

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.04.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.155 of 2016

S.Sivakumar

.. Petitioner

vs.

1.M/s.Sundaram Finance Limited
No.21, Patullos Road
Chennai - 600 002.

2.Mr.M.Sowundrapandian
Arbitrator
Former District & Sessions Judge
No.55/38, Teachers Colony
Venkataratnam Nagar
Adayar, Chennai - 600 020.

3.Mr.R.Manoharan

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 5th November 2015 passed by the 2nd respondent/learned Arbitrator in Arbitration Case No.MS/SF/102 of 2014 and consequently declare all proceedings initiated by the second respondent as against the petitioner are void; and direct the 1st respondent to pay the costs of this petition to the petitioner and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.K.Suresh Babu

For Respondents : Mr.T.Srinivasa Raghavan for
M/s.T.Srinivasa Raghavan & Associates
Assisted by Mr.E.Tamizharasan for R1
R2-Arbitrator

ORDER

Instant 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 05.11.2015' ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator, who is a former District Judge.

2. Section 34 in the scheme of A & C Act finds its slot under Chapter VII of A & C Act, which is captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act also reveals that recourse to Court against an arbitral award may be made by an 'application'. Also to be noted, the very caption to Section 34 of A & C Act reads 'APPLICATION FOR SETTING ASIDE AN ARBITRAL AWARD' (underlining made by Court to supply emphasis and highlight). Be that as it may, such recourse against an arbitral award is being assigned the nomenclature 'Original Petition' in this Registry. Therefore, I shall refer to the instant proceedings as 'OP' for the sake of convenience and clarity.

3. Before this Court proceeds further, it is necessary to extract earlier proceedings of this Court dated 01.04.2019, which reads as follows:

'Vide separate orders made in the aforesaid 'Original Petitions' ('OPs' for brevity), my predecessor learned judge has directed the Registry to requisition the arbitration records.

The earlier proceedings dated 15.06.2016 in each of the OP reads as follows:

"Order dated 15.06.2016 in O.P.No.154 of 2016

1. It is noticed that the learned Arbitrator has been arrayed as second respondent to the present proceeding.

2. To my mind, the arbitrator is neither a necessary nor a proper party to the present proceeding. Accordingly, the second respondent is deleted from the array of parties. An amended memo of parties would be filed within a period of two weeks.

3. At request, re-notify on 17.08.2016.

4. The Registry will requisition the arbitration record, in the meanwhile.

Order dated 15.06.2016 in O.P.No.155 of 2016

1. It is noticed that the learned Arbitrator has been arrayed as second respondent to the present proceeding.

2. To my mind, the arbitrator is neither a necessary nor a proper party to the present proceeding. Accordingly, the second respondent is deleted from the array of parties. An amended memo of parties would be filed within a period of two weeks.

3. At request, re-notify on 17.08.2016.

4. The Registry will requisition the arbitration record, in the meanwhile."

2. Learned counsel for petitioner Mr.K.Suresh Babu, submits that memo for amendment pursuant to paragraph 2 of the orders dated 15.06.2016 have not been filed and undertakes to file the same within one week from today.

3. With regard to requisitioning of arbitral records, Registry is directed to send a communication to the Sole Arbitrator in both OPs i.e. Mr.M.Sowundrapandian, Arbitrator, Former

District & Sessions Judge, No.55/38, Teachers Colony, Venkataratnam Nagar, Adyar, Chennai-600 020, requesting him to send to this Court the entire records of the Arbitral Tribunal pertaining to Arbitration Case Nos.MS/SF/102 of 2014 and MS/SF/101 of 2014 in which arbitral awards dated 30.11.2015 and 05.11.2015 respectively have been passed.

4.Registry to send the aforesaid communication to second respondent at the aforementioned address by the end of this week i.e. on or before 05.04.2019. Registry to send this communication through a mode where Registry will have acknowledgment for the communication. In the communication, learned arbitrator shall be requested to produce the records within one week from the date of receipt of the communication. It shall also be made clear that records shall be delivered by the Arbitral Tribunal to the Office of the Registrar General of this Court in a sealed cover, who in turn shall have the same put up along with the case file before the next listing. If the second respondent Sole Arbitrator does not respond, Registry shall put up a note in this regard.

List this matter on 23.04.2019.'

4. Most relevant portion of the earlier proceedings of this Court is paragraph 3. Pursuant to paragraph 3, Registry has requisitioned arbitral records pertaining to impugned award from the AT and the same has been sent to the Registrar General in a sealed cover, who in turn has placed the same before this Court. The sealed cover was opened in Court at the hearing and this Court had the benefit of perusing the records of AT pertaining to the impugned award.

