IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.09.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.758 of 2015

1.P.Kothai

2.J.Mathivanan ... Petitioner

vs.

1.Shriram Transport Finance Company Ltd.,
Rep. By its G.P.A.Holder Mr.S.Varadhan
Mookambika Complex, 3rd Floor
Lady Desikachary Road
Mylapore, Chennai – 600 004

2. A.Rajkumar Kothari

3. Mr.P.Rosaiah
Sole Arbitrator
Retired District Judge
7th Floor, Mookambika Complex
Lady Desikachary Road
Mylapore, Chennai – 600 004 ... Respondents

(Second respondent given up and third respondent deleted in and by this order)

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside aside the Award dated 31.03.2015 made in Arbitration Case F.No.464 of 2014, to direct 1st respondent to pay costs and to grant any further or other reliefs which this Hon'ble

Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioners : Mr.T.L.Thirumalaisamy

For Respondents : Mr.S.Elangovan for R1

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 convenience and clarity. An 'arbitral award dated 31.03.2005' (hereinafter 'impugned award' for the sake of brevity) made by an Arbitral Tribunal constituted by a sole Arbitrator is under challenge in the captioned OP .

2. Sole Arbitrator, who constituted AT and made the impugned award, has been arrayed as Respondent No.3 in captioned OP. Considering the nature of the submissions made today, viewed in the light of basis of challenge to impugned award, this Court following the procedure followed by Hon'ble Supreme Court in ***Zonal General Manager Ircon International Limited Vs. Vinay Heavy Equipments*** reported in ***(2015) 13 SCC 680,*** deletes the sole Arbitrator from the array

of parties. Therefore, Respondent No.3 will stand deleted in and by this order.

3. Respondent No.2 is an individual and this Court is informed by both sides without any disputation or disagreement that Respondent No.2 is a franchisee of Respondent No.1, which is a 'Non-banking Financial Company' ('NBFC' for the sake of brevity). Considering the nature of the matter, Mr.T.L.Thirumalaisamy, learned counsel for petitioners submits that the second respondent is only a formal party and he is giving up the second respondent. This submission is recorded and second respondent stands given up. Therefore, second respondent also stands deleted from the array of parties. This means that Shriram Transport Finance Company Ltd., which this Court is informed is an NBFC now becomes the sole respondent. Two petitioners, who are admittedly borrower and guarantor respectively, qua NBFC under a Hire Purchase Agreement dated 16.02.2007 (hereinafter 'said contract' for the sake of brevity) are petitioners 1 and 2 respectively in captioned OP. As already mentioned supra, aforementioned NBFC is now the lone respondent in captioned OP.

4. Mr.T.L.Thirumalaisamy, learned counsel on record for petitioners and on behalf of lone respondent NBFC, Mr.S.Elangovan,

learned counsel representing Mr.K.S.Ramakrishnan, counsel on record for the NBFC, are before me in this web-hearing on a video-conferencing platform. Both learned counsel consented for captioned main OP being taken up for final disposal on a web-hearing, pursuant to which captioned OP was taken up and heard out.

5. Nucleus of captioned OP is said contract i.e., Hire Purchase Agreement dated 16.02.2007 under which the petitioners were advanced money for purchase of a Mahindra Vehicle/automobile (Model 2002) bearing Registration No.TN-01-U-5353. This Court is informed that it is a Mahindra Bolero multi-utility passenger vehicle and the same shall hereinafter be referred to as 'said automobile' for the sake of convenience and clarity.

6. Captioned OP being an application under Section 34 of A and C Act, factual matrix in a nutshell containing essential facts imperative for appreciating this order will suffice. In this view of the matter, suffice to say that there is no disputation that value of said contract is Rs.4,03,202/- (Rupees Four Lakhs Three Thousand Two Hundred and Two only); that this sum is to be repaid in 36 monthly installments of Rs.11,200/- each; that there is an arbitration clause in said contract, which serves as an arbitration agreement between the parties i.e.,

arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. This Court is informed that there is no disputation or disagreement about the existence of this arbitration clause/arbitration agreement; that alleging default in repayment, NBFC triggered the arbitration agreement, AT entered upon reference and passed the impugned award *ex parte,* as according to the impugned award, notice to Respondent No.1 (Petitioner No.1 in captioned OP) was returned unserved, notice to Respondent No.2 (Petitioner No.2 in captioned OP) was served, but both did not appear, after which paper publication was effected; that after one witness was examined on behalf of NBFC, which was claimant before AT and after six documents Exs.C1 to C6 were marked, impugned award came to be made by AT; that captioned OP (assailing the impugned award) has been presented in this Court on 04.09.2015; that captioned OP is now being heard out.

