IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 19.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.379 of 2014

Sohan Lal Dang ... Petitioner

Vs.

1.M/s.ASN Cargo Movers,
CW 500 G-Floor,
Sanjay Gandhi Transport Nagar,
Delhi.

2.M/s.Ashok Leyland Finance
(A division of IndusInd Bank Ltd.)
Rep. by its Executive Legal,
Sudarsan Building,
No.86, Chamiers Road,
Chennai-4.

3.D.Saravanan ... Respondents

Original Petition filed under Section 34(4) of the Arbitration and Conciliation Act, 1996, to set aside the award passed by the sole Arbitrator Mr.Saravanan in Arbitration Claim Petition No.195 of 2006 dated 07.02.2007.

For Petitioner : Mr.G.M.Anantha Kumar

For 2nd Respondent : Mr.P.Suresh Srinivasan

ORDER

There is a sole petitioner and there are three respondents in the instant Original Petition ('OP' for brevity). Instant OP has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an arbitral award dated 07.02.2007 (hereinafter 'impugned award' for brevity) made by an Arbitral Tribunal ('AT' for brevity) constituted by a Sole Arbitrator. To be noted, the Sole Arbitrator who constituted the AT has been arrayed as third respondent before this Court in the instant OP.

2.A perusal of the case file placed before me reveals that the instant OP has been admitted on 17.07.2014.

3.Post admission, the second respondent before me, Ashok Leyland Finance (a division of IndusInd Bank Ltd.) (hereinafter 'finance company' for the sake of convenience and clarity) has entered appearance.

4.Mr.G.M.Anantha Kumar, learned counsel for the sole petitioner and Mr.P.Suresh Srinivasan, learned counsel on record for the finance company are before this Court.

5.To be noted, notice sent to the first respondent remains unserved and a communication dated 19.08.2014 from the Administrative Officer attached to the Registrar General of Delhi High Court bearing reference

No.21301/DHC/Genl. reads as follows :

HIGH COURT OF DELHI : NEW DELHI

No.21301/DHC/Genl.
Dated : 19.08.2014

From
The Registrar General,
High Court of Delhi,
New Delhi

To
The Court Officer (Original Side),
High Court, Madras.

Sub : Service of Notice (s) in O.P.No.379 of 2014 M/s.Ashok Leyland Finance (A division of IndusInd Bank Ltd.) Vs. M/s.ASN Cargo Movers, Mr.Sohan Lal Dang, D.O.H. 14.08.2014, upon R1.

Sir,

I am directed to return herewith in original your notice(s) /summons in the case cited above and to inform you that since the Notice was received in this Court on 16.08.2014, i.e. after the date of hearing, service thereof cannot be effected.

I am, therefore, to request you to send fresh notices/ summons well in advance giving sufficient time for effecting service.

Yours faithfully,
Sd/-
Administrative Officer (J)
For Registrar General

Suffice to say that first respondent remains unserved. Considering the nature of this matter, this Court is of the view that presence of first respondent before this Court is not imperative for proceeding further with instant OP. To be noted, first respondent who was served through substituted service by AT remained *ex parte* before AT.

6.The entire lis is pivoted on a loan agreement dated 24.11.2004 bearing reference No.DP002402H (hereinafter 'said loan agreement' for brevity). In the said loan agreement, finance company is the lender, first respondent is the borrower and petitioner in the instant OP is the guarantor.

7.The said loan agreement is for finance provided by finance company for purchase of an automobile/vehicle bearing engine No.FWH 284842 chasis No.FWA 046118.

8.This Court is informed by both the learned counsel that the said automobile/vehicle is a truck (hereinafter 'said truck' for the sake of convenience and clarity).

9.The loan amount is Rs.11,60,000/- or in other words, Rs.11.60 lakhs to be returned in 46 monthly instalments. As can be culled out from the case file placed before me, the monthly instalments fell due on 24th of every calendar month and the last of such instalments fell due on 24.10.2008.

10.It is the case of the finance company that the first respondent/ borrower, paid seven monthly instalments and thereafter, committed default. Learned counsel for finance company also submits that the said truck was repossessed/seized on 25.10.2005 and it was sold for a sum of Rs.5,65,000/- on 28.03.2006. In other words, said truck post repossession was sold for

Rs.5.6 lakhs and the same was appropriated by the finance company and according to the learned counsel for finance company, it has been adjusted towards the dues of the borrower qua the said loan agreement.