5. With regard to instant OP, central theme of the instant OP is a loan

agreement dated 29.11.2011 bearing reference No.GZ294061. To be noted, this loan agreement has been marked as Ex.A1 before AT. This loan agreement is financial assistance extended by the first respondent finance company before this Court to the third respondent before this Court one Mr.R.Manoharan, who is the principal borrower. To be noted, petitioner in instant OP before this Court is a guarantor. The details of the loan agreement can be culled out from the two schedules of Ex.A1 and the two schedules as culled out from Ex.A1 loan agreement is as follows:

'FIRST SCHEDULE

No.	Item	Particulars
1	Agreement No. & Date	GZ294061 - 29/11/2011
2	Description of Assets	1 No. TIPPER HCV
	Make	LEYLAND
	Model	2011
	Engine No.	PBE157395Z
	Chassis No.	MB1JANJC5BRNF0790
	Registration No.	
3	Loan Amount	Rs.28,00,000.00
4	Loan Period	48 months
5	No. of Instalments	47
6	No. & Amount of Advance Instalments.	1 - Rs.76,100
7	Rate of Interest	Monthly compounded @ 12.64% Annualized @ 13.4
	Charges	
	a) Cheque dishonouring Charges	As levied by lender's bankers subject to a Minimum of Rs.250 for each dishonour.
	b) Cheque Collection Charges	Rs.11 per thousand on

No.	Item	Particulars
		outstation cheques.
	c) Non Post Dated cheques collection charges	As levied by the lender subject to a minimum of Rs.150/- per instalment.
	d) Other Charges	Expenses incurred for collection of instalments
9	Rate of Premium Payable for Premature closure of the contract	3 percent on principal balance on the date of foreclosure
10	Rate of Additional Interest as provided under Article 14 Sub Clause No. 14.1	30.00% per annum

SECOND SCHEDULE

Sl.No.	Due Dates (Monthly)	Amount (Rs.)	Total Amount (Rs.)
1	22/12/2011	76100 ... 76100 * 1	76100.00
2	22/01/2012 to 22/10/2015	75650 each ... 75650 * 46	3479900.00
		Total Amount Due	3556000.00

6. It is not in dispute that the petitioner in the instant OP before this Court has executed a guarantee deed, which is also dated 29.11.2011. This guarantee deed executed by the petitioner in instant OP has been marked as Ex.A2 before AT.

7. There is no dispute or disagreement that the principal borrower (3rd respondent before this Court) committed default after paying 16 'Equated Monthly Instalments' ('EMIs' for brevity), resulting in the first respondent

finance company repossessing the Truck, which is subject matter of the loan agreement. It is also not in dispute that first respondent finance company had sold the said Truck and realised certain sums of money. After adjusting sale proceeds of the said Truck, the finance company has laid a arbitration claim for, what according to the finance company, is the balance payable under the loan agreement, arraying the principal borrower (3rd respondent in instant OP) and the guarantor (petitioner in instant OP) as respondents 1 and 2 respectively before AT.

8. AT entered upon reference and passed an *ex-parte* award directing the respondents before AT to pay a sum of Rs.21,61,695.19ps with interest at the rate of 18% per annum from 11.12.2013 till the date of realisation with costs of arbitration proceedings and a sum of Rs.5,500/- towards remuneration of AT and expenses of AT have also been mulcted on the respondents before AT.

9. Before AT, one Mr.G.Sehkar, an employee of the finance company has been examined as P.W.1 and 21 documents have been marked as Exs.A1 to A21. With regard to respondents there was no oral or documentary evidence and as mentioned supra an *exparte* award came to be passed.

10. This *ex-parte* award is the impugned award in the instant OP.

11. Post notice in instant OP and after the previous proceedings of this Court dated 01.04.2019 and after the records of the AT have been placed before this Court, main OP was taken up for disposal by consent of both sides.

12. Mr.K.Suresh Babu, learned counsel on record for the petitioner in the instant OP and Mr.T.Srinivasa Raghavan, (assisted by advocate Mr.E.Tamizharasan) learned counsel on record for the contesting first respondent finance company are before this Court.

13. Before this Court proceeds further, it is to be noted that the sole Arbitrator, who constituted the AT has been arrayed as respondent No.2 in the instant OP. This Court is of the considered view that it is not necessary to array the sole Arbitrator, who constituted the AT as one of the respondents in the instant OP. However, as the main OP is now being heard out and disposed of, this Court is now not embarking upon the exercise of passing orders for deleting respondent No.2, as it will cause procedural delay.

14. Be that as it may, learned counsel for petitioner, predicated his submissions on three main grounds and the three main grounds can be summarised as follows:

a) petitioner in instant OP, who is a guarantor is not a party to the aforesaid loan agreement Ex.A1.

b) the provisions of Contract Act have been given a go by with regard to the status of a guarantor as the documentation before the AT is in contravention of Sections 128, 142 and 143 of the Contract Act besides Section 133 of the Contract Act.

c) the impugned award is vitiated owing to lack of notice within the meaning of Section 21 of A & C Act.

15. This Court now embarks upon the exercise of dealing with each one of the grounds in the order in which they were raised.

