

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.08.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.844 of 2015

Mrs.Manjula Varshaney
residing at

H.No.1-11-25-A, Begumpet Ground Floor,
Shamlal Bldgs., Opp.Nalli Silk Sarees,
Hyderabad-500 016.

... Petitioner

- Vs. -

1. Kotak Mahindra Bank Ltd.,
4th floor, Ceebros Centre,
Montieth Road, Egmore,
Chennai-9.

2. Mr.N.C.Vijayaragavan
Arbitrator,
Golden Demure, AH-Block,
Door No.87, 5th Street,
Ground floor flat,
Anna Nagar, Chennai-40.

... Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitration Award bearing No.974 dated 30.10.2009 passed by the 2nd respondent.

For Petitioner : No appearance

For first Respondent : Mr.M.Arunachalam

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 and convenience.

2. Captioned OP has been filed assailing 'an arbitral award dated 30.10.2009' (hereinafter 'impugned award' for the sake of brevity) which has been made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole Arbitrator, who has been arrayed as second respondent in captioned OP. First respondent before AT, namely Manjula Varshaney, has filed the captioned OP.

3. The trajectory, which captioned OP has taken in the last three listings is significant and therefore this Court deems it appropriate to reproduce the proceedings of this Court in captioned OP in the last three listings on 15.07.2020, 17.08.2020 and 19.08.2020, which read as follows:

'Proceedings dated 15.07.2020

Mr. V.Sivakumar, learned counsel on record for sole petitioner is before me in this Virtual Court, but there is no representation for contesting first respondent. To be noted, a sole Arbitrator, who made

the impugned award, has been arrayed as second respondent.

2. There is no representation for the contesting first respondent though this matter has been duly shown in the cause list, which contains the name of the first respondent as well as the name of Mr.M.Arunachalam, learned counsel, who has accepted notice on behalf of the contesting first respondent vide proceeding made by learned predecessor Judge on 18.11.2018.

3.Be that as it may, learned counsel for petitioner submits that he has no instructions from the petitioner though he had sent a communication by Registered Post with acknowledgement due in 2018 when the matter was earlier listed for final disposal. This is reflected in proceedings made by a Hon'ble predecessor Judge on 29.10.2018.

4. However, today learned counsel for petitioner submits that he would send one more communication to the petitioner and seeks four weeks time saying that the petitioner is in Hyderabad.

List this matter under the same caption on 14.08.2020.'

'Proceedings dated 17.08.2020

Read this in conjunction with and in continuation of earlier proceedings dated 15.07.2020.

2.Today, Mr.V.Sivakumar, learned counsel on record for sole petitioner is before me in this virtual Court, for contesting first respondent Mr.M.Arunachalam, learned counsel is before me and he expressed regret for not being present in the previous virtual hearing on 15.07.2020. Learned counsel for contesting first respondent submits that there was a technical glitch at his end in the last listing.

[illegible]

a) *Learned counsel reports 'No instructions';*
b) *Learned counsel submits that he has no alternate ad*

c) *Learned counsel submits that change of vakalat has been taken from him.*

show the name of the petitioner together with full/complete address as in the short and long cause titles of the OP in the next listing. To be noted, this is done with the intention of giving adequate opportunity to the petitioner.

List day-after-tomorrow i.e., 19.08.2020.'

'Proceedings dated 19.08.2020

Read this in conjunction with and in continuation of earlier proceedings dated 17.08.2020, pursuant to which Registry has shown the name of the petitioner together with full and complete address of petitioner as in the short and long cause titles today, but the position is no different.

2. In the light of earlier proceedings, Registry to not to show the name of Mr.V.Sivakumar in the next listing, but this matter shall be listed under the caption 'FOR DISMISSAL' on 25.08.2020'

4. The aforesaid proceedings in the last three listings are self-explanatory. Pursuant to the aforementioned earlier proceedings, captioned OP is listed under the caption 'FOR DISMISSAL' today, but the position is no different today. In other words, today also Mr.M.Arunachalam, learned counsel on record for the contesting first respondent in captioned OP is before me, but there is no representation for the petitioner. To be noted, in the previous proceedings dated 19.08.2020, this Court had directed the Registry to not to show the name of Mr.V.Sivakumar, who was appearing for

the petitioner in the light of 'no instructions' having been reported. However, name of the counsel has been shown today.

