

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.08.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.298 of 2015

M/s.Talera Logistics Pvt Ltd.,
Rep. By its Managing Director
14 Mothilal Talera Road
Pune – 411 001

... Petitioner

- Vs. -

1. M/s.Ford India Pvt Ltd.,
rep. By its General Manager [Finance]
Singaperumal Koil – 603 204

2. The Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.,)
47, Pulla Avenue
Shenoy Nagar
Chennai – 600 030

... Respondents

(second respondent deleted in and by this order)

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 read with Sec. 151 CPC to call for the records relating to the Arbitration Case and set aside the Award dated 10.09.2014 passed by the learned Arbitrator.

For Petitioner : No appearance

For Respondents : Mr.T.K.Baskar

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)' and this Act shall hereinafter be referred to as 'A and C Act' for the sake of brevity.

2. Captioned OP has been filed with a prayer to set aside an 'arbitral award dated 10.09.2014' (hereinafter 'impugned award' for the sake of brevity) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a Hon'ble sole Arbitrator.

3.It is necessary to set out the trajectory of earlier listings and proceedings therein owing to the course I propose to adopt in this matter. For this purpose, this Court deems it appropriate to reproduce proceedings in six earlier listings viz., dated 14.07.2020, 16.07.2020, 21.07.2020, 28.07.2020, 04.08.2020 and 06.08.2020 which read as follows:

'Proceedings dated 14.07.2020

Last two listing of this matter in the physical Court were on 12.03.2020 and 18.03.2020 when the matter was heard for some time.

Today, in the virtual Court Mr.T.K.Bhaskar, learned counsel for contesting first respondent is before me, but there is no representation for the petitioner. With the intention of giving further opportunities to the petitioner, Registry to directed to list this matter day after tomorrow i.e., 16.07.2020.'

'Proceeding dated 16.07.2020

Read this in conjunction with and in continuation of earlier proceedings of this Court dated 14.07.2020.

2. The position is the same today, in other words Mr.T.K.Bhaskar, learned counsel for contesting first respondent is before me, but, there is no representation for the petitioner.

3. Learned counsel for contesting first respondent is permitted to communicate to the learned counsel for petitioner about this/earlier listings and proceedings thereat.

4.List this matter on 21.07.2020.

'Proceedings dated 21.07.2020

Read this in conjunction with and in continuation of earlier proceedings of this Court dated 16.07.2020. 2.Today Mr.T.K.Bhaskar, learned counsel for contesting first respondent is before me, but there is no representation for the petitioner today also. 3.To be noted, pursuant to earlier proceedings dated 16.07.2020, learned counsel for contesting first respondent has sent necessary communication to counsel for petitioner and has placed the same before the Registry, which in turn has placed it before this Court. In addition to this, it is also to be noted that the matter has been duly notified in the cause list and all essential particulars such as Meeting

Number, Password etc., have been given. This is the third successive listing where the counsel for petitioner has not joined this Virtual hearing. This is rather unfortunate. However, with the intention of giving further opportunity to the petitioner, list this matter under the same caption on 28.07.2020. '

'Proceedings dated 28.07.2020

Mr.T.K.Bhaskar, learned counsel for contesting first respondent is before me, but there is no representation for the petitioner today also. 2.Read this in conjunction with and in continuation of earlier proceedings dated 21.07.2020. 3.In the light of previous proceedings, situation today is rather unfortunate as counsel for petitioner has not chosen to join the virtual hearing today in spite of the matter being duly notified in the cause list with all necessary particulars such as Meeting Number and Password. 4. However, with the intention of giving further opportunity, list this matter on 04.08.2020. 5. Counsel for contesting first respondent is permitted to communicate today's proceedings and date of next listing to learned counsel for petitioner.'

'Proceedings dated 04.08.2020

Read this in conjunction with and in continuation of earlier proceedings dated 14.07.2020, 16.07.2020, 21.07.2020 and 28.07.2020.

2.The aforementioned four listings are four consecutive previous listing of this OP.

