

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14.02.2020

Pronounced on: 21.02.2020

Coram::

The Honourable Dr.Justice G.Jayachandran

Original Petition No.394 of 2014

1.T.P.Akbar

2.P.Musthafa Kamal

... Petitioners

/versus/

1.M/s.Sundaram Finance Ltd.,
Represented by its Managing Director,
No.21, Patullos Road,
Chennai – 600 002.

2.Hon'ble Sri K.S.Gowthaman,
Arbitrator,
New No.49, 224-B,
IV Cross Street,
Natesa Nagar,
Virugambakkam,
Chennai – 600 092.

... Respondents

Prayer:- This Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award No.C.P.No.KSG/SF/41/2013 dated 22nd January, 2014 passed by the second respondent – Arbitrator and to order the costs of this petition to the petitioners and to pass such further or other orders as this Court may deem fit and proper in the facts and circumstances of the case.

For Petitioners : Mr.P.Neelakantan

For Respondents : Mr.S.Suresh

ORDER

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 by the borrower and the guarantor against the finance company in favour of which the arbitrator (the second respondent) has passed the impugned award directing the petitioners to pay the first respondent a sum of Rs 2,49,427.30/- with interest at the rate of 18% pa from 09/10/2012 till the date of realisation. A sum of Rs 1,500/- towards arbitration fees and a sum of Rs.596/- (towards costs).

2.Background facts:

On 02/12/2010 the first petitioner (T.P.Akbar- hereinafter referred as borrower) and M/s Sundaram Finance Ltd (first respondent – hereinafter referred as financier) entered into a finance agreement for financing the first petitioner to purchase a Leyland Lorry HCV 2010-KL-AG-2631. Loan of Rs.13,50,000/- advanced to the borrower who agreed to repay the same with interest in 35 monthly instalments. The vehicle was hypothecated to the financier. For the said loan, the second petitioner (P.Muthafa Kamal – hereinafter referred as guarantor) stood guarantee. The borrower failed to repay the loan instalments hence the hypothecated vehicle was seized by the

financier on 29/05/2012. The vehicle was sold for Rs.10,55,000/- on 09/10/2012. After intimating the factum of sale of the vehicle to the borrower, the financier initiated arbitration proceedings as per Article 22 of the terms of agreement. The second respondent, the Arbitrator has passed the impugned award on 22/01/2014.

3.The award of the arbitrator is under challenge on the following grounds:-

I.The ex-parte award passed by the 2nd respondent – Arbitrator is contrary to law, facts and circumstances of the case and is liable to be set aside.

*II.The 2nd respondent was appointed as the sole arbitrator by the Managing Director of the 1st Respondent – Company who is the claimant without notice to the petitioners before making such appointment of the arbitrator. Hence, the appointment of the arbitrator and the award passed thereon by him in the absence of the petitioners are illegal and void as per the law laid down by the Hon'ble Supreme Court in **Dulal Poddar vs. Executive Engineer, Dona Canal Division and others** reported in 2004 (1) SCC 73.*

III.The ex-parte award passed by the 2nd respondent-Arbitrator is liable to be set aside under Section 34(2)(iii) of the Arbitration and Conciliation

Act, 1996, since the petitioners were not given proper notice before appointment of the arbitrator and in respect of the inter-se dispute between the parties necessitating arbitral proceedings.

IV The petitioners were not represented in the arbitral proceedings due to want of proper notice and was unable to present their case either in person or through a counsel.

V.The award passed by the arbitrator granting an exorbitant and excessive rate of future interest at 18% per annum till realization of the whole amount of Rs.2,49,427.30 awarded is against law and equity and is in conflict with the public policy of India.

VI.The arbitrator ought to have found that the subject matter of dispute after taking forcible custody of the vehicle and clandestine sale of the vehicle allegedly purported to be for realization of the alleged balance amount is not capable of settlement by arbitration since the same is not contemplated by the parties under any clauses in the hire purchase loan agreement. The dispute cannot originate unilaterally by the exclusive act of one party alone by sale of the vehicle without reference to the other party.

VII. It should have been found that the loan agreement has come to an end by the unilateral action of the 1st respondent by seizing the vehicle from the

custody of the 1st petitioner and on loss of the vehicle, the hire purchase agreement got frustrated and terminated and any further action for realization of any money allegedly due under the said agreement is contrary to the terms of the contract and the law and is liable to be set aside. The hire purchase agreement cannot survive once the vehicle is taken into custody. The sale of the vehicle was done in a hurry only to create a dispute and such an alleged dispute is not a dispute that qualifies for reference to arbitration under the agreement between the parties.