16. First ground is that the petitioner in instant OP, who is a guarantor, is not a party to the 'loan agreement dated 29.11.2011' (hereinafter 'said loan agreement') and therefore, the petitioner will not qualify as a 'party' within the meaning of Section 2(1)(h) of A & C Act. It was submitted that as the petitioner is not a party to the arbitration agreement within the meaning of Section 2(1)(h) of A & C Act, arbitration could not have been initiated against the petitioner. It is not in dispute that the guarantee deed (as alluded to supra) also dated 29.11.2011 was marked as Ex.A2 before the AT. It is also not in dispute that the petitioner

as a guarantor has signed only Ex.A2 guarantee deed and has not signed the said loan agreement.

17. In this backdrop, responding to the contentions raised by the learned counsel for the petitioner, learned counsel for first respondent finance company submitted that the petitioner certainly becomes a party to the arbitration agreement between the parties by operation of Section 7(5) of A & C Act. Saying so, learned counsel for finance company drew the attention of this Court to the arbitration agreement between the parties. Arbitration agreement between the parties within the meaning of Section 7 of A & C Act is in the form of a clause in the loan agreement Ex.A1 and the clause is article 22. Article 22 is captioned 'Law, Jurisdiction, Arbitration' and this Court deems it appropriate to extract entire article 22 which 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 provisions 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 of 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 securities furnished by or on behalf of the Borrower.'

18. As already mentioned supra, petitioner is not a signatory to the loan agreement. However, with regard to the guarantee deed, learned counsel for contesting first respondent finance company drew the attention of this Court to Clause 12 and a part of the preamble portion. Clause 12 of the guarantee deed (Ex.A2) reads as follows:

'12. The Guarantor/s agree/s that the arbitration clause provided under the loan agreement binds the guarantor(s) and the guarantor/s is/are also bound by the award passed by the arbitrator.'

19. The relevant preamble portion reads as follows:

'..... AND WHEREAS relying upon the undertakings and assurances provided by the Guarantor/s hereunder and the undertakings and assurances provided by the Borrower the

Lender has, under and pursuant to the Loan Agreement dated 29/11/2011 entered into with the Borrower ("Loan Agreement") the terms and conditions which the Guarantor/s is/are fully aware, agreed to extend a Loan facility of Rs.28,00,000/- to the Borrower upon the terms and conditions mentioned in the Loan Agreement and this Guarantee.'

20. Referring to Clause 12 and the aforesaid preamble portion in the guarantee deed (Ex.A2), it was contended that this is a case where there is a reference in a contract to a document containing arbitration clause. Section 7(5) of A & C Act reads as follows:

7. Arbitration agreement

(1)

(2).....

(3).....

(4).....

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.'

21. In other words, it is the specific and pointed submission of learned counsel for contesting first respondent finance company that the aforesaid reference in the guarantee deed (Ex.A2) to the loan agreement (Ex.A1) which in turn contains the arbitration clause i.e., Article 22, brings into force an arbitration agreement within the meaning of Section 7(5) of A & C

Act between the first respondent finance company, third respondent

principal borrower and the petitioner guarantor. A perusal of Exs.A1 and A2, particularly the aforesaid clauses and relevant portions, leaves this Court with little doubt that this will certainly qualify as an arbitration agreement between the first respondent finance company, third respondent and petitioner guarantor within the meaning of Section 7(5) of A & C Act. Therefore, the first argument that the guarantor is not a party to the loan agreement and therefore, the arbitration ought not to have been conducted qua the petitioner fails.

22. This takes us to the second argument which turns on various provisions of Contract Act. As alluded to supra, the sum and substance of the arguments that was raised by learned counsel for petitioner is that on a conjoint reading of Sections 128, 142, and 143 of the Contract Act besides Section 133 would reveal that for a guarantee to be enforceable, it has to necessarily be tripartite. Responding to the above submission, learned counsel for first respondent submitted that this is in the nature of a generic ground of attack which may qualify under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). In other words, it was the specific submission of learned counsel that they would not attract a ground under Section 34 of A & C Act much less good enough to have the impugned award set aside. The other point that was raised is, in the light of the conjoint reading of Exs.A1 and A2, which have been done supra, in dealing with the

question of whether the petitioner in instant OP is a party to the arbitration agreement would apply to the instant case also. On this basis, it was submitted that there is certainly no violation of the above said provisions of the Contract Act and guarantor certainly becomes a party to the agreement and it cannot be gainsaid that the terms of agreement are contrary to the above said provisions. There is no difficulty in accepting both the aforesaid arguments of the learned counsel for first respondent finance company. If certain provisions of the Contract Act have been given a go by in drawing up of the agreements itself, it may not even be available as a ground to be raised before the AT, but nonetheless it may well have been open to disputation on a different turf. Not having done that, as rightly pointed by learned counsel for first respondent these are grounds more in the nature of grounds that can at best be raised in a regular first appeal under Section 96 of CPC. Considering the narrow scope of instant OP which is under Section 34 of A & C Act (about which there will be little more elaboration by this Court in the later part of this order), there is no difficulty in holding that the second ground of attack also does not carry the campaign of the petitioner against the impugned award any further.