3.In all the aforementioned earlier listings, counsel for contesting first respondent was before this Court, but there was no representation for the petitioner.

4.To be noted, learned counsel for contesting first respondent was permitted to communicate to the counsel on record for the petitioner about the listing and ensuing listings which have been pursuant to 21.07.2020 as well as 28.07.2020 proceedings.

5.Today Mr.T.K.Bhaskar, learned counsel for contesting first respondent is before me and the situation is no difference. Learned counsel has email filed the communication sent to the counsel on record for petitioner. The mail and attachment read as follows:

'O.P. No. 298 of 2015 - Talera Logistics Pvt. Ltd. v. Ford India Pvt. Ltd. & Anr. Aravind P Tue, Jul 28, 2020 at 2:32 PM

To: mselvaraju_bl@yahoo.com, mselvaraju.llb@gmail.com

Cc: "T.K.Bhaskar hsb", Varuni Mohan

Dear Sir, Please find the trail mail. The captioned matter was listed today before the Hon'ble High Court, and it was noted that none appeared for the Petitioner when the matter was taken up. The matter is posted to be heard next on 04.08.2020. Kindly be present for the hearing on the said date. Best Regards,

Aravind Prasanna, Associate

HSB Partners Capitale,

9th Floor, No. 554/555,

Anna Salai Teynampet, Chennai 600 018

Land-line: +91 44 2435 5217/2435 5218

Fax: +91 2435 5257, Mobile: +91-9952606501,

6.In the light of trajectory, this matter has taken. I am constrained to list this matter under the caption 'For Dismissal' day-after-tomorrow. List under the caption 'FOR DISMISSAL' on 06.08.2020.'

'Proceedings dated 06.08.2020

Read this in conjunction with and in continuation of earlier proceedings dated 04.08.2020.

2. *This matter has been listed under the caption 'FOR DISMISSAL' today pursuant to earlier proceedings. Notwithstanding such listing, the position is no different today. In other words, Mr.T.K.Bhaskar, learned counsel for contesting first respondent is before me and there is no representation for the petitioner.*

3. *Learned counsel for contesting first respondent submits that the matter can be heard out on merits as proceedings under Section 34 are such that it is not an appeal and this Court, sitting in Section 34 jurisdiction, is not an Appellate Court.*

For the purpose of considering this plea and with the intention of giving yet another opportunity to the counsel for petitioner, list this matter under the same caption on 24.08.2020.'

4. The aforesaid proceedings in six earlier listings capture what unfurled in the virtual hearings when the matter was listed earlier. From the last six proceedings, which preceded instant listing, the following position emerges clearly:

- a) Counsel for petitioner in captioned OP has not joined seven meeting and come before this Court in virtual hearings for five consecutive hearings;

b) Pursuant to directions of this Court on 28.07.2020, counsel for respondent has communicated the proceedings / the next listing to the learned counsel on record for petitioner, but learned counsel on record petitioner has not chosen to join the hearings, in spite of such communication (to be noted, the e-mail has been extracted and reproduced in 04.08.2020 proceedings, which has been reproduced supra).

c) Prior to last five listings, the matter was heard for some time and this is captured in 14.07.2020 proceedings.

5. Owing to the last two proceedings, the matter is listed under the caption 'FOR DISMISSAL' today.

6. Though the matter is listed under the caption 'FOR DISMISSAL' today, advertng to earlier proceedings dated 06.08.2020, Mr.T.K.Bhaskar, learned counsel for respondent submitted that a OP under Section 34 of the A and C Act can be disposed of on merits even in the absence of counsel for petitioner unlike a civil appeal. To support his contention, learned counsel pressed into service ***J.G. Engineers Pvt. Ltd. v. Union of India (UOI) and***

