IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2019

CORAM:

THE HONOURABLE MR. **JUSTICE S.VAIDYANATHAN**

Original Petition No.158 of 2016

1. S.Asritha Reddy
2. P.Santhosh Reddy ... Petitioners

vs.

1. M/s.Challani Finance,
rep. By its Manager and Power of Attorney,
Kannan,
No.36, Veerappan Street,
Sowcarpet, Chennai – 79.

2. K.A.Mariappan, Advocate
Sole Arbitrator,
No.26/34, II Main Road,
Jawahar Nagar,
Chennai 600 082. ... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 29.10.2015 passed by the Sole Arbitrator in Arbitration Proceedings Case No.ARC No.397 of 2015.

For Petitioners : Mr.D.Kumaralingam

For Respondents : Mr.S.Rameshkumar

O R D E R

This Petition is filed to set aside the Arbitral Award dated 29.10.2015 passed by the Sole Arbitrator in Arbitration Proceedings Case No.ARC No.397 of 2015.

2. From the pleadings, it is seen that the 1st Petitioner herein borrowed a sum of Rs.15,00,000/- as loan from the 1st Respondent/Finance Company towards purchase of a new vehicle, i.e. MERCEDEZ BENZ and the 2nd Respondent stood as Guarantor to the same. Both the Petitioners have executed the Hire Purchase Agreement dated 12.11.2013 as well as the Promissory Note dated 12.11.2013 in favour of the 1st Respondent/Finance Company and they are liable to pay the said loan amount to the 1st Respondent in 25 monthly instalments, from 12.11.2013 to 12.11.2015 at Rs.75,000/- per month (Rs.75,000/- x 12), totalling Rs.18,75,000/-.

3. According to the 1st Respondent/Finance Company, from the date of execution of the said Hire Purchase Agreement, the Petitioners have paid only four monthly instalments to the 1st Respondent/Finance Company for Rs.3,00,000/-. Since the Petitioners defaulted in payment of loan amount, the 1st Respondent/Finance Company arrived at a sum of Rs.13,92,000/- as settlement to be paid by the Petitioners on or before 31.08.2014. But, the 1st Petitioner, vide her letter dated 20.10.2014, mentioned the incorrect settlement amount as Rs.13,00,000/-. Thereafter, the 1st Respondent/Finance Company insisted and arrived at Rs.14,27,000/- as settlement towards the said Agreement, to be payable on or before 31.10.2014.

4. It is the further case of the 1st Respondent/Finance Company that since the Petitioners did not come forward to settle the said amount within the stipulated period, the 1st Respondent, vide letter dated 25.10.2014 sent a notice through Registered Post Acknowledgement Due. But, the same was returned with the endorsement 'UNCLAIMED/REFUSED'. As there was no reply from the Petitioners, on 12.04.2015, the 1st Respondent/Finance Company arrived at a sum of Rs.18,20,500/- as the actual balance in respect of the Hire Purchase Agreement dated 12.11.2013, and foreclosed the said Hire Purchase Agreement for the said sum and the foreclosure notice was sent to the Petitioners on 04.05.2015.

5. Thereafter, the 1st Respondent/Finance Company, invoked Arbitration proceedings against the Petitioners and caused a notice dated 23.05.2015 to the Petitioners. The learned Arbitrator passed an Award on 29.10.2015 in favour of the 1st Respondent/Finance Company, which reads as follows:

> “The Respondents are hereby directed to pay the Claimant the following amounts, jointly and severally:
>
> (a) The claim sum of Rs.18,20,500/-
>
> (b) Also, further interest @ 12% per annum for Rs.18,20,500/- from 23.05.2015 till the same is realized in full.
>
> (c) Also, a sum of Rs.2,500/- towards Arbitrator's Fee and
>
> (d) A sum of Rs.500/- towards cost.”

6. Learned counsel for the Petitioners contended that the 1st Petitioner has paid a sum of Rs.6,00,000/- to the 1st Respondent/Finance Company, for which, no Receipt has been given by the 1st Respondent and the same has not been considered by the Arbitrator and that the Petitioners were set exparte in the Arbitration proceedings. He further contended that whenever the 1st Petitioner was present in the place of Arbitration, the Arbitrator was not at all available and in that regard, the 1st Petitioner caused a Lawyer's Notice to the 1st Respondent/Finance Company on 03.10.2015, as to whether the Arbitrator is available for the purpose of adjudicating the dispute, and requested for a reply.

7. According to the learned counsel for the Petitioners, the Arbitration proceedings, at any stretch of imagination, cannot be considered to be properly conducted and that the proceedings have been conducted in absentia, and hence, the same is liable to be interfered with.

