

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :06.12.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.A.No.1101 of 2019

S.Ramesh

.. Applicant

vs.

M/s.Kotak Mahindra Bank Ltd,
8th Floor, TVH Agnitio Park,
141, Old Mahabalipuram Road,
Kandanchavadi, Chennai - 600 096.

.. Respondent

Original application filed under order XIV Rule 8 of Original Side Rules and under section 9(1)(ii)(a) of the Arbitration & Conciliation Act, 1996 to grant interim injunction restraining the respondent from proceeding of sale of applicant's vehicle bearing Registration No. TN-28-AJ-5257 which is hypothecated under Loan Agreement No.CV2882167 dated 28.04.2015.

For Applicant : Mr.B.Siddeswaran

ORDER

Mr.B.Siddeswaran learned counsel on record for the applicant is before this Court. Instant application has been filed under Section 9(1)(ii)(a) of 'The Arbitration & Conciliation Act, 1996' (hereinafter 'A and C Act' for brevity).

2. The case of the applicant as can be culled out from the case file placed before this court, more particularly, from the affidavit filed in support of instant application and from the submissions made by learned counsel for applicant is that the nucleus of the application is a 'loan agreement bearing No.CV2882167 dated 28.04.2015' (hereinafter the 'said loan agreement' for the sake of brevity, clarity and convenience). It is submitted that the applicant has taken a loan qua a 'truck bearing registration no.TN-28-AJ-5257' (hereinafter 'said truck' for the sake of brevity, clarity and convenience).

3. It is submitted that there is an arbitration clause in said loan agreement and therefore, there is an arbitration agreement between the applicant and the respondent being an arbitration agreement within the meaning of Section 7 of the A and C Act.

4. Applicant submits that respondent has already invoked the aforementioned arbitration clause/arbitration agreement between the parties complaining of alleged default in repayment of loan taken by the applicant under said loan agreement and thus raising an arbitral dispute in this regard. With regard to this aspect of the matter, a communication dated 31.10.2019 from the respondent is relevant and the same is as follows:

 **kotak** REFERRED TO ARBITRATION **Kotak Mahindra Bank**
Dated: **31.10.2019**

REF No: KMBL/CV/2882167/1172 OF 2019

1. **S. RAMESH**
SRI MSK LORRY TRANSPORTS NO 4 751 NEHRU NAGAR
VASANTHAPURAM POST TRICHY ROAD, NAMAKKAL-637001.

2. **ARTHANARI M**
4-751-B NEHRU NAGAR, VASANTHAPURAM PO TRICHY
ROAD, NAMAKKAL-637001.

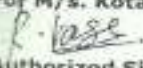
Sir/Madam,

1. You have availed finance facility of **Rs. 16,00,000/-** from us by hypothecating the vehicle under Loan Agreement No: **CV2882167** dated **28.04.2015** herein after called the "Said agreement" which is binding on you, the co-borrower and the guarantors.

2. Under the terms and conditions of the said Agreement all of you agreed to repay the loan amount of **Rs. 16,00,000/-** along with interest in Equated Monthly Installments, apart from other charges payable and the said agreement. However you have committed a breach of the agreement by failing to adhere to the repayment schedule by defaulting in payment of Equated Monthly Installments regularly.

3. In this regard a notice dated **02.08.2019** has been issued by us, calling upon all of you to pay **Rs. 4,37,125/-** (Rupees Four Lakh Thirty Seven Thousand One Hundred Twenty Five Only) as of **02.08.2019** but the same did not result in any payment. This has given rise to claims and disputes in connection with the Terms and Conditions of the "Said Agreement".

4. As per the "Said Agreement" it is expressly agreed between the parties that, all Claims/disputes arising in connection with the said agreement shall be adjudicated upon, by a Sole Arbitrator nominated by the Company in accordance with the provisions of Arbitration and Conciliation Act 1996 and rules framed there under. We, in furtherance of the same have appointed and referred the matter to the Sole Arbitrator **Shri. R. TAMILSELVAN B.A., B.L.** to arbitrate the dispute in accordance with the provisions of Arbitration and Conciliation Act 1996 and subsequent amendments.

For M/s. Kotak Mahindra Bank Ltd

Authorized Signatory
Copy to:
Shri. R. TAMILSELVAN, B.A., B.L.,
Room No.4, 1st Floor, "Mubarak Plaza",
No.260/128, Angappan Naicken Street,
Perrys, Chennai - 600 001.

