IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.10.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

**O.P.No.449 of 2020**

**&**

**A.No.2453 of 2020**

Balaji Industries
Having its registered office at
Plot No.6 & 7, Block No.305
Swaminarayanan Industrial Estate
Tanthithaiya, Kadodara Bardoli road
Surat – 394 305, Gujarat ... Petitioner

- Vs. -

Kotak Mahindra bank Limited
KG Point, 1st Floor, Kotak House, Ghod Dod Road
Athwa, Surat – 395 007, Gujarat
and also
Having admin office at
5th Floor, Samson Towers
402, L.Pantheon Road
Egmore, Chennai – 600 008 ... Respondent

Prayer: Petition filed under Section 34 2(IV) of the Arbitration and Conciliation Act, 1996 to set aside the ex parte award dated 26th November 2019 passed by the Sole Arbitrator in Arbitration Case No.KB B DB 119/2019.

For Petitioner : Mr.Pranav Jain
for Mr.Pawan Jhabak

**ORDER**

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity.

2. In captioned OP, there is a sole petitioner and a lone respondent. From hereon, for the sake of convenience and clarity, sole petitioner 'Balaji Industries' shall be referred to as 'BI' and sole respondent 'Kotak Mahindra Bank Limited' shall be referred to as 'said Bank'.

3. Captioned OP has been filed assailing an 'arbitral award dated 26.11.2019' (hereinafter 'impugned award' for the sake of convenience and clarity) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole Arbitrator.

4.Short facts shorn of elaboration are that BI took a loan for business purposes from said Bank vide 'Loan Agreement No. CSG152839403 dated

10.07.2018' (hereinafter 'said contract' for the sake of convenience and clarity); that the loan taken by BI from said Bank vide said contract is liable to be repaid in 24 'Equated Monthly Installments' ('EMIs' in plural and 'EMI' in singular for the sake of convenience); that BI admittedly did not pay all the 24 EMIs; that said Bank therefore recalled the loan account and triggered the arbitration clause therein vide a communication to BI, being communication dated 19.09.2019; that BI admittedly received the said communication; that thereafter AT sent a communication dated 20.09.2019 fixing 10.10.2019 (03.30pm) as the date and time of the first sitting for the AT; that vide this 20.09.2019 communication AT had communicated full/complete address of the venue; that BI, which duly/admittedly received this communication dated 20.09.2019 from the AT, sent a reply dated 11.10.2019; that in the reply, BI contended that referral of the case to arbitration is in contravention of Section 8 read with Section 7 of the A and C Act; that AT thereafter proceeded with the arbitration; that it is evident from the impugned award that there were as many as four sittings on 10.10.2019, 31.10.2019, 18.11.2019 and 26.11.2019; that BI did not choose to go before AT; that AT held service of aforementioned notice sufficient and made the impugned award on the basis of oral evidence and exhibits placed before it by said Bank; that BI presented captioned OP in this Court on 25.02.2020, but without the original of the impugned award; that BI took out an application in A.No.1023 of 2020 with a prayer to dispense with the production of original impugned award; that the plea in A.No.1023 of 2020 was that BI had received the impugned award from AT or in other words impugned award was duly served on BI, but the Manager in the office of BI, who received the original impugned award had resigned from BI, owing to which BI is unable to communicate with him and get the original impugned award; that the prayer in A.No.1023 of 2929 was acceded to by this Court vide an order dated 25.08.2020 albeit preserving the rights of all concerned; that thereafter captioned OP has been listed before this Court in this web-hearing on a video-conferencing platform under the caption 'MOTION CASES'.

5. This Court having set out short facts shorn of elaboration or in other words factual matrix in a nutshell that are essential for appreciating this order, now proceeds to examine the submissions made by learned counsel for petitioner. To be noted, in the preceding paragraph where factual matrix containing essential facts has been set out, the trajectory the matter has taken in reaching this Court vide the captioned OP has also been captured.

6. Today, in the web-hearing on a video-conferencing platform, when captioned OP was listed under the cause list caption 'MOTION CASES' Mr.Pranav Jain, learned counsel representing the counsel on record for petitioner (BI) submitted that BI had paid more than 14 EMIs, BI had paid two EMIs even after receipt of the aforementioned trigger notice and the first communication dated 20.09.2019 from AT; that BI was hoping that it will be given an opportunity to pay the balance, but BI was shocked to receive the impugned award dated 26.11.2019. Learned counsel for petitioner submitted that it would be appropriate to give an opportunity to BI to pay the balance and clear the loan account i.e., said contract.

