

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.12.2018

DELIVERED ON : 05.03.2019

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.M.A. No.2690 of 2018

- 1.M/s.Gen Next Motors Limited,
rep. by its Director Sumit Vinod Gupta,
Plot No.1/70, TTC Industrial Area,
Near Thane Belapur Road,
Khairane,
Navi Mumbai-400 079.1st Appellant /1st Respondent
- 2.Sumit Gupta,
Director M/s.Gennext Motors Ltd.,
No.130, Motobhoy Mansion,
M.K.Road, Churchegate,
Mumbai-400 079.2nd Appellant /2nd Respondent
- vs
1. M/s.Nissan Renault Financial Services
India Private Limited,
rep. by its Authorised Signatory Y.Gokulakrishnan,
ASV Ramana Towers, 5th Floor,
No.52, Venkatanarayana Road,
T.Nagar, Chennai-17.1st Respondent / Claimant
2. Sheela Gupta,
Director M/s.Gennext Motors Limited,
Ramsarovar, 1st Street,
Nadiawala Colony, SV Road,
Malad, Mumbai-400 064.2nd Respondent/3rd Respondent

Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 against the order dated 26.10.2018 passed in Memo No.5 of 2018 in Arbitration case No.PG/NRSFI/2018 on the file of the Arbitral Tribunal.

For Appellants : Mr.Thriyambak J Kannan

For Respondents : Mr.S.Namasivayam
: for respondent No.1

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellants against the order dated 26.10.2018 passed by the learned Arbitrator in Memo No.5 of 2018 in Arbitration Case No.PG/NRSFI/2018, ordering attachment of properties mentioned in Memo No.5 of 2018.

2. Brief facts are that the first appellant is a Private Limited Company, dealing in the sale of cars and car accessories, of which, the second appellant and the second respondent were Directors. The first respondent on the execution of required documents and furnishing of necessary security, extended a financial facility in favour of the first appellant company for purchase of cars and accessories from the manufacturer as well as for purchase of demo cars. Accordingly, the first respondent disbursed a sum of Rs.15 Crores to the appellant company on 06.5.2015, which was later extended to Rs.32 Crores and the said sum was arrived at on the basis of the execution of a deed of hypothecation dated 06.5.2015 by the appellant company creating a floating charge over the cars and accessories purchased from the manufacturer and various receivables including cash. As collateral coverage, a sum of Rs.3.66 Crores was provided in the form of an irrevocable bank guarantee and necessary Form was also provided as security for repayment of financial facility. The second appellant and the second respondent have executed personal guarantees in favour of the first respondent, which had been renewed.

3. According to the appellants, the financial facility was extended to the first appellant company pursuant to the terms and conditions contained in the Facility Agreement, according to which in case of any dispute between the first appellant company and the first respondent arising out of or in connection with the Facility Agreement, Clause 29 of the agreement required the same to be resolved by way of arbitration, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act"). The arbitration clause provided for appointment of a Sole Arbitrator to be appointed by the first respondent.

4. Stating that the first appellant company had allegedly violated the terms and conditions of the Facility Agreement and was liable to pay the first respondent a sum of Rs.17.98 Crores, disputes arose out of the said agreement between the parties and the first respondent invoked Clause 29 of the same vide a letter dated 18.5.2018 appointing Mr.P.Ganesan, a retired District Judge as the Sole Arbitrator and the arbitration proceedings have commenced and are presently underway.

5. According to the appellants, prior to the arbitration proceedings being initiated, the first respondent filed Applications being A.S.Nos.3759 and 3782 of 2018 under Section 9 of the said Act seeking interim measures, pending arbitration, to restrain the second appellant and the second respondent from leaving the country and to direct the appellants and the second respondent to furnish additional security of Rs.17.98 Crores.

6. By an order dated 24.09.2018, this Court allowed A.No.3782 of 2018 as against the appellants and dismissed A.No.3759 of 2018. While allowing A.No.3782 of 2018, this Court has passed an order directing the appellants to furnish security to the first respondent within a period of four weeks from today, failing which appropriate orders can be passed by the Arbitral Tribunal under Section 17 of the said Act to attach the schedule mentioned properties.

7. The first respondent filed a Memo before the Arbitral Tribunal seeking directions to pass appropriate orders under Section 17 of the said Act to attach the properties pursuant to the orders passed by this Court in A.No.3782 of 2018. By the impugned order dated 26.10.2018, the learned Arbitrator, passed an order of attachment of the properties. Challenging the same, the appellants have preferred this appeal.

