

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.01.2021

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.571 of 2020

and

A.No.3003 of 2020

1.Mani.V

S/o.Veerassamy

2. Lakshmi.M.

C/o.Mani

... Petitioners

-Vs.-

M/s.Shriram City Union Finance Ltd.,
Represented by its Authorized Representative
Having their office at No.123 Angappan Naickan St.,
Chennai-600 001.

and

it's inter alia branch, Sorento Building,
1st Floor, No.6, L.B.Road, Adyar,
Chennai-600 020.

.. Respondent

This Original Petition filed under Section 34 (2) (a) (ii) & 34 (2) (b) (iii) of the Arbitration and Conciliation Act, 1996, praying to set aside the the award dated 16.12.2019 made in ACP(EF) No.CAR 305/2019 and thereby dismiss/reject the claim of the Respondent.

For Petitioners : Mr.Vigneshwar Elango

For Respondent : Mr.K.V.Ananthakrushnan

ORDER

In a web hearing on a video conferencing platform today, Mr.Vigneshwar Elango, learned counsel on record for the two petitioners in the captioned 'Original Petition' ['OP' for the sake of brevity] and Mr.K.V.Ananthakrushnan, learned counsel on record for the lone respondent are before me, with the consent of both learned counsel, captioned OP was taken up for final disposal and it was heard out.

2. Proceedings/order made by this Court in the captioned OP in the listing on 10.12.2020 is of relevance and the same reads as follows:

'Mr.Vigneshwar Elango, learned counsel for two petitioners is before me in this web hearing on a video conferencing platform.

2. Captioned 'original petition' ['OP' for the sake of convenience and clarity] has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of convenience and clarity assailing an 'arbitral award dated 16.12.2019 bearing reference No.ACP(EF)No.CAR 305/2019'

[hereinafter 'impugned award' for the sake of convenience and clarity].

3. Learned counsel submits that captioned OP is specifically predicated on Section 34(2)(a)(iii) of A and C Act as according to him prior notice of arbitral proceedings has not been issued to petitioners. To further his contention in this direction, learned counsel draws the attention of this Court to pleadings, particularly paragraph Nos.3.3, 3.4, grounds (d) and (e) in captioned OP, which read as follows:

'3.3. Out of the Blue the petitioners were issued with a notice from the Learned Arbitrator Mr.C.A.Ravichandiran dated 18.09.2019 calling forward the petitioners to attend the Arbitration proceedings to be held on 15.10.2019. Due to some personal inconvenience, petitioners were unable to attend the Arbitration proceedings held on 15.10.2019.

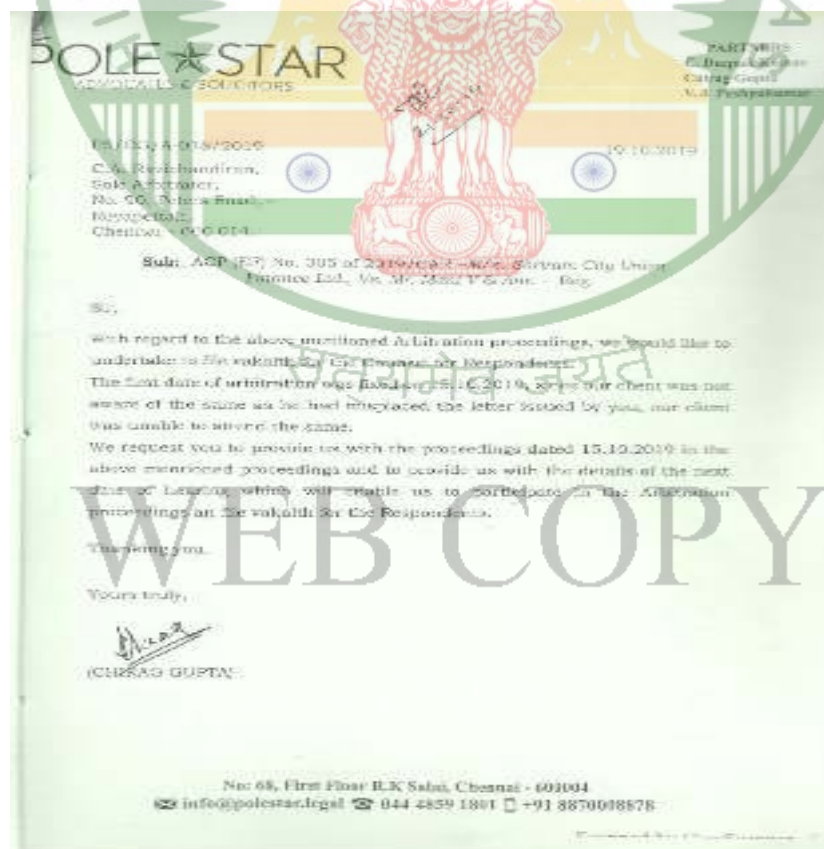
3.4. It is pertinent to point out here that the proceedings which was supposedly to be held on 15.10.2019 was held on 16.10.2019 by the Arbitrator for the reasons best known to him. The petitioners were completely unaware of the fact that the Arbitration proceedings had taken place on 16.10.2019.