23. This takes us to the last ground of attack qua the impugned award i.e., the ground that notice within the meaning of Section 21 of A & C Act has not been given to the petitioner.

24. It was argued by learned counsel for petitioner that at best or at the highest there are two communications both dated 25.02.2014. The first of the communication dated 25.02.2014 is from the Assistant General Manager (Legal) of the first respondent finance company to the Managing Director of the first respondent company. In other words, it is an intra office communication qua the first respondent finance company. This has been marked as Ex.A13 before AT. A perusal of records of AT reveals that copies of Ex.A13 have been marked to the principal borrower (3rd respondent in the instant OP) and the petitioner in the instant OP. The postal acknowledgement cards with regard to third respondent principal borrower and the petitioner guarantor have been marked as Exs.A14 and A15. As the principal borrower is not before this Court, we are not concerned with that aspect of the matter as far as instant OP is concerned. With regard to the petitioner, who is a guarantor, the postal acknowledgement card is Ex.A15. To be noted, learned counsel for petitioner made a categorical submission that one Mr.V.Ragav has received this notice and it has not been received by the petitioner. A careful perusal of the records of AT which are before this Court and particularly Ex.A13 reveals that the submission of learned counsel for petitioner is correct. Likewise, the second of the communication dated 25.02.2014, is a communication from the Managing Director of the first respondent finance company to the sole Arbitrator, who constituted the AT. This has been

marked as Ex.A16 before the AT. A careful perusal of the records of AT reveals that this communication also has been marked to both the third respondent principal borrower and the petitioner guarantor. Postal acknowledgement card with regard to the third respondent principal borrower is Ex.A17 and the postal acknowledgement card with regard to the petitioner guarantor is Ex.A18. A close examination of the records of AT reveals that Ex.A18 has also been received by one Mr.V.Ragav and it has not been received by the petitioner.

25. Learned counsel for petitioner drawing the attention of this Court to section 21 of A & C Act, submitted on a demurrer that these notices certainly do not qualify as a notice or communication within the meaning of Section 21 of A & C Act.

26. In response to the aforesaid arguments of learned counsel for petitioner, learned counsel for first respondent finance company drew the attention of this Court to Section 3(1)(a) of A & C Act, which reads as follows:

'3 Receipt of written communications

(1)...

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and'

27. Adverting to Section 3(1)(a) of A & C Act, learned counsel for first respondent submitted that any written communication is deemed to have been received by the addressee if it is delivered to the addressee at his place of business, habitual residence or mailing address. There is also no dispute or disagreement before this Court that the address to which the aforesaid Ex.A15 and A18 were sent as far as the petitioner is concerned is the correct address. However, learned counsel for petitioner submitted that his avocation is such that he is constantly at the wheel and in travel. Learned counsel submitted that petitioner is a Truck Driver by avocation and therefore, he is not available in the address most of the time. It was submitted that the receipt of the notice by one Mr.Ragav does not bind him. It was submitted that it was not brought to petitioner's attention. It was also submitted, on instructions, by learned counsel for petitioner that the petitioner does not know any one by name Mr.Ragav and the notice was not brought to his attention. Be that as it may, this argument does not carry the petitioner further in the light of language in which Section 3(1)(a) of A & C Act is couched, because the address to which the communication has been sent is undoubtedly the correct address of the petitioner. If that be the case, arguments of this nature, does not carry the petitioner any further, this is more so in the light of the exist and express language in which Section 3(1)(a) is couched. Having said that, this Court deems it pertinent to write that it was well open to the petitioner to enter upon

disputation before AT that there is no one by name Ragav and that acknowledgement cards/receipt are stage managed and a make believe affair. Not having done that before At, petitioner cannot now be heard to contend to the contrary in a Section 34 OP i.e., instant OP.

28. This takes us to the question as to whether this Exs.A15 and A18 are communications within the meaning of Section 21 of A & C Act at all. As already mentioned supra, Ex.A13 is an intra office communication qua the first respondent finance company, being a communication from the Assistant General Manager (Legal) of the first respondent finance company to the Managing Director i.e., Managing Director of the first respondent finance company. Ex.A16 is a communication from the Managing Director of the first respondent company to the sole Arbitrator, who constituted the AT. Considering the importance, these two exhibits are extracted and reproduced infra. Ex.A13 reads as follows:

'SUNDARAM FINANCE

Enduring values. New age thinking

February 25, 2014

FROM:

TO:

*ASSISTANT GENERAL MANAGER (LEGAL)
SUNDARAM FINANCE LIMITED
21, PATULLOS ROAD
CHENNAI - 600 002*

*THE MANAGING DIRECTOR
SUNDARAM FINANCE LIMITED
21, PATULLOS ROAD
CHENNAI - 600 002.*

Dear Sir:

*Con. No.GZ294061 Loan Agreement date: 29/11/2011
Borrower: Mr.R.MANO HARAN Guarantor: Mr.S.SIVAKUMAR
Vehicle details:LEYLAND TIPPER HCV Chassis
No.MB1JANJC5BRNF0790 Engine No.PBE157395Z Registration*

No.TN-47-AA-6819 Shortfall Amount Rs.2161695.19 ps.

