IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.11.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.788 of 2015

1.M/s.Keerti Shoes India Pvt. Ltd.,
Represented by its Managing Director
Mr.S.Ramesh, No.2A (SP) Industrial Estate
Guindy, Chennai – 600 032

2. Mr.S.Ramesh

3. Mrs.Shanthi Ramesh ... Petitioners

vs.

1.M/s.Shriram City Union Finance Limited
Represented by its Authorised Signatory
Mr.N.A.Ganesh Sankar
having its Office at
No.221, Royapettah High Road
Mylapore, Chennai – 600 004

2. D.Bhaskar
Sole Arbitrator
No.221, Royapettah High Road
Mylapore, Chennai – 600 004 ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the order dated 19.08.2015 passed by Sole Arbitrator in Arbitration Case No.23 of 2013 and to pass such other suitable order or orders as this Hon'ble Forum may deem fit and proper and necessary in the nature and circumstances of the case and to award costs of this appeal.

For Petitioner No.1	:	Mr.S.Gopalakrishnan for Official Liquidator
For Petitioners 2 and 3	:	Mr.P.Jesus Moris Ravi
For Respondents	:	Mr.R.Umashankar of M/s.Sri & Shankar Associates 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 No.26 of 1996)', which shall hereinafter be referred to as 'A & C Act' for the sake of brevity and convenience.

2.Captioned OP has been filed assailing an 'arbitral award dated 19.08.2015, bearing reference Arbitration Case No.23 of 2013' (hereinafter 'impugned award' for the sake of brevity), which has been made by a sole Arbitrator, who constituted the 'Arbitral Tribunal' ('AT' for the sake of brevity).

3. In the captioned OP, there are three petitioners and two respondents. The three petitioners i.e., petitioners 1 to 3 are respondents 1 to 3 respectively before the AT. Respondent No.1 in captioned OP is

the sole claimant before the AT. The sole Arbitrator, who constituted the AT and made the impugned award, has been arrayed as second respondent in captioned OP.

4. This Court had requisitioned the records of AT pertaining to the impugned award and the same have since been sent to this Court and have also been placed before this Court today as part of the case file.

5. In the web-hearing on a video-conferencing platform i.e., virtual hearing, Mr.S.Gopalakrishnan, learned counsel representing the 'Official Liquidator attached this Court' ('OL' for the sake of brevity), who has stepped into the shoes of the first petitioner company, Mr.P.Jesus Moris Ravi, learned counsel on behalf of petitioners 2 and 3 and Mr.R.Uma Shankar of M/s.Sri & Shankar Associates (Law Firm) on behalf of the contesting first respondent are before me.

6. The presence of the sole Arbitrator in the array of parties is really not necessary for disposal of captioned OP. With the consent of aforementioned three counsel, captioned OP was taken up for final hearing and was heard out.

7. From the submissions made before this Court, in the hearing today, from the case file placed before this Court and records of the AT which are also before this Court, it comes to light that the first petitioner

company had taken financial assistance described as 'Enterprise Finance Loan' from the first respondent company. The loan amount is Rs.25 lakhs. The transaction dates back to 31.12.2010 when the loan was sanctioned. This loan amount was to be repaid in 24 'Equated Monthly Installments' ('EMIs' for the sake of brevity) of Rs.1,37,222/-each payable before 28th of every month. The tenure i.e., 24 EMIs is from 28.01.2011 to 28.12.2012. There is no disputation that the first petitioner company has repaid as many as 21 of the 24 EMIs albeit with delay.

8. There is also no disputation that there is an arbitration agreement between the parties. To be noted, petitioners 2 and 3 are guarantors qua the loan transaction and this Court is informed that petitioners 2 and 3 are spouses.

9. In the wake of three out of 24 instalments remaining unpaid, the first respondent triggered the arbitration clause, AT was constituted, it entered upon reference and made the impugned award.

10. There is also no disputation or disagreement that first petitioner company went into liquidation *inter alia* in a winding up petition filed by the first respondent company being C.P.No.22 of 2014 in the Company Court. This Court is informed that there is another winding up petition, namely C.P.No.28 of 2014 qua first petitioner company, which is at the

instance of another petitioning creditor. This is mentioned in the report of the OL dated 31.08.2020.

11. Assailing the impugned award, learned counsel for petitioners 2 and 3 submitted that there is violation of sub-section (3) of Section 24 of A and C Act as all the documents and information have not been supplied to petitioners 2 and 3. It was also argued that the records of the first respondent company do not serve as proof / evidence in any sense of the matter as it is not a Bank i.e., records of first respondent do not qualify as Bankers books.