d. The Learned Arbitrator in his summons issued to the petitioners called upon them to attend the Arbitration proceedings on 15.10.2019 but conducted the arbitration proceedings on 16.10.2019 in order to proceed with the arbitration in the absence of the

petitioners and set them ex-parte.

e. The Learned Arbitrator ought to have considered the fact that the petitioners issued a notice through their counsels dated 19.10.2019 requesting for the next date of hearing in order to take part in the Arbitration Proceedings.'

4. What is of significance is, in this regard, learned counsel, adverting to a notice through counsel (sent by petitioners) being notice dated 19.10.2019 emphatically asserts that the same was served in person on the arbitrator on 21.10.2019. This notice has been placed before me as part of case file. Scanned reproduction of the same reads as follows:



5. Adverting to short signature/initials on 21.10.2019 notice, learned counsel asserts that it is the signature (acknowledgement of receipt) qua sole arbitrator, who constituted the AT. Learned counsel submits that while the notice has fixed 15.10.2019, as hearing date, hearing/sitting was actually held on 16.10.2019 in unholy haste and more importantly, there is no response to 19.10.2019 notice is petitioners' counsel's further say.

6. In the light of aforesaid submission, issue limited notice on above point to sole respondent returnable by 17.12.2020. Private notice permitted. Private notice through electronic modes (besides conventional modes) also permitted.

7. Registry to requisition the records of AT from Mr.C.A.Ravichandran, Sole Arbitrator, pertaining to impugned award i.e., award dated 16.02.2019 bearing reference No.ACP(EF)No.CAR 305/2019. Registry to requisition through electronic modes of communications, if coordinates are available (besides conventional modes). At request, learned counsel for petitioners is permitted to communicate a copy of this proceedings/order to learned Arbitrator for the limited purpose of expeditious submission of records of AT in the office of Registrar General of this Court in a sealed envelope so that the same can be placed before me in the next listing.

8. List on 17.12.2020.

3. Thereafter, there were two listings of captioned OP, one on 17.12.2020 and another on 05.01.2021 and the proceedings made in these two listings read as follows:

'Proceedings dated 17.12.2020

Read this in conjunction with and in continuation of earlier proceedings dated 10.12.2020.

2. To be noted, short forms/abbreviations used in the earlier proceedings made in the previous listing on 10.12.2020 are being continued to be used in the instant proceedings also.

3. In this web hearing on a video conferencing platform today i.e., virtual hearing Mr.Vigneshwar Elango learned counsel on record for two petitioners is before me.

4. Pursuant to earlier proceedings dated 10.12.2020, Registry has put up a note saying that the records of AT have since been received and the records have also been placed before me as part of the case file. Be that as it may, vide Paragraph No.6 of previous proceedings dated 10.12.2020 limited notice was issued to sole respondent, notice has since been effected and Ms.Janani Ananthakrushnan, learned counsel who has joined hearing today submits that her Senior Mr.K.V.Ananthakrushnan, herself and co-counsel (if any) with address for service at No.14/31, Gopal Sreet, T.Nagar, Chennai-600 017, have instructions to enter appearance and file Vakalatnama. In other words, she accepts notice on behalf of sole respondent and undertakes to file Vakalatnama along with her Senior and co-counsel (if any) by Monday i.e., 21.12.2020.