VIII. The 2nd respondent-Arbitrator ought to have granted sufficient opportunity to the petitioners to present their case and ought to have ruled on its own jurisdiction under Section 16 of the Arbitration and Conciliation Act, 1996 before proceeding with the alleged dispute in the facts and circumstances of the case.

IX. The ex-parte award was passed by the 2nd respondent-arbitrator without application of mind and the arbitrator being on the regular pay-roll of the claimant - 1st respondent - company was highly biased in favour of the 1st respondent-company and has been acting all throughout for the interest of the claimant-respondent-company.

X. The ex-parte award passed by the 2nd respondent-arbitrator suffers from gross errors

apparent on the face of record and the award is based on in consistent findings.

XI.The arbitrator has failed to consider the important clauses of the loan agreement and the very fact of premature appointment of the arbitrator by the Managing Director of the 1st respondent-company is without prior notice.

XII.At any rate, the ex-parte award passed by the 2nd respondent is liable to be set aside both in law and on facts.

4.The financier has filed its written submissions in response to the petition challenging the arbitration award passed in its favour. The written submissions of the financier read as below:-

"The only ground raised by the petitioners are that petitioners were not served with notice before the appointment of Arbitrator.

As per Section 21 of the Arbitration and Conciliation Act, 1996:- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

In the present case the letter dated 29.12.2012 1st respondent company requesting its Managing Director to nominate its Arbitrator and on the same day the Managing Director nominate the Arbitrator and requested the Arbitrator to enter his reference of Arbitration in the dispute arose between the parties. In the said letters the dispute/claim was categorically mentioned and both the letters copies were marked to the petitioners. The said letters were marked before the Arbitral Tribunal and the petitioners also filed the entire documents before this Honourable Court in the above said Section 34 petition. Now on the above said aspect it deems that both the letters were served on the petitioners, though they have been served notices from the tribunal they have not chosen to appear before the arbitral tribunal to raise any objection. In the above said circumstances it can be seen that section 21 notice was served on the petitioners but they never raised any objection for the arbitral tribunal and the petitioners have waited till the award was passed and raised the above said objections in the above petition.

In the above said circumstances, the petitioners though they have been served notices by the arbitral tribunal and failed to participate and raise all the objections including the constitutional of the Arbitral Tribunal and received each and every notices sent by the 1st respondent throughout its actions and demand and not giving any response to settle the contract, the

petitioners have approached this Honourable Court with unclean hands and the above petition has to be dismissed. Moreover the 1st respondent company running its business through receiving public deposits and it is bounden duty of the 1st respondent to protect its investors and petitioners like persons have dodged in repaying the loan amount it will end in risk of rights of investors in getting the deposit amount.

It is therefore prayed that this Honourable Court may be pleased to dismiss the above petition and direct the petitioners to pay the amount along with costs as per the award and thus render justice.

5. According to the petitioners, out of 35 monthly installments, the borrower has cleared 21 installments by 10th September 2012. Due to some unexpected financial problem after the 9th installment, got defaulted and there was delay in payment. The Financier without waiting for the payment of the remaining installments, forcibly took the custody of the vehicle on 29.05.2012. Such forcible take over of the vehicle is not contemplated under the Hire Purchase Loan agreement entered into between the borrower and the financier.

6. On 08.10.2012, however the borrower cleared the due upto 21st installments with expectation that the financier will return the custody of the vehicle. Contrarily, the financier without the knowledge and consent of the

borrower, sold the vehicle for a sum of Rs.10,55,000/- and intimated the same through his subordinate to the borrower and the guarantor. Without hearing the borrower, regarding appointment of arbitrator and without giving sufficient opportunity to the borrower to enter appearance and contest the claim petition, exparte award was passed on 22.01.2014 allowing the entire claim of the financier company with excessive interest @ 18% per annum.

7.The impugned award starts with the introductory paragraph regarding service of notice. The Arbitrator has stated that on his acceptance of the reference, he sent notice dated 23.01.2013 to the respondents therein through Registered Post with Acknowledgment Due (RPAD) calling upon them to appear before him on 04.03.2013. The said notice was duly served on both the respondents therein. The respondents did not appear hence, to provide another opportunity to the respondents, he has sent notice dated 06.03.2013 along with the copies of the claim statement and documents filed by the claimant/financier and directed the respondents/ petitioners herein to appear and file their reply on 06.05.2013. The said notice was duly served on both the respondents but they did not appear on 06.05.2013. Therefore, they were called absent and set exparte on 06.05.2013 and proceeded further in the absence of the respondents.