Ors. reported in **AIR 2011 SC 2477**. This is for the proposition that a Court does not exercise appellate jurisdiction under Section 34 of A and C Act. There is no difficulty in accepting this proposition. This Court has repeatedly held that an application under Section 34 of A and C Act is neither an appeal nor a revision and that it is not even a full-fledged judicial review. This Court has held that it is a mere challenge to an arbitral award within the limited legal perimeter of Section 34 of A and C Act. It may not be necessary to dilate further on this aspect of the matter as the law is too very well settled that an application under Section 34 is not an appeal. As it is not a civil appeal, principles ingrained in sub-rule (1) of Rule 17 of Order XLI of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) would not come into play. In my considered view, captioned OP does not even have the trappings of a civil appeal. In this regard, it is to be noted that it has been repeatedly held that a Civil Appeal cannot be disposed of on merits and that it has to be dismissed for default in the absence of counsel for appellant owing to Order XLI Rule 17 Sub-Rule (1) and explanation thereat as would be evident even from a recent judgment of the Hon'ble Supreme Court in **Sri Prabodh CH Das &Anr v Mahamaya das &Ors** reported in **AIR 2020 SC 178**. In **Sri Prabodh CH. Das** case paragraph 10 is of

relevance and the same reads as follows:

10. This position has been clarified by this Court in Abdur Rahman and others v. Athifa Begum and others² wherein it was held that High Court cannot go into the merits of the case when 1 Ins. by CPC (Amendment) Act 104 of 1976, s 87, (w.e.f. 1-2-1977) 2 1996 (6) SCC 62, there was nonappearance of the appellant. In Ghanshyam Dass Gupta v. Makhan Lal this Court has reiterated the legal position as under:

“Prior to 1976, conflicting views were expressed by the different High Courts in the country as to the purport and meaning of subrule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for the appellant’s default. Conflicting views raised by the various High Courts gave rise to more litigation. The legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, the Explanation to subrule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in subrule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an Explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate

court that there was sufficient cause for nonappearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.”

7. Be that as it may, even with regard to Order XLI Rule 17 Sub-Rule (1) (Explanation thereat), some High Courts, as High Court of Patna in ***Patliputras Industries & Ors v Rameshwar Prasad Choudhary*** reported in ***(1992) 1BLJR 151*** have held that when a civil appeal has been heard for some time, it can be disposed of on merits when the appellant counsel does not appear subsequently, but it is not necessary to delve into this aspect of the matter as captioned OP clearly not a civil appeal and as it does not even have the trappings of a civil appeal. As delineated supra, the law is too very well settled that Section 34 proceedings is not an appeal. In this regard, I also deem it appropriate, only as a matter of analogy and only for the purpose of making this discussion elucidative, to refer to explanation to Rule 2 of Order XVII CPC. Order XVII Rule 2 with explanation thereat reads as follows:

'2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit

in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.]

8. It is clear that even in a Original Suit, there is a provision for disposing of the matter on merits when a party fails to appear. However, it may not be necessary to delve any further into this aspect also as Section 34 besides not being an appeal/not having even the trappings of an appeal, is clearly a summary proceeding as laid by Hon'ble supreme Court in ***Fiza Developers*** case [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796], which was reiterated as a step in the right direction by Hon'ble Supreme Court in ***Emkay Global*** case, being ***Emkay Global Financial Services Ltd., v. Girdhar Sondhi*** reported in (2018) 9 SCC 49. To be noted, ***Fiza Developers*** principle is proceedings under Section 34 are summary in nature or in other words Section 34 application should be disposed of by adopting a summary procedure and this principle has been reiterated even very recently by

Hon'ble Supreme Court in ***Canara Nidhi Limited case [M/S. Canara Nidhi Limited vs M. Shashikala reported in 2019 SCC Online SC 1244]***.

9. For all the reasons alluded to and delineated supra, I have no difficulty in coming to the conclusion that a Section 34 application can be disposed of on merits when either of the parties do not appear before this Court notwithstanding whether the matter has been heard for some time previously or not.