7. In the above mentioned paragraph, short facts shorn of unnecessary particulars or in other words, factual matrix in a nutshell containing essential facts imperative for appreciating this order have been captured besides the trajectory which this matter has taken until this day has also been set out. Though very many points have been raised in the petition filed in support of captioned OP, learned counsel for

petitioners at the hearing submitted that he would limit his submissions to one point of challenge and that one point of challenge is limitation.

8. Furthering his submissions in this direction, learned counsel for petitioners submitted that the arbitration proceedings are barred by limitation and therefore, the impugned award is liable to be set aside as being vitiated owing to being in conflict with public policy,which is one of the basis / slots available under Section 34 of A and C Act for setting aside an arbitral award. To be noted, as mentioned supra, captioned OP has been presented in this Court on 04.09.2015 and therefore, it would be governed by pre 23.10.2015 regime. To put in differently, applying ***Ssangyong*** principle [***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** *reported in* ***(2019) 15 SCC 131***] captioned OP shall be governed by the A and C Act as it obtained in the statute books prior to amendment by Act 3 of 2016, which took effect retrospectively on and from 23.10.2015. To be noted, an arbitral award being in conflict with public policy was available as a basis of challenge prior to 23.10.2015 also.

9. With regard to limitation, learned counsel for petitioners submitted that said contract is dated 16.02.2007, the first installment or in other words first EMI is payable on 16.03.2007 and the last EMI i.e.,

36th EMI is payable on 16.02.2010. To be noted, this Court is informed that 'EMI' stands for 'Equated Monthly Installment'. It is submitted that according to the impugned award, first notice that has been issued by the NBFC is a legal notice dated 29.08.2014, which has been marked as Ex.C4 before AT. There is no other notice or communication prior to that which has been marked as an exhibit/placed before AT as can be seen from the impugned award. Learned counsel for petitioners submitted that Articles 19 and 21 of the Limitation Act, 1963 (hereinafter 'Limitation Act' for the sake of brevity) are the applicable articles qua case on hand. It was pointed out that the limitation is three years from the date on which the loan is made (with regard to both articles i.e., Articles 19 and 21), saying so, learned counsel further submitted that limitation commences from 16.02.2007 elapses on 15.02.2010 and therefore, notice issued on 29.08.2014 is clearly time barred. Learned counsel placed reliance on a case law, namely ***Shriram Transport Finance Company Ltd. Vs. V. Balanisamy and Ors***. reported in ***2018 (4) CTC 805*** to say that cause of action in cases of this nature commences for NBFC when the default is committed.

10. In response to the above submission, Mr.S.Elangovan, learned counsel for NBFC submitted that some communications were

issued prior to 29.08.2014 (according to him sometime in 2010) and therefore it cannot gainsaid that the impugned award is liable to be set aside on the ground of limitation. It was also submitted by learned counsel for NBFC that a perusal of the impugned award would reveal that two petitioners before this Court, who are respondents before the AT, did not appear before AT in spite of being duly served. It was submitted that it is the responsibility of the respondent before AT to appear before AT on receipt of notice and not having done that, respondents cannot now raise this issue. Learned counsel also drew the attention of this Court to paragraph 2 of the petition filed in support of captioned OP and submitted that there is a clear reference to notice of termination of an agreement dated 12.08.2014.

11. By way of reply, learned counsel for petitioners submitted that paragraph 2 of the petition in captioned OP pertains to Form 35 for name transfer, which only means that the respondents have repossessed the vehicle and have transferred the same to third party. There is also a reference to settlement, but it was submitted that it may not be necessary to advert to the same as this is a Section 34 application.

12. This Court having set out the rival submissions, now proceeds to discuss the rival submissions, give its dispositive reasoning for

arriving at a conclusion and giving its verdict. As already delineated and alluded to supra, learned counsel for petitioners chose to argue the captioned OP on one point notwithstanding very many averments in the OP and that one point is limitation. This Court is clear in its mind that the provisions of Limitation Act will apply to arbitration proceedings owing to Section 43 of A and C Act, which reads as follows:

> *'43. Limitations.— (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.*
>
> *(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.*
>
> *(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.*
>
> *(4)Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing*

the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.'

13. As Limitation Act is applicable to arbitration proceedings, it is certainly open to the petitioner in a Section 34 application to argue that arbitration proceedings are barred by limitation. The next limb which needs to be looked into is, limitation being founded on public policy is terra firma in a ocean of laws / legal principles and this is because, limitation has to be examined even in cases where it is not set up as a defence by the defendant. This principle is ingrained in Section 3 of the Limitation Act. As limitation is terra firma founded on public policy, there is no doubt that limitation can certainly be raised as a point to say that an arbitral award is vitiated for being in conflict with public policy.