सत्यमेव जयते

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Kotak Mahindra Bank Ltd.
CN: 19511DMH1985PLC038137
Commercial Banking, 8th Floor
Zone II, Full Agrico Park
No. 1, Old Mahatma Park Road
Kandanchavadi, Chennai
Tamil Nadu - 600 001

Registered Office:
27 BKC, C-27, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai-400051,
www.kotakmbk.in

T +91 044 56248568

5. There is no disputation or contestation by the applicant regarding the aforesaid communication dated 31.10.2019 having been received by the applicant on 04.11.2019. Therefore, even according to the applicant's averments, the arbitral proceedings qua said loan agreement commenced on 04.11.2019. To be noted, though the language in which Section 21 of the A and C Act is couched states that the communication should be a request for the arbitral dispute to be referred to arbitration, in the instant case, the communication qua appointment of sole arbitrator has not been disputed by the applicant who received the communication on 04.11.2019. Be that as it may, what is of greater significance is, the Arbitral Tribunal (constituted by sole arbitrator) has already entered upon the reference, as this court is informed that Arbitral Tribunal, post receipt of aforementioned 31.10.2019 communication, has issued notice to both parties (applicant and respondent) and also held sittings. To be precise in terms of dates in this regard, it is submitted that the sole arbitrator who constituted the arbitral tribunal has admittedly sent a communication dated 06.11.2019 fixing the hearing date for a preliminary meeting on 27.11.2019, (2.30 p.m.) and the venue has also been set out in the communication and it reads as follows:

*Room No.4, 1st Floor, "Mubarak Plaza",
No.260/128, Angappan Naicken Street, Parrys,
Chennai - 600 001.*

6. There is also no dispute that the first sitting of the Arbitral Tribunal was held on 27.11.2019 and on that date, it stood adjourned to 12.12.2019. More importantly, an application has been filed by the applicant before the Arbitral Tribunal with a prayer for interim direction. It is the case of the applicant that said truck was repossessed by the respondent on 23.11.2019 and therefore, an interlocutory application was moved before the Arbitral Tribunal seeking an ad interim direction to direct the respondent to hand over possession of the said truck. This application is admittedly pending. With regard to the narrative thus far, most relevant parts of the affidavit filed in support of the instant application are contained in paragraph Nos. 3, 5 and 9.

Paragraph No.3 of the affidavit reads as follows :

I submit that I the claim petition in Arbitration Ref No.KMBL/CV/2882167/1172 of 2019 has been filed by the respondent. I have received a notice from the Arbitrator dated 06.11.2019 directing me to appear before the Tribunal on 27.11.2019 and though I had entered appearance through my counsel, there was no sitting on that date and the above claim petition was adjourned to 12.12.2019.

Relevant portion of para 5 reads as follows:

I further submit that I was taken by surprise on account of the fact that the

Arbitrator had passed an interim order under Section 17 of Arbitration and Conciliation Act,1996 to seize the above mentioned vehicle. The above said interim order has been passed on the first day of hearing of the matter'.

Relevant portion of para 9 reads as follows:

'I further state that the no claim petition and interim order was served to and only hearing notice were sent to me. I approached the Arbitrator with my counsel for the claim petition and the interim order passed under Section 17 of the Arbitration and Conciliation Act,1996'.

7. As alluded to supra, instant application has been filed under Section 9(1)(ii)(a) of the A and C Act. Sub-section (3) of Section 9 makes it clear that the Court shall not entertain an application under sub-section (1) of Section 9 once the arbitral tribunal has been constituted. For the sake of convenience and ease of reference, sub-section (3) of Section 9 reads as follows:

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

8. In the instant case, it would be evident from the narrative thus far that in the instant case, Arbitral Tribunal has not only been constituted, but it has entered upon the reference, held at least two sittings and most importantly, the applicant has already moved the Arbitral Tribunal for interim relief which is obviously and admittedly an application under Section 17 of the A and C Act. Therefore, this is a case where sub section (3) of Section 9 operates in full force.

9. In the light of sub section (3) of Section 9 of A and C Act, this application cannot be entertained. This itself is the end of the matter for the applicant.

10. However, for the sake of completion of facts and for the sake of completion of the trajectory of the hearing, it is necessary to record that this Court has noticed the averments of the applicant that the Arbitral Tribunal has passed an interim order under section 17 of the A and C Act.