10. Having set out the legal position with regard to hearing out an application under Section 34 on merits when one of the parties / counsel for parties absents himself/herself, I now proceed to examine whether Hon'ble sole Arbitrator, who constituted the AT, who made the impugned award needs to be arrayed as a co-respondent. Drawing inspiration from the course adopted by Hon'ble Supreme Court in ***Zonal General Manager Ircon International Limited Vs. Vijay Heavy Equipments*** reported in (2015) 13 SCC 680, considering the case file before me and considering the nature of grounds that have been raised qua impugned award, I am of the considered view that Hon'ble sole Arbitrator need not continue to be in the array of parties in the captioned OP on hand. Therefore, second respondent stands

deleted in and by this order. As a consequence, procedurally speaking, contesting first respondent now becomes the sole respondent.

11. In the aforesaid backdrop, I proceeded to examine captioned OP on merits on the basis of the case file that is before me and this Court also heard out the submissions made by Mr.T.K.Bhaskar, learned counsel for sole respondent now.

12. Petitioner in captioned OP was claimant before AT and respondent in captioned OP was respondent before AT. However, for the sake of abundant clarity and convenience, petitioner shall be referred to as 'Talera' and respondent shall be referred to as 'Ford'. From the case file placed before me, it comes to light that Ford is a car manufacturer and Talera is a company engaged in packing, storage, forwarding, movement of goods, spare parts of cars etc., In this backdrop of the respective business activities, the parties before this Court, entered into an agreement, which is described as 'Service Parts Distribution Agreement' dated 10.09.1999 which was for the period from 10.09.1999 to 30.06.2000. However, this stood extended till 31.03.2007 but the agreement was terminated by Ford vide notice dated 14.02.2007. To be noted in the interregnum, there were similar agreements dated 02.07.2001, 01.05.2003 and 03.03.2005. It may not be necessary to

dilate on these facts, considering the limited scope of an application under Section 34. Short facts shorn of elaboration/particulars/details which are not imperative for appreciating this order will serve the purpose. Suffice to say that the bone of contention or in other words, crux and gravamen of the lis between Talera and Ford before AT was with regard to who is to absorb Service Tax. This bone of contention is posited on contractual pitchfork of Clause 8.1 of Service Parts Distribution Agreement on one side and conditions in purchase order on the other side.

13. Having set out the crux and gravamen of the lis between the parties before AT or in other words having set out the bone of contention, this Court now proceeds to examine the impugned award and the petition filed in support of captioned OP. Before examining the impugned award, it is necessary to mention that captioned OP says that it is under Section 34 of A and C Act, but does not specify any one or more of the eight grounds adumbrated therein or the facets of the same as explained by various Courts. In other words, the petition does not state with specificity as to which of the slots adumbrated in sub-section (2) of Section 34 or facets of the same explained by Courts are attracted qua petitioner's campaign to set aside the impugned award in its capacity as protagonist of captioned OP. However, a

perusal of the grounds reveals that it is more in the nature of an appeal on merits. This Court is not sitting in appeal qua impugned award. However, based on the case file and the submissions made earlier, it is clear that the case of the petitioner is that the impugned award has interpreted the contract between the parties in a manner which is impermissible.

14. In response to the above, learned counsel for respondent submits that the impugned award has examined the obtaining legal position and has come to the conclusion that in cases of Service Tax, it is open to parties to decide who should absorb the same by way of a contract and therefore, conclusion arrived at or the view taken by AT vide the impugned award cannot be described as an implausible view, which no reasonable person would take.

15. On the aforesaid legal contentions, this Court now proceeds to examine the impugned award on merits.

16. A careful and close perusal of the impugned award reveals that there has been full contest between the parties. As many as 33 documents, namely Exs.C1 to C33 have been marked on the side of Talera and two exhibits, namely Exs.R1 and R2 have been marked on the side of Ford. No oral evidence has been let-in. On the rival pleadings before AT, Hon'ble AT has

framed as many as 10 issues, these 10 issues have been captured in Paragraph 21 of the impugned award and the same reads as follows:

'1. Was not the obligation to bear the service tax on services rendered by the Claimant towards the Respondent on the Claimant under the agreement dated 10.09.1999 and subsequent agreements entered into between the parties and purchase orders placed on the Claimant by the Respondent?

