

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.03.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.469 of 2015

1.Pavan Cargo Pvt. Ltd.,
Rep. by its Managing Director,
No.55-4344/1, Doctor's Colony,
Seetamadhara,
Vishakapatnam 530013.
Andhra Pradesh.

2.D.V.B.Krishnam Raju,

... Petitioners

vs.

1.M/s.DFL Infrastructure Finance Ltd.,
Rep. by its Authorised Representative,
No.14, Ramakrishna Street,
T.Nagar,
Chennai 600 017.

2.K.Moorthy,
Sole Arbitrator.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award of the second respondent in A.C.P.(D.F.L) No.1/2020 dated 03.12.2014.

For Petitioners : Mr.K.Ethiraj

For Respondents : No appearance.

ORDER

Mr.K.Ethiraj, learned counsel for petitioners is before this Court.

2. Sole Arbitrator, who constituted the Arbitral Tribunal, has been arrayed as second respondent. Claimant before the Arbitral Tribunal is respondent No.1 before this Court. Respondents 1 and 2 before the Arbitral Tribunal are petitioners 1 and 2 before this Court.

3. To be noted, both respondents have been duly served and names of the respondents are shown in the cause list. This Court is informed that no counsel has entered appearance on behalf of respondents. Names of respondents called out aloud thrice in the Court and in the adjoining corridors, but no response.

4. To be noted, with regard to first respondent, as formal and conventional modes of service, were in vain, petitioners resorted to substituted service by taking leave of this Court. Learned predecessor Judge vide proceedings dated 12.02.2020, had permitted the petitioners to resort to substituted service vide proceedings dated 12.02.2020 reads as follows:

“The present application for substituted service has been taken note, on account of the fact that the petitioner is unable to serve the first respondent, as the notices sent had been returned with the endorsement “vacated”. Notice has been taken to the last known address.

2.In view of the above fact, the petitioner has taken out a petition in question and the same is ordered. Substituted service is directed to the first respondent through affixture on court notice board and last known address and by publication in the English Daily, “News Today” and in the Tamil Daily, “Makkal Kural” returnable by 04.03.2020.”

Publication has been effect and the same as follows:

**IN THE HIGH COURT OF
JUDICATURE AT MADRAS**
(Ordinary Original Civil Jurisdiction)
O.P. No.469 of 2015
In the matter of Arbitration and
Conciliation Act 1996
and
In the matter of Award of the 2nd
Respondent dated 03.12.2014

1. Pawan Cargo Pvt., Ltd.
Rep., by its Managing Director
No.55-4344/1, Doctor's Colony,
Seetamadhara,
Vishakapatnam - 526 013,
Andhra Pradesh.

2. D.V.B. Kotham Raju
S/o. M. S. Srinivasan Raju
S/1/67, Padmalathi,
Vishakapatnam - 526 017.

... Petitioner/ Respondents

1. M/s. DFL Infrastructure Finance Ltd.,
Rep., by its Authorised Representative,
No.14, Ramakrishna Street,
T.Nagar, Chennai - 600 017
... Respondent/Claimant

2. K. Moorthy, Sole Arbitrator,
No.234, Old No.42, V Floor,
Angappa Naicken Street,
Chennai - 600 001

To
M/s. DFL Infrastructure Finance Ltd.,
Rep., by its Authorised Representative,
No.14, Ramakrishna Street,
T.Nagar, Chennai - 600 017
... Respondent/Claimant

Please take notice the above O.P.No.469 of
2015 is posted before Hon'ble High Court
Madras, for your appearance on 04.03.2020
at 10.30 A.M. You are hereby informed that
the matter will be heard and decided on
merits in your absence, if you fail to appear
on 04.03.2020 at 10.30 A.M.

K.ETHIRAJI,
Advocate for Petitioner
103, Add. Law Chambers,
High Court Buildings,
Chennai - 600 104

5. On 04.03.2020 also there was no representation for first respondent. However, proceedings dated 04.03.2020 reads as follows:

“Matter mentioned. At request of petitioner, list on 10.03.2020.”

6. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) turns on a very narrow compass. Instant OP has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996 (26 of 1996)' (hereinafter referred to as 'A and C Act' for the sake of brevity and clarity).

7. Pivotal to instant OP is a loan agreement between petitioners and first respondent being loan agreement No.XCEQVIZ00000587 dated 15.11.2007 (hereinafter referred to as 'said Contract' for the sake of convenience and clarity).

8. Clause 22 of said contract is an arbitration clause and the same serves as an Arbitration Agreement between petitioners and first respondent within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

9. The said contract, was for the purpose of financial assistance for petitioners for purchasing a crane. Before proceeding further, this Court deems it appropriate to observe that it is not necessary to dilate further on facts for two reasons. One reason is that the instant OP turns on a very narrow compass and disposal is a summary procedure. The other reason is, an OP under Section 34 of A and C Act, is neither an appeal nor a revision. It is not even a full-fledged judicial review, but a limited judicial review within the contours and confines of 8 slots set out under Section 34 of A and C Act. To put it differently, it is a mere challenge to an arbitral award.