Under the aforesaid contract, we write to inform you that a claim/dispute has arisen due to non payment of the Short fall amount.

In terms of Article 22 of the said loan agreement, such a claim/dispute has to be adjudicated through sole arbitrator to be appointed by you. Accordingly, we request you to appoint an arbitrator who can adjudicate upon the dispute/claim in accordance with the provisions of the Arbitration & Conciliation Act, 1996.

Thanking you,

Yours truly,

For SUNDARAM FINANCE LIMITED

sd/-

ASSISTANT GENERAL MANAGER (LEGAL)'

29. Ex.A16 reads as follows:

'SUNDARAM FINANCE

Enduring values. New age thinking

T.T.Srinivasaraghavan

Managing Director

February 25, 2014

Mr.M.Sowundarapandian

Arbitrator

Old No.89, Kamaraj Avenue,

2nd Street, Adyar, Chennai - 600 020.

Sir,

Under the Loan Contract No.GZ294061 dated 29/11/2011 entered into among M/s.Sundaram Finance Limited, 21, Patullos Road, Chennai. 600 002, as lender Mr.R.MANOCHARAN, KARUR as Borrower and Mr.S.SIVAKUMAR, KARUR as Guarantor, there is an Arbitration Clause, where under I have been empowered to appoint an Arbitrator with regard to disputes/differences and claims that may be

referred to you by me, arising out of the said Loan agreement.

Now, I have received a letter dated 25/02/2014 from M/s. Sundaram Finance Limited, requesting me to appoint an Arbitrator to adjudicate upon the dispute/claim that has arisen among the said parties under the said Agreement. The address of the parties are given below:

BORROWER:

MR.R.MANO HARAN
S/O MR.RENGASAMY NO.16
T.SELLANDIPALAYAM,
THORANAKKALPATTI
KARUR - 639 003

GUARANTOR:

MR.S.SIVAKUMAR
S/O. MR.SANKAR
6/858 EB COLONY PARAMATHI ROAD
NAMAKKAL - 637 001

ALSO AT:

MR.R.MANO HARAN
S/O MR.RENGASAMY
SF NO.572/1A SITE NO.2
NORTH PART, WARD NO.1, 4TH CROSS
BHARATHIDASAN NAGAR
THANTHONDRIMALAI
KARUR - 639 004

In exercise of the power conferred on me under the Arbitration Clause of the said Loan agreement, I hereby nominate you as an Arbitrator in the matter referred to me by M/s. Sundaram Finance Limited.

A synopsis of the case is contained in the enclosed letter dated 25/02/2014 addressed to me by M/s. Sundaram Finance Ltd.

May I request you to enter reference at your earliest convenience?

Thanking you

Yours truly
sd/-

T.T.SRINIVASARAGHAVAN
MANAGING DIRECTOR'

30. Exs.A13 and A16 are of the same date. Therefore, Ex.A13

<http://www.judis.nic.in> obviously has been served on the same date on the Managing Director of the

first respondent finance company, but even the service on one Mr.Raghav is only on 4th March 2014. However, by that time Ex.A16 had also been dispatched and that has also been simultaneously served on Mr.Ragav on 4th March 2014.

31. A careful perusal of the contents of the two letters, leave this Court with the considered view that these may not qualify as communications within the meaning of Section 21 of A & C Act. It is not necessary to delve further into this owing to what is to follow.

32. Faced with the above situation, learned counsel for first respondent finance company referred to Article 22 of the loan agreement. To be noted, Article 22 of the loan agreement (Ex.A1), which is the arbitration clause i.e., arbitration agreement between the parties, has already been extracted and reproduced elsewhere supra. Referring/adverting to article 22 of the loan agreement (Ex.A1), learned counsel for first respondent finance company submitted that in the nature of the arbitration clause, it is not necessary to comply with Section 21 of A & C Act. It was the specific and pointed submission of learned counsel for first respondent finance company that in an arbitration clause, where it has been agreed that a party other than the parties to the contract will appoint the arbitrator, Section 21 of A & C Act does not apply. Therefore, it was

submitted that it is not necessary to even go into the question of whether Exs.A13 and A16 qualify as a communication or notice within the meaning of Section 21 of A & C Act. As a sequitur what falls for consideration before this Court is, in the light of the language in which Article 22 of the A & C Act is couched, whether Section 21 of A & C Act is applicable at all. This takes us to further arguments which were made by learned counsel for first respondent finance company in support of his contention that Section 21 of A & C Act will not apply to an arbitration clause like Article 22, where a party other than the parties to the contract is to nominate an arbitrator. Learned counsel pressed into service, Twenty-Third Edition of Russell on Arbitration and drew the attention of this Court to the commentary therein on commencing the arbitration proceedings. Attention of this Court was drawn to page No.189 of the said book and the commentary captioned 'Commencement for limitation purposes' which goes by the numeric reference 5-021 and the same reads as follows:

'Commencement for limitation purposes.

