

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :25.04.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.944 of 2018

1.Mr.Syed Basheer Ahmed
2.Mrs.Hajira Banu .. Petitioners

vs.

1.M/s.Cholamandalam Investments and
Finance Company Ltd.,
(formerly known as Cholamandalam
DBS Finance Ltd.,)
"Dare House", 1st Floor
No.2, N.S.C.Boase Road
Chennai - 600 001

2.Mr.V.Inbavjayan
Advocate/Arbitrator
Plot 108, G-2 Majestic Colony
Valasaravakkam
Chennai - 600 087 Respondents

Original Petition filed under Section 34 of the
Arbitration and Conciliation Act, 1996, to set aside the
award of the 2nd Respondent dated 04.06.2018.

For Petitioner : Mr.J.Srinivasa Mohan

For Respondents : Mr.T.M.Mano

ORDER

There are two petitioners and two respondents in the

instant 'Original Petition' ('OP' for brevity). Instant OP

<https://hcservices.ecourts.gov.in/hcservices/>

has been filed under Section 34 of 'The Arbitration and

Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 04.06.2018' ('impugned award') made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator. To be noted, sole Arbitrator, who constituted the AT, has been arrayed as Respondent No.2 in instant OP.

2.Before proceeding further, it is necessary to make it clear that in A & C Act, with regard to recourse against an arbitral award, a legal proceeding for setting aside an arbitral award has been referred to as 'application' in Section 34 of A & C Act. However, such a legal proceeding assailing arbitral awards under A & C Act are being given the nomenclature 'Original Petition' in this Registry and therefore, I am referring to the instant proceedings as 'OP' for the sake of convenience and clarity.

3.Before this Court embarks upon the exercise of dealing with the instant OP on merits, it is deemed appropriate and pertinent to write that it was not necessary to array the sole Arbitrator, who constituted the AT, as one of the respondents in the instant OP. This is owing to the nature of the grounds that have been raised. Be that as it may, as the main OP itself is being heard out and is being disposed of, this Court is not embarking upon the exercise of directing deletion of Respondent No.2 as

that will cause procedural delay.

4. Mr.J.Srinivasa Mohan, learned counsel on record for petitioners and Mr.T.M.Mano, learned counsel representing the counsel on record for the contesting first respondent are before this Court.

5.As the instant OP is one under Section 34 of A & C Act, suffice to give a thumbnail sketch of facts which are imperative for understanding and appreciating this order.

6.The central theme of the instant lis is constituted by a sanction letter and a loan agreement, both dated 30.09.2014, wherein and whereby the first respondent, which this Court is informed, is a 'Non-Banking Financial Company' ('NBFC' for brevity), sanctioned a loan of Rs.80 lakhs to the petitioners, who are co-borrowers. To be noted, this Court is informed that the two petitioners in the instant OP are spouses.

7.The sanction letter dated 30.09.2014 has been marked as Ex.A1 before AT and the loan agreement has been marked as Ex.A2 before AT.

8.It is not in dispute that the first respondent
(which shall hereinafter be referred to as 'finance

company' for the sake of convenience and clarity) disbursed a sum of Rs.34,38,155/- to 'Industrial Development Bank of India' (IDBI) to which the petitioners owed the said sum of money. It is also not in dispute that petitioners had availed what is described as Home Equity Loan.

9. It is the case of the petitioners that the balance i.e, balance from and out of Rs.80 lakhs sanctioned loan was never disbursed to the petitioners.

10. Be that as it may, this Court is informed that under the aforesaid loan agreement and sanction letter i.e., Exs.A1 and A2, the Equated Monthly Installment (EMI) was Rs.1,21,820/- and that EMIs run for 120 months. In other words tenor is 120 months.

11. It is also the case of the petitioners that they received a letter on 30.03.2015 from the finance company (first respondent) stating that it has restricted the loan to the aforesaid amount/quantum i.e., Rs.34,38,155/-.