10. Having said that instant OP is neither an appeal nor a revision and not even a full-fledged judicial review, it may be necessary to look at the manner and mode or in other words procedure to be adopted by this Court for disposal of a OP under Section 34. Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796 held that proceedings under Section 34 of A & C Act are summary procedures. Subsequently in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in

(2018) 9 SCC 49, Hon'ble Supreme Court reiterated Fiza Developers principle and held that it is a step in the right direction. Therefore, suffice to say that disposal of instant OP is a summary procedure.

11. This takes us to the ground on which instant OP is predicated.

12. Though very many grounds in the nature of grounds raised in a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) have been raised in the OP on hand, learned counsel for petitioner very fairly submitted that he would predicate his arguments on one main ground available to him under Section 34.

13. According to learned counsel, that one main ground is, the petitioners were not given proper notice of appointment of Arbitrator. To put it in terms of statutory expression, learned counsel for petitioners is predicating instant OP on Section 34(2)(a)(iii). To say with greater statutory specificity, first limb of Section 34(2)(a)(iii).

14. Learned counsel submitted that this was raised in arbitral proceedings before the Arbitral Tribunal, but unfortunately this has neither been reflected in the impugned award nor has supporting material been placed before this Court.

15. Instant OP was presented more than half a decade ago in this Court. To be precise, instant OP was presented on 03.02.2015. Sub-section(6) of Section 34 of A and C Act prescribes a one year time line for disposal of such OPs and Sub-section(6) of Section 34 of A and C Act prescribes that OPs of instant nature shall be disposed of within one year from the date of service of notice to the parties under Sub-Section(5). This sub-section (6) and importance of disposing of OPs of instant nature as expeditiously as possible and within one year time line was emphasised by Hon'ble Supreme Court in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***(2018) 9 SCC 472***. To be noted, though ***Bhumi Vikas*** case law is an authority for the broad proposition that sub-section (5) of Section 34 is only directory and not mandatory, there is a categoric observation in ***Bhumi Vikas*** case law that every endeavour should be made by courts dealing with Section 34, OPs to adhere to one year time line prescribed in sub-section (6) of Section 34. Therefore, the observation made by the Hon'ble Supreme Court in Paragraph 26 of ***Bhumi Vikas*** case law in reported judgment cited supra is to be reproduced. Paragraph 26 is 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)

16. Though the point urged by learned counsel for petitioners being a point predicated on the first limb of Section 34(2)(a)(iii) shall be

borne out of arbitral records, this Court decided to proceed further owing to ***Bhumi Vikas*** principle and due to trajectory (respondents served, but not before this Court) of instant OP.

17. A careful perusal of the impugned award reveals that a chronicle of the trajectory which the arbitral proceedings have taken have been set out under the caption 'PROCEDURAL HISTORY' in Paragraph 4. A close perusal of the chronicle under the caption 'PROCEDURAL HISTORY' reveals that the dispute was referred to arbitration by appointment of Sole Arbitrator on 10.02.2010. Relevant portion reads as follows:

“4.PROCEDURAL HISTORY:

- 10.02.2010 *Dispute was referred to arbitration by appointing Mr.K.Moorthy as Sole Arbitrator in accordance with the agreement in reference and as per the Arbitration and Conciliation Act, 1996, to try, adjudicate and resolve the dispute between the Claimant and the Respondent.*
- 26.03.2010 *Date of notice for the 1st hearing on 24.04.2010.*
- 24.04.2010 *First date of hearing.”*

10.02.2010 *Dispute was referred to arbitration by appointing Mr.K.Moorthy as Sole Arbitrator in accordance with the agreement in reference and as per the Arbitration and Conciliation Act, 1996, to try, adjudicate and resolve the dispute between the Claimant and the Respondent.*

18. A careful perusal of the impugned award makes it clear that appointment of Sole Arbitrator was by the first respondent i.e., claimant before the Arbitral Tribunal. This is articulated in Paragraph 5A of the impugned arbitral award and the relevant portion reads as follows:

“ 5A.....The claimant further states that as per clause 22 of the loan agreement that in case of any dispute or claims that may arise thereunder the same shall be referred to arbitration and settled/resolved by a sole arbitrator nominated by the Claimant and such arbitral proceedings shall be conducted at Chennai. Pursuant to which the claimant had initiated the present arbitration proceedings.”