The parties are free to agree when an arbitration is to be regarded as commencing both under the Arbitration Act 1996 and for limitation purposes. In the absence of agreement the provisions of Section 14 of the Arbitration Act, 1996 apply. Under that section an arbitration is treated as being commenced when a notice in writing is served on the other party requiring him to agree to the appointment of an arbitrator or, if the parties are each to make an appointment, requiring him to appoint an arbitrator. The party giving the

notice does not have to already have appointed his own arbitrator. Where, however, the arbitration agreement specifies the person to be appointed as arbitrator, the arbitration is treated as being commenced when a notice in writing is served on the other party requiring him to submit the dispute to that person. Finally, if the arbitrator is to be appointed by someone other than a party to the arbitral proceedings, such as an arbitral institution, the arbitration is treated as being commenced when a notice in writing is given to that other person requesting him to make the appointment. It is prudent to send to the respondent a copy of the notice addressed to the person requested to make the appointment as this may avoid arguments about when the notice was given.'

33. Relying on the aforesaid commentary in Russell on Arbitration, learned counsel for first respondent submitted that where arbitrator is to be appointed by some one other than a party to the arbitration proceedings such an arbitration institution, arbitration is treated as being commenced when a notice in writing is given to that other person requesting him to make the appointment. Referring to this portion of the commentary, learned counsel submitted that the aforesaid communication being Ex.A13 which is a communication as mentioned supra from the Assistant General Manager (legal) first respondent finance company to his Managing Director will qualify as a communication from the first respondent company in writing given to the person i.e., third party who is making appointment viz., Managing Director, requesting him to make the appointment.

34. A careful perusal of the aforesaid commentary pertaining to Russell on Arbitration reveals that it turns on Section 14 of UK Arbitration Act which is also of the year 1996.

35. UK Arbitration Act was not readily made available to this Court in the hearing.

36. Therefore, this Court embarked upon the exercise of locating Section 14 of the UK Arbitration Act from the official website of the Government of UK being legislation.gov.uk.

37. Section 14 of 1996 Arbitration Act in UK reads as follows:

'14 Commencement of arbitral proceedings.

(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of

a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5)Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.'

38. When this soft copy was shown to the learned counsel for first respondent finance company, learned counsel agreed that this is the Section which has been referred to in the aforesaid Russell on arbitration.

39. That leads us to sub Section (5) of Section 14 of UK Arbitration Act. Sub Section (5) of Section 14 of UK Arbitration Act makes it clear that in cases where the arbitrator is to be appointed by a person other than the parties to the arbitration, arbitral proceedings are commenced when one party gives notice to that person requesting him to make appointment in respect of that matter. It is in this context, the aforesaid commentary has been aimed.

40. There is no dispute or disagreement that there is no equivalent of Sub Section (5) of Section 14 of Arbitration and Conciliation Act operating in India. It therefore follows that the Commentary i.e., Russell on

Arbitration does not help the first respondent finance company. Therefore, that takes us back to Section 21 of A & C Act. Now reverting to Section 21, as Section 21 does not make any distinction between arbitration where arbitrator has to be appointed by parties to arbitration agreement and where arbitrator is to be appointed by a third party i.e., a party other than a party to the contract, one has to look at Section 21 as a provision which applies to all arbitration agreements, the only exception being cases where the parties themselves have agreed in the arbitration clause/arbitration agreement that the arbitration proceedings will commence in some other manner.

41. In the instant case, in the light of Article 22 of Ex.A1 loan agreement, there is no dispute or disagreement before this Court that the parties have not agreed for commencement of arbitral proceedings in any other manner. In this view of the matter, this Court is unable to accept the contentions of learned counsel for first respondent finance company that Section 21 of Arbitration Act does not apply.

42. This Court is also of the considered view that in the light of the scheme of A & C Act and in the light of theme of A & C Act, which is in the nature of continuing consent of the parties at every point/stage of arbitral proceedings, it cannot be gainsaid that Section 21 does not apply to

arbitration where the arbitrator is to be appointed by a third party other than the parties to the contract.

