

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15-10-2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.157 of 2016

1.T.Tamilselvi

2.K.Thirumavalayan

... Petitioners

Vs.

1.M/s.Kotak Mahindra Prime Ltd.,
rep by its Authorized Signatory,
J.Neethirajan,
1st Floor, Ceebros Centre,
No.45, Montieth Road,
Egmore, Chennai-600 008.

2.L.Dinakaran
Advocate, Sole Arbitrator,
D.No.60,A Ground Floor,
Guru Kriba, Plat No.6, Manirajam Street,
Valasaravakkam,
Chennai-600 087.

(R-2 stands deleted in and by this order)

... Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Award of the second respondent dated 18.08.2015 made in relation to dispute arising out of agreement dated 26.02.2013 in agreement No.8931855 entered into between petitioner and first respondent and thus render justice.

For Petitioners : No Appearance

For Respondents : Mr.A.Abdul Hameed
of M/s.AAV Partners for R-1

ORDER

Mr.A.Abdul Hameed of M/s.AAV Partners (Law Firm) on behalf of 'Kotak Mahindra Prime Ltd.' (hereinafter referred to as the 'said NBFC' for the sake of convenience and clarity) is before this virtual Court on a video conferencing platform, but there is no representation for two petitioners. To be noted, 'NBFC' stands for 'Non Banking Financial Company'.

2 There was no representation for petitioners in the last four listings on 02.09.2020, 09.09.2020, 15.09.2020 and 07.10.2020. The proceedings made in the last four listings read as follows:

'Proceedings dated 02.09.2020:

There is no representation for the petitioners, but Ms.Revathy Manivannan of M/s.AAV Partners (Law Firm) for contesting first respondent is before me in this web-hearing on a video-conferencing platform and learned counsel is ready. With the intention of giving further opportunity to the petitioners, list this matter under the same caption on 09.09.2020.

Proceedings dated 09.09.2020:

Read this in conjunction with and in continuation of earlier proceedings dated 02.09.2020.

2.Today, Mr.Abdul Hameed of M/s.AAV Partners (Law Firm) is before me in this web-hearing on a video-conferencing platform on behalf of contesting first respondent and learned counsel is ready, but there is no representation for the petitioners.

However, with the intention of giving further opportunity to the petitioners, list this matter on 15.09.2020.

Proceedings dated 15.09.2020:

Read this in conjunction with and in continuation of earlier proceedings dated 09.09.2020.

2.Today, Mr.Abdul Hameed of M/s.AAV Partners is before me in this web-hearing on a video-conferencing platform on behalf of the contesting first respondent and learned counsel is ready, but there is no representation for the petitioners today also.

3.However, with the intention of giving another last opportunity to the petitioners, this matter is adjourned today, but with a caveat that the captioned OP will be heard out on merit if the petitioners do not join the virtual hearing in the next listing also.

List under the same caption on 23.09.2020.

Proceedings dated 07.10.2020:

Mr.Abdul Hameed of M/s.AAV Partners (Law Firm) on behalf of contesting first respondent is before me in this

web-hearing on a video-conferencing platform and learned counsel is ready, but there is no representation for the petitioners.

2.For the purpose of giving sufficient opportunity to the petitioners, list this matter on 15.10.2020, but without sub-caption 'RE-NOTIFIED' within parenthesis.

List on 15.10.2020.'

3 Therefore, this is the fifth consecutive listing in which petitioners have not chosen to come before this Court.

4 Captioned 'Original Petition' ('OP' for the sake of brevity) is a petition assailing an Arbitral Award and captioned OP has been filed 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. Therefore, captioned OP is clearly not an appeal. To be noted, Hon'ble Supreme Court and this Court have repeatedly held that challenge to an Arbitral Award under Section 34 of A and C Act is not an appeal. This Court has also taken the view that principles underlying Order XLI Rule 17 Sub-rule (1) read with Explanation thereof of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) would not apply to OPs of this nature as they are not

appeals. Therefore, though counsel for petitioners is not before this Court (in the fifth consecutive listing), this Court proceeds to examine the captioned OP on merits and dispose of the same on merits on available records after hearing learned counsel for said NBFC.

5 To be noted, with regard to array of parties, the sole Arbitrator who constituted the 'Arbitral Tribunal' ('AT' for the sake of brevity) has been arrayed as second respondent and said NBFC has been arrayed as the first respondent. Mr.A.Abdul Hameed, learned counsel submits that the presence of the sole Arbitrator in the array of parties is not necessary in the case on hand, particularly owing to the nature of challenge to the impugned award. Therefore, this Court following the principle that only a Tribunal which is to defend its own orders will normally be impleaded in proceedings assailing orders made by Tribunal (principle laid down by Hon'ble Supreme Court in **Jogendrasinhji Vijaysinghji Vs. State of Gujarat and Others** reported in (2015) 9 SCC 1), procedure adopted by the Hon'ble Supreme Court in **Zonal General Manager, Ircon International Limited Vs. Vinay Heavy Equipments** reported in (2015) 13 SCC 680, deletes the second respondent from the

array of parties. Therefore, the said NBFC now becomes the lone respondent.