11.After giving credit to the aforesaid seven monthly instalments paid as well as Rs.5.65 lakhs realised by finance company by sale of said truck post repossession, a claim was made against the first respondent/borrower and the petitioner before me/guarantor for a sum of Rs.3,67,865/- saying that the claim arises out of defaulted instalments as per the said loan agreement and it includes interest. This in a nutshell is the crux and gravamen of the arbitral dispute which went before the AT.

12.Before the AT, borrower (first respondent before this Court/instant OP) was arrayed as first respondent and the guarantor (petitioner before this Court/instant OP) was arrayed as second respondent.

13.A perusal of the impugned award reveals that on receipt of notice, petitioner/guarantor sent a telegram (this Court is informed that the telegram was still in vogue at that point of time) raising objection to the jurisdiction of AT.

14.First respondent/borrower was served through substituted service i.e., through paper publication as can be culled out from the impugned award.

15.However, after sending the telegram, petitioner/guarantor did not participate in the proceedings before the AT. First respondent/borrower who was served through substituted service (paper publication) also did not appear before the AT.

16.In short, an *ex parte* award came to be passed by AT. In other words, the impugned award is an *ex parte* award. Seven exhibits were marked as Exhibits A1 to A7 by the finance company. With regard to jurisdiction, AT adverting to the arbitration agreement between the parties which is in the form of a covenant in the said loan agreement has held that the venue has been agreed to be Chennai and therefore, AT has jurisdiction. Thereafter, AT has exhibited Exhibits A1 to A7 and has passed an award for a sum of Rs.3,57,865/- together with interest at the rate of 18% per annum.

17.Learned counsel for petitioner submitted that he is only a guarantor, he is 78 years old, he is in the evening of his life and he has not benefited from the said loan agreement in any manner. These are submissions which unfortunately cannot be looked into in the instant OP as it is one under Section 34 of A & C Act. However, learned counsel for petitioner submits that the impugned award was never served on the petitioner. In other words, it is the specific and pointed case of the learned counsel for the petitioner that there is a infarct of Sub-Section 5 of Section 31 of A & C Act. Section 31(5) of A & C Act read as follows :

"31. Form and contents of arbitral award

(1) ...
(2) ...
(3) ...
(4) ...
(5) After the arbitral award is made, a signed copy shall be delivered to each party."

18.The aforesaid ground was examined. A perusal of the case file placed before this Court reveals that the entire arbitral records pertaining to the impugned award has been sent to this Court under cover of a letter dated 17.07.2018 from the AT (Sole Arbitrator) who is third respondent in the instant OP. The arbitral records are contained in one file and they have been given pagination 1 to 90 by AT. The letter dated 17.07.2018 under cover of which AT has sent the records of AT pertaining to impugned award reads as follows :

Date : 17.07.2018

To
The Registrar,
Original Side,
High Court,
Madras-600 104.

Sir/Madam,

Ref : O.P.No.379 of 2014 on the file of Hon'ble High Court, Madras between Sohan Lal Dang -Vs- 1.M/s.ASN Cargo Movers, 2.M/s.Ashok Leyland Finance (A division of IndusInd Bank Ltd.) and another

Sub : Production of original records and proceedings in Arbitral Claim Petition No.195 of 2006, M/s.Ashok Leyland Finance (A division of IndusInd Bank Ltd.) Versus M/s.ASN Cargo Movers, Mr.Sohan Lal Dang

In pursuance of the order of the Hon'ble High Court, Madras, dated 02.07.2018 made in the above O.P., I am obliged to send herewith the original arbitration file including the award containing page Nos.1 to 90.

Kindly receive and acknowledge the same.

Sd/-
D.SARAVANAN
Sole Arbitrator

Encl : As above

19.This Court had the benefit of perusing the records of AT with the assistance of both the learned counsel before this Court.

20.On a perusal of records of the AT placed before this Court with the assistance of both the learned counsel before this Court, it comes out clearly that the impugned award has not been delivered to the guarantor who is the petitioner before this Court in instant OP. Therefore, there is no difficulty in coming to the conclusion that there is a clear infarct qua Sub-Section 5 of Section 31 of A & C Act, more particularly, vide running page No.10 of the records of the AT. It comes to light that there is an envelope post award which has been sent to first respondent/borrower. Likewise, there is no dispute or disagreement before this Court that the impugned award was duly delivered to the finance company. Therefore, besides Section 31(5) of A & C Act, learned counsel for petitioner draws my attention to Section 18 of A & C Act and submits that this is a clear infarct of Section 18 of A & C Act. Section 18 of A & C Act read as follows :

"18. Equal treatment of parties - The parties shall be treated with equality and each party shall be given a full opportunity to

present his case."