8. In reply, learned counsel appearing for the 1st Respondent/Finance Company submitted that the Petitioners have been duly served with notice as regards the Arbitration proceedings and that the Petitioners have engaged a Lawyer, who appeared before the Arbitrator and presented his Vakalat. He further submitted that the learned counsel, who

filed Vakalat for the Petitioners, before the Arbitrator, did not chose to appear before the Arbitrator, whenever the matter was posted for hearing.

9. The contention of the learned counsel for the 1st Respondent/Finance Company is that in terms of Section 4 of the Arbitration and Conciliation Act, 1996, the Petitioners are deemed to have waived their rights with regard to participation in the Arbitration proceedings. When the Petitioners are aware of the Arbitration proceedings, it is the duty on their part to pay the outstanding amount as per the Hire Purchase Agreement dated 12.11.2013, more particularly in the light of Section 13(2) of the Arbitration and Conciliation Act and at no stretch of imagination, it can be considered that the Arbitrator has rendered an exparte Award.

10. Learned counsel appearing for the 1st Respondent/Finance Company went on to contend that the Petitioners did not turn up for hearing at the scheduled time and used to contact the Lawyer's Office of the 1st Respondent/Finance Company and hand over papers by making an endorsement at the time of closing the Office, say at 5.30 p.m. and not earlier. Having refused to receive the notice, i.e. Deemed service, the Petitioners are not entitled to any relief. He further contended that once the Arbitrator has set a person exparte, he has no right to re-open the case and pass a fresh Award.

11. In support of his case, learned counsel appearing for the 1st Respondent/Finance Company relied on a Karnataka High Court decision in the case of **Karnataka State Road Transport Corporation vs. M.Keshava Raju,** reported in **CDJ 2003 Kar HC 609**. Relevant portion of the said judgment is extracted hereunder:

> "14. Section 16 does not state whether a party's failure to raise his objections within the time limit prescribed under Sub-section (2) of Section 16 has the effect at the post award stage. It needs to be noticed that the Working Group in its report has pertinently stated that a party who fails to raise plea as required under Article 16(2)(a) which corresponds to Section 16(2) should be precluded from raising such objection not only during the later stages of the arbitral proceedings but also in other contexts in particular, in setting aside proceedings or enforcement proceedings subject to certain limits such as public policy, including those relating to any objection with respect to the existence or validity of the arbitration agreement. Since Sub-section (2) of Section 16 says that a plea that Arbitral Tribunal does not have jurisdiction should be raised along with (not later than), the statement of defence and since Section 16 does not state that the party's failure to raise his objection within the time limit set by Section 16(2) has any effect of affecting the award at the post-award, stage, the question to consider is whether the plea with regard to want of jurisdiction of the Arbitrator raised by the appellant, for the first time, in this appeal, is required to be entertained.
>
> 15. In our considered opinion, the above plea cannot be entertained for more than one reason. Firstly, one of the objects in enacting the Act is to have early completion of arbitration proceedings minimising the supervisory role of Courts in arbitral process. Sections 4, 5 and 16 of the Act have been enacted to give effect to that object. Secondly, even the method of arbitration as a dispute resolution mechanism and the procedure

envisaged for that are intended to reach the finality to resolve the dispute between the parties as quickly as possible. Therefore, it is imperative that the party raising jurisdiction point, should raise such plea at the earliest, that is to say, at the threshold of the proceeding. If that is not insisted, it is trite, the very object in enacting the Act, on the basis of the 'Uncitral Modern Law', would be defeated. The jurisdiction plea now raised for the first time in the Memorandum of Appeal was not raised either directly or by necessary implication before this Court in C.M.P. No. 4/1996 or before the Arbitrator or before the Court below. The appellant having acquiesced in the jurisdiction of the Arbitral Tribunal without any demur and protest, having participated in the proceedings and having suffered an award cannot now turn round and raise the plea that the orders of this Court in C.M.P. No. 4 of 1996, the award of the Arbitrator and the judgment of the Civil Court dated 20-6-2000 in Arbitration Suit No. 6 of 1998 are nullity.

16. Thirdly, the appellant should be deemed to have waived his right to object to the jurisdiction of the Arbitrator to pass the impugned award in terms of the provisions of Section 4 of the Act. Section 4reads as follows :

"4. Waiver of right to object A party who knows that --

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, without that period of time, shall be deemed to have waived his right to so object"

17. Section 4 narrates the circumstances in which the party, who knowingly fails to object the non-compliance of any non-mandatory provisions of Part-I or any requirement under the arbitration agreement by the other party, is deemed to have waived his right to object. This section is based on general principles such as "estoppel" or "venire contra factum proprium". It is intended to help the arbitral process function efficiently

> and in good faith. If there is non-compliance of any non-mandatory provision of Part I or of any requirement of the arbitration agreement by a party to an arbitration agreement of which the other party to the agreement though has the knowledge of such non-compliance but does not object without undue delay, or If a time limit is provided for stating that objection and no objection is taken within that period of time, such a party later on can neither raise objection about that non-compliance of any provision of Part I nor any requirement of the arbitration agreement since such party shall be deemed to have waived its objection. Though, in order to apply the doctrine of waiver by invoking Section 4, the first condition is that the non-compliance must be of non-mandatory provision of Part I or of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, sub-sections (2) and (3) of Section 16 are one of such mandatory provisions. Section 16(2) of the Act provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 16(3) of the Act provides that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."

