IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.11.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.310 of 2020
and
A.No.1225 of 2020

1. Sacred Heart Educational Trust
   Rep. by its Rex Abraham
   Managing Trustee
   No.10, Devaraj Nagar
   Sholinganallur
   NR Toll Plaza
   Chennai-600 119.

2. Rex Abraham
   Co-borrower
   No.10, Devaraj Nagar
   Sholinganallur
   NR Toll Plaza
   Chennai-600 119. ... Petitioners

vs.

1. M/s. IDFC First Bank Ltd.,
   (Earlier known as M/s.Capital First Limited)
   Represented by its authorised signatory
   Mr.Gaurav Chordia
   No.455 Anna Salai
   1st Floor, Teynampet
   Chennai-600 018.

2. Augustine Vasanthraj Abraham
   Co-borrower
   No.10, Devaraj Nagar

Sholinganallur
NR Toll Plaza
Chennai-600 119. ... Respondents

Original Petition filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, to set aside the arbitration award dated 11.01.2020 passed by the Hon'ble Arbitral Tribunal.

For petitioners : Mr.R.Thirumoorthy
For Respondents : Mr.S.Ram Prasad for R1

ORDER

Captioned 'original petition' ('OP' for the sake of brevity, convenience and clarity) is an application under 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 the sake of convenience and clarity, assailing an 'arbitral award dated 11.01.2020 bearing reference ARBITRATION Case NO.:IDFC/ARB/15 OF 2019' [hereinafter 'impugned award' for the sake of brevity, convenience and clarity] made by a sole arbitrator, who is a retired District Judge and who constituted the 'Arbitral Tribunal' ['AT' for the sake of convenience and clarity].

2. There are two petitioners and two respondents in captioned OP. Petitioners 1 and 2 are borrower and co-borrower respectively. Respondent No.1 is the entity which lent the money and 'respondent No.1' shall be referred to as 'Bank'. The elder son of second petitioner, who also is a co-borrower, has been arrayed as second respondent in captioned OP.

3. Mr.R.Thirumoorthy, learned counsel on record for two petitioners and Mr.S.Ram Prasad learned counsel on record for Bank are before me in this web hearing on a video conferencing platform. To be noted, second respondent has been duly served, his name together with complete/full address as in OP short and long cause titles is shown in the cause list and more than one opportunity has been given to second respondent, but second respondent has not chosen to come before this Court in the virtual hearing. This Court is informed that second respondent has not entered appearance through any counsel. To be noted, the impugned award is against second respondent also and this Court is informed that second respondent has not chosen to assail the same.

4. In the aforementioned backdrop, with the consent of aforementioned two counsel on record on either side, this Court took up the captioned OP for final disposal and captioned OP was heard out.

5. Owing to the limited legal landscape and short statutory perimeter of Section 34 of A and C Act, short facts or in other words essential facts imperative for appreciating this order will suffice. Such facts are that a 'loan agreement dated 31.07.2017 bearing Loan Agreement No.11574171' [hereinafter 'said loan agreement' for the sake of convenience and clarity] between the parties is the fulcrum of the matter; that vide said loan agreement, Bank had lent Rs.4,50,00,000/- (Rupees Four Crores and Fifty Lakhs Only) to aforementioned borrower and co-borrowers and the same is described as loan against property; that this borrowing had to be repaid in EMIs (Equated Monthly Instalments); that number of EMIs vary as the lending is on floating interest rate; that number of EMIs were 150 and subsequently, the same became 216; that the tenor is from 05.09.2017 to 05.08.2035; that there was a default and therefore, the Bank issued a recall notice dated 06.03.2019; that there is an arbitration clause in the said Loan Agreement i.e., Clause No.18; that

post recall of loan, bank triggered the arbitration clause vide notice dated 22.08.2019 *inter-alia* by appointing a sole arbitrator, who constituted the AT; that AT entered upon reference and made the impugned award as the respondent before AT did not appear before AT in spite of notice being either sent or served in accordance with the A and C Act. To be noted, petitioners 1, 2 and second respondent in captioned OP are respondents 1 to 3 respectively before AT and this has already been mentioned supra; that vide impugned award, AT held that Bank is entitled to Rs.4,76,98,217.23 (Rupees Four Crores Seventy Six Lakhs Ninety Eight Thousand Two Hundred Seventeen and Paise Twenty Three Only) with interest, besides directing the borrowers to pay Rs.7,000/- towards costs, arbitrator fee and charges to the Bank; that on receipt of this impugned award dated 11.01.2020, captioned OP has been presented in this Court on 20.02.2020; that notice was issued in captioned OP; contesting respondent Bank has entered appearance; that captioned OP is now being taken up for final hearing and the same is being heard out.