5. *List after Christmas Holidays.'*

'Proceedings dated 05.01.2021

Read this in conjunction with and in continuation of earlier proceedings made in previous listing on 17.12.2020.

2. *Today, in this virtual Court, Mr.Vigneshwar Elango, learned counsel on record for two petitioners and Ms.A.Janani, counsel on record for sole respondent are before me.*

3. *Learned counsel for petitioners seeks an adjournment citing difficulty.*

List on 20.01.2021.'

4. Pursuant to aforementioned proceedings made on 10.12.2020, requisitioning records of AT qua impugned award, the same have been submitted in this Court by learned sole Arbitrator, who constituted the 'Arbitral Tribunal' ['AT' for brevity] and the records have been placed before me.

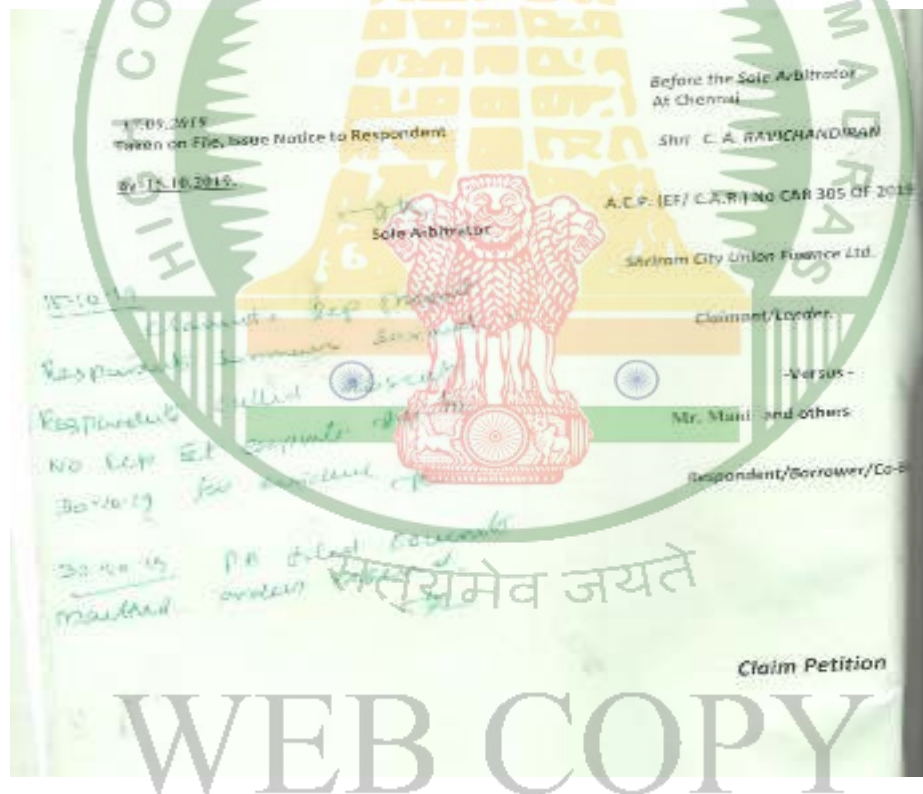
5. In the light of 10.12.2020 proceedings, the only point that arises for consideration is whether there is breach of second limb of Section 34(2)(a)(iii) of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' ['A and C Act' for the sake of brevity]. In other words, the lone point

on which learned counsel for petitioner predicated is challenged to impugned award is, the petitioners were not given proper notice of the arbitral proceedings.

6. In this regard, the proceedings made by this Court in 10.12.2020 listing, which has been extracted and reproduced supra, captures the challenge as articulated by the protagonists of captioned OP and therefore, this Court shall not dilate on the same again.

