

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **09.03.2020**

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.501 of 2010

Citifinancial Retail Services India Ltd.,
No.117, Dr.Radhakrishnan Road
Mylapore
Chennai - 600 014
Rep. by its Assistant Manager-Collections
Mr.J.Srikumar ... Petitioner

vs.

1.Dove Finance Ltd.,
No.17-A, Ballaiah Avenue
Off. Luz Church Road
Mylapore
Chennai - 600 004
2. Y.K.Rajagopal
Sole Arbitrator
Old No.6, New No.11
First Floor, Francis Joseph Street
Chennai - 600 001

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 03.03.2007 passed by the second respondent in Arbitration Case No.R/Dove/1/2005 with regard to the disputes arising between the petitioner and the first respondent under

Program Agreement dated 02.09.2002, as well as the interim order dated 29.5.2006 passed by the second Respondent in the above proceedings or, in the alternative remit the matter to the Arbitral Tribunal to consider the evidence rejected vide interim order dated 20.05.2006 and thereupon pronounce an award.

For Petitioner : Mr.V.Balasubramani

For Respondents : No appearance for R1

ORDER

Mr.V.Balasubramani, learned counsel on record for petitioner is before this Court. With regard to the contesting first respondent, read this in conjunction with and in continuation of earlier proceedings made by this Court on 05.03.2020, which reads as follows:

'Mr.V.Balasubramani, learned counsel for sole petitioner is before this Court. It is pointed out that first respondent has been duly served by resorting to substituted service. Proof of publication is placed before this Court as part of case file. To be noted, second respondent is the sole arbitrator and only the name of the second respondent is shown in the cause list today.

2. Registry is directed to show the name and address of the first respondent as in the short cause title of the OP along with the name and address of the second respondent on Monday. i.e., 09.03.2020.

List on 09.03.2020.'

2. Pursuant to aforesaid proceedings, name and address of the contesting first respondent, as in the short and long cause titles of the main 'Original Petition' ('OP' for brevity) has been shown in the cause list. Name of the first respondent called out aloud thrice in the Court and in the adjoining corridors. There is no response. This Court is informed that no counsel has entered appearance on behalf of the first respondent.

3. To be noted, second respondent is the sole arbitrator, who constituted the Arbitral Tribunal, which passed an 'interim award dated 29.05.2006' and 'award dated 03.03.2007' (hereinafter 'impugned interim award' and 'impugned award' respectively for the sake of brevity and convenience). Considering the grounds raised in the instant OP, second respondent is deleted from the array of parties.

4. Instant OP was presented in this Court one decade and two years ago i.e., on 14.06.2007 to be precise. 12 years is a fairly long period even under normal circumstances, but in the light of sub-section (6) of Section 34 of 'The Arbitration and Conciliation Act, 1996' (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for brevity, it is too long a period. To be noted, sub-section (6) of Section 34 prescribes a one year time line for disposal of challenges to awards under Section 34 of A and C Act. This Court also reminds itself that Hon'ble Supreme Court in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in (2018) 9 SCC 47 , more particularly in Paragraph 26 therein, has referred to sub-section (6) of Section 34 and has observed that Courts dealing with applications under Section 34 should make every endeavour to dispose of such applications by adhering to the time line. Though ***Bhumi Vikas*** case law is an authority for the broad proposition that notice under sub-section (5) of Section 34 is directory and not mandatory, the observations made by Hon'ble Supreme Court in Paragraph 26 of ***Bhumi Vikas Bank*** case law is instructive and this Court deems it appropriate to extract Paragraph 26,

which reads as follows:

“26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.”

(Underlining and double underlining made by this Court to supply emphasis and highlight)

5. Having noticed the time line and the length of time for which instant OP has been pending in this Court, before embarking upon the exercise of disposing of instant OP, this Court reminds itself about the manner in which OPs of instant nature have to be dealt with. Hon'ble Supreme Court in Fiza Developers [**Fiza Developers & Inter - Trade (P) Ltd.**

Vs. AMCI (India) (P) Ltd. reported in (2009) 17 SCC 796] held that challenges to arbitral awards are summary procedures. Subsequently in **Emkay Global Financial Services Limited Vs. Girdhar Sondhi** reported in (2018) 9 SCC 49, Hon'ble Supreme Court reiterated the *Fiza Developers* principle and held that it is a step in the right direction. This leaves us with the inescapable conclusion that disposal of instant OP is a summary procedure.