12. Petitioners' counsel also pointed out that they have deposited the title deeds of the property, which is the subject matter of Home Equity loan. To be noted, this is an undisputed fact. This is an undisputed fact as the

claim statement dated 15.04.2016 has averred categorically in Paragraph 8 that the respondents deposited the necessary documents of the property, which was to be given as security. Besides this, a perusal of what is captioned 'Documentation Check List' forming part of Ex.A1 also shows that the documents have been so deposited. Documentation check list, which forms part of Ex.A1, is scanned and reproduced infra:

13. It is the case of the petitioners that under the aforesaid circumstances, they received a notice dated 22.12.2015. Considering the importance of this notice, the same is scanned and reproduced infra:

14. It is the positive case and emphatic assertion of the petitioners that they did not receive any notice prior to the aforesaid notice dated 22.12.2015 regarding arbitration, much less regarding commencement of arbitration.

15. Be that as it may, AT entered upon reference, both sides participated in the proceedings before AT, the petitioners did raise the plea that the entire Rs.80 lakhs sanctioned has not been disbursed to the petitioners and petitioners also raised a plea that notice invoking arbitration has not been sent to them. Ultimately, AT made the impugned award wherein and whereby AT made an award for

a total sum of Rs.68,18,621/- in favour of the finance company. Interest from the date of the award i.e., 04.06.2018 to date of realization or in other words future interest was also awarded besides costs of the arbitration.

16. Under the aforesaid circumstances, instant OP has been filed assailing the impugned award.

17. Learned counsel for petitioners predicated his challenge to the impugned award on four grounds, which can be broadly summarized as follows:

a) there is no notice within the meaning of Section 21 of A & C Act;

b) the impugned award has completely misconstrued the terms of the contract i.e., loan agreement by proceeding on the basis that the dues were payable in 41 EMIs as detailed in Ex.A1. Besides this, AT has referred to Clause 16 of the loan agreement which is of no relevance. This according to the petitioners' counsel is a violation of Section 28(3) of A & C Act;

c) There is a violation of Section 12 of A & C Act as there is no disclosure as required thereunder; and

d) There is violation of Sections 29 and 29A of A & C Act.

18. This court now proceeds to deal with the four grounds one after other in the order in which they have been summarized and set out supra.

19. With regard to there being no notice under Section 21 of the A & C Act, a perusal of the impugned award reveals that it proceeds on the basis that the arbitration proceedings were initiated on 20.11.2015, but as alluded to supra, it is the pointed and specific case of the petitioners that they did not receive any communication other than the communication dated 22.12.2015, which has been extracted, scanned and reproduced supra.

20. Faced with the above situation, learned counsel for first respondent Finance Company took time for getting instructions and reporting to this Court as to whether there was any communication at all prior to aforesaid 22.12.2015 communication, more particularly as to whether there was any communication which shows that arbitration proceedings were initiated on 20.11.2015 as mentioned in the impugned award. In this regard, proceedings of this Court dated 11.04.2019 is of relevance and the same reads as follows:

'Mr.J.Srinivasa Mohan, learned counsel for petitioner is ready, Mr.T.M.Mano, learned counsel representing the counsel on record for contesting respondent seeks an accommodation as as to try and get further instruction in the light of what unfurled in the hearing yesterday (10.04.2019).

At request of contesting 1st respondent, adjd. By a fortnight. List on 25.04.2019.'

21. After taking time for getting instructions, learned counsel for first respondent Finance Company submits that there is nothing to show that there was any communication prior to 22.12.2015, which was from the Arbitrator, who constituted the AT, wherein learned Arbitrator mentioned that he has been appointed as sole Arbitrator by the Finance Company. In other words, it is submitted that there is nothing on record to show that there was commencement of arbitral proceedings on 20.11.2015 much less, commencement within the meaning of Section 21 of A & C Act. This leads us to the indisputable and inevitable conclusion that there was no notice within the meaning of Section 21 of A & C Act.

22. This takes us to the question as to whether notice within the meaning of Section 21 of A & C Act is legally imperative. In this regard, a judgment of the Delhi High Court in **Alupro Building Systems Pvt. Ltd., Vs.**

(Del) can be usefully referred to. To be noted 'R.A.J' stands for 'Recent Arbitration Judgments'. Relevant paragraphs are Paragraphs 23 to 30 and the same read 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 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 straight away 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.'

23. This Court is of the considered view that Alupro principle is clearly applicable to the facts of the instant case as there is no disputation or disagreement in the instant case that there is no notice within the meaning

of Section 21 of A & C Act.