14. With regard to the case on hand, what is of utmost relevance is, even according to the impugned award and according to the undisputed submissions made by both sides, default commenced from first EMI. The first EMI, as mentioned supra, is payable on 16.03.2007. On a extreme demurrer even if the 36th EMI is considered as the reckoning date, 36th EMI fell due on 16.03.2010 and therefore, Ex.C4 legal notice dated 29.08.2014, which is the only communication referred

to in the impugned award, is clearly beyond three years from the date of cause of action.

15. With regard to the submission of learned counsel for NBFC that there was some correspondence prior to 2014 i.e, sometime in 2010, the same is not before this Court. In any event, it cannot be placed before this Court in the light of ***Canara Nidhi Limited*** principle laid down by Hon'ble Supreme Court in ***Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244,*** wherein it has been made clear that only those documents which were part of the arbitral proceedings can be placed before a Court in Section 34 proceedings and if any other document is to be introduced, the same has to be done only by taking leave of the Court. There is nothing of that sort or in otherwords no application in this regard in the instant case on hand.

16. With regard to argument of learned counsel for NBFC based on Paragraph 2 of the petition, as rightly pointed by learned counsel for petitioners, it pertains to Form 35. This Court is informed that Form 35 is the prescribed form in Regional Transport Office for the purpose of transferring the name of the registered owner of an automobile from one person to another.

17. Be that as it may, as a matter of fact, this Court notices that even according to the impugned award, the value of the said contract is little over Rs.4 lakhs, namely Rs.4,03,202/- (Rupees Four Lakhs Three Thousand Two Hundred and Two only) to be precise and the award is for a whopping sum of about Rs.33 lakhs, Rs.32,96,041/- (Rupees Thirty Two Lakhs Ninety Six Thousand Forty One only) to be precise together with future interest at the rate of 18% per annum from the date of claim petition dated 29.01.2014 till date of realization. As mentioned supra, this Court is informed that the said automobile, which is subject matter of said contract, is a Mahindra Bolero multi-utility passenger vehicle. This is recorded merely as a matter of part of facts that have been noticed (undisputed facts) by this Court and it is made clear that this is not seen as a challenge to the impugned award under Section 34 of A and C Act.

18. With regard to the case law pressed into service by learned counsel for petitioners, as mentioned supra, same is ***Shriram Transport Finance Company Ltd. Vs. V. Balanisamy and Ors.*** reported in ***2018 (4) CTC 805***. As already mentioned supra, attention of this Court was drawn to paragraph 13 of that judgment, which reads as follows:

> '***13.*** *On appreciation of the above factual matrix, we are of the view that the cause of action arose for the appellant to*

initiate arbitration proceedings or other recovery proceedings to secure their financial interest commence only from the date on which the respondents failed to honour their payment commitment as per the agreement dated 01.08.2004. In this case, the respondents failed and neglected to pay the loan amount from the second instalment, which falls due on 01.10.2004, on which date, the cause of action commences for the appellant to take action against the respondents for the default committed by them in paying the loan amount. It is also not the case of the appellant that after committing default from the second instalment, the respondents had subsequently paid any amount towards the loan amount. Therefore, the period of limitation for the purpose of taking any action against the respondents for the default committed by them commences from 01.10.2004, on which date, the entire amount becomes due and hence, within three years therefrom, the appellant ought to have taken legal steps to recover the loan amount from the respondents. In this case, the appellant had invoked the arbitration clause contained under the agreement dated 01.08.2004 and made a reference to the arbitrator only on 28.06.2010. Therefore, the claim petition filed by the appellant before the learned Arbitrator is hopelessly barred by the Law of Limitation. In order to lend support to this conclusion, we are fortified by the decision of the Honourable Supreme Court, relied on by the learned counsel for the first respondent, in the case of (Sundaram Finance Limited v. Noorjahan Beevi and another) reported in (MANU/SC/0697/2016 : 2016) 5 ML J 535 (SC) wherein it was held as follows:-

> *"20. ...The rights of the parties have to be determined as per the terms and conditions of the agreement dated 20.09.1983. The terms of the agreements as noted by the High Court and referred to by us as above clearly indicate that on committing a breach of terms and conditions of the agreement, the rights shall accrue to the plaintiff to sue for balance instalments and the damages for breach of contract. Thus, the right to sue shall not stand differed till either sale which took place on 20th May, 1985 or till the last date of payment of the instalment that is 20th September 1986. Both the courts below have rightly taken the view that Limitation shall start running from the date the hirer defaulted in making payment that is on 20.05.1984 and suit has been filed beyond three years from the above date was clearly barred by time...."*