12. Learned counsel for OL submitted that he reiterates the report of OL dated 31.08.2020, which reads as follows:

'REPORT OF THE OFFICIAL LIQUIDATOR IN O.P.No.788/2015

The Official Liquidator attached to this Hon'ble Court as the Liquidator of M/s.Keerti Shoes India Pvt. Ltd humbly submits his report as follows:

1. That by order dated 30.6.2015 passed in C.P.No.28 of 2014, this Hon'ble Court had wound up M/s.Keerti Shoes India Pvt.Ltd and appointed the Official Liquidator as the Provisional Liquidator of the company with direction to take charge of the assets of the company.

2. Pursuant to the said order, the Official Liquidator had taken symbolic possession of the Registered office premises by placing *new locks with existing locks placed by the erstwhile management situated at No.2A (SP), Industrial Area, Guindy, Chennai – 32 on 07.09.2015 and filed necessary application seeking orders to proceed further in the matter.*

3. That by an order dated 29.10.2015 in C.A.No.1041/2015 in C.P.No.28/2014 this Hon'ble Court directed the Official Liquidator to break open the existing locks and to take inventory of assets and also gave liberty to deploy the security guards to safeguard the assets of the company until an alternative arrangement is made by the secured creditor. Accordingly, locks were broken and inventoried the available assets in all the 3 floors of the building through M/s.Itcot Consultancy and Services Ltd and engaged the services of M/s.Global Security Services, Chennai to safeguard the assets of the company.

4. That the Official Liquidator filed C.A.No.238/2016 against the Ex-directors of the subject company seeking direction to hand over the assets/books/records of the company under section 468 of the Companies Act, 1956 and Further another C.A.No.265/2016 under section 454 (5) A of the Act, 1956 was filed for non filing of Statement of Affairs. Subsequently, as per the direction of this Hon'ble Court the Ex-directors have submitted the defective Statement of Affairs before the Official Liquidator.

5. That by an order dated 27.4.2016 in C.A.No.106/2016 in C.P.No.28/2014, this Hon'ble Court directed the Official Liquidator to appoint an approved valuer and and directed to the place the valuation report before this Hon'ble Court along with draft sale notice and terms and conditions for sale of assets.

6. That by an order dated 16.09.2016 in C.A.No.106/2016 in

C.P.No.28/2014 this Hon'ble Court directed for shifting goods to the first floor of the subject company. Accordingly, the same was complied. In the above proceeding, Petitioner/Secured Creditor/Ex-director of the subject company was also participated and necessary minutes also drawn to that effect.

7. That by an order 9.6.2017 in C.A.No.244/2017 in C.P.No.28/2014 this Hon'ble Court directed the Official Liquidator to hand over the possession of the movable/immovable assets of the subject company to the secured creditor State Bank of India to continue the recovery measure under SARFAESI Act who stood outside the winding up proceedings. Accordingly, the possession of movable and immovable assets of the subject company pertaining to First Floor was handed over to the secured creditor on 12.7.2017. Subsequently, the secured creditor disposed both immovable/movable assets and remitted a sum of Rs.2,70,000/- towards sale consideration of moveable assets available at the Registered Office as the same was belonging to the subject company.

8. That it is further submitted that vide order dt.27.4.2018 in C.A.No.106/2016, the Hon'ble High Court, Madras has directed the Official Liquidator to hand over the second floor to Mr.S.Ganesh, the applicant and that vide a modified order dated 7.12.2018 the Hon'ble High Court has directed the Offiical Liquidator to release the extent of the property that belonged to the applicants after securitizing the original documents. Consequently the Official Liquidator has handed over the 2nd and 3rd floors of the building "SAM Complex" to the applicants S.Ganesh and S.Naresh on 11.2.2019.

9. That as on today the fund position of the Company Rs.2,76,995/-.

10. That it is submitted that as the funds are meagre, no claims were invited.

11. That it is submitted that the Hon'ble Court may be pleased to take this report on record and prayed to pass any orders as the court may deem fit.'

13. Learned counsel for first respondent company submitted that adequate opportunity has been given to the petitioners, but the petitioners did not turn up before the AT. Attention of this Court was also drawn to Section 4 of A and C Act. Adverting to Section 4, it was submitted by learned counsel that the counsel for petitioners 2 and 3 cannot now be heard to make contentions which are being advanced as they had proceeded with the arbitration/not raised within reasonable time and therefore the contentions should be deemed to have been waived. Learned counsel for first respondent company also submits that the grounds that are being advanced do not fall within any of the slots adumbrated under Section 34 of A and C Act and therefore, the petitioners are entitled to have the impugned award set aside or dislodged.