8. Heard the learned counsel for the appellants and the learned counsel for the first respondent.

9. Assailing the impugned order of the learned Arbitrator dated 26.10.2018 passed in Memo No.5 of 2018, Mr.Thriyambak J Kannan, learned counsel for the appellants submitted that the learned Arbitrator has erred in not adhering to the most basic principle of arbitration proceedings wherein the learned Arbitrator is obligated to afford the appellants in respect of any proceedings any opportunity to respond to the contentions raised in the said proceedings that are pending before him and in passing the impugned order, the learned Arbitrator has gone beyond the boundaries prescribed by the said Act. He would submit that without setting assigning any reason, the learned Arbitrator has passed the impugned order of attachment, which is void ab initio and is liable to be interfered with. In support, the learned counsel relied upon the following decisions:

- (i)Uma Nath Pandey and others v. State of Uttar Pradesh and another, reported in (2009) 12 SCC 40;

- (ii) Sports Authority of Andhra Pradesh, Hyderabad
v. Regal Sports Company, Secunderabad,
reported in 2008 SCC OneLine AP 377.
- (iii) C.M.A.No.2241 of 2013 decided on 28.02.2014
(R.Ramesh v. R.Raveender) on the file of
Madras High Court.

10. Per contra, the learned counsel for the first respondent Mr.S.Namasivayam, submitted that this Court inter alia had passed an order in A.No.3782 of 2018 directing the first appellant and the second respondent to furnish security within a period of four weeks, failing which directing the learned Arbitrator to pass an appropriate order of attachment of the properties of the first appellant and the second respondent under Section 17 of the said Act. Since the first appellant and the second respondent failed to obey the order of this Court, the first respondent filed a Memo before the learned Arbitrator and learned Arbitrator has rightly ordered attachment of properties. He would submit that since the order impugned is pursuant to the order of this Court made in A.No.3782 of 2018, the appellants have no grievance over the same. The learned counsel submitted that in order to drag on the proceedings, the appellants have filed the present appeal. Therefore, the same cannot be entertained.

11. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

12. For better appreciation, it would be relevant to extract the Memo filed by the first respondent before the learned Arbitrator:

"The Claimant humbly submits that the Claimant Company had made a claim of Rs.17,76,65,630/- (Rupees Seventeen Crores Seventy Six Lakhs Sixty Five Thousand Six Hundred and Thirty Only) with interest @ 24% per annum from 20.06.2018 till the date of realization before this tribunal. The Hon'ble High Court inter alia had passed an order in Application A.3782 of 2018 filed by the Claimant herein under Section 9 of the Arbitration and Conciliation Act, 1996 on 24.09.2018 directing the 1st and 2nd Respondents herein to furnish security within a period of four weeks failing which directing this Hon'ble Tribunal to pass appropriate order of attachment of the properties of the 1st and 2nd Respondents under Section 17 of the said Act.

2.The relevant portion of the order of the Madras High Court is extracted here:

"67. Therefore, I am of the view that during the interregnum pending consideration of Section 17 application for interim measure by the arbitral tribunal, ends of justice would be met if the 1st and the 2nd respondents be directed to furnish security to the applicant within a period of four weeks from today failing which appropriate orders can be passed by the arbitral tribunal under Section 17 of the Act to attach the schedule mentioned properties."

3. For this purpose, the affidavit and the Judges Summons in the Section 9 application and the copy of the order of the Hon'ble Madras High Court in A.3782 of 2018 is also attached with this memo.

For the reasons stated above and in furtherance of the orders of the Hon'ble High Court in A.3782 of 2018, this Tribunal may pass appropriate orders under Section 17 of the said Act to attach the Scheduled mentioned properties of the Judges Summons."

13. The aforesaid Memo has been taken on file by the learned Arbitrator as Memo No.5 of 2018. By the impugned order dated 26.10.2018, the learned Arbitrator has passed the following order in the said Memo:

"This Memo filed by the claimant stating that the Hon'ble High Court in A.3782/18, under section 9 ordered the R1 and R2 to furnish security within a period of four weeks failing which directing this Hon'ble Tribunal to pass appropriate order under section 17 of the Arbitration Act and hence the claimant prayed to attach the schedule properties since the R1 and R2 did not comply with the orders of Hon'ble High Court on or before 24.10.2018. Today the date is 26.10.2018. Hence the claimant counsel prays to issue necessary orders.

Copy given to R1 and R2's counsel who is present. She has represented that they are going to appeal on the orders of the Hon'ble High Court. But till date they have not filed any petition regarding appeal on the orders of the Hon'ble High Court. Hence this Tribunal is bound to only the orders of Hon'ble High Court accordingly, I order under section 17 to attach the schedule properties mentioned in the Memo 5/18. Consequently the

concerned Sub Registrars/Registrars to make necessary entries in the registers maintained by them reflecting the attachment as per order of this Tribunal. R3 is not concerned with this Memo."

14. On a perusal of the order impugned, it is seen that though the appearance of the counsel on record for the appellants was noted by the learned Arbitrator, the learned Arbitrator has failed to give a chance to respond to the contents of the Memo to the appellants. Further, the learned Arbitrator has not recorded anything about his satisfaction in respect of Memo while ordering attachment. The learned Arbitrator just recorded in the impugned order that the Tribunal is bound by the orders of this Court passed in A.No.3782 of 2018. The learned Single Judge of this Court in A.No.3782 of 2018 directed the appellants to furnish security, failing which appropriate orders were directed to be passed by the Tribunal.