7. This Court carefully perused the records of AT qua impugned award, which have been placed before it and the following points are noticed. In this regard, this Court deems it pertinent to set out that expression '*furnish proof that*' in Section 34(2) (a) of A and C Act has been replaced by '*establishes on the basis of the record of the arbitral tribunal that*' by Amending Act being Act 33 of 2019. To be noted, vide Section 1(2) of this Amending Act, the same will kick in on the date on which, Central Government makes a notification in the Official Gazette and different dates can be appointed for different provisions of the Amending Act. In this case, the expression, which we are concerned with relates to provision of Section 7

of the Amending Act and the same kicked in i.e., came into force on and from 30.08.2019 vide notification of Central Government being S.O.3154(E). To be noted, captioned OP has been presented on 16.03.2020 [post 30.08.2019] and therefore, this is being mentioned. The adjudication/record of proceedings qua adjudication as culled out from the records of AT is as follows:



8. Therefore, it is clear that AT sent a notice dated 18.09.2019 fixing 15.10.2019 10.30.a.m to 12.30.p.m as the date and time of the first sitting of

AT. To be noted, the venue has also been mentioned in this notice. This 18.09.2019 notice has been duly received by both the petitioners on 19.09.2019 and the postal acknowledgement cards are available in the records. There is no difficulty in this regard and petitioners' counsel also does not dispute this, but, what the petitioners' counsel's say is, a letter dated 19.10.2019 was given to the sole Arbitrator, who constituted AT *inter alia* saying that petitioners could not participate in the 15.10.2019 sitting and specifically sought for (a) 15.10.2019 proceedings and (b) details of the next date of hearing/sitting so as to enable the petitioners to participate in the arbitration proceedings. It is the specific case of learned counsel for petitioners that this was served in person on the sole Arbitrator, who constituted AT on 21.10.2019 and the signatures contained in that letter is that of the sole Arbitrator. A careful perusal of not one but, three signatures of sole Arbitrator available in the records [extracted and reproduced supra] and a comparison of the same with the signature in the 19.10.2019 notice [also scanned and reproduced supra as part of 10.12.2020 proceedings] leaves this Court with the considered view that to the naked eye the signature on the 19.10.2019 communication appears to be that of the Arbitrator.

9. Be that as it may, what is of greater significance is, the Procedural History as captured in the impugned award reads as follows:

'Procedural History:

19.09.2019. The date on which, the claim petition and relevant documents filed. Specifically notifying Arbitral Tribunal's intention to pass an award on merits in case of Respondents' failure to appear and file their objections if any. Notice to Respondents ordered by 16.10.2019. 16.10.2019 Claimant's Representative present. Respondents summons served. Respondents called absent. No representation. Set exparte. Adjourned to 30.10.2019 for evidence. 30.10.2019 On petition P.A filed documents marked orders reserved.'

10. The aforementioned procedural history runs contrary to the adjudication proceedings found in the records of AT while the records of AT show that the first sitting was on 15.10.2019 as indicated in the aforementioned 18.09.2019 notice, on that day, the respondents [petitioners before me] have been set exparte and the next date of sitting has been fixed as 13.10.2019 for evidence. Thereafter, the impugned award has been made on 16.12.2019.

11. Learned counsel for respondent, submitted that the Procedural History captured in the impugned award is a typographical error and the

petitioners cannot make a mountain out of a molehill. On a demurer even if this is a typographical error, there is nothing to demonstrate that 15.10.2019 proceedings were sent to the petitioners (who are respondents before AT). On a further extreme demurer even absent 19.10.2019 communication, nothing prevented AT from sending 15.10.2019 proceedings to the respondents before AT, who are petitioners before me.

12. Learned counsel for respondent, pressed into service an order dated 11.01.2018 made by a Hon'ble Division Bench of this Court in O.S.A.No.66 of 2014. Placing reliance on this order, learned counsel for respondent submitted that the petitioners cannot insist on adjournment as a matter of right.