6 Captioned OP being an application under Section 34 of A and C Act, short facts shorn of elaboration will suffice. Factual matrix in a nutshell is that there is a loan agreement dated 26.02.2013 (hereinafter 'said loan agreement' for the sake of convenience) between the two petitioners and the said NBFC; that first petitioner is the borrower and the second petitioner is co-borrower; that the said loan agreement dated 26.02.2013 is for purchase of an Automobile, i.e., a Innova Car; that a sum of Rs.11,18,000/- (Rupees Eleven Lakhs Eighteen Thousand only) was advanced as loan by said NBFC to petitioners under the said loan agreement; that it is the case of said NBFC that petitioners committed default in repayment of loan resulting in triggering of the arbitration clause in the said loan agreement; that Clause 31 of the said loan agreement captioned 'Arbitration' serves as an arbitration agreement between the parties (to be noted, arbitration agreement within the meaning of Section 2(1)(b) read with section 7 of A and C Act); that post trigger notice, AT was constituted, it entered upon reference and

made an arbitral award dated 18.08.2015 (hereinafter 'impugned award' for the sake of convenience and clarity) inter-alia holding that petitioners in captioned OP are liable to pay to said NBFC a sum of little over Rs.8.70 lakhs (Rs.8,70,401.70 to be precise) together with future interest; that vide impugned award, a direction to handover the automobile and direction regarding cost of arbitration were also given; that petitioners presented captioned OP on 03.11.2015 in this Court assailing the impugned award.

7 This Court, having set out the factual matrix in a nutshell or in other words, short facts containing essential facts with details/particulars necessary for appreciating this order makes it clear that the narrative above also captures the trajectory the matter has taken in reaching this Court vide captioned OP.

8 Though petitioners' counsel have not chosen to come before this virtual Court for five consecutive listings in spite of their names being shown in the cause list and in spite of the same being duly notified, Mr.A.Abdul Hameed of M/s.AAV Partners (Law Firm), for said NBFC,

which is now a lone respondent, very fairly submitted that the impugned award has not given reasons upon which it is based. Learned counsel also very fairly pointed out that petitioners 1 and 2, who were respondents 1 and 2 respectively before the AT, had filed counter statement raising certain issues, but there is no discussion about the same in the impugned award much less reasons.

9 In the light of the fair stand taken by learned counsel for the lone respondent (now) i.e., said NBFC, the task of disposing of captioned OP on merits, has become fairly simple.

10 Therefore, it will be appropriate to extract paragraphs 8 to 11 of the impugned award, which read as follows:

'8.The following issues arise for consideration:

- 1.Whether the Respondents are liable to pay the sum of Rs.8,70,401.70/?
- 2.Whether the Respondents are liable to pay interest at 18% p.a. on the amount claimed from 11.7.2015 to the date of realisation?
- 3.Whether the Claimant is entitled to costs? and
- 4.To what other reliefs the Claimant is entitled to?

9.Issue 1:

The claim of the Claimant is that the Respondents have borrowed a sum of Rs.11,18,000/- and that the Respondents has failed and neglected to pay the same in spite of repeated demands as on 7.11.2013. The burden of proof lies on the Claimant to prove its case. The documents filed by the Claimant is marked as Exhibits A1 to A6;

Exhibits Marked by the Claimant:

Ex.No.	Description
A1.	Loan Agreement
A2.	Demand Promissory Note
A3.	Statement of Accounts
A4.	Recall Notice
A5.	Arbitration Notice
A6.	Board Resolution

Ex.A1 and A2 proves the loan transaction, disbursement of money and the other agreed terms of repayment, payment of banking and other charges and expenses and the agreement to resolve all disputes and claims through a sole arbitrator appointed by the Claimant. Ex.A3 proves the default committed by the Respondents and the amount claimed by the Claimant and Ex.A4 and A5 proves that the Claimant has made a demand and has intimated the Respondents about the initiation of arbitration proceedings. Ongoing

through the documents and submissions by the Claimant/Respondents this Tribunal holds that the Claimant is entitled to claim Rs.8,70,401.70/- from the Respondents. Accordingly this issue is answered in favour of the Claimant.

10.Issues 2,3 & 4:

The Claimant has claimed interest at the rate of 18% from 11.7.2015 to the date of realization and for cost of the arbitral proceedings. The Claimant places reliance on the terms mentioned in Ex.A1 for the said claim, considering the commercial nature of the transaction. With regard to the cost of the proceedings this tribunal finds that these proceedings arose only due to the default committed by the Respondents under the said loan agreement and the Claimant is entitled to cost of the proceedings. The above issues 2, 3, and 4 are answered accordingly.