14. This Court carefully considered the rival submissions.

15. Besides the aforementioned submissions turning on Section 34(3) of A and C Act and documents of the first respondent company not being those maintained by a Bank, learned counsel for petitioners 2 and 3 drew the attention of this Court to Paragraphs 6 and 7 of the impugned award and submitted that the entire arbitral proceedings has been done in a lopsided manner i.e., without giving adequate opportunity, as even according to the impugned award, on 25.06.2015, the first respondent's company representative was present, he filed vakalatnama, the matter was adjourned to 10.07.2015 and on 10.07.2015, again the representative was present, counsel for respondents was also present. At request of respondents' counsel, time was extended for filing counter till 16.07.2015. On 16.07.2015, the claimant's representative was present, but there was no representation for respondents. Therefore, the matter was posted to 28.07.2015. AT has proceeded on the basis of proof affidavit filed by the authorised signatory of first respondent company on 19.06.2014. This Court is of the considered view that notwithstanding the aforementioned submissions made by learned counsel on either side,

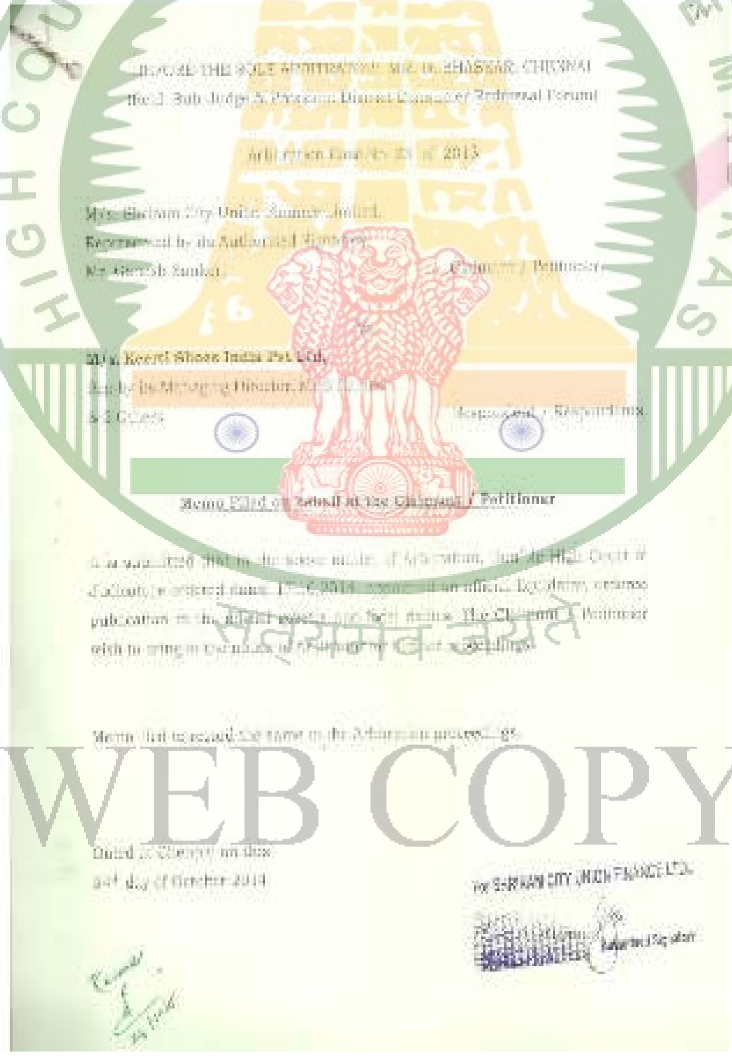
these facts have been set out only for capturing what unfurled in the arbitral proceedings as comprehensively as possible. To be noted, this Court had the benefit of perusing the records of the arbitral tribunal as the same were requisitioned and were placed before this Court as part of case file (as alluded to supra).

16. In the considered view of this Court, Paragraph 5 of the impugned award is clinching. Paragraph 5 of the impugned award reads as follows:

> *'5. On **29.05.2014,** claimant was present, there was no representation for the respondents, hence this tribunal marked all the respondents set ex-parte and posted the matter to **11.06.2014** for filing proof affidavit of the claimant. On 11.06.2014 at the request of the claimant time was extended for filing proof affidavit and the matter was adjourned till 24.10.2014. On **24.10.2014** a memo was filed by the claimant stating appointment of liquidator by the Hon'ble High Court of Judicature, Madras and the matter was adjourned to 29.10.2014, 30.12.2014, 25.02.2015, 28.04.2015 and 09.06.2015. On **09.06.2015** a memo was filed by the claimant stating, High Court of Judicature, Madras ordered and issued stay proceedings to its earlier order dated 17.10.2014 hence, this tribunal issued fresh notice dated 09.06.2015 with copies of claim petition to all the respondents directing them to appear for the hearing on 25.06.2015. The notice sent to the first respondent was*