13. Learned counsel for respondent also insisted that notices sent by the respondent to the petitioners prior to the commencement of arbitral proceedings had also been duly received and therefore, aforementioned plea put forth by the petitioners' is specious and it cannot be entertained. In the considered view of this Court, this is not specious, but sound and correct as we are concerned with proper notice of arbitral proceedings and not pre-

arbitral communications between parties to list. In this regard, the aforementioned 30.08.2019 Amendment to Section 34(2)(a) of A and C Act becomes significant and this is not a case of protagonists of captioned OP furnishing proof, but it is a case of plea being established on the basis of records of Arbitral Tribunal. The paragraphs dealing with proceedings before Arbitral Tribunal in the aforementioned order of Hon'ble Division Bench are paragraphs 5 and 6 and the same read as follows:

'5.It is the case appellants that they had not received any intimation of the approval of the loan. Admittedly, the first appellant had received phone calls from Ms.Ramya and Mr.Shriram (Regional Manager) from Mylapore Branch of M/s.Shriram City Union Finance Limited for non-payment of the loan instalments. He apparently did nothing inspite of phone calls. Be that as it may, the first appellant could not have claimed an adjournment of the arbitration proceedings as a matter of right. It was for the appellants to appear before the Arbitrator and make their submissions.

6. The learned Single Bench very rightly found that the appellants had received notice and the request of the first appellant to postpone the hearing had not been acceded to. Before the actual date of hearing, the first appellant wrote another letter reminding the Arbitrator to postpone the hearing. Adjournment cannot be claimed as of right. If adjournment were not granted, it was for the

appellants to appear before the Arbitrator and file their pleadings, which they had not done.'

14. Learned counsel for petitioners, submitted that the said order of Hon'ble Division Bench is clearly distinguishable on facts as this is not a case where the petitioners sought adjournment and the petitioners are not saying that adjournment is a matter of right. On the contrary, it is pointed out that this is a case where the petitioners wanted to know the next date of sitting so as to enable them to participate in the arbitration proceedings. This has been articulated in aforementioned 19.10.2019 letter and the same has also been alluded to supra. It was also submitted that the aforesaid order is not an authority for the proposition that petitioners need not have been put a notice that they being set exparte and the petitioners need not be provided with copies of the proceedings dated 15.10.2019. Learned counsel also submitted that above order was rendered prior to 30.08.2019. This Court finds force in the submissions of learned counsel petitioners and this Court accepts the submission that the aforementioned order is both distinguishable on facts and is also not an authority for the proposition that is being canvassed in the case on hand by the respondent. In this regard, this Court

reminds itself of observation of Lord Denning in ***Harper Vs. National Coal Board [(1974) 2 All ER 441(CA)]*** that precedents are not to be read ipsissima verba. To be noted, this Harper's case principle has been recognised by Hon'ble Supreme Court in **BGS SGS Soma JV Vs. NHPC** reported in **(2020) 4 SCC 234** and relevant paragraph is paragraph 43. Relevant portion of this paragraph 43 reads as follows:

'43. In any case, a judgment must be read as a whole, so that conflicting parts may be harmonised to reveal the true ratio of the judgment. However, if this is not possible, and it is found that the internal conflicts within the judgment cannot be resolved, then the first endeavour that must be made is to see whether a ratio decidendi can be culled out without the conflicting portion. If not, then, as held by Lord Denning in Harper v. National Coal Board [Harper v. National Coal Board, 1974 QB 614 : (1974) 2 WLR 775 : (1974) 2 All ER 441 (CA)] , the binding nature of the precedent on the point on which there is a conflict in a judgment, comes under a cloud. [In Harper, 1974 QB 614 : (1974) 2 WLR 775 : (1974) 2 All ER 441 (CA), the decision in Central Asbestos Co. Ltd. v. Dodd, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All ER 1135 (HL), a House of Lords judgment, had to be applied. It was found that two learned Law Lords decided the question of law in favour of Dodd, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All ER 1135 (HL), whereas two learned Law Lords decided the question of law against Dodd, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All

