

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.07.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.313 of 2014

1.K.Prem Chander

2.K.Manohar

...Petitioners

Vs.

1.M/s.Hella India Automotive Private Limited
Formerly known as FTZ Engineering (P) Ltd.,
Apex Plaza, Fourth Floor
No.3, Nungambakkam High Road
Chennai – 600 034

2. Mr.S.Jayaraman

Arbitrator

Former Additional Registrar, Madras High Court

“V” Block No.107, Near Tower

Anna Nagar, Chennai-600 040

...Respondents

(First respondent name amended as per order
dated 06.02.2020 in A.No.473/2020)

Original Petition filed under Section 34 (1) of the Arbitration and
Conciliation Act, 1996, to set aside the award passed by the second

respondent /learned Arbitrator in Arbitration Case No.SJ/HELLA/1/2007 dated 17.12.2009 with cost of this proceedings.

For Petitioners : Mr.Suresh Babu

For Respondent : Mr.S.Ravi
of M/s.Gupta and Ravi (Law Firm)
for first respondent

ORDER

This is an application for setting aside an arbitral award dated 17.12.2009 made by the second respondent, who is the sole arbitrator, who constituted the Arbitral Tribunal.

2.This award dated 17.12.2009 shall be referred to as 'impugned award' and the second respondent, who constituted the Arbitral Tribunal as sole arbitrator shall be referred to as 'AT' denoting 'Arbitral Tribunal'.

3.As applications for setting aside arbitral awards are being given the nomenclature 'Original Petition' by the Registry in this Court, this case on hand shall be referred to as 'OP' denoting 'Original Petition'.

4.First respondent in instant OP, namely 'Hella India Automative Private Limited' (hereinafter 'Hella' for the sake of brevity) is the claimant before AT. Petitioners 1 and 2 in instant OP are Respondents 1 and 2 respectively before the AT. However, the parties will be referred to either by their ranks before this Court or by short form for the sake of convenience and clarity.

5.Nucleus of the lis qua instant OP on hand is an agreement dated 25.05.2001, which has been marked as Ex.C4 before AT. What is of significance is, there are three parties to Ex.C4 and they are 'Babcock Borsig Softech Limited' (hereinafter 'BBSL' for brevity), petitioner Nos.1 and 2. While BBSL is a Private Limited Company (this Court is informed that it is a company incorporated in India) and therefore a juristic person, petitioners 1 and 2 are natural persons. Clause 19 of this nucleus agreement serves as an arbitration agreement between these three parties and clause 19 of the nucleus agreement reads as follows:

'19.any / all dispute(s) and / or difference(s) and / or question(s) between the parties to this agreement out of this agreement or any part thereof including any breach of the term(s) and condition(s) of this agreement shall be settled by arbitration by the sole arbitrator who shall be appointed by the company in its absolute discretion and the award given by such arbitrator shall be binding on the parties to this agreement. The venue of arbitration shall be Chennai and the Courts in Chennai shall have exclusive jurisdiction on the matter.'

6. Thereafter, there are also two indemnity bonds dated 25.05.2001 executed by petitioners 1 and 2 in favour of BBSL, which have been marked as Ex.C5 collectively before AT.

7. The sum and substance of this nucleus agreement and two indemnity bonds, namely Exs.C4 and C5 are that BBSL sent first petitioner to Germany for training in lieu of which first petitioner agreed / undertook to serve BBSL or any of its associates or affiliates companies to which he may be transferred for a minimum period of 5 years from the date of beginning of training in Germany and first petitioner also agreed

to not to take up employment with any other employer either during the period of training or during the period of service. There is also a clause for liquidated damages wherein it has been covenanted that if the first petitioner breaches the terms, BBSL will be entitled to claim liquidated damages of Rs.5 lakhs.

8.The first respondent submitted a letter of resignation dated 02.01.2006 citing family and personal reasons. Complaining that this is breach, arbitration clause was invoked / arbitration proceedings were commenced and the same culminated in the impugned award vide which AT has *inter alia* held that there is breach by the petitioners and awarded Rs.3 lakhs as liquidated damages, besides certain directions regarding arbitration expenses and interest. To be noted, this court is informed that second petitioner is surety qua first petitioner's aforementioned undertaking.

9.Assailing the impugned award, instant OP was presented in this Court 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. Instant OP was presented some time in March of 2010 and therefore, the case on hand is more than a decade old in this Court. In view of the time line for disposal of an application under section 34 prescribed vide sub-section (6) of section 34 viewed in the light of the observation made by Hon'ble Supreme Court in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in **(2018) 9 SCC 472** (Paragraph 26), it would be appropriate to describe instant OP as ancient rather than vintage.