11.Hereby it is awarded that:

i)The Claimant is entitled to receive from the Respondents and the Respondents are hereby directed to pay jointly or severally the Claimant a sum of Rs.8,70,401.70 as on 11.7.2015 together with interest at 18% per annum from the aforesaid date to the date of realization;

ii)The 1st Respondent is directed to handover the vehicle covered under the Loan Agreement dated 26.2.2013 to the claimant and claimant is hereby permitted to sell the vehicle and adjust the sale proceeds towards the outstanding amount failing which claimant is permitted to

seize the vehicle and sell the same and adjust the sale proceed towards outstanding amount.

(iii)The Respondents are directed to pay the cost of the arbitration proceedings of Rs.2000/- (Arbitrator Fee – Rs.1500/- + Expenses – Rs.500/-) to the Claimant.'

11 To be noted in paragraph No.8, four issues have been framed by AT in the impugned award. A perusal of answer to issue No.1 and common answer to issue Nos.2, 3 and 4 make it clear that the AT has not set out the reasons upon which it (impugned award) is based. AT has merely set out that on going through documents and submissions, the claimant is entitled to it's claim of little over Rs.8.70 lakhs and interest. This is in answer to issue No.1. Likewise, in common answer to issue Nos.2, 3 and 4, AT has merely mentioned that it finds that proceedings arose only due to the default committed by respondents before AT vide said loan agreement without giving reasons/basis for the same.

12 This takes us to the arbitration clause in the loan agreement.

As already alluded to supra, Clause 31 of the loan agreement dated 26.02.2013 is the arbitration clause and the same serves as an arbitration agreement between the parties i.e., between two petitioners and the said

NBFC (now lone respondent). To be noted, 'arbitration agreement' within the meaning of section 2(1)(b) read with section 7 of A and C Act.

Clause 31 of said loan agreement reads as follows:

'31.Arbitration:

All disputes, differences, and / or claim arising out of these presents or in any way touching or concerning the same or as to constructions, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the arbitration of a sole arbitrator to be nominated by the Lender. In the event of death, refusal, neglect, inability or incapability of a person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned. The arbitration proceedings shall be conducted in English language and held at the place more particularly mentioned in the Schedule II of the present agreement hereunder.'

13 A perusal of the aforementioned arbitration agreement between the parties makes it clear that parties have not agreed that no reasons need to be given by AT. Likewise, there is no dispute or disagreement before this Court that impugned award is not an award on

agreed terms within the meaning of Section 30 of the A and C Act. To be noted, parties agreeing that no reasons need be given by AT and an award being on agreed terms within the meaning of Section 30 of A and C Act are the two exceptions to the rigour of Section 31(3) of A and C Act which mandates that AT should state reasons upon which it is based. This Court deems it appropriate to extract Section 31(3) of A and C Act which reads as follows:

'31. Form and contents of arbitral award.--(1) x x x x x
(2) x x x x x
(3) The arbitral award shall state the reasons upon which it is based, unless--
(a) the parties have agreed that no reasons are to be given,
or
(b) the award is an arbitral award on agreed terms under section 30.'

14 This Court is of the considered view that violation of or infarct of Section 31(3) which is a sacrosanct provision of A and C Act will sound the death knell of an arbitral award. In taking this view, this Court draws inspiration from one of the principles laid down by Hon'ble Supreme Court in *Associate Builders* case being *Associate Builders Vs.*

Delhi Development Authority reported in **(2015) 3 SCC 49** and the relevant paragraph is paragraph 42.2 which reads as follows:-

“42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.”

To be noted, Supreme Court has made it clear in **Ssangyong** case law being **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)** reported in **(2019) 15 SCC 131** that this contravention of Section 31(3) will become a patent illegality on the face of the award and is therefore available to dislodge an arbitral award both in pre and post 23.10.2015 regimes of A and C Act.

15 In the instant case, in the light of narrative, discussion and dispositive reasoning supra, this Court has no hesitation in coming to the conclusion that there is a clear infarct of sub-section (3) of Section 31 of the A and C Act. Therefore, the impugned award is liable to be set aside.