"Served". *The notice sent to the second respondent was returned unserved as* ***"Left"*** *and the notice sent to the third respondent was returned unserved as* ***"Unclaimed".***

17. In the light of the aforementioned paragraph 5 of the impugned award, this Court examined the records of the AT. In the records of the AT, no doubt a memo dated 24.10.2014 filed by the first respondent company is there and the same is as follows:


Memo Filed on behalf of the Claimant / Petitioner

Dated at Chennai on this

24th day of October 2014

18. The memo dated 09.06.2015 and the communication sent by AT dated 09.06.2015 to the parties is available. 09.06.2015 memo reads as follows:

'***<u>Memo filed on behalf of the Claimant/Petitioner</u>***

It is submitted that the earlier memo dated 24.10.2014, the claimant states that the Hon'ble High Court of Judication, ordered and issued stay proceedings to its earlier order dated 17.10.2014. For the reason, the claimant requests permission to proceed further in the arbitration proceedings.

Memo filed to record the same in the Arbitration proceedings.

Dated at Chennai on this 9th day of June 2015

Sd/-

Claimant'

19. More importantly, the order of stay said to have been passed by this Court staying the appointment of Provisional Liquidator is not forming part of records of the AT. It may not be necessary to even to go into this aspect of the matter as Company Petition has been presented in the Company Court *inter alia* by the first respondent as a petitioning creditor. This is C.P.No.22 of 2014. Besides this, there is also another CP at the instance of another petitioning creditor, namely C.P.No.28 of 2014. This is evident from report of OL alluded to supra. There is no

disputation that these Company Petitions at the instance of petitioning creditors are under the Companies Act, 1956 (hereinafter 'said Act' for the sake of brevity). On presentation of the winding up petitions in the competent Company Court and more particularly, on OL taking charge, the OL steps into the shoes of the first petitioner company and on first respondent bringing this to the notice of AT vide memo dated 24.10.2014, the OL should have been put on notice. It is for the OL to represent the first petitioner company. The first petitioner company or its ex-directors will really have no say qua company though they have a say in their individual capacities. This Court notices that this CP at the instance of another petitioning creditor is pending even as of today. This is clear as daylight as report of OL before me refers to C.P.No.28 of 2014 (not C.P.No.22 of 2014 filed by contesting first respondent) and talks about fund position. To be noted, official website of this Court also shows this CP to be pending, besides showing this CP to have been filed on 29.11.2013 and registered on 22.01.2014. To be noted, impugned award was made on 19.08.2015. This being the case, the arbitral proceedings could not have been proceeded with without leave or without putting the OL on notice. This Court deems it appropriate to make it clear that AT proceeding with the arbitral proceedings without putting the OL on notice itself vitiates the proceedings as Company Petition for winding up was brought to be notice of AT.

20. This clearly is infarct of Section 18 which talks about equal treatment of parties. It is also an infarct of the 'Natural Justice Principle' (NJP). This Court notices that the instant OP has been presented in this Court on 14.09.2015 and therefore, the captioned OP will be governed by A and C Act as it stood prior to 23.10.2015 amendment. Therefore NJP carved out as one of the judicial doctrines in the oft-quoted ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49]*** would still operate for the captioned OP. Further, violation of provisions of A and C Act will sound the death knell of an arbitral award. In this case it is Section 18. This is being mentioned in the light of Section 18 infarct which has been adverted to supra. In the light of the narrative thus far, impugned award is vitiated by violation of principles of NJP qua oft-quoted ***Associate Builders*** case law, besides infarct of Section 18 of the A & C Act and therefore, the impugned award is liable to be set aside.

21. To be noted, prayer in the OP reads as follows:

In view of the facts mentioned above, the Appellant prays for the following relief:

(i) For the reasons stated above, this Hon'ble Court may be pleased to set aside the order dated 19.08.2015 passed by Sole Arbitrator D.Bhaskar in Arbitration Case No.23 of 2013;

(ii) To pass such other suitable order or orders as this Hon'ble Forum may deem fit and proper and necessary in the nature and circumstances of the case;

(iii) To award costs of this appeal.'

22. In the light of narrative, discussion and dispositive reasoning supra, Instant OP is allowed in terms of prayer limb (i). With regard to prayer limb (ii), no further orders are passed. With regard to prayer limb (iii), there shall be no order as to costs.

27.11.2010

Speaking order: Yes/No
Index: Yes/No

gpa

M.SUNDAR.J.,

gpa

O.P.No.788 of 2015

27.11.2020