2. Whether the relevant legal provisions mandated that the service tax was under all circumstances to be passed on and collected from the service recipient, notwithstanding anything contained in any agreement between the parties?

3. Whether the Claimant is entitled for reimbursement of Rs.66,05,609/- towards service tax paid for the period from September 1999 to March, 2007?

4. Whether the Claimant is entitled to a sum of Rs.1,02,85,414.78 towards interest for delayed payment of service tax as imposed by the Service Tax authorities?

5. Whether the Claimant is entitled to a sum of Rs.81,88,919.00 towards penalty for the delayed payment of service tax authority?

6. Whether the Claimant is entitled to a sum of Rs.5,00,000/- towards litigation expenses?

7. Whether the Claimant is entitled to the relief of calling for the records of the Central Excise Return filed by the Respondent for the period of 1999 to 2007 as claimed by it?

8. Whether the Claimant is entitled for costs as prayed for?

9. *Whether the Claimant is entitled on the sum of Rs.66,05,609/- for the period of October, 1999 to March 2007 from 02.04.2014 at the rate of 18% p.a till the date of realization as pleaded by the Claimant in their rejoinder statement?*

10. *Whether parties are entitled to any other relief?'*

17. A perusal of 10 issues reveals that answer to Issues 1 and 2 would effectively answer the other issues as they are more in the nature of a sequitur to Issues 1 and 2. Therefore, the manner in which Hon'ble AT has dealt with Issues 1 and 2 is of immense significance for testing the impugned award.

18. The discussion on Issues 1 and 2 is captured in Paragraphs 43 to 80 of the impugned award. A careful perusal of these paragraphs 43 to 80 of the impugned award reveal that the sole bone of contention turned on two aspects before AT. One aspect is, it is the case of Talera that Ford had intentionally misled it and deliberately held it liable for Service Tax. Second aspect is Service Tax has to necessarily be absorbed by Ford and that it cannot be shifted to Talera by an agreement. The first aspect of the matter has been discussed and answered in Paragraphs 43 to 60, while the second aspect of the matter has been discussed and answered in Paragraphs 61 to 80.

19. With regard to Paragraphs 43 to 60, after extracting the relevant provisions and after taking note of the judgment of Hon'ble Supreme Court in

Rashtriya Ispat Nigam Ltd., Vs. Devanchand Ramsaran (2012 (5) SCC 306), AT has come to the conclusion that it is not inclined to find for Talera with regard to being intentionally misled, as AT has come to the conclusion that there is no material to hold that Ford has deliberately and intentionally misled Talera. This is articulated in Paragraph 60 of the impugned award. In this regard, it is necessary to remind oneself of the ***Hodgkinson*** principle [***Hodgkinson Vs. Fernie (140 ER 712)***], which is to the effect that AT is the best Judge of the quality and quantity of evidence before it. To be noted, this ***Hodgkinson*** principle was laid down by a English Court way back in 1857, which has been reiterated by Hon'ble Supreme Court in the celebrated ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***]. In this regard this Court has noticed that captioned OP has been presented in this Court on 10.12.2014.

20. With regard to second aspect of the matter, this Court, as already alluded to supra, notices that Hon'ble Arbitral Tribunal has placed reliance on the judgment of the Hon'ble Supreme Court in ***Rashtriya Ispat Nigam Ltd., Vs. Devanchand Ramsaran*** as is evident from the impugned award. Hon'ble AT has placed reliance on this judgment reported in AIR 2012 SC 2829=(2012) 5 SCC 306. The paragraphs in ***Rashtriya Ispat Nigam*** case

law extracted in the impugned award is from AIR (Paragraphs 37, 38 and 39), which read as follows:

'37. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.

38. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider.

39. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an

agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.'