6. In the short narrative of essential facts imperative for appreciating this order set out supra, this Court has also captured the

trajectory this matter has taken in reaching this Court.

7. In the virtual hearing, today Mr.R.Thirumoorthy learned counsel for petitioners made submissions, summation of which are as follows:

(a) There was no notice of appointment of arbitrator and therefore, impugned award is vitiated by Section 34(2)(a)(iii) of A and C Act.

(b) As a corollary to above argument, it was submitted that Section 12 of the A and C Act has been breached as there has been no disclosure by the sole arbitrator.

(c) It was submitted that payments have been made by petitioners even while the arbitral proceedings were underway, but the Bank having, promised to close the matter, continued the arbitration. This is in clear violation of public policy and therefore, there is an infarct, which vitiates the impugned award under Section 34(2)(b)(ii) of A and C Act.

8. In response to the above submissions, Mr.S.Ram Prasad, learned counsel made submissions, summation of which is as follows:

(a) The borrowers have repaid only little over 1.47 crores i.e., Rs.1,47,19,650/- and they were intimated about every hearing before AT.

(b) After the loan recall notice, a notice regarding appointment of arbitrator, being notice dated 22.08.2019, was in fact issued.

(c) The petitioners have not raised points argued now in OP, particularly point regarding no notice.

9. This Court carefully examined the impugned award as well as an affidavit styled 'Additional Affidavit' sworn to by the second petitioner. Learned counsel for petitioners drew the attention of this Court to Paragraph Nos.10 and 11 of Additional Affidavit, which read as follows:

'10. I further state that as per the advice of the employees of the 1st respondent, I have arranged amount and paid sum of Rs.5,25,686/- (Five Lakhs Twenty Five Thousand and Six Hundred Eighty Six Rupees Only) on 3-10-2019 and

Rs.2,00,000/- on 17-10-2019 through RTGS transaction then they assured that arbitration proceedings will not continue and the same is stopped. And further they assured that they will adjusted the arrears of the balance and instruct us to pay monthly E.M.I. continuously. Even thereafter I paid Rs.3,25,686 by cash on 23-10-2019.

11. Thereafter, I have made following payments. I have enclosed the cash vouchers.

On 26-12-2019 Rs.50,000/- through online transfer by RTGS and Rs.50,000 by cash.

On 30-12-2019 Rs.4,25,686/- by cash.

On 30-01-2020 Rs.30,000/- by cash.

On 1-02-2020 Rs.2,00,000/- by cash.

On 04-02-2020 Rs.2,95,700/- by cash.

On 05-03-2020 Rs.3,50,000/- by cash

On 06-03-2020 Rs.1,26,000/- by cash.

On 09-03-2020 Rs.49,700/- by cash.'

10. Learned counsel submitted that the above payments have not been considered by the Arbitrator. It was also submitted that the Bank promised that the account will be closed and believing such a statement made by the Bank, the petitioner did not go before AT. However, there is no disputation or disagreement that there is nothing in writing to buttress this and payments made during pendency of arbitral proceedings are

being relied on only to buttress the submission that a promise to pursue arbitration was made by the Bank.

11. This Court now proceeds to consider the submissions, discuss the same and give its dispositive reasoning. The first and second submissions made by learned counsel for petitioners can be taken up together as those two submissions turn on notice *inter-alia* regarding appointment of arbitrator. A careful perusal of the impugned award brings to light that there is in fact a notice, being notice dated 22.08.2019, which has been marked as Ex.C4 before AT. AT has framed an issue with regard to jurisdiction i.e., Issue No.1 and answered the same. Issue No.1 and answer to Issue No.1 read as follows:

> *'Whether the Sole Arbitrator has jurisdiction to try, adjudicate and resolve the dispute?*
>
> *The relationship between the Claimant and the Respondents is lender and borrowers. Therefore, it is deemed to be fit and proper to go through the loan agreement entered into between the claimant and the borrowers, which is marked as **Exhibit C2**.*
>
> *Clause 18 of the Exhibit C2 is extracted below:*
>
> *"All disputes, difference and / or claim arising out of these presents including any dispute as to any amount*

outstanding, or in any way touching or concerning the same or as to constructions, meaning or effect hereof or as to the right and liabilities of the parties hereunder shall be settled by arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the arbitrator to be nominated by CAPITAL FIRST. In the event of death, refusal, neglect, inability or incapability of a person so appointed to act as an arbitrator, CAPITAL FIRST may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned. The arbitration shall be final and binding on all parties concerned. The arbitration proceedings shall be held at branch location or at the registered office of Capital First and the arbitration shall be conducted in English language."