ER 1135 (HL), stating that his claim was barred. As Lord Denning stated, the fifth Law Lord, Lord Pearson, was the odd man out, in that he agreed with the two learned Law Lords that the law did not support Dodd case, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All ER 1135 (HL), but agreed with the minority judges that Dodd, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All ER 1135 (HL) claim was not barred. This being the case, Lord Denning spoke of the precedential value of Dodd case, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All ER 1135 (HL) as follows: "How then do we stand on the law? We have listened to a most helpful discussion by Mr McCullough on the doctrine of precedent. One thing is clear. We can only accept a line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would show the decision itself to be wrong. The second proposition is that if we can discover the reasoning on which the majority based their decision, then we should accept that as binding upon us. The third proposition is that, if we can discover the reasoning on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong result. The fourth proposition is that, if we cannot discover the reasoning on which the majority based their decision, we are not bound by it. We are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House. In support of those propositions, I would refer to the speech of Lord Dunedin in Great Western Railway Co. v. Owners of S.S. Mostyn, 1928 AC 57, pp. 73-74 (HL), and of Lord MacDermott in Walsh v. Curry, 1955 NI 112 (CA), pp. 124-125 and of Viscount

Simonds in Midland Silicones Ltd. v. Scruttons Ltd., 1962 AC 446, pp. 468-469 : (1962) 2 WLR 186 (HL) Applying the propositions to Central Asbestos Co. Ltd. v. Dodd, 1973 AC 518 : (1972) 3 WLR 333 : (1972) 2 All ER 1135 (HL), the position stands thus : (1) the actual decision of the House in favour of Dodd must be accepted as correct, We cannot accept any line of reasoning which would show it to be wrong. We cannot therefore accept the reasoning of a minority of two — Lord Simon of Glaisdale and Lord Salmon — on the law. It must be wrong because it led them to the wrong result. (2) We ought to accept the reasoning of the three in the majority if we can discover it. But it is not discoverable. The three were divided. Lord Reid and Lord Morris of Borth-y-Gest took one view of the law. Lord Pearson took another. We cannot say that Lord Reid and Lord Morris of Borth-y-Gest were correct : because we know that their reasoning on the law was in conflict with the reasoning of the other three. We cannot say that Lord Pearson was correct : because we know that the reasoning which he accepted on the law led the other two (Lord Simon of Glaisdale and Lord Salmon) to a wrong conclusion. So we cannot say that any of the three in the majority was correct. (3) The result is that there is no discernible ratio among the majority of the House of Lords. In these circumstances I think we are at liberty to adopt the reasoning which appears to us to be correct.” (Harper case, 1974 QB 614, pp. 621-22)(emphasis in original)]’.

15. This Court also reminds itself of the observation of Hon'ble

Supreme Court in ***Sreenivasa General Traders Vs. State of Andhra Pradesh***

reported in **(1983) 4 SCC 353** where it was held that observations case laws have to be read in the context of facts settings in which they appear. The fact setting of the case relied on by learned counsel for respondent is clearly distinguishable qua case on hand as that was a case where adjournment was insisted as a matter of right and it turned on several other issues also.

16. Be that as it may, the petitioners have taken the stand that the arbitral proceedings were hastily held on 16.10.2019 owing to the procedural history captured in the impugned award, but it was not and if 15.10.2019 had been sent/given to petitioners the trajectory, dimensions and dynamics of this matter may well have been different.

17. Owing to the narrative thus far, the inevitable sequitur is, there has been an infarct second limb of Section 34 (2)(a)(iii) leading to a Section 34(2)(a)(i) situation i.e., the infarct qua lack of proper notice of arbitral proceedings has resulted in putting the parties i.e., petitioners under an incapacity qua the arbitral proceedings. This Court also notices that there is a breach, which has the trappings of Section 18 of A and C Act as, the 15.10.2019 proceedings have not mailed to the petitioners, whereas the respondent has had the benefit of the said proceedings.

18. Before parting with this case, in the light of the view that has been taken by this Court, this Court deems it appropriate to extract and reproduce a portion of paragraph 52 of **McDermott International v. Burn Standard Co. Ltd., reported in (2006) 11 SCC 181**) which reads as follows:

'52. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.'

19. If the parties resort to re-arbitration, though obvious, any observation made in this order will not come in the way of such proceedings.