8.The decision of the Arbitrator to proceed further with the available documents was also intimated to the respondents vide notice dated

11.05.2013. Relying upon Section 25(C) of the Arbitration and Conciliation Act, 1996, the Arbitrator has proceeded further, in the absence of the respondents.

9. Article 22 of the loan agreement entered between the first petitioner/borrower and the financier reads as below:-

"22.(a) All disputes, differences any/or claim arising out of this agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Managing Director/Joint Managing Director of the Lender. The award given by such an Arbitrator shall be final and binding on the Borrower to this agreement."

It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred dying or being unable to act for any reason, the Managing Director/Joint Managing Director of the Lender at the time of such death of the arbitrator or of his inability to act as arbitrator, shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with the reference from the stage which it was left by his predecessor.

(b) The venue of arbitration proceedings shall be at Chennai

(c)The arbitrator so appointed herein above, shall also be entitled to pass an award on the hypothecated asset and also on any other securities furnished by or on behalf of the Borrower.”

10.The appointment of the Arbitrator in this case is in terms of the above article and therefore, the borrower cannot contend that the appointment of the Arbitrator is in violation of any law in force.

11.The prime contention of the learned counsel for the petitioners is that, proper notice was not served on the petitioners. Whereas, the Arbitrator in his award had in an unambiguous term, recorded that notice was duly served on both the respondents through RPAD. But the respondents / petitioners herein did not turn up to participate in the arbitration proceedings. Therefore, the contention of the petitioners that the award is in contravention of Section 34(2)(a)(iii) of the Arbitration Act is also incorrect.

12.It is contended by the petitioners that after reserving the matter for passing award on 03.06.2013, the Arbitrator has passed the award after seven months and it is a misconduct on the part of the Arbitrator and for that reason, the award is liable to be set aside. The delay of seven months in passing the award after reserving it for orders, cannot *per se* presume to be illegal or improper unless, any misconduct or miscarriage of justice could be pointed out.

13. In this case, the petitioners have not specified any of the *mala fide* or miscarriage of justice accrued in view of the delay of seven months in passing the award. The petitioners contend that the seizure of vehicle for non payment and sale of the vehicle without proper notice is improper and illegal and the same was not considered by the Arbitrator while considering the claim preferred by the first respondent/financier.

14. Before passing the award, the Arbitrator has ordered notice to the petitioners and the paper publication effected for the sale of the asset and the offer letters issued by the prospective buyers are marked as Exs.A.9 to A.12. In the award, the sale price of Rs.10,55,000/- has been defrayed and arrived the balance payable by the petitioner as Rs.2,94,427.30/-.

15. It is not the case of the first petitioner/borrower that he was regular in paying the due despite that, the vehicle was seized. He admits that after 9th installment, he defaulted and after seizure of vehicle, he has made payment upto 21st installment. While the first petitioner/borrower is liable to pay 35 installments, as per the agreement, even according to him, he has paid only 21 installments and still 14 installments is due. For the realization of the amount due, the vehicle has been seized and sold in public auction after due publication. For the balance amount, the arbitration clause has been invoked and the Arbitrator after affording opportunity to the petitioners had proceeded. Taking note of the fact that the transaction are commercial in nature, the

an Arbitrator nominated by the Managing Director of the Lender. Having left the discretion

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19.Regarding arbitration proceedings as pointed out earlier, the Arbitrator has caused notice to the petitioners thrice before proceeding with the arbitration. The petitioners have failed to participate in the arbitration proceedings. Now, they cannot take advantage of their own fault and plead that it is an exparte award and hence, liable to be set aside.

20.The scope of the Court to interfere in an arbitration award under Section 34 of the Arbitration and Conciliation Act is very limited and narrow. Unless the award suffers any of the infirmity enumerated in Section 34(2) of the Arbitration and Conciliation Act, the impugned award cannot be set aside.

21.The contention of the petitioners that the award was passed without proper notice seems to be false. Therefore, this Court finds that the first petitioner/borrower an admitted defaulter in payment of the due can have no complaint about the seizure of the vehicle. Likewise, having voluntarily abstained from participating in the arbitration proceedings, despite notice, at later point of time, questioning the award on the ground that they were not given opportunity of hearing, does not arise.

22.In the result, the Original Petition is dismissed as devoid of merits.

21.02.2020

Index :Yes/No
Speaking Order/Non-speaking order
jbm

Dr.G.Jayachandran,J.

jbm



Pre-delivery order in
Original Petition No.394 of 2014

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