the fact that petitioners have not taken any step in the right direction

of going before the arbitral tribunal. In my considered opinion, the petitioners have been completely recalcitrant and nonchalant qua the arbitral proceedings and therefore, they will not be entitled to judicial intervention under Section 34 of A & C Act. Judicial intervention in Section 34 of A & C Act at the instance of such recalcitrant parties will militate against the scheme of A & C Act qua ADR mechanism is my considered view. That judicial intervention under Section 34 of A & C Act should be minimal cannot be disputed. In my considered opinion, judicial intervention should be minimal being sublime philosophy underlying the amendments to A & C Act. I have already alluded to Fiza Developer's Principle supra.

(s) Before parting with this case, it may be necessary to set out that Honourable Supreme Court in a recent judgment rendered in ***State of Bihar V. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in **2018 9 SCC 472** (in paragraph No.26) has held that Courts dealing with applications to set aside arbitral awards should make every endeavour to adhere to the timeline prescribed under sub-section 6 of Section 34 of A & C Act, which prescribes a timeline for petitions under Section 34 of A & C Act also. This has been reiterated again by Honourable Supreme Court in ***Emkay Global Financial Services Limited V. Girdhar Sondhi*** reported in **2018 9 SCC 49**.

(t) In sum and substance, or in other words, the crux and gravamen of A & C Act is to provide expeditious disposal. In this view of the matter, a case where the petitioners have not taken any effort whatsoever to go before the arbitral tribunal or even write to the arbitral tribunal, but comes before this Court and pleads no notice has been served (when records of arbitral tribunal are summoned and perused, it comes to light that notice has infact been served) may not be a fit case for interference on the ground that learned arbitrator should not have set the petitioners ex parte in the first hearing itself though this might have been a tenable ground under other circumstances. In other words, in cases where an effort is made by the petitioners to go before the arbitrator, the complexion, dynamics and dimensions of applications and judicial intervention qua Section 34 of A & C Act will obviously operate differently.

(u) This takes us to the conclusion.

CONCLUSION:

In the light of all that have been set out supra, particularly, in the light of dispositive reasoning supra, I have no hesitation in coming to the conclusion that instant OPs deserve to be dismissed leaving the parties to bear their own costs.

M. SUNDAR,J.

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DECISION:

O.P. Nos. 564 to 567 of 2018 are dismissed. Consequently, connected applications are dismissed.

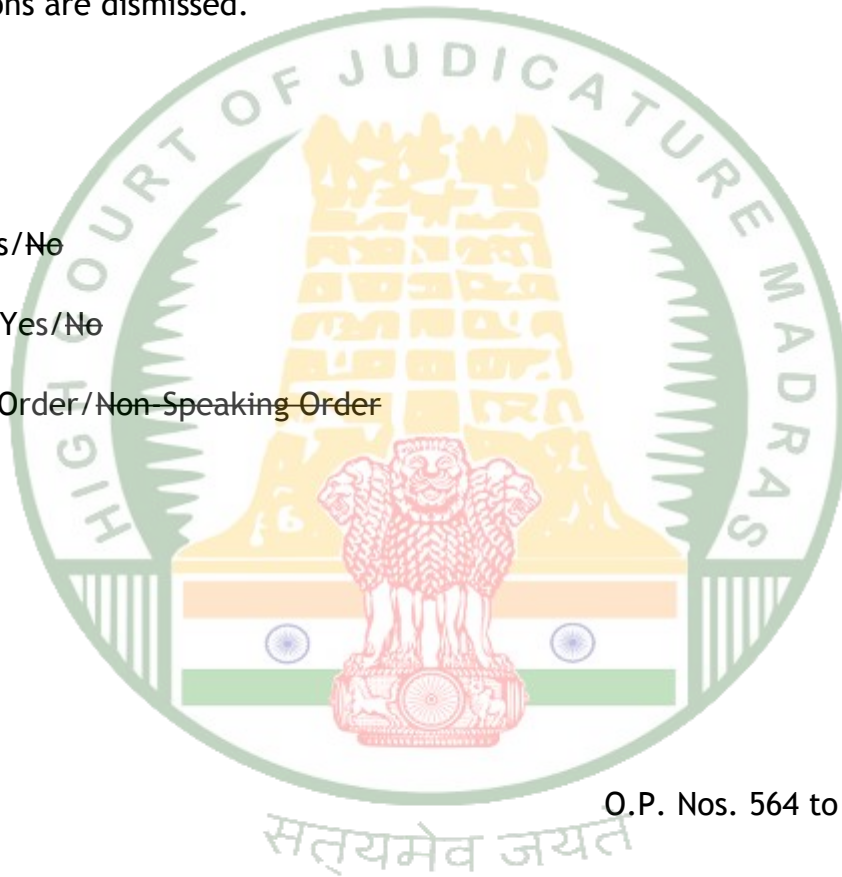
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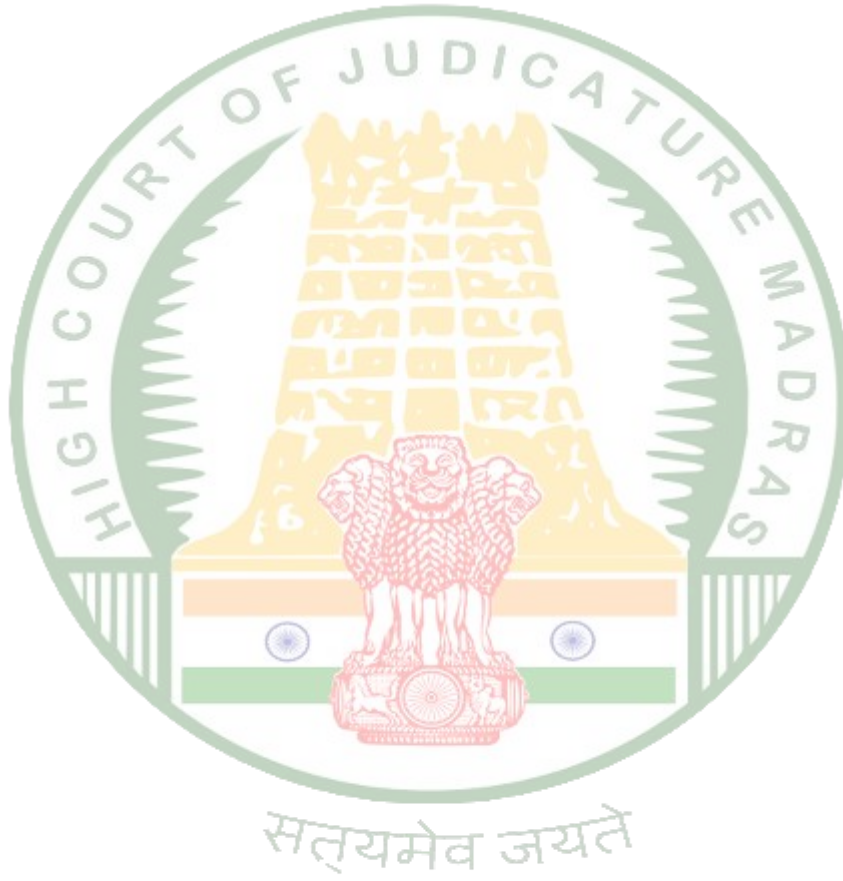
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O.P. Nos. 564 to 567 of 2018

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