10.Be that as it may, in the web-hearing on a video-conferencing platform, i.e., virtual court today, Mr.Suresh Babu, learned counsel for petitioners and Mr.Ravi of M/s.Gupta and Ravi (Law Firm), learned counsel for contesting first respondent who are before me are ready for final disposal paving the way for disposal of an ancient matter through modern technology.

11. Counsel for petitioners submitted that as protagonist of instant OP, his submissions shall be predicated and posited only on two slots and they are Section 34(2)(a)(ii) and Section 34(2)(a)(iii). To be noted, Section 34(2)(a)(iii) consists of three limbs and learned counsel pitched himself on the first limb, namely petitioners herein not being given proper notice of appointment of Arbitrator.

12. With regard to the first slot, namely the arbitration agreement not being valid, learned counsel submitted that there is no arbitration agreement between Hella and petitioners. In other words, it is his pointed submission that there is no arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act as Hella is neither a party to nucleus agreement within the meaning of Section 2(1)(h) of A and C Act nor is there novation of nucleus agreement. Furthering his submission on these lines, learned counsel referred to Ex.C.9 which is a letter dated 17.06.2003 from an entity which goes by the name 'FTZ Engineering Private Limited' ('FTZ' for brevity) to first petitioner,

wherein FTZ has stated that it has undertaken for the purpose of continuity of service and benefits of employment such as provident fund and gratuity, the obligations of BBSL under nucleus agreement (Ex.C.4).

13. It was submitted that in the impugned award AT has proceeded on the basis that Ex.C9 operates as novation qua Ex.C4. To be noted, FTZ is also a juristic person as it is a private limited company. This FTZ appears to have subsequently been rechristened as Hella Engineering Pvt. Ltd. Thereafter, Hella Engineering Pvt. Ltd., also appears to have been reborn as Hella India Automotive Private Limited, owing to which an amendment has been carried out in instant OP vide order dated 06.02.2020 in A.No.473 of 2020. In other words, it is the pointed submission of learned counsel for petitioners that while nucleus agreement (Ex.C.4) is with BBSL, one FTZ undertakes obligations with regard to continuity of service with first petitioner and this FTZ turns into Hella Engineering Private Limited, which has ultimately now become 'Hella India Automotive Private Limited' ('Hella' as is being referred to in

short form in this order for the sake of brevity), all of which are juristic persons.

14. Second point of argument of learned counsel for petitioners is predicated on the first limb of Section 34(2)(a)(iii) as mentioned supra. In other words, it is his pointed case that the petitioners were not given notice of appointment of Arbitrator much less proper notice. Furthering his submission in this regard, learned counsel drew the attention of this Court to Ex.C16, which is a letter dated 27.04.2007 from Hella Engineering Private Limited to the petitioners. Though postal receipts showing despatch are available, there is nothing to show that it has been served on the noticees, who are petitioners 1 and 2 respectively.

15. In response to this submission made by learned counsel for petitioners, learned counsel for contesting first respondent relied heavily on Ex.C9 and submitted that it becomes novation and therefore, it should be construed that FTZ has stepped into the shoes of BBSL.

16. With regard to the second contention, learned counsel for first respondent submitted that Ex.C16 has been despatched to the petitioners' last known habitual residence and therefore, it should be construed that Ex.C16 has been duly served on the petitioners.

17. This Court carefully considered the rival submissions.

18. Before proceeding further, as would be evident from the narrative thus far, both points that have been urged in instant OP are under Section 34(2)(a) of A and C Act. Therefore, 'establish on the basis of the record of the arbitral tribunal' approach was taken as records of AT were requisitioned earlier and the same are before me. To be noted, the expression 'furnishes proof that' was substituted with 'establishes on the basis of the record of the arbitral tribunal that', vide Arbitration and Conciliation (Amendment) Act, 2019, which is Act 33 of 2019. In Act 33 of 2019, which is the amending Act, Section 7 deals with this amendment to Section 34 and Section 7 has been duly notified on and from 30.08.2019 vide Notification of Ministry of Law and Justice (Department

of Legal Affairs) being S.O.3154(E) dated 30.08.2019.

19.In this regard, it is pertinent to mention that a perusal of the case file placed before me reveals that predecessor learned Judge has requisitioned the arbitral records from AT, the same have been sent by the AT and the entire arbitral records are before me today (as already mentioned supra elsewhere in this order).

20.I examined the two rival contentions by carefully sifting through the records of AT.

21.With regard to the first contention that there is no valid arbitration agreement between Hella and petitioners, Exs.C1 to C16 have been marked and one witness CW1 (R.Venkatesan, General Manager of Hella) has been examined. To be noted, first respondent Hella is claimant before AT. With regard to the petitioners before me, though no oral evidence was let in, two exhibits Exs.R1 and R2 have been marked.