20. There is one other aspect of the matter/proceedings which needs to be set out in this matter. Prayer in the captioned OP reads as follows:

'It is therefore in the interest of justice necessary and prayed that the Hon'ble court may be pleased to set aside the the Award dated 16.12.2019 made in ACP(EF) No.CAR 305/2019 and thereby dismiss/reject the claim of the

Respondent and pass further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the this case and thus render justice.'

21. A perusal of prayer shows that the petitioners seek to set aside the impugned award and consequently want dismissal/rejection of the claim of the respondent. There is no question of dismissing/rejecting the claim of the respondent in this OP. It is a matter for re-arbitration, if that be so. All that can be said/done in the captioned OP is allowed to the extent of setting aside the impugned award. Therefore, the second limb of prayer in the captioned OP i.e., dismissal/rejection of the claim of respondent is not acceded to. It is made clear that the impugned award is set aside and the captioned OP is allowed to that extent. This shall be borne in mind by Registry while drawing up the decretal order. Considering the nature of the matter, there shall be no order as to costs. Consequently, connected Application No.3003 of 2020 is closed.

22. Registry is directed to retain the records of AT along with the envelope and covering letter from the sole Arbitrator dated 12.12.2020 in a sealed envelope and this is obviously for the purpose of reference in an intra

court appeal, if that be so. There shall be a post script to this order also in this regard.

20.01.2021

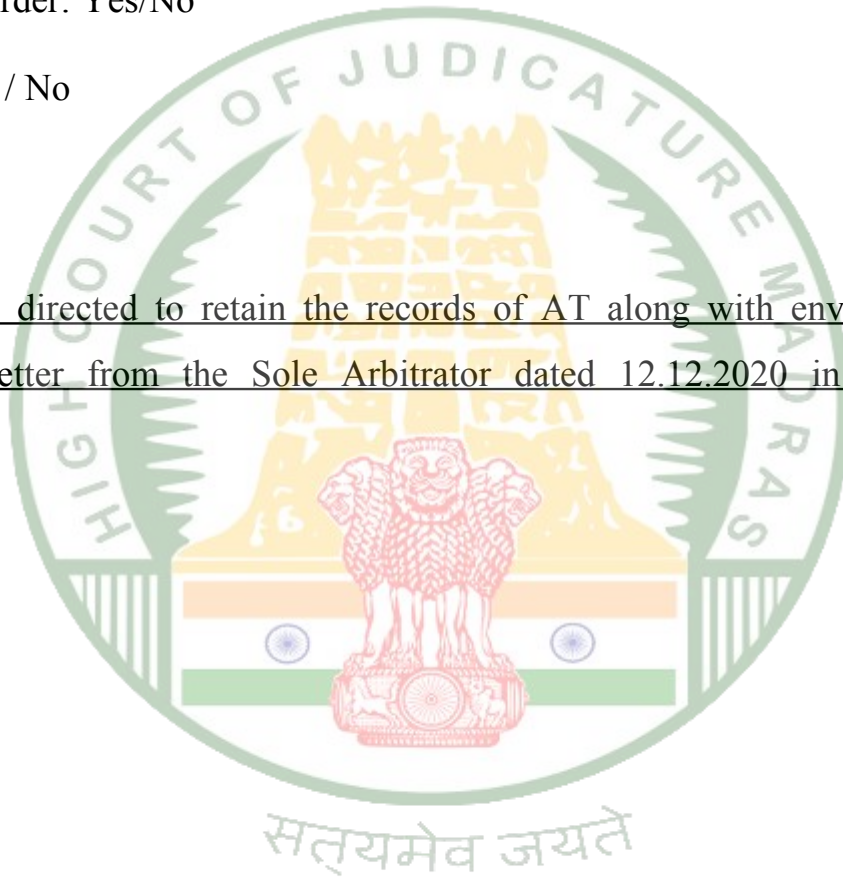
Speaking order: Yes/No

Index: Yes / No

kmi

P.S.

Registry is directed to retain the records of AT along with envelope and covering letter from the Sole Arbitrator dated 12.12.2020 in a sealed envelope.



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