(Underlining made by this Court to supply emphasis)

19. Therefore, if the sole Arbitrator was appointed by the first respondent who is the claimant before the Arbitral Tribunal, it is for the first respondent to come before this Court and demonstrate that the

petitioners were put on notice and given proper notice of appointment of the Arbitrator. After all, petitioners cannot be called upon to prove the negative. To be noted, it is the stated position of the petitioners that they have not received any notice from the first respondent regarding appointment of sole Arbitrator.

20. It is also clear from the arbitral award, more particularly, narrative under the caption 'PROCEDURAL HISTORY' (Paragraph 4), that the Arbitral Tribunal also did not notify the petitioners about the appointment of Arbitrator.

21. The relevant portion of impugned award which has been extracted and reproduced supra, reveals that the first communication from the Arbitral Tribunal was dated 26.03.2010, where the Arbitral Tribunal has notified the noticees about the first hearing on 24.04.2010. In other words, the impugned Arbitral Award makes it clear that the petitioners were not put on notice much less proper notice about appointment of Arbitrator. As already alluded to supra, that the first respondent, which appointed the Arbitrator under Clause 22 of said Contract, has also not come before this Court to demonstrate that the petitioners were put on notice about appointment of the arbitrator.

22. This takes us to the manner in which this ground has been articulated in instant OP. This has been articulated in sub-paragraph(iii) of paragraph 5 in instant OP, which reads as follows:

“(iii). The arbitrator failed to note that there was no intimation by the first respondent as to the appointment of the arbitrator and an intimation by the arbitrator of his appointment and of his consent, to be sent to the petitioners herein and are they fail you to follow the known practice and procedure had resulted in serious prejudice to the petitioners herein and therefore the proceedings is void abinitio and liable to be set aside.”

Suffice to say that the aforesaid grounds remain un-refuted.

23. The petitioner's counsel could have done well by placing his challenge under Section 16 on the orders of the Arbitral Tribunal, but the lone point on which instant OP is predicated [in the light of the submissions today] (notwithstanding several grounds raised in the OP) saves the day for the petitioners owing to narrative in the impugned award, relevant portion of which has been extracted and set out above.

24. As the petitioners has been able to canvass the ground that they have not been given notice, much less proper notice of appointment of Arbitrator (without any contradiction or disputation) instant OP has to inevitably be allowed and the impugned award has to be set aside.

25. Resultantly, instant OP is allowed and impugned award dated 03.12.2014 made by the second respondent is set aside. Considering the nature of the matter, there shall be no order as to costs.

10.03.2020

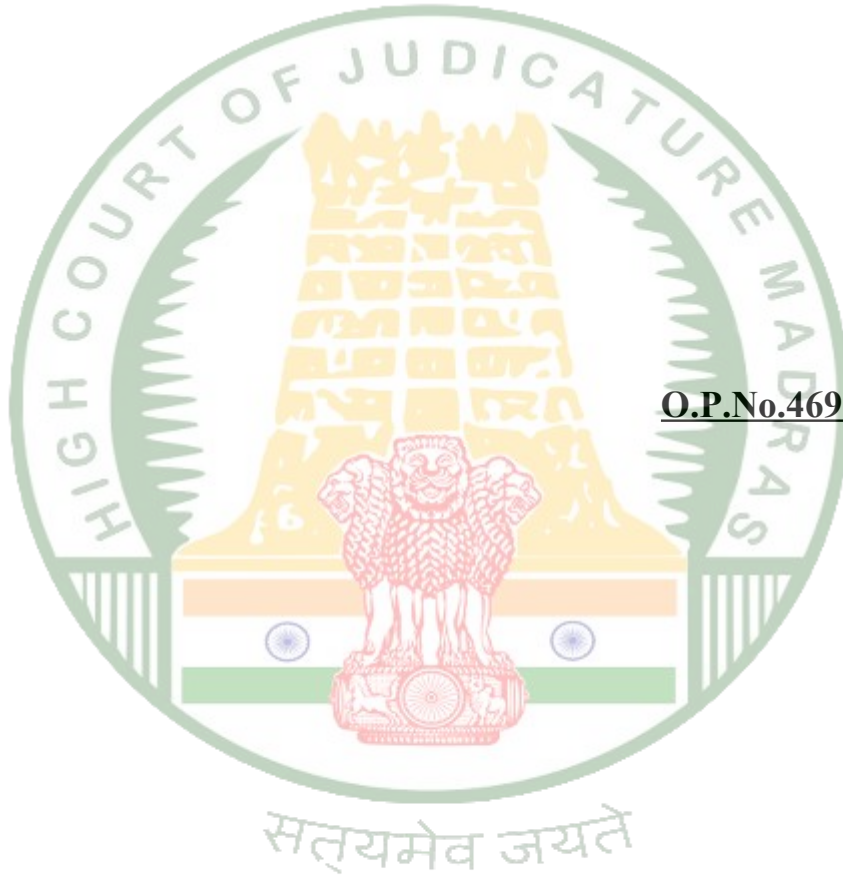
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