7. A perusal of the petition i.e., captioned OP and affidavit filed in support of A.No.2453 of 2020 (with a prayer for stay of impugned award) reveals that the burden of the song qua BI now is that the AT ought to have given further opportunities. This plea was reiterated and submissions on the same lines were made by learned counsel for petitioner in the oral hearing today.

8. This Court examined the case file that has been placed before it in the light of the submissions of learned counsel. The trigger notice from said Bank being notice dated 19.09.2019 and the hearing notice from AT (being

notice dated 20.09.2019 fixing the hearing on 10.10.2019) have been duly received by the petitioner BI. There is no disputation in this regard. This Court noticed from the case file that as far as address of BI is concerned, in the trigger notice the pincode has been shown as 394 221, whereas in the reply dated 11.10.2019 and in the captioned OP pincode has been shown as 394 305 (State of Gujarat). However, the other coordinates of the address are the same. Be that as it may, as the trigger notice and the notice from AT have been duly received by the petitioner BI, it is not necessary to embark on any enquiry on this aspect of the matter.

9. The reply (of BI) to the trigger notice from said Bank is dated 11.10.2019 as alluded to supra. This reply of BI (petitioner) dated 11.10.2019 reads as follows:

*'Date:11.10.2019*

*To*

*Kotak Mahindra Bank Ltd.,*
*K.G.Point, 1st Floor, Kotak House*
*Ghod Dod Road, Opposite Kalyan Jewelers, Athwa*
*Surat, Gujarat – 395007*
*Dear Sir,*

*Sub: Regarding Reference of dispute to Arbitration*

*Ref: Your Letter Ref.No.BLF-19-09-2019-20-REF-G-3-70 Dated 19.09.2019*

*With reference to the above and without prejudice, it is very* *humbly stated that we do not agree with your unilateral decision to refer the case to arbitration as the same has been done without taking our consent on the subject. Further your referral of the case to arbitration is in sheet contravention of section 8 r.w.s.7 of the Arbitration and conciliation Act 1996 hence the same is out rightly rejected herewith which may please be noted.'*

*Thanking you,*
*Yours faithfully,*
*for Balaji Industries*
*Sd/-*
*(Manager)'*

10. As already alluded to supra, in the reply there is no mention about paying the balance. On the contrary, in this reply the contention is that referral to arbitration is in contravention of Section 8 read with Section 7 of A and C Act, but the burden of song is different now. In this regard, Grounds B and D of captioned OP are relevant and the same read as follows:

*'B. The Petitioner states at the very outset that till date the Petitioner has repaid a total amount of Rs.17,30,750/- for 14 installments, which is more than 60% of the total amount of Rs.29,67,000/- availed by the Petitioner. The Petitioner states that only 10 installments (i.e., an amount of Rs.12,36,6250/- out of the 24 installments that are due and payable to the Respondent herein.*

*D. The Petitioner states that on the 19th September, 2019, the Respondent had issued a letter to the Petitioner about the dispute over repayment of the loan amount due and payable by the Petitioner under the terms of the Loan Agreement and that the same is to be referred to the Sole Arbitrator. The Petitioner states* *that denied and opposed the same vide a letter dated 11th October, 2019 stating that it will cause great prejudice to the Petitioner if such referral were to be made. The Petitioner states that subsequent to the said letter dated 11th October,2019, the Petitioner had continued making payments to the Respondent as per the terms of loan agreement, although there were minor delays in making such payments.'* `

11. A perusal of the aforementioned pleadings in the captioned OP as well as the affidavit filed in support of stay application being A.No.2453 of 2020 reveal that execution of the said contract is not disputed. A perusal of the trigger notice dated 19.09.2019 from the said Bank reveals that the arbitration agreement between the parties i.e., BI and the said Bank, is by way of a clause in said contract or to put it differently, arbitration agreement being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act between BI and said Bank is in the form of a covenant in said contract. If there is any disputation regarding the existence of the arbitration agreement, as contended in 11.10.2019 letter , BI should have gone before AT and raised the issue as preliminary issue. As would be evident from Paragraphs 1 and 2 of the impugned award, it is clear that AT has held as many as four sittings and has also held that the service of notice is sufficient. To be noted, notice has not only been received, but the

petitioner BI has also sent a reply. More importantly, the trigger notice has also been received. In this regard, relevant portion of paragraph 1 and paragraph 2 of the impugned award are as follows:

> *' 1............The Claimants had through their representative filed their claims statement and documents on :10.10.2019 and the Respondents though being legally served did not appear either in person or through counsel. The hearing dates on which the case was taken up is as follows: 10.10.2019, 31.10.2019, 18.11.2019, 26.11.2019.*
>
> *2.All the notices were sent to the last known addresses of the Respondents by Registered Letter Acknowledgement Due, which constitute sufficient service. Respondents failing to appear were and this tribunal decided to proceed further in his absence with the available documents. As per Section 3 of the Arbitration and Conciliation Act, 1996 "a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it". Further as per Section 25(C) of the said Act, which reads as follows: "a party fails to appear at an oral hearing or to produce documentary evidence the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it".'*

12. There is nothing to demonstrate that the aforementioned approach of AT in the impugned award warrants judicial intervention under Section

34 of A and C Act.

13. In the impugned award, AT has considered the evidence, both oral and documentary before it. This is evident from paragraphs 5 to 7 of the impugned award, which read as follows:

*'5.PW1 is the authorized signatory in the claimant bank and she is aware of the facts of the case. The following documents were marked through her along with the claims statement being taken on file:*

| | |
|---|---|
| *Exhibit A1* | *Board Resolution* |
| *Exhibit A2* | *Loan Application* |
| *Exhibit A3* | *Loan Agreement* |
| *Exhibit A4* | *Foreclosure Statement* |
| *Exhibit A5* | *Loan Retail Notice* |

*6. It is evident that the claimant and the respondents have entered into a Loan agreement for the respondent. Exhibit A2 goes to prove that the respondent has approached the claimant for a loan and for the said purpose, respondent executed a loan agreement which is marked as Exhibit A3. The foreclosure statement is marked as Exhibit A4 along with the Loan Recall Notice as Exhibit A5 The Claimant's have maintained their accounts in the regular course of their business and all payments have been duly accounted for in their accounts.*

*7. The claims statement and the documents taken on file through the PW1 proves that the claimant extended finance facility to the respondents and that the respondents have signed and bound themselves as borrowers and co-borrowers /guarantor and that the money claimed by the claimant is due and payable by the respondents jointly and severally. The loan agreement, which is marked as Exhibit A3 envisages a specific clause regarding the appointment of arbitrator by Claimant Bank and the parties have also agreed that the venue of such arbitration shall be at Chennai.'*

14. It is therefore clear that BI (petitioner), which initially sent a reply to said Bank (reply dated 11.10.2019) in response to 19.09.2019 trigger notice contending that referral to arbitration is in violation of Sections 7 and 8 of A and C Act, never went before the AT in spite of adequate opportunity. However, what is of significance is, the burden of the song qua BI or in other words, the pivotal plea now in the captioned OP is based on said contract. The said contract, execution of the same and the arbitration agreement, which is in the form of a covenant in the said contract, is now not in dispute in captioned OP. There is no other vitiating aspect within the legal/statutory perimeter of Section 34 of A and C Act that is demonstrable. As already alluded to supra, the plea now is that BI (petitioner) ought to have been given further opportunity so that the balance could have been paid

and a buttressing submission is that two EMIs have been received even post trigger notice while arbitration was underway.

15. In the aforesaid backdrop, going by the obtaining position of law as laid down by Hon'ble Supreme Court in ***Ssangyong Engineering*** *case* being ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India [(2019) 15 SCC 131],*** there cannot be a review on the merits of the dispute. To be noted, as already mentioned supra, captioned OP has been presented in this Court on 25.02.2020 and therefore, applying the same ***Ssangyong*** principle, captioned OP will be governed by post 23.10.2015 regime or in other words, A and C Act as obtaining post amendment by Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. Therefore, this Court finds no basis to judicially intervene qua impugned award under Section 34 of A and C Act.

Owing to the narrative thus far, discussion and dispositive reasoning set out supra, captioned OP is dismissed. There shall be no order as to costs. Consequently, connected application is also dismissed.

**28.10.2020**

Speaking Order: Yes/No
Index: Yes/No
gpa

**M.SUNDAR, J.**

**gpa**

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**28.10.2020**