6. After noticing the time line for disposal of instant OP and also after noticing that disposal of instant OP is a summary procedure, this Court also deems it appropriate to remind itself that instant OP is neither an appeal nor a revision and it is not even a full-fledged review, but it is a limited judicial review within the contours and confines of 8 slots set out under Section 34 of A and C Act. This Court now straight away plunges into factual matrix in the light of scope of instant OP and in the light of disposal being by way of a summary procedure, all of which have been alluded to supra. It is not necessary to set out facts in great detail. In other words, short facts shorn of elaboration will suffice.

7. Short facts are that the genesis of instant lis is an agreement captioned 'PROGRAM AGREEMENT' dated 02.09.2002 between the petitioner and the respondent (hereinafter 'said contract' for the sake of clarity). This Court is informed that petitioner is in the business of retail financing and respondent is in the business of financing purchase of consumer durables and two wheelers. Vide said contract, it was agreed that the respondent would locate potential borrowers seeking finance for purchasing consumer durables and two wheelers, who would be recommended as customers to the petitioner for the purpose of provision of loan facilities.

8. There is no dispute or disagreement that Clause 18 of said contract captioned 'Arbitration' is an arbitration agreement between the petitioner and the respondent and that serves as an 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. Clause 18 reads as follows:

'18. ARBITRATION

18.1. Any dispute or difference arising out of or in connection with this Agreement or in the interpretation of any of the provisions of this agreement, either party may by 30 days notice in writing

given to the other refer the dispute or difference for settlement by Arbitration of a Sole Arbitrator appointed by mutual consent. In case the Parties do not agree upon appointment of a sole Arbitrator, then either party may apply to the court for appointment of a Sole Arbitrator under the provisions of the Arbitration and Conciliation Act, 1996.

18.2. The Arbitrator so appointed shall after hearing both the parties or in the event of either of them remaining exparte or refusing to participate in the arbitration proceedings, after hearing the party attending the proceedings, pass a reasoned Award and the Award so passed shall be final and binding on the all parties to the dispute.

18.3. The Arbitration shall be governed by the Provisions of the Arbitration and Conciliation Act, 1996 and the rules or regulations framed thereunder.

18.4. The venue of Arbitration shall be CHENNAI or such other place as may be directed by the Arbitrator from time to time. The language of Arbitration Proceedings shall be English.

18.5. The costs of Arbitration shall initially be borne and paid by the parties to the dispute in equal proportion and ultimately to be borne and paid in full or in part by such party or parties as may be determined by the Arbitrator.'

9. As said contract was operating, respondent before this Court complained of breach of obligations by the petitioner and raised arbitrable

disputes. Suffice to say that sole Arbitrator (Originally arrayed as Respondent No.2 in instant OP and who now stand deleted by this Court) was appointed as sole arbitrator to constitute the Arbitral Tribunal vide an order dated 11.02.2005 made in O.P.No.51 of 2005.

10. Arbitral Tribunal entered upon reference. The respondent before this Court was claimant before the Arbitral Tribunal. The breach alleged by the respondent is articulated in Paragraph 18 of the claim statement, which reads as follows:

'18. The Respondents have committed a breach of the following clauses of the Agreement:

a. The Respondents have failed to pay the advance incentive per facility for every calender month as stipulated in Clause 5.8.

b. The Respondents have failed to generate and forward to the Claimants the monthly Statements as stipulated in Clause 11.2. As a result of this breach the Claimants are still in the dark regarding the defaults committed by customers referred by them. This blacking out of information has disabled the Claimant from following up the alleged delinquent accounts.