15. Admittedly, as against the orders passed by the learned Single Judge of this Court in A.No.3782 of 2018, the appellants have preferred appeal in O.S.A.No.442 of 2018 on 23.10.2018 and the same is pending.

16. The learned Arbitrator has passed the impugned order mainly relying upon the direction of the learned Single Judge of this Court in A.No.3782 of 2018. In his order, the learned Arbitrator recorded that till date, the appellants have not preferred any appeal against the order passed in A.No.3782 of 2018. However, the situation changed and the appellants have preferred appeal against the order in A.No.3782 of 2018.

17. On a bare reading of the order impugned, this Court is of the view that before ordering attachment of properties, the learned Arbitrator has not afforded an opportunity to the appellants to respond the Memo filed by the first respondent.

18. It is settled that no order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice.

19. In Rajasthan State Road Transport Corporation and another Vs. Bal Mukund Bairwa (2), reported in (2009) 4 SCC 299, the Hon'ble Supreme Court observed as under:

"35. Any order passed in violation of the principles of natural justice save and except certain contingencies of cases, would be a nullity."

20. In the decision relied upon by the learned counsel for the appellants in Uma Nath Pandey and others v. State of Uttar Pradesh and another, supra, the Hon'ble Supreme Court held as follows:

"3. The second rule is 'audi alteram partem', that is 'hear the other side'. At times and particularly in continental countries, the form 'audietur at altera pars' is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely, 'qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum facerit', that is 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right (see Boswel's case, (1605) 6 Co Rep 48b) or in other words, as it is now expressed, 'justice should not only be done but should manifestly be seen to be done'. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated."

21. The learned Arbitrator is bound by the provisions of the Arbitration and Conciliation Act and is obliged to treat the parties to the arbitration proceedings fairly and equally. As stated supra, it is clear from the order impugned that the learned Arbitrator did not even give the appellants a chance to respond to the contents of the Memo. Therefore, this Court is of the view that the order impugned in this appeal is in violation of principles of natural justice. Further, as rightly argued by the learned counsel for the appellants, the learned Arbitrator has acted in a hasty manner. Hence, on the sole ground, the order of the learned Arbitrator impugned in this appeal is liable to be set aside and the matter is remanded to the learned Arbitrator for fresh consideration.

22. It appears that by an order dated 20.11.2018, this Court granted interim stay of all further proceedings in Memo No.5 of 2018 in Arbitration Case No.PG/NRSFI/1/2018, dated 26.10.2018 and the same has been in force till date. The first respondent has not taken steps to vacate the interim order till date. Therefore, at this stage, if the matter is remanded back to the learned Arbitrator for fresh consideration of the Memo, no prejudice would be caused to the other side, particularly, the first respondent.

23. The other decisions relied upon by the learned counsel for the appellants viz., (i) Sports Authority of Andhra Pradesh, Hyderabad v. Regal Sports Company, Secunderabad, reported in 2008 SCC OneLine AP 377 and (ii) C.M.A.No.2241 of 2013 decided on 28.02.2014 (R.Ramesh v. R.Raveender) on the file of this Court, are in relation to the provisions of Order 38, Rule 5 CPC. There is no quarrel that before passing an order of attachment before judgement, the Court must be satisfied on the compliance of Order 38, Rule 5 CPC. In the present appeal, this Court cannot test the order passed by the learned Single Judge of this Court in A.No.3782 of 2018. Moreover, challenging the said order, the appellants have preferred appeal and the same is pending. Therefore, the decisions relied upon the learned counsel for the appellants in respect of Order 38, Rule 5 of CPC are not elaborated in this order.

24. For the foregoing reasons, the order impugned in this appeal is liable to be set aside on the sole ground of violation of principles of natural justice and accordingly, the same is set aside. The matter is remanded back to the learned Arbitrator for fresh consideration of the Memo No.5 of 2018 in Arbitration Case No.PG/NRSFI/1/2018. The learned Arbitrator is directed to afford an opportunity of hearing to the appellants and the respondents and to dispose of the same within a period of one month from the date of receipt of a copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vs
To

1. Thiru.P.Ganesan,
District Judge (Retd.)
Sole Arbitrator,
778, 4th Street, Judge Colony,
Kagithapuram, S.Kolathur, Chennai-17.

2. The Arbitration Tribunal, Chennai.

+1 cc to Mr.Thriyambak J Kannan, Advocate, S.R.No.20819

+1 cc to Mr.B.Namasivayam, Advocate, S.R.No.20211

C.M.A.No.2690 of 2018

RV (CO)
SSM(29/03/2019) .