21.It was submitted by the learned counsel for petitioner that the principles enshrined in Section 31(5) and Section 18 of A & C Act emanate from public policy of India and are traceable to fundamental policy of Indian law. Fundamental policy of Indian law has been explained by Hon'ble Supreme Court in the celebrated and oft quoted *Associate Builders Vs. Delhi Development Authority* reported in *(2015) 3 SCC 49* by reiterating the elucidation of fundamental policy of Indian law made by Hon'ble Supreme Court in *ONGC Ltd. v. Western Geco International Ltd.,* reported in *(2014) 9 SCC 263.*

22.A perusal of *Western Geco* and *Associate Builders* principles reveal that fundamental policy of Indian law includes three distinct juristic doctrines *viz.*, (i) judicial approach, (ii) adherence to principles of natural justice and (iii) irrationality/perversity.

23.The tests for these three juristic doctrines have also been laid down and they are (i) fidelity of judicial approach, (ii) *audi alteram partem*, reasons for conclusions and (iii) *wednesbury* principle of reasonableness respectively i.e., in that order.

24.Learned counsel for petitioner asserts that he came to know about the impugned award for the first time only on receipt of notice from the executing Court in New Delhi when an Execution Petition was launched by the finance company for realising the monies due under the impugned award.

25.Copy of the notice received from the executing Court has also been placed before this Court as part of the typed set of papers by the petitioner. Learned counsel for petitioner submits that after receipt of notice from the executing Court, certified copy was applied for and the impugned award was ultimately obtained on the basis of which, instant OP was filed.

26.Elaborating on the same, learned counsel submitted that after sending telegram to AT assailing the jurisdiction of AT, his objection to jurisdiction of AT was accepted and he was taken by surprise when he received notice in the Execution Petition. This buttresses the case of the petitioner qua Section 31(5) and Section 18 of A & C Act which as rightly pointed out by the petitioner are traceable of public policy and fundamental policy of Indian law. To be noted, this is not a case where impugned award was mailed to all parties to arbitrable dispute before AT and thereafter remaining unserved on one of the parties. This is a case where impugned award has been mailed to one of the parties alone i.e., finance company leaving the petitioner to be lulled into the belief that petitioner's objection to jurisdiction of AT was sustained.

27.While testing this award, this Court has borne in mind the principle 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* that proceedings under Section 34 of A & C Act are summary procedure. To be noted, *Fiza Developers* principle was subsequently reiterated by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49 and while so reiterating, Hon'ble Supreme Court held that *Fiza Developers* principle is a step in the right direction.

28.Keeping this principles in mind, the impugned award was tested. In other words, the impugned award has been tested within the contours and confines of Section 34 of A & C Act. The undisputed facts are as clear as daylight from the records placed before this Court, particularly, the records of the AT which have been alluded to supra.

29.In other words, this Court has tested the impugned award in a summary procedure on undisputed facts on the basis of records that have been placed before this Court.

30.In totality, owing to the narrative supra, the inevitable conclusion is that the impugned award is liable to be set aside as one being in conflict with public policy of India. Principles enshrined in Section 31(5) and Section 18 of A & C Act alluded to supra are traceable to fundamental policy of Indian law.

The entire records of the AT which have been sent to this Court by learned Arbitrator under cover of a letter dated 17.07.2018 consisting of 90 pages (continuous pagination) shall be kept in a sealed cover along with this case file.

DECISION :

Original Petition is allowed setting aside the impugned arbitral award dated 07.02.2007 made in arbitral claim petition No.195 of 2006 in the matter of dispute between M/s.Ashok Leyland Finance (A division of IndusInd Bank Ltd.) and (1) 1.M/s.ASN Cargo Movers and (2) Mr.Sohan Lal Dang. Considering the nature of the submissions made and the trajectory of the hearing, parties are left to bear their respective costs.

19.03.2019

Index : Yes/No
Internet : Yes
gya

M.SUNDAR, J.

gya

O.P.No.379 of 2014

19.03.2019