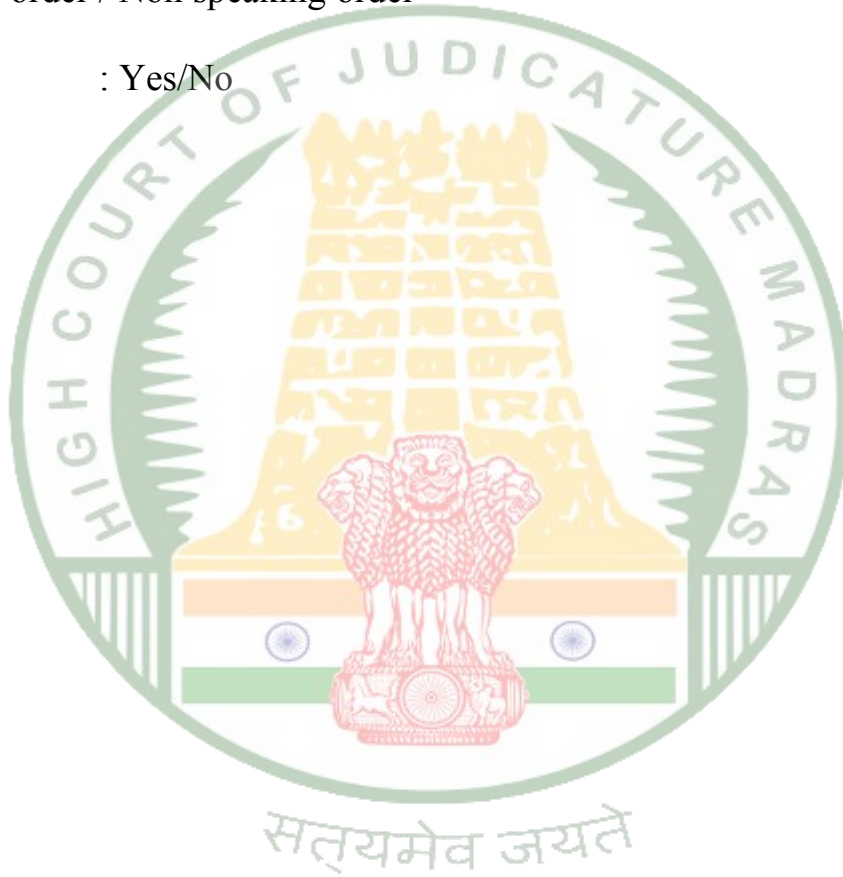
16 Owing to the narrative thus far, captioned OP is allowed, but there shall be no order as to costs.

15.10.2020

Speaking order / Non speaking order

Index : Yes/No

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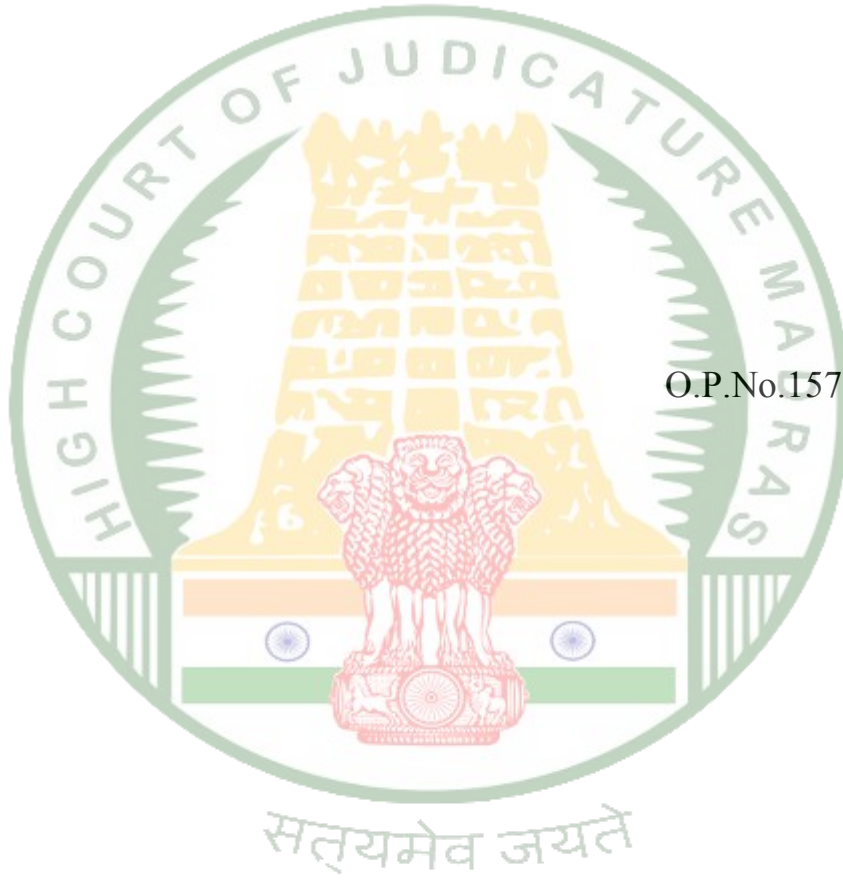


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O.P.No.157 of 2016

M.SUNDAR, J.

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O.P.No.157 of 2016

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15.10.2020