12. Heard the learned counsel on either side and perused the material documents available on record.

13. It is not in dispute that there was a Hire Purchase Agreement dated 12.11.2013 between the 1st Respondent/Finance Company and the Petitioners herein towards purchase of a vehicle, by which, the Petitioners had availed a sum of Rs.15,00,000/- as loan, repayable in 25 monthly instalments

at Rs.75,000/- per month. Admittedly, the 1st Petitioner/Borrower of the vehicle paid only four instalments and had defaulted in payment of the loan thereafter. The Arbitration proceedings were initiated, notice has been sent to the Petitioners and the Petitioners are aware of the Arbitration proceedings.

14. From the documents produced by the 1st Respondent/Finance Company, it is very clear that the Petitioners were in the habit of handing over papers in the Office of the 1st Respondent/Finance Company only at 5.30 p.m. and not earlier. The contention of the 1st Respondent/Finance Company that the finding rendered by the Arbitrator has become functus officio may be correct, provided, he has passed an Award on merits or an exparte Award touching the merits of the matter. Before an Award is passed, the party aggrieved is entitled to make a representation to hear him/her. In this case, the Award was passed on 29.10.2015 and the counsel for the Petitioners sent a letter dated 03.10.2015 to the Arbitrator, narrating the facts and requested him to conduct the Arbitration proceedings in accordance with law.

15. Though the finding rendered in paragraph 18 of the Arbitral Award appears to be like an opinion, this Court cannot set aside the Award, as nothing prevented the Petitioners from not only requesting to re-open the case before the Award is passed, but also forwarding necessary copies of documents

along with their counter to enable the Arbitrator to consider the request of the Petitioners and pass an Award. The Arbitration and Conciliation Act, 1996 is legislated only for the purpose of speedy disposal and relief to the parties, and hence, technicalities cannot stand in the way of a summary trial.

16. When the matter came up for hearing on the last occasion, this Court posed a suggestion to the learned counsel appearing for the 1st Respondent/Finance Company as to whether a sum of Rs.4,50,000/- together with interest at 9% per annum could be accepted by the 1st Respondent/Finance Company, so that the matter can be given a quietus to. Today, the parties were also present before the Court. On instructions, learned counsel appearing for the 1st Respondent/Finance Company submitted that when there was demand for payment of the outstanding amount, the Petitioners took some of their persons to the Office of the 1st Respondent/Finance Company and created problem there. However, the said submission was refuted by the learned counsel for the Petitioners that the Petitioners and the 1st Respondent/Finance Company are known to each other and that the 1st Petitioner has parted a sum of Rs.6,00,000/- to the 1st Respondent/Finance Company without taking any acknowledgement.

17. The allegation of untoward incidents as narrated by the 1st Respondent/Finance Company and the averment of the learned counsel for the

Petitioners that a sum of Rs.6,00,000/- has been paid by the 1st Petitioner, cannot be gone into the present issue, as there is no material available before this Court and this Court cannot go beyond what is stated in the Arbitral Award.

18. On instructions, learned counsel appearing for the 1st Respondent/Finance Company stated that the 1st Respondent/Finance Company is willing to accept interest at the reduced rate of 9% per annum, provided the Petitioners pay a sum of Rs.18,20,000/- as ordered by the Arbitrator.

19. This Court is of the view that on receipt of the Notice dated 03.10.2015 from the Petitioners, the Arbitrator ought to have given an opportunity to them. But, when there is no relief sought for, the Arbitrator need not give an opportunity. As there is no fault both on the side of the Petitioners and that of the 1st Respondent/Finance Company, this Court is inclined to interfere with the Arbitral Award only with regard to the rate of interest, by reducing the same from 12% to 6% per annum. As it is represented that the 1st Petitioner has already paid a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) to the 1st Respondent/Finance Company during the pendency of the Original Petition, as per the order of this Court dated 19.09.2018, **the Petitioners are hereby directed to pay the outstanding**

amount of Rs.8,20,500/- (Rupees Eight Lakhs Twenty Thousand Five Hundred only) to the 1st Respondent/Finance Company together with interest at 6% per annum, either jointly or severally.

With the above direction and observation, this Original Petition stands disposed of. No costs.

23.01.2019

Index : Yes

Speaking Order : Yes

Note to Registry:

Issue copy of this order on or before 06.03.2019
(aeb)

S.VAIDYANATHAN,J.

(aeb)

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23.01.2019