5. Be that as it may, a perusal of the case file reveals that impugned award was made nearly 11 years ago i.e., on 30.10.2009 to be precise. Captioned OP has been presented in this Court on 17.02.2010 more than a decade ago, but it has been processed and numbered five years later as would be evident from the caption. Whether such delay is permissible is left open as it is too late in the date to go into that aspect in the case on hand owing to the factual matrix and the distance it has travelled on the timeline.

6. In the light of the trajectory the captioned OP has taken in the last three listings coupled with the obtaining position that there is no representation for the petitioner i.e., petitioner has not chosen to give instructions to her counsel or make alternate arrangements, this Court proceeds to take up the OP and dispose of the same on merits. In this regard, it is made clear that a OP under Section 34 of A and C Act is not an appeal. It is neither an appeal nor a revision. It is not even a full-fledged judicial review, but it is a limited challenge to an award within the contours and confines of Section 34 of A and C Act and interpretation of 8 slots under sub-section (2) of Section 34 as elucidatively interpreted by various Courts.

Be that as it may, as instant OP is not an appeal, the principles underlying Explanation to sub Rule (1) of Rule 17 of Order XLI of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) do not apply and therefore there is no impediment in disposing captioned OP on merits. Besides this, one cannot also loose sight of the strict and stiff time lines that have been drawn for arbitration and court proceedings relating to arbitration qua arbitration as a 'Alternate Dispute Resolution' ('ADR') mechanism. Time line with regard to a Section 34 application is now ingrained in sub-section (6) of section 34 of A and C Act. The times line is one year. To be noted going by sub-section (6) of Section 34 of A and C Act, time line is one year from the date of receipt of notice under sub-section (5) by the noticee/respondent. However, pre-application notice under sub-section (5) has been held to be directory and not mandatory by Hon'ble Supreme Court in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in **(2018) 9 SCC 472**. Owing to pre-application notice under sub-section (5) being held to be directory and not mandatory, one year time line ingrained in sub-section (6) has to be now reckoned from the date of presentation of the application under Section 34 of A and C Act in cases where there is no pre-application notice. In instant case, as already mentioned supra the date of presentation is 17.02.2010 which is

more than ten years ago. As already mentioned, the impugned award is dated 30.10.2009. Though instant OP is covered by pre 23.10.2015 regime of A and C Act, the stiff and short time line for arbitration as an ADR mechanism (which have now found statutory expression) cannot be ignored . Dismissal for default/non-prosecution would give the petitioner another bite at the cheery, which is clearly not in tune with the sublime philosophies expeditious disposal and finality of arbitral awards underlying arbitration as an ADR mechanism. Therefore, for these reasons, this Court has considered it appropriate to take up the captioned OP and dispose of the same on merits.

7. Mr.M.Arunachalam, learned counsel for contesting first respondent submits that the entire matter turns on a very narrow compass. Learned counsel submits that the fulcum of the case is a 'Loan cum Guarantee Agreement No.SPL-150319' (which shall hereinafter referred to as 'said agreement' for the sake of convenience and clarity). On instructions, learned counsel submits that said agreement is dated 20.09.2007. Even according to the petition filed by the petitioner, there is no dispute that the petitioner was advanced a sum of Rs.15 lakhs as personal loan under said agreement and that the same is repayable in 36 monthly instalments of Rs.53,690/- each commencing from 10.10.2007. In other words, the first

Equated Monthly Instalments (EMI) has to be paid on 10.10.2007 and the last EMI due date is 10.09.2010.

8. The simple issue is, the petitioner, after availing the loan, committed default in payment of the EMIs. This Court is informed that there is an arbitration clause in the said agreement, the same was triggered, AT was constituted, which entered upon reference and made the impugned award. To be noted, the existence of this arbitration clause, which serves as an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act is not in dispute even in the petition filed by the petitioner.

9. A careful perusal of the petition filed by the petitioner reveals that the entire thrust or in other words, the sole ground projected in captioned OP is that sufficient notice was not given to the petitioner by AT. With regard to notice, 2 paragraphs in the impugned award are of relevance and the same read as follows:

'The registered mails carried the address of the respondents as recorded in the agreement entered into by the claimant which happened to be addresses to the last known place of business and the claimants further confirmed that all along during the tenure of the contract they were in touch with the first respondent personally

and by post to these address only. The post office made several attempts to deliver each of these mails and they could not succeed in their efforts and returned the mails addressed to the respondent (s) undelivered with their remarks. When written communications are sent as stated above it is deemed to have been received on the date the communication was attempted to be delivered. There is adequate evidence on record of attempt by the post office to deliver the mails, which was not possible for reasons stated above. This tribunal has complied with the requirements of Sec.3 of the Arbitration and Conciliation Act, 1996 and also the provisions of Sec.27 of the General Clauses Act in the manner of service by post.