c. Even after several requests the Respondent has not given the individual details of the defaulters, the details of which are known only to the Respondent.

d. The Respondent has committed a breach of the obligation cast upon them under Art.15(a) of the Agreement in as much as they have miserably failed to follow up the alleged defaulted facilities thereby depriving the Claimant of their remuneration and leading to perhaps a poor state of the portfolio as alleged by the Respondent. The Claimant reiterates that in the retail finance segment and micro finance segment, which essentially comprises of loans to consumer durables and two wheelers, intense follow up of recovery, ensuring that overdues do not mount and detailed scrutiny of movements regularly are prerequisites for ensuring that the portfolio does not turn bad. The Respondent, though in this business on a large scale across the country and having the requisite infrastructure, IT Facilities and manpower, have failed miserably in monitoring and taking effective and timely steps in recovering dues from the portfolio created under this arrangement for reasons best known to them.'

11. Thereafter, the respondent before this Court in its capacity as claimant before the Arbitral Tribunal has made a claim, which is contained in paragraph 20 of the claim statement, which reads as follows:

'20. For all the reasons stated above it is prayed that this Hon'ble Tribunal may be pleased to

(a) direct the respondent to pay the sum of Rs.16,52,671/- to the claimant together with interest @ 18% from April 2004 to till date of realisation;

- (b) pay costs to the Claimant and*
- (c) pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.'*

12. Petitioner before this Court in its capacity as sole respondent before Arbitral Tribunal filed a counter statement and made a counter claim. The basis of the counter claim and counter claim itself is articulated in the penultimate paragraph and last paragraph, which read as follows:

'For the reasons stated above, this Respondent that, after the detailed working of computing not payout due to Claimant on account of business procured by Claimant and as per the Computation done nothing is due and payable by the Respondent to the Claimant. On the other hand, Rs.5,21,989/- from this Claimant to the Respondent which amount the Claimant has to pay the Respondent with an interest of 19% from this day till the date of realization.

Under these circumstances, it is prayed that this Hon'ble Forum may dismiss the above Claim Statement filed by the Claimant and direct the Claimant to pay a sum of Rs.5,21,989/- with interest from this date and till the date of payment in full and thus render justice.'

13. After completion of pleadings, in the aforesaid back drop, issues were framed, oral evidence was let-in and documents were also marked.

14. In this scenario, the respondent before this Court, took out interlocutory applications, seeking permission to reopen evidence, for filing additional documents and other allied reliefs, This prayer is rejected by Arbitral Tribunal vide an interim award dated 29.05.2006. Points for consideration is captured in the interim prayer and the same reads as follows:

'Points for Consideration:

1.Prayer in Application No.1.Whether permit the petitioner to reopen the case and to file the rejoinder statement?

2.Prayer in Application No.2. Whether permit the petitioner to let in evidence and mark additional documents?

3. Prayer in Application No.3.Whether to permit the petitioner to reopen and the evidence of the petitioner and permit the petitioner to let in additional evidence through new witnesses and mark additional documents through the said witness?

4.Prayer in Application No.4.Whether to reopen and recall the evidence of the respondent and permit the petitioner to cross-examine the respondent's witness? '

15. Conclusion in the interim award is contained in three paragraphs, which reads as follows:

'Further there is no pleading with regard to reopen and recall to cross-examine the P.W.1. Whether based on the new documents or to cover some more left out points. In the absence of pleadings the same cannot be allowed.

Both the parties filed their proof affidavit simultaneously by consent and on their own violation and the procedure was not objected to by the petitioner and any event it does not amount to a serious breach of procedure.

For all the forgoing reasons the all the above petitions filed by the Petitioner/Respondent are dismissed and the proceedings will continue for arguments. The case is posted to 17-06-2006 for arguments at No.17-A, Balaiah Avenue, Off Luz Church Road, Mylapore, Chennai – 600 004.'

16. This is how the impugned interim award came to be passed, thereafter arbitral proceedings continued and the same culminated in impugned award i.e., award dated 03.03.2007.