From the aforesaid Clause agreed to by both the parties, it is clear that the sole arbitrator appointed by the Claimant has jurisdiction to try, adjudicate and resolve the dispute, as a dispute has been referred to the Sole Arbitrator by letter dated ***22.08.2019*** *addressed to the Borrowers with a copy to the arbitrator* ***(C4)****. It is seen from* ***C3*** *the Loan recall notice dated* ***06.03.2019*** *that the borrowers were also informed that in case of failure to repay the dues, arbitration proceedings will be initiated. It is seen that this is only a dispute on repayment of loan, even though is equitable mortgage exists as a security for the due repayment of loan, which would become consequential, only if the Award is* *passed in favour of the claimant.*

In the above circumstances, stated above the first issue is answered in the affirmative.'

12. As there has been notice regarding appointment of arbitrator, the argument that there was no notice regarding appointment of arbitrator does not carry the petitioners' campaign against the impugned award any further in the captioned OP. With regard to Section 12 of A and C Act, as it is the specific case of petitioners that they did not go before AT only owing to the alleged assurance said to have been given by the Bank**,** there is nothing to demonstrate that the arbitrator had any circumstances or relationship or interest with the parties which he did not disclose. To be noted, even now in the captioned OP also no such circumstance has been pointed out. In this regard, learned counsel for petitioners placed reliance on the ***Alupro principle in Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.*** reported in ***2018 (3) R.A.J. 94 (Del)***, wherein need for trigger notice was emphasised. In the instant case, there is a trigger notice and therefore, ***Alupro principle*** does not help the petitioners' case. Be that as it may, with regard to the submissions made by learned counsel for Bank that such a plea has not been raised either

before AT or in captioned OP, this Court is conscious that Hon'ble Supreme Court in ***Lion Engineering Case (M/s.Lion Engineering Consultants Vs. State of M.P & Ors*** reported in ***2018 SCC Online SC 327***) has held that ***MSP principle (MSP Infrastructure Ltd. vs. Madhya Pradesh Road Development Corporation Ltd.*** *reported in* ***(2015) 13 SCC 713)*** is not correct law. In other words, in ***Lion Engineering Case,*** Hon'ble Supreme Court has held that it is open to the parties to raise jurisdiction issue even if it has not been raised before AT. However, in the instance case, as no breach or no infarct qua Section 12 is pointed out and as the AT has dealt with the jurisdiction issue by framing an issue which this Court finds is not an implausible view, this Court is unable to accept the submission that the impugned award is liable to be dislodged.

13. With regard to the public policy plea predicated on Section 34(2)(b)(ii), captioned OP, having been presented in this Court on 20.02.2020, is obviously governed by post 23.10.2015 regime of A and C Act. To be noted, this is in accordance with ***Ssangyong*** principle, being the ratio laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National***

Highways Authority of India *reported in* ***(2019) SCC Online SCC 677 equivalent to (2019) 15 SCC 131.*** In ***Ssangyong*** principle, more particularly, in Paragraph Nos.34 to 36, Hon'ble Supreme Court has made it clear that owing to Explanation 2 to Section 34(2)(b)(ii), a Section 34 of A and C Act legal exercise does not entail a review on merits of the matter, more importantly, Hon'ble Supreme Court has made it clear that Paragraph Nos.28 and 29 of ***Associate Builders*** case i.e., ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49*** and Paragraph Nos.35, 38 to 40 of ***Western Geco case*** which was reiterated in ***Associate Builders,*** are not of significance owing to the impact of 23.10.2015 amendment. Perversity, as elucidated in ***Associate Builders case,*** is now available as patent illegality ground under Sub-Section 2(A), but it may not be necessary to go into that aspect of the matter as vide proviso thereto re-appreciation of evidence is forbidden. To be noted, paragraph Nos.34 to 36 of ***Ssangyong*** principle read as follows:

Paragraph Nos. 34 to 36 of Ssangyong case law:

> ***'34.*** *What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of*

Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

***35.** It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice".*

This again would be in line with paras 36 to 39 ofAssociate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36.*Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders[Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.'*

14. This Court has also carefully perused the procedural history that has been captured in the impugned award. The procedural history captured in the impugned award is an answer to Issue Nos.2 & 3. Issue Nos.2 and 3 and answer to the same are as follows:

'Whether the service of notice to the respondents is complete? Whether the matter can be heard in the absence of the respondents?