In the circumstances this tribunal had no alternate except to proceed with the resolution of the dispute on the basis of the claim statement and documents submitted by the claimant.'

10. After the aforesaid trajectory before Arbitral Tribunal, AT has proceeded to examine the claim, which according to the contesting first respondent before me, was for Rs.9, 95, 424/-. After scrutiny of records and accounts, an award was passed for the aforesaid amount together with interest and future interest. As far as the costs of the arbitration, it was held that both parties should bear the same equally.

11. Reverting to crux of the challenge to the impugned award, which is on notice, the two paragraphs in the impugned award, which have been extracted and reproduced supra speak for themselves.

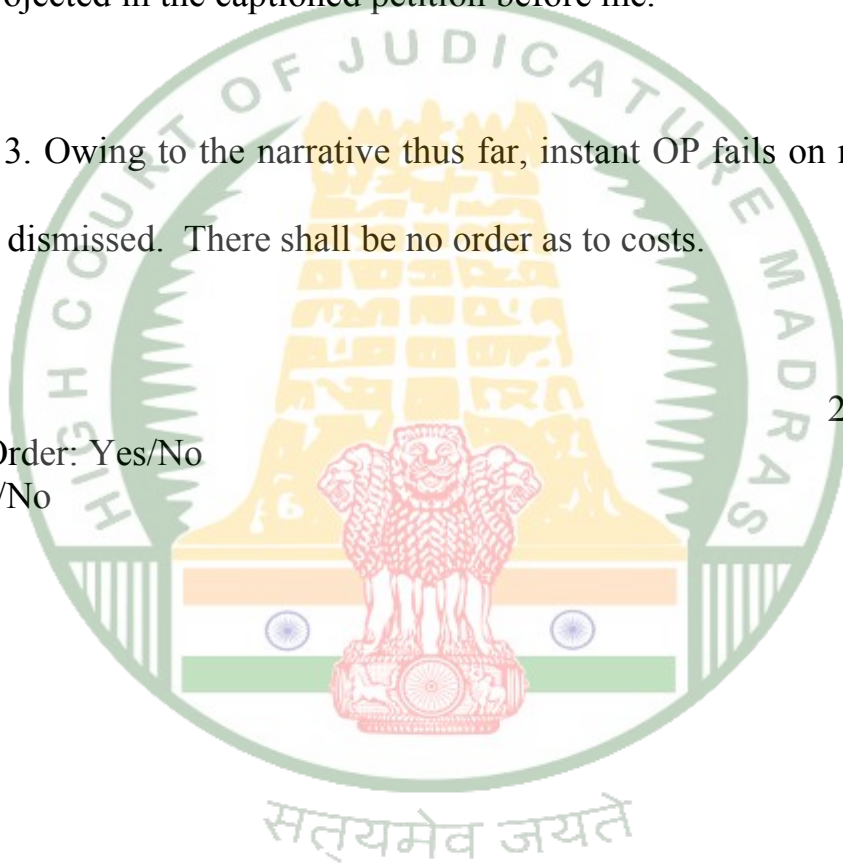
12. In this aspect, one more point of significance is, as already delineated supra, instant OP having been presented in this Court on 17.02.2010 is governed by pre 23.10.2015 regime. This means that with regard to the grounds such as proper notice not being given about the arbitral proceedings, the protagonist of the petition i.e., the petitioner in captioned OP should furnish proof. To be noted, prior to 23.10.2015, the expression contain in Section 34(2)(a) is 'furnishes proof'. In the instant case, there is nothing in the case file before this Court, wherein the petitioner has furnished any proof. A party can no doubt not be called upon to prove the negative i.e, that the party has not received notice, but in the instant case, not having disputed the loan transaction qua said agreement, the petitioner has received the impugned award in the same address and has filed the instant OP. Post filing the instant OP also, the petitioner has not diligently pursued the same as would be evident from the trajectory, which has been alluded to supra. Therefore, in the absence of contra proof from the petitioner's side, this Court is inclined to accept the narrative regarding

service of notice i.e., attempt to serve notice, which has been articulated in the impugned award (two relevant paragraphs have been extracted and reproduced supra). This brings to an end and diffuses the lone point, which has been projected in the captioned petition before me.

13. Owing to the narrative thus far, instant OP fails on merits and the same is dismissed. There shall be no order as to costs.

25.08.2020

Speaking Order: Yes/No
Index: Yes/No
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M.SUNDAR, J.

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