17. A perusal of the impugned award reveals that one witness each was examined on the side of the petitioner and respondent, as many as 22

exhibits were marked on the side of the petitioner (respondent before this Court) and two documents were marked on the side of the respondent (petitioner before this Court)

18. Points for consideration as can be culled out from the impugned award reads as follows:

'Point for consideration:

- 1. Whether the role of the claimant is restricted only to source the customers to the respondent?*
- 2. Whether the responsibility collection of defaulted amounts from the sourced customers by the Claimant lies with the Claimant or the respondent?*
- 3. Whether the respondent has taken diligent steps for recovery of the amount from the sourced customers?*
- 4. Whether respondent has committed breach of the terms of the agreement?*
- 5. Whether claimant is entitled for any amount as per the Programme Agreement in case of any default by the sourced customer?*
- 6. Whether the Claimant is liable to pay the counter claim made by the respondent?'*

19. The conclusion is contained in Paragraphs 10 and 11 of the

impugned award, which read as follows:

'10. The claimant seeks interest at the rate of 18% per annum from April 2004 on the ground that this is a commercial transaction. But I consider that the award of interest from that date till realization 12% per annum will just and reasonable having regard to the market conditions and provision of Sec.31(7)(a) and (b) of the Arbitration and Conciliation Act, 1996.

11. In the result, I pass an Award, directing the respondent to pay the claimant a sum of Rs.16,52,671/- with interest thereon at rate of 12% per annum from April 2004 till realisation, together with Rs.70,000/- being the cost of these proceedings made up of Arbitrator's remuneration of Rs.65,000/- expenses of the Arbitrator Rs.4850/-, the value of the Non-Judicial Stamp Rs.150/- for engrossing the award.'

20. Instant OP has been laid assailing the impugned interim award as well as impugned award.

21. Though very many grounds have been set out in the OP on hand, from the submissions made by learned counsel for petitioner and from a perusal of the OP, it comes to light that only three points fall for consideration and they are as follows:

- a) Petitioner was not given proper opportunity before the Arbitral Tribunal as the petitioner could not submit some vital

evidence;

b) Impugned award is against public policy;

c) Impugned award has not been made by the Arbitral Tribunal in accordance with the terms of said contract and without taking into account the usage of the trade applicable to the transaction.

22. The aforementioned three points were articulated and projected by the learned counsel.

23. A careful perusal of the impugned interim award and impugned award leaves this Court with the considered view that it cannot be gainsaid that sufficient opportunity had not been given to the petitioner as extensive oral evidence has been let-in and as mentioned supra, as many as 24 exhibits in all have been marked by both sides.

24. This Court is of the considered view that opinion of the Arbitral Tribunal that the matter turns on interpretation of Article 7.1 of said contract does not warrant any interference. Even in this regard, it is not as if the

Arbitral Tribunal has completely rejected the request of oral and documentary evidence by holding that the entire matter turns on interpretation of Article 7.1. In other words, notwithstanding the matter turning on Article 7.1 of said Contract, the Arbitral Tribunal has permitted extensive oral and documentary evidence on both sides.

25. Moving on to the next ground that has been urged namely, public policy, to be noted, the instant OP was presented in this Court on 12.06.2007. The term 'public policy' was not statutorily explained when instant OP was filed. The lead cases in this regard are **ONGC Ltd. v. Western Geco International Ltd.**, reported in (2014) 9 SCC 263 and **Associate Builders Vs. Delhi Development Authority** reported in (2015) 3 SCC 49. To be noted, these two case laws were rendered by Hon'ble Supreme Court prior to 23.10.2015 when public policy was statutorily explained. These two case laws culled out three distinct juristic principles and also laid down the tests qua these three distinct juristic principles with regard to public policy. The three distinct juristic principles culled by Hon'ble Supreme Court in **Western Geco** and **Associate Builders** case laws qua public policy are a) Judicial approach, b) 'Natural Justice Principles'

('NJP' for brevity), and c) Irrationality/perversity. The tests for testing these three distinct juristic principles laid down by Hon'ble Supreme Court are a) fidelity of judicial approach, b) *audi alteram partem* and c) time honoured *Wednesbury* principle of reasonableness respectively.