24. In addition to the Alupro principle, this Court deems it appropriate to refer to the celebrated Associates Builders case [**Associate Builders Vs. Delhi Development Authority** reported in (2015) 3 SCC 49]. In Associate Builders case, particularly Paragraph 42, Hon'ble Supreme Court held that contravention of the Arbitration Act by itself would be regarded as patent illegality. As the Alupro principle is to the effect that notice within the meaning of Section 21 of A & C Act is legally imperative, it is applicable in all fours to the facts of this case. It follows as a sequitur that there is contravention of Section 21 of A & C Act and therefore it is clearly a patent illegality. To arrive at the conclusion that impugned award in instant case is vitiated by patent illegality, there is no issue touching upon mere erroneous application of law. Likewise, no re-appreciation of evidence is required as it emerges from undisputed facts as would be evident from the narrative thus far in this regard. It does not turn on any application of law qua the impugned award. Therefore, it can be safely concluded that there is contravention of Section 21, which is held to be legally imperative (Alupro principle) owing to the factual matrix of the case and owing to this contravention in the light of Associate Builders principle, impugned

award is vitiated by patent illegality. This by itself is sufficient to invalidate the impugned award. However, this Court deems it appropriate to deal with the other three grounds on which the petitioners have predicated the instant OP.

25. With regard to the impugned award misconstruing the terms of the contract and holding that this was a loan agreed to be paid in 41 EMIs (misconstruing the terms detailed in Ex.A1), it certainly turns on Section 28(3) of A & C Act and therefore, applying Associate Builders principle this will also qualify as patent illegality.

26. With regard to violation of Sections 12, 29 and 29A of A & C, which constitute the 3rd and 4th grounds, learned counsel for first respondent, though had taken time to get instructions, submits that there is nothing on record to show that there had been disclosure by the Arbitrator. As the impugned award does not articulate anything in this regard, read in the light of the aforesaid communication dated 22.12.2015, which the petitioners assert, is the only communication they have received coupled with the fact that the first respondent finance company is not able to produce any other document to the contrary, this Court considers it unnecessary to requisition the records of the AT.

27. Be that as it may, with regard to the last ground touching upon Sections 12, 29 and 29A, learned counsel for petitioner pressed into service a judgment of the Hon'ble Supreme Court rendered in **HRD Corporation (Marcus Oil and Chemical Division) Vs. GAIL (India) Limited (Formerly Gas Authority of India Ltd.,)** reported in **2017 (5) R.A.J.232 (SC)**.

28. However, if there had been a disclosure under Section 12, first respondent Finance Company should be able to show prima facie material in this regard in the light of Section 18 of the A & C Act. As there is no such material, this Court considers that it is not necessary to go into the HRT Corporation principle in the instant case. With regards to Sections 29 and 29A they are matters of record on which there is no dispute. Though it has already been alluded to supra elsewhere in this order, it is made clear that this Court did not embark upon the exercise of requisitioning the records of AT in the light of there being no disputes in this regard by the first respondent Finance Company.

29. It is made clear that in the considered view of this Court patent illegality is something which is so obvious and so conspicuous on the face of the impugned award that no process of inference needs to be resorted to,

to detect the same. In other words, patent illegality, which should be so obvious and so conspicuous that it would be obvious and conspicuous and therefore sufficient. To put it differently, an illegality which is so obvious and conspicuous that it needs not be detected much less detected by taking recourse to an inferential process. In the instant case, this Court is convinced in the light of the narrative supra that the impugned award is certainly vitiated by patent illegality within the aforesaid parameters.

30. Another aspect of the matter which this Court has reminded itself is Fiza Developers principle. Fiza Developers principle was laid down by the Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796*** . Fiza Developers principle, in simple terms, is to the effect that proceedings under Section 34 of A & C Act are one issue summary procedures.

31. To be noted, Fiza Developers was explained by Hon'ble Supreme Court subsequently in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***.

32. This is mentioned to articulate with clarity the

manner in which the instant OP has been examined. With regard to the application of tests for patent illegality, it is also necessary to mention that the grounds of public policy and patent illegality were available for petitioners assailing an arbitral award even prior to 23.10.2015. Only difference is post 23.10.2015 public policy has been statutorily explained. With regard to patent illegality, it was available as a ground which was added to the list of grounds by a judgment of Hon'ble Supreme Court i.e., **Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]** whereas post 23.10.2015, it has been given statutory expression vide Sub-section (2A) of Section 34 albeit with a proviso which constricts and circumscribes the manner in which it has to be tested.