11. To be noted, the relevant averments contained in para 5 have already been extracted and reproduced supra. Therefore, in this case, not only has the Arbitral Tribunal been constituted, but the Arbitral Tribunal has also exercised powers under section 17 of the A and C Act. Besides this, as alluded to supra, the applicant has also moved the Arbitral Tribunal under Section 17 of the A and C Act.

12. One other aspect of this matter is, sub-section (3) of section 9 of A and C Act consists of two limbs. The first limb talks about Court not entertaining an application under sub-section (1) of section 9 on Arbitral Tribunal being constituted. This has already been alluded to supra. The second limb is in the nature of an exception to the first limb. Vide second limb, it has been statutorily made clear that for exercising powers under sub-section (1) of section 9, post constitution of Arbitral Tribunal, the Court should find existence of circumstances which may not render the remedy provided under section 17 efficacious. In the instant case, all the circumstances point towards rendering remedy provided under section 17 efficacious. This is more so, as admittedly the applicant himself has moved the Arbitral Tribunal under section 17 as set out supra.

13. Dovetailed with the aforesaid two limbs of sub-section (3) of section 9, {which came into force on and with retrospective effect from 23.10.2015, vide The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)}, is a simultaneous amendment to section 17 (vide the same amending Act 3 of 2016), whereby section 17 was made expansive, vesting the Arbitral Tribunal with powers to make orders in the nature of interim measures, akin to section 9. In this case, prayer under section 9(1)(ii)(a) (mentioned as section 9(ii)(a) in the judges summons) is clearly available to the applicant before the Arbitral Tribunal (already constituted and which has entered upon the reference) under section 17(1)(ii)(a) of A and C Act.

14. In the light of the narrative thus far, more particularly, in the light of sub section (3) of Section 9 of the A and C Act, this Court is not inclined to entertain this application under Section 9 of A and C Act.

15. This Court is constrained to observe that this application is completely misconceived and the application is dismissed as misconceived besides being bereft of merits, but this Court refrains from imposing cost in the light of the nature of the submissions made at the bar today.

06.12.2019

sli

Speaking Order

Index : Yes

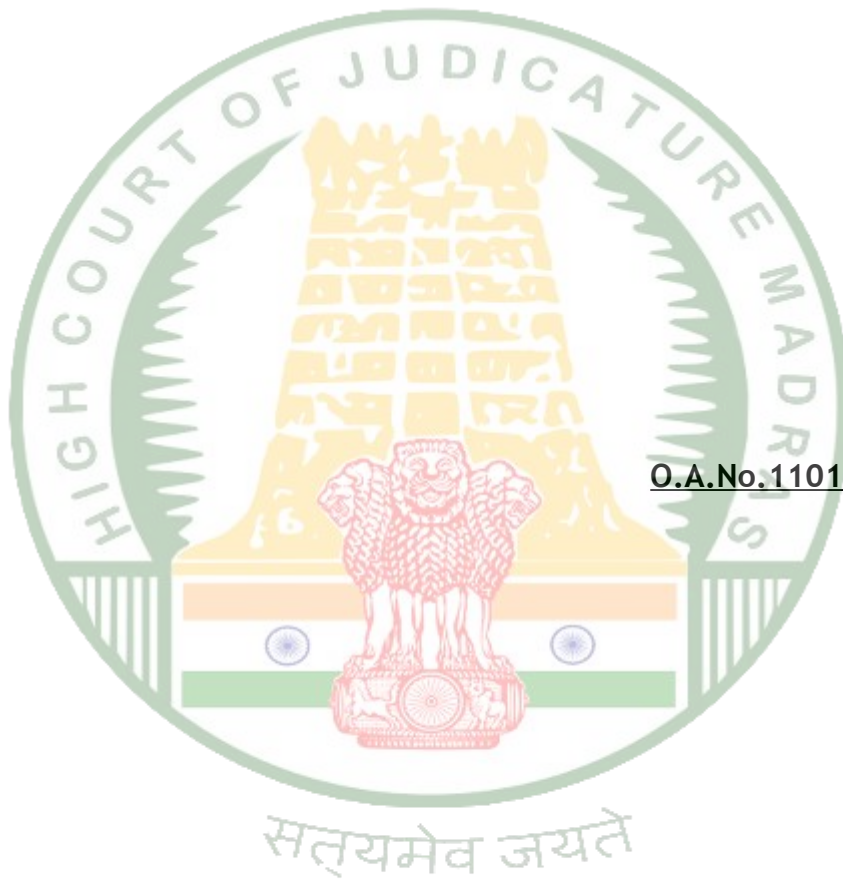
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M.SUNDAR.J.,

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