22.A careful perusal of aforementioned exhibits bring to light that there is no document to show that there is an arbitration agreement

between Hella and petitioners. Therefore, this question regarding a valid arbitration agreement between petitioners and Hella can be answered only by answering the question as to whether aforementioned Ex.C9 acts as novation qua Ex.C4 and as to whether the arbitration agreement between BBSL and petitioners now becomes an arbitration agreement between Hella and petitioners. Therefore, this point turns on novation. The pointed issue is whether Ex.C9 dated 17.06.2003 acts as novation qua nucleus contract Ex.C.4 dated 25.05.2001. For this purpose, learned counsel for petitioners pressed into service a judgment of Hon'ble Division Bench of this Court being *Andhra Bank Vs. Bhagya Nagar Solvent Extractions Pvt. Ltd.* in C.R.P.No.143 of 2016 (order dated 13.01.2020). Attention of this Court was drawn to Paragraphs 13, 14 and 26 which read as follows:

'13.DRT, after extracting Section 62 of the Indian Contract Act, 1872, has also considered a catena of decisions in K.Appukuttan Panicker and Anr. v. S.K.R.A.K.R. Athappa Chettiar and Ors [AIR 1966 Kerala 303], Canara Bank & Ors. v. City Bank N.A. & Ors. [(2004) 1 SCC 12], has recorded a finding to invoke the Principle of Novation under Section 62 of

the Indian Contract Act, 1872 and there should be an agreement of parties to the new contract and the liability of the original contractor can be transferred only by Tripartite Agreement which will amount to Novation and further in para 12.21 observed that "At no stretch of imagination, an inference can be drawn from Exs.A16 to A28 and A30 to A33 to the effect that there was a Tripartite Agreement between the petitioner/bank, first respondent, second respondent and other respondents" and in the absence of any evidence to prove the Tripartite Agreement and substitution of old contract, the plea of Novation made by the petitioner/bank cannot be sustained and that was the main reason for the dismissal of the Original Application.

14. The Appellate Authority, namely DRAT concurred with the findings of the Tribunal/DRT and dismissed the appeal filed by the petitioner/bank and thus, it is a case of concurrent finding.

26. In the considered opinion of the Court, no tenable grounds have been placed to persuade this Court to exercise the power of judicial review for the reason that DRT-II, Chennai as well as DRAT, Chennai had considered the factual aspects and legal position and rightly reached the conclusion that no evidence was made available to prove the fact of Tripartite Agreement between the parties herein for substitution of old contract and the documentary evidence produced by the petitioner/bank before the Tribunal would also reveal/disclose that repeated averments made by the first respondent for settlement of dues and also in the form of OTS, have not been accepted and in the absence of any new material as to the substitution of old contract in the form of new contract, the plea for novation taken by the petitioner cannot be accepted and the materials placed on record before this Court did not probablise the case of the petitioner/original applicant.'

23.Suffice to say that *Bhagya Nagar* principle when applied to fact setting of this case is, BBSL is not a party to Ex.C9 and therefore, there can be no novation. To put it differently, subsequent agreement has to necessarily be tripartite for a novation to come into force is *Bhagya Nagar* principle. If this principle laid down by a Hon'ble Division Bench of this Court is applied to the factual matrix of this case, it emerges clearly that Ex.C9 does not operate as novation qua Ex.C4.

24.A careful perusal of Ex.C9 reveals that first petitioner has not signed the same. It is a unilateral letter written by Hella to first petitioner. To be noted, Ex.C.9 has been marked subject to objection. Learned counsel for first respondent attempted to explain this by saying that Ex.C9 has been acted upon. In the considered view of this Court this is no argument, much less a convincing argument as we are dealing with an arbitration agreement and AT is a creature of contract. A careful perusal of Section 2(1)(b) read with Section 7 of A and C Act makes it clear that there is no arbitration agreement between Hella and petitioners. This is

more so as Ex.C9 makes it clear that Hella has taken over the obligations of BBSL only with regard to continuity of service of first petitioner. In this regard, it was also argued by first respondent that in the nucleus agreement Ex.C4 in Clause 3, it has been covenanted that the first petitioner undertook to serve BBSL or any of its associates or affiliated companies to which he may be transferred. This again does not save the day for Hella with regard arbitration agreement as petitioners have raised this point before AT and AT has answered this in Issue No.(c) in the following manner:

'(c) Whether there was an agreement between the claimant company and the respondents?

32. It was argued by the learned counsel for the respondents that there was no agreement between the claimant and the respondents. This argument has already been considered in detail and decided against the respondents by this Arbitral Tribunal by its order dated 09.07.2008 and passed while dealing with the preliminary objections raised by the respondents, who are, now, not entitled to raise the very same point once again in these very proceedings. '

25.In the light of Section 16 and more particularly in the light of sub-section (4) of Section 16, petitioners are entitled to raise this point now. In this regard, the ratio laid down by Hon'ble Supreme Court in ***Lion Engineering case [Lion Engineering Consultants Vs. State of Madhya Pradesh]*** reported in ***(2018) 16 SCC 758*** is relevant.