33. The vital and significant difference is the manner in which the two grounds have to be tested has now been circumscribed. With regard to public policy, it has been circumscribed by explanation 2 to Sub-section (2) (b) (ii) of Section 34. With regard to patent illegality as alluded to supra it has been circumscribed by proviso to sub-section (2A). It has already been alluded to elsewhere supra in this order that with regard to patent illegality it is not a case of erroneous application of law and it is not a case warranting re-appreciation of evidence. In other words, it was within the parameters laid down in proviso to Sub-

section (2A). It is also to be noted that the date of commencement of arbitral proceedings is something which is nebulous in the instant case as this Court has sustained the plea of the petitioners that there is no notice within the meaning of Section 21 of A & C Act. The factual position that there was no notice within the meaning of Section 21 of A & C Act has become a undisputed issue as the first respondent finance company was not able to produce any notice/communication to this effect in spite of sufficient time being granted for getting instructions. In the absence of a notice within the meaning of Section 21 of A & C Act what would be the date of commencement of arbitral proceedings is nebulous and at the moment, a moot question. This Court leaves this question open in the instant case for being tested in another case where there is serious contest in this regard and where it becomes imperative for deciding the OP. In the instant case suffice to mention that 22.12.2015 is the date on which AT has sent a communication to the petitioners saying that the sole Arbitrator has been appointed by the first respondent Finance Company.

34. Owing to all that have been set out supra, this Court is convinced that the petitioners have made out a case for judicial intervention qua impugned award owing to the same *inter-alia* being vitiated by patent illegality.

Resultantly the impugned award is set aside.

This OP is allowed. Considering the nature of the matter and the trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs.

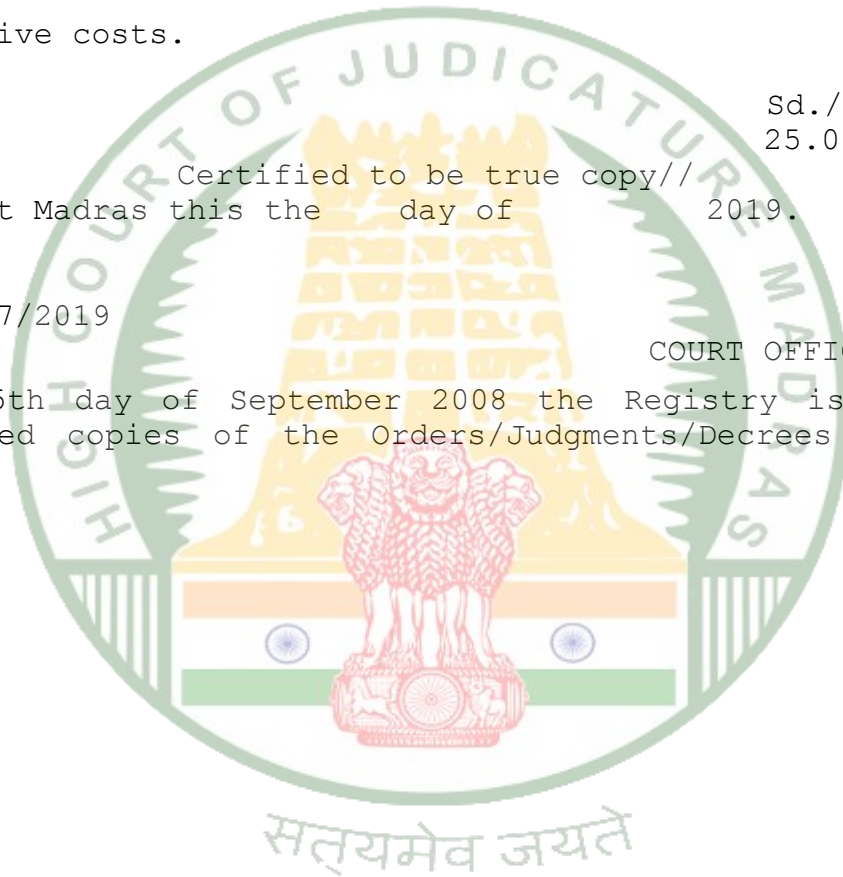
Sd./-M.S.J
25.04.2019

Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 16/07/2019

COURT OFFICER(O.S.)

From 25th day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.



WEB COPY