*The 1st notice dated **31.08.2019** was sent to the respondents through registered post with acknowledgement card, directing the parties to appear before the Arbitrator on 21.09.2019 either in person or through any authorized representative/counsel, duly appointed by them, for enquiry into the above mentioned dispute at M/s.IDFC FIRST BANK LIMITED, earlier known as M/s.CAPITAL FIRST LIMITED, having office at No.455, Anna Salai, 1st Floor, Teynampet, Chennai-600 018. The notice sent through Registered Post to the respondents and the same has been duly **"SERVED"** to the 1st and 2nd respondents, and the same was returned as **"LEFT"** by the 3rd respondent.*

*On **21.09.2019**, the authorized representative of the claimant and the claimant's counsel were present and filed claim statement, the same was taken by me on record and the respondents called absent and there was no one appeared on behalf of respondents thereafter the matter posted to **12.10.2019**. Subsequently 2nd hearing notice dated **27.09.2019** was sent to the respondents and the same has been duly **"SERVED"** to the 1st and 2nd respondent, and the same was returned as **"LEFT"** by the 3rd respondent. Thereafter, on **12.10.2019** the respondents and their counsel called absent and the claimant present and filed their proof affidavit and exhibits C1 to C5 were marked and the matter* *was posted to **02.11.2019**. The notices to the respondents for intimating the 3rd hearing were sent on **15.10.2019,** which was also **"SERVED"** to the 1 & 2 respondent and the same was returned as **"LEFT"** by the 3rd respondent. On **02.11.2019**, the respondents or their counsel did not appear and there is no representation on behalf of the respondents and the claimant counsel present and the argument heard and matter was posted on **16.11.2019**. Again notice was sent to the respondents for intimating the 4th hearing date to the through Register Post on **02.11.2019**, which was also **"SERVED"** to the 1 & 2 respondent and the same was returned as **"LEFT"** by the 3rd respondent. On **16.11.2019**, the respondents were called absent and no representation on behalf of the respondents and hence the respondents were made set exparte.*

*The counsel for claimant averred that since notices have been sent only to the address given by the respondents in their loan agreements, which are the correct and last known address, and above all the notice sent to respondents and the same has been duly **"SERVED"** to the 1st and 2nd respondent, and the same was returned as **"LEFT"** by the 3rd respondent.*

On the basis of Section 3 of the Arbitration and Conciliation Act, 1996, Section 27 of the General Clauses Act, 1897, Section 114(f) of the Indian Evidence Act, 1872, and judgements reported in Madan & Company Vs. WazirJaivir Chand (1989) 2 SCC 602 and Basant Singh Vs.

Roman Catholic Mission 2002 7 SCC 531, I hold that the respondents were duly served. In the circumstance, it is held that the matter can be heard in the absence of the respondents. Further on the basis of Section 25(b) of the Arbitration & Conciliation Act, the respondents have forfeited their right to file defence statement. Issue Nos.2 & 3 are answered accordingly.

15. Another interesting aspect of the matter is the averments in the captioned OP as contained in Sub-Paragraph Nos.(iv) and (v) of Paragraph No.5, which read as follows:

'iv) After IDFC took over the affairs of the company of Capital First Limited, the petitioner was not furnished the details of the statement of accounts. Infact, the petitioner has been paying monthly instalments each every month without any default. Because the petitioner's on who is the 2nd respondent did not co-operate and failed to spend his time with office management of the trust, the petitioner faced some problem including financial crisis. Hence the petitioner was unable to pay two EMI for the month of September 2019-November 2019.

v) The petitioner respectfully states that, while so, the employees from the petitioner received summon and they did not intimate to the petitioner belatedly. However, the petitioner appeared before the 1st respondent and explained *the situation for which the employees from the financial institution who used to come for collection from the 1st respondent instructed the petitioner to pay two instalments for enable them to give up the arbitration proceedings further.'*

16. The burden of song of the second petitioner is, he blames the second respondent for the predicament petitioners find themselves qua said Loan agreement. All this is clearly outside the realm of Section 34. After all a Section 34 legal drill does not entail a review of impugned award on merits. Though this Court has serious doubts as to whether such a defence could have been taken even before AT, this Court refrains itself from expressing any opinion on the same and it is ideal to leave it open owing to this Court not being inclined to sustain the campaign against impugned award.

17. In the light of the narrative thus for, captioned OP fails and the same is dismissed. Consequently, connected miscellaneous application is also dismissed. There shall be no order as to costs.

27.11.2020

Speaking/Non-speaking order
Index : Yes / No
Internet : Yes / No
mk

M.SUNDAR.J.,

mk

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