26.Before moving on to the second point, it is made clear that this Court has not embarked upon the exercise of reappraisal of evidence. Records of AT and dispositive reasoning of AT have been tested on the touchstone of *Bhagya Nagar* principle qua novation.

27.This takes us to the second point of contention. A careful perusal of records of AT reveals that there is nothing to show that Ex.C.16 has been served on noticees, namely petitioners before me. Learned counsel for first respondent in response to this drew my attention to Section 3(1)(b) of A and C Act and submitted that a record of attempt

to deliver Ex.C.16 to last known habitual residence of petitioners will suffice.

28.This Court is unable to accept this submission as sub-clauses (b) and (a) of Section 3(1) are dovetailed. A careful reading of Section 3(1) in its entirety would reveal that only if the place of business, habitual residence or mailing address of a noticee cannot be found after making reasonable inquiry, a written communication can be deemed to have been received if it is sent to the addressee's last known habitual address, place of business or mailing address. It is nobody's case here that the three kinds of addresses referred to in Section 3(1)(a) could not be found after making reasonable inquiry. On the contrary, the whole matter has proceeded on the basis that petitioners continue to reside in the same address and it is not the case of Hella that petitioners have changed their address and Hella is unable to locate / find the new address. Therefore, Section 3(1)(b) of A and C Act does not come to the aid of the first respondent (Hella) in instant OP. If section 3(1) does not come to the aid

to first respondent owing to the fact setting of this case, the argument predicated and posited on Section 34(2)(a)(iii) (first limb) needs to be sustained. Likewise, as the validity of the arbitration agreement (Clause 19 of nucleus agreement Ex.C.4) turns on novation (Ex.C.9 qua Ex.C.4) and as I find for the petitioners on novation point, the argument predicated on Section 34(2)(a)(ii) also deserves to be sustained in the light of facts and circumstances of the instant case.

29.Owing to all that have been set out supra, instant OP is allowed and impugned award is set aside. There shall be no order as to costs.

06.07.2020

Speaking order: Yes

Index: Yes/No

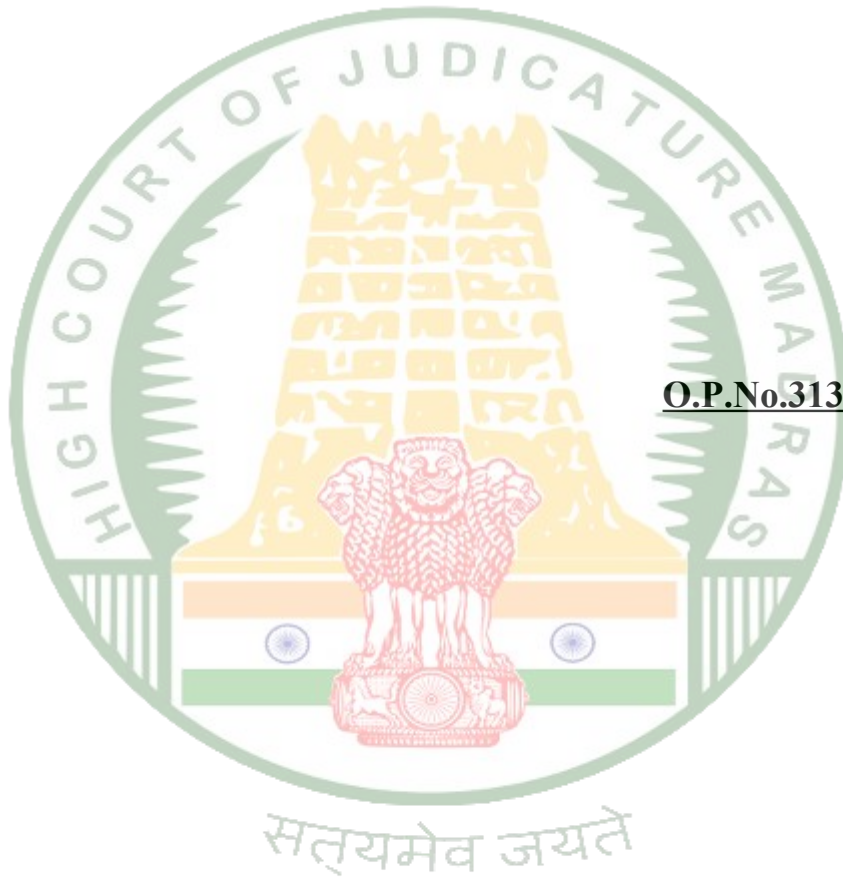
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