19. A perusal of Paragraph 13 reveals that Hon'ble Division Bench has held that the date of commission of default would be the cause of action by placing reliance on a judgment of Hon'ble Supreme Court reported in ***Sundaram Finance Limited v. Noorjahan Beevi and another*** reported in ***2017 (1) CTC 96(SC)***. For the purpose of making this order as comprehensive as possible, this Court deems it appropriate to extract the points for consideration before AT as set out in the

impugned award. This is contained in paragraph 4, which reads as follows:

*'4.**POINTS FOR CONSIDERATION***

1.Whether the Loan agreement entered into between the Claimant and Respondents is true & valid?

2. Whether the 1st and 2nd respondents committed default in payment of monthly installments and was there any arrears of outstanding due?

3. Whether the Claimant is entitled for an award for the amount claimed in the claim petition?

4. Whether the Claimant is entitled for subsequent interest at the rate of 36% per annum?

5.What relief the Claimant is entitled to?'

20. Answer to Point No.1 and Point No.5 are relevant and the same read as follows:

*'**Point I**:*

It is perused that Ex.C3 is the loan agreement dated 16-02-2007 and it is executed between the Respondents and Claimant. The 1st Respondent executed the said agreement as borrower and the 2nd Respondent as guarantor and 3rd respondent is franchisee of the claimant. On perusal of Ex.C3 agreement it is clear that the Loan agreement is without any ambiguity in respect of the terms and conditions as stated in the agreement and there is absolutely no reason to disbelieve its credibility. It is only to be held that Ex.C3 is a true and valid document. On perusal of Ex.C3 and its schedule, it *is evident that the 1st and 2nd Respondents had availed financial facility from the claimant for the said vehicle bearing Registration No.TN-01-U-5353 through the 3rd Respondent.*

Point 5:

On the basis of the documents submitted and on the points taken for consideration as discussed above, I am fully satisfied that the Claimant have proved their claim. Hence, the Claimant is no doubt entitled to the cost of the arbitration on filing the bill of costs.'

21. This takes us to the witnesses and list of documents before AT, which is adumbrated under the caption 'APPENDIX OF EVIDENCE', which reads as follows:

'APPENDIX OF EVIDENCE

Witness for Claimant

PW1 – Mr.S.Varadhan

Witness for Respondents

Nil

DOCUMENTS MARKED

For Claimant:

Ex.C1 Deed of Power of Attorney dated 04-04-2003

Ex.C2 Copy of the Franchisee agreement

Ex.C3 Original Loan Agreement dated 16-02-2007

Ex.C4 Copy of the legal notice sent to Respondents dated 29.08.2014

Ex.C5 Postal receipts, Returned postal cover from respondent No.3 & Served postal acknowledgement from respondent No.2 & No.3
Ex.C6 Statement of amount due

For Respondents :NIL'

22. A perusal of Appendix of Evidence reveals that the only notice post said contract i.e., loan agreement dated 16.02.2007, which was before the AT, is legal notice from NBFC dated 29.08.2014, which has been marked as Ex.C4. It is also to be noticed that there is no other document before the AT. This makes it clear that the trigger notice is clearly barred by limitation and therefore, the impugned award is vitiated for entertaining arbitral proceedings which are barred by limitation and not examining limitation though Section 3 of Limitation Act read with Section 43 of A and C Act makes it statutorily imperative to do so even if it is not set up as a defence. This takes us to prayer in OP which has been set out in Paragraph 11 of the petition, which reads as follows:

'11. For all the reasons stated above, this Hon'ble Court may be pleased to pass a judgment and decree in favour of the petitioners

(i) Setting aside the Award dated 31.03.2015 made in Arbitration Case F.No.464 of 2014;

(ii) Directing the 1st respondent to pay costs and

(iii) Grant any further or other reliefs which this Hon'ble Court may deem fit and proper in the circumstances of the case and thus

render justice'

23. With regard to 11(i) of prayer paragraph, impugned award, being award dated 31.03.2015 made in Arbitration Case F.No.464 of 2014, is set aside. With regard to 11(ii), there shall be no order as to costs. With regard to 11(iii), no other orders are passed. Impugned award set aside and OP allowed to the extent indicated supra.

29.09.2020

Speaking order: Yes
Index: Yes/No
gpa

M.SUNDAR.J.,

gpa

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