21. To be noted, this extract is in paragraph 48 of the impugned award.

Therefore, this Court has no difficulty in coming to the conclusion that Hon'ble AT has taken a view based on the ratio laid down by Hon'ble Supreme Court in ***Rashtriya Ispat Nigam*** case, which is to the effect that the parties by contract can decide who amongst them would absorb the Service Tax.

22. With regard to the argument predicted on dichotomy between Clause 8.1 of the agreement and the Purchase Order, suffice to say that Hon'ble AT has extracted both these clauses and has done a harmonious reading of the two, which again is based on documentary evidence before AT. In this regard, Ex.C23 is relevant. For all practical purposes Ex.C23 serves as correspondence between Talera and Ford over a period of time i.e., March 2001 to the date of impugned award. Thus, this correspondence is also before me as part of the typed-set of papers from Pages 262 to 428 i.e., typed-set of papers filed by the petitioner. Suffice to say that Hon'ble AT has examined all these documents, correspondence exchanged between Talera

and Ford (Ex.C23) which is in effect Ex.C23 series and has come to the conclusion that Ford has not misled Talera or Ford has not lulled Talera into the belief that Service Tax would be absorbed by Ford besides coming to the conclusion that parties can by contract decide who amongst them would absorb the Service Tax. In this regard, learned counsel for respondent placed reliance on a recent judgment of Hon'ble Supreme Court in **Dyna Technologies** case [**Dyna Technologies Pvt. Ltd. Vs. Crompton Greaves Ltd.** [2019 SCC OnLine SC 1656]. Relevant paragraphs in Dyna Technologies case law which pithily sets out what can be described as **Dyna Technologies** principle is contained in Paragraphs 26, 27 and 36 and the same read as follows:

'26. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as

provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated'

'27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.'

'36. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regards to the speedy resolution of dispute.'

23. In sum and substance, suffice to say that this Court on a careful reading of Paragraphs 43 to 80 of the impugned award is unable to convince itself that Hon'ble AT has taken a view which no reasonable person would have taken. In other words, this Court is unable to persuade itself to believe that the view taken by Hon'ble AT is implausible. Therefore, this Court finds

for the respondent in instant OP and holds that there is no ground to interfere with the impugned award.

24. Before parting with this matter, reverting to hearing out a section 34 application on merit when one of the parties absent themselves, this Court deems it appropriate to remind itself about sub-section (6) of Section 34, which was introduced vide amendment which was brought in from 23.10.2015. This Court is conscious that instant OP is in the pre 23.10.2015 regime, but time lines cannot be lost sight of as expeditious disposal adhering to timelines is the sublime philosophy underlying arbitration as an ADR mechanism. As the time line of one year for disposal has now been statutorily prescribed, this one year time line has to be reckoned from the service of pre-application notice under sub-section (5), but the pre-application notice has now been held to be directory and not mandatory by the Hon'ble Supreme Court in Bhumi Vikas Case law [*State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472]. As pre-application notice under sub-section (5) has now been held to be directory and not mandatory, in a case where a Section 34 petition has been presented in this Court without a pre-application notice, the reckoning date shall be the date on which the OP has been presented in this Court. This Court has repeatedly

taken this view. Be that as it may, this Court also cannot loose sight of the fact that the Hon'ble Supreme Court in the same ***Bhumi Vikas Bank*** case law, which is for the broad preposition that sub-section (5) pre-application notice is directory and not mandatory, has emphasized on the one year timeline. The relevant paragraph is 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.'

25. Therefore, it is necessary that Section 34 applications cannot be allowed to languish in this Court owing to one of the parties or their counsel absenting themselves that too repeatedly inspite of several opportunities and communication about listing.

Owing to all that have been set out supra, this Court has no difficulty in holding that there is absolutely no ground for judicial intervention qua impugned award, therefore instant OP fails and the same is dismissed. There shall be no order as to costs.

24.08.2020

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



WEB COPY

OP.No.298 of 2015

M.SUNDAR, J.

gpa



O.P.No.298 of 2015

WEB COPY

24.08.2020