43. That apart, one point that is of immense significance is, this Court is unable to persuade itself to accept the argument that the arbitration clause (article 22 of the loan agreement) in the instant case, is one where a third party i.e., a party other than the party to the arbitration agreement will nominate the arbitrator. The reason is straight and simple. There are three parties to the arbitration agreement. Two parties, i.e., borrower and guarantor are natural persons. The third party, i.e., finance company is a juristic person. As one of the parties to the arbitration agreement is a juristic person, obviously some natural person has to act on behalf of the juristic person. Therefore, to say that the Managing Director of juristic person appointing the arbitrator should be construed as a third party to the arbitration agreement is unacceptable. Furthermore, in the instant case, the legal Manager of the juristic person write to the Managing Director of the juristic person for appointment. This Court is unable to accept the argument that in such a setting, the Managing Director of first respondent finance company, which is a juristic person becomes a third party. In other words to put it in very simple terms Article 22 of the loan agreement in the instant case only means that arbitrator will be appointed by one of the parties to the arbitration agreement viz., finance company, which is a

juristic person. For enhanced clarity, it is made clear that Article 22 of the loan agreement, which is a covenant saying that arbitrator shall be nominated by the Managing Director of Sundaram Finance Limited only means that arbitrator will be nominated by Sundaram Finance Limited. It is to be noted that the specific language used in Article 22 is to the effect that arbitrator shall be nominated by the Managing Director of the 'lendor'.

44. As this Court does not accept the interpretation of the learned counsel for first respondent that it is a case of appointment of arbitrator by a third party, this by itself brings curtains down on the matter. However, this Court deems it appropriate to examine the matter further with the intention of making this order comprehensive.

45. It is also made clear that the question as to whether aforesaid communications i.e., Exs.A13 and A16 both dated 25.02.2014 and both extracted/reproduced supra qualify as communications/notices within the meaning of Section 21 is not being examined further beyond the tentative *prima facie* view that they may not so qualify. This is owing to the emphatic stated position of learned counsel for first respondent finance company that no notice/communication within the meaning of Section 21 of A & C is necessary owing to the arbitration clauses (Article 22) (according to learned counsel) providing for appointment of Arbitrator by third party.

46. Be that as it may, with regard to Section 21 of A & C Act, learned counsel for petitioner pressed into service a judgment of the Delhi High Court made in ***Alupro Building Systems Pvt. Ltd Vs. Ozone Overseas Pvt. Ltd.*** Learned counsel placed before this Court a hard copy of this judgment reported in ***CDJ 2017 DHC 077***. However, this Court in its own research notices that this judgment has been reported in Recent Arbitration Judgments and the citation is 2018(3) R.A.J. 94(Del). On a careful analysis, it also comes to light that there is no intra Court appeal against the order rendered by the learned single judge of Delhi High Court in ***Alupro Building Systems Pvt. Ltd Vs. Ozone Overseas Pvt. Ltd.*** The Delhi High Court addressed itself to the question as to whether Section 21 is mandatory. Addressing itself to the question as to whether a notice within the meaning of Section 21 is mandatory, Delhi High Court held that it may not be gainsaid that Section 21 is solely for the purposes of limitation. Delhi High Court culled out at least five other distinct objectives which are served by a notice within the meaning of Section 21. All these are articulated in paragraphs 23 to 30 of Alupro, captioned 'Whether Section 21 is mandatory', and the same reads as follows:

'Is the notice under Section 21 mandatory?

23. While the above ground is by itself sufficient to invalidate the impugned Award, the Court proposes to also examine the next ground whether the Respondent could have,

without invoking the arbitration clause and issuing a notice to the Petitioner under Section 21 of the Act filed claims directly before an Arbitrator appointed unilaterally by it?

24. Section 21 of the Act reads as under:

"21. Commencement of arbitral proceedings.--Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as

envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act as an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11 (6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

29. Of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision

must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of Section 43 (1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the 'Respondent' receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of Section 21, thus frustrating an important element of the parties consenting to the appointment of an arbitrator.

30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law.'

47. To be noted, Delhi High Court has also carefully noticed the judgment of the Hon'ble Supreme Court in ***State of Goa Vs. M/s.Praveen Enterprises*** reported in **(2012) 12 SCC 581**, wherein, the Hon'ble Supreme Court had held that in cases, where limitation issue is raised, the date of receipt of communication within the meaning of Section 21 by the addressee is the reckoning date or in other words, the Hon'ble Supreme Court in ***Praveen Enterprises*** held that Section 21 will operate as the reckoning date in cases where limitation is raised. After noticing ***Praveen Enterprises*** case, Delhi High Court also noticed that Hon'ble Supreme Court has observed in ***Praveen Enterprises*** case that Section 21 will not apply to a counter claim and the ratio of the Hon'ble Supreme Court is to the effect that whenever an issue of limitation is raised, notice within the meaning of Section 21 and the date of receipt of the same by the noticee is the reckoning date.

48. This takes us to a very interesting question. The arguments raised by learned counsel for first respondent finance company that in the light of Article 22 where Arbitrator has to be appointed by person other than the parties to the arbitration proceedings, Section 21 does not apply at all. In a case of this nature, if limitation is set up as a plea what would be the basis of the reckoning date on which limitation is to be computed is the question which falls for consideration. Judgment of Hon'ble Supreme Court in

Praveen Enterprises case makes it clear that notice under Section 21 will be the reckoning date. Therefore, it cannot be gainsaid that Section 21 does not apply to cases of this nature.