26. From the submissions made before this Court and from the OP, this Court is of the considered view that challenge to the arbitral award is more in the nature of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). In other words, no specific point regarding the aforementioned three distinct juristic principles or violation of the same have been pointed out to say that the impugned interim award and impugned award are in conflict with public policy. To be noted, ***Western Geco and Associate Builders*** case laws were reiterated by Hon'ble Supreme Court in ***Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Ltd.***, reported in (2017) 2 SCC 228.

27. This takes us to the last point regarding impugned award i.e., that it has not been in terms of said contract and without taking into account the usage of the trade applicable to the transaction. To be noted, this obviously is a plea predicated on sub-section (3) of Section 28 of A and C Act as it

stood prior to 23.10.2015. Sub-section (3) of Section 28, as it stood prior to 23.10.2015 reads as follows:

'28(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'

28. A careful perusal of the impugned award leaves this Court with the considered view that all aspects of contract have been looked into and nothing contrary to the trade usage have been pointed out.

29. As all the points projected for assailing the impugned interim award and impugned award do not find favour with this Court and as this Court is of the considered view that none of the points projected in an attempt to dislodge the impugned interim award and impugned award fit into the slots under Section 34, this Court comes to the conclusion that instant OP deserves to be dismissed.

Instant OP dismissed, but there shall be no order as to costs.

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Speaking Order/Non-Speaking Order

Index : Yes/No

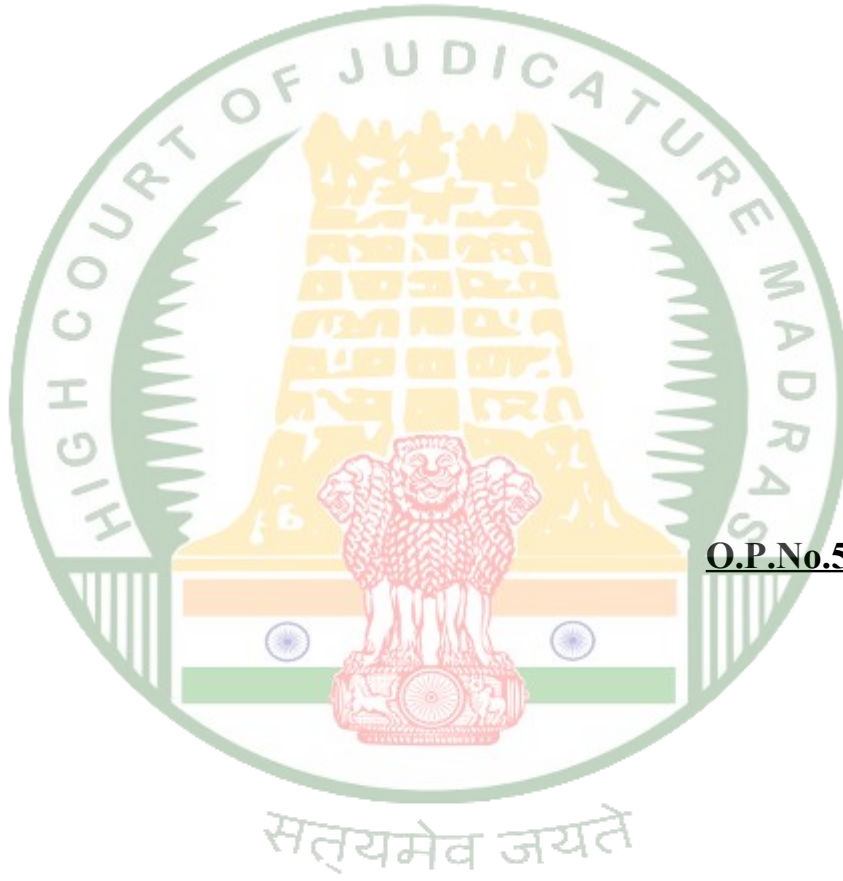
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