49. A notice within the meaning of Section 21 is absolutely essential i.e., statutorily imperative. The question of limitation can be decided only by taking recourse to Section 21. Besides this, a notice within the meaning of Section 21 also serves several other purposes as laid down by the Delhi High Court in Alupro case.

50. Besides all these, this Court has also reminded itself that a petition under Section 34 of A & C Act is a one issue summary procedure and this principle has been laid down by Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796. To be noted, ***Fiza Developers*** principle was subsequently explained by the Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in (2018) 9 SCC 49 and while so explaining ***Fiza Developers*** principle, Hon'ble Supreme Court held that ***Fiza developers*** principle is a step in the right direction.

51. This Court has borne in mind the legal parameters and statutory perimeter, i.e., legal parameters / determinants adumbrated within the

statutory perimeter of section 34 of A & C Act, which can also be described as contours of section 34 of A & C Act in deciding the instant O.P. In doing so, this court has also reminded itself of aforesaid Fiza Developers principle (summary procedure).

52. It has also been borne in mind that Section 34 is not an appeal. It is not even a revision. It was at best a limited judicial review within the contours and confines of Section 34 of A & C Act.

53. This takes us to the last limb of this order. Now that it has been held that there is a violation of Section 21 of A & C Act in this case, that by itself would vitiate the impugned award, as it is a contravention of a provision of A & C Act.

54. In this regard the oft-quoted celebrated judgment of Hon'ble Supreme Court being *Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49 is instructive. In Associate Builders case, more particularly in paragraph 42.1, Hon'ble Supreme Court held that contravention of provisions of the A & C Act will become a ground for setting aside an arbitral award and will certainly be a death-knell for an arbitral award. Following the principle laid down by Hon'ble Supreme Court in Associate Builders case, as it is in contravention of Section 21 of A & C

Act, this Court has no hesitation in coming to the conclusion that the impugned award is liable to be set aside.

55. In the light of the narrative supra, the impugned award is set aside. Consequently, instant OP is allowed, but considering the nature of the matter and the trajectory of the hearing today, this Court deems it appropriate to leave the parties to bear their respective costs.

23.04.2019

Speaking Order

Index : Yes

Internet: Yes

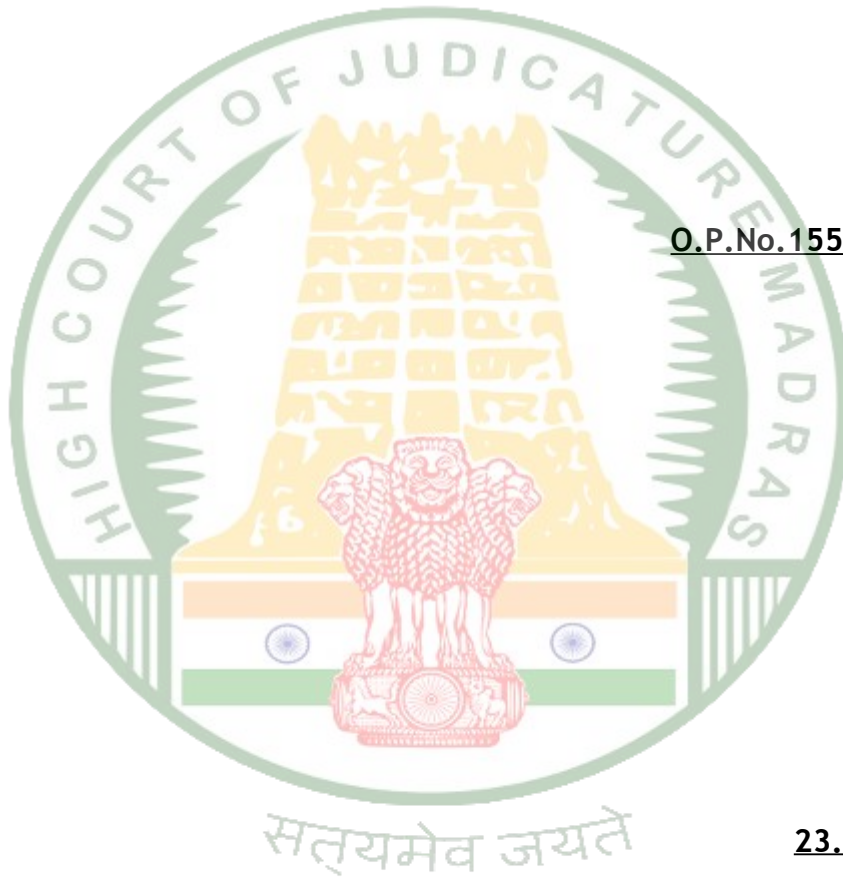
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Note: The records of the arbitral Tribunal shall be put back in envelope, sealed cover and shall be retained as part of the case file.

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M.SUNDAR. J.,



O.P.No.155 of 2016

23.04.2019

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