

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.03.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.No.3077 of 2020

M/s.Indusind Bank Limited
Represented by its Authorised representative
No.25, Steeple Reach, A Block, 3rd Floor,
Cathedral Road, Gopalapuram,
Chennai – 600086 ... Applicant

Vs.

1.M/s.A.K.Automobiles, (Borrower)
Rep. by its Proprietor
Mr.ArjunNagpal, No. B-24, Swami,
DayanandMargKanti Nagar,
Main Road, Delhi – 110 051.

2.Arjun Nagpal, (Guarantor)

3.Rajiv Nagpal, (Guarantor)

... Respondents

Prayer: Judges summon filed under Order XIV Rule 8 OS Rules read with Section 29 – A (4) of the Arbitration and Conciliation Act, 1996 to extend time by a period of 6 months from 15.04.2020, to enable the arbitrator to complete the arbitration proceedings in Arbitration Case CDN/IIBL/003/2019 as between the applicant and the respondents.

For Applicant : Mr.M.Arunachalam

For respondents 2 : Mr.Dushyant Kumar

ORDER

The above application is filed for extending the mandate of the arbitrator. The respondents who have entered appearance had filed a counter, in which they have inter alia contended that the very initiation of the arbitral proceedings is a gross abuse since the notice under Section 21 had not been served on them and it was only the notice dated 14.08.2019 that the respondents had first received. This was a correspondence regarding the initiation of the arbitral proceedings. The said communication was in the form of order dated 13.08.2019 alleged to have been passed by the arbitral tribunal.

2. The respondents thereafter consulted their counsel, who on enquiry came to know that the next date of hearing was on 09.09.2019.

The categorical case of the respondents is that they had neither received the notice under Section 21 invoking arbitration clause nor had they received the letter appointing the learned arbitrator. Therefore they would contend that the very initiation of the arbitration proceedings is totally flawed and contrary to the procedure contemplated under the Arbitration and Conciliation Act.

3. The respondents have also taken out an application under Section 16 (2) before the learned arbitrator on 21.01.2020. The learned counsel would contend that since the very initiation is flawed there cannot be an extension of the arbitral proceedings.

4. The learned counsel appearing on behalf of the applicant would submit that the respondents have participated in the proceedings and that the proceedings are at the stage of recording evidence. The learned counsel would further argue that the Section 16 (2) application had also been argued by the parties after which the lock-down had been implemented, therefore the matter could not be proceed further. In the

interregnum, the time had also expired. Therefore, they had come forward with the above application. The learned counsel for the applicant would also submit that no prejudice would be caused to the respondents if the extension is granted.

5. Heard the learned counsels and perused the records.

6. A perusal of Section 21 of the Arbitration and Conciliation Act would clearly indicate that the proceedings would commence when the request for referring the dispute of arbitration is received by the respondents. This appears to be a *sine qua non* for initiating the arbitral proceedings and is the commencement of the arbitral proceedings. In the instant case, there is nothing to show that the notice has been received by the respondents. Further, even the letter appointing the arbitrator has not been served on the respondents and there is no proof to show service in this regard.

7. This Court had called the records of the learned arbitrator which

was produced by the arbitrator. A perusal of the same would show that the 1st notice dated 17.05.2019 is a notice sent by the arbitrator informing the Advocate for the applicant and the respondents that the matter would be posted on 03.06.2019 for their appearance. This notice also contains the disclosure made under Section 12 (1) r/w Explanation 2 and Sixth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015. This notice has not been served on any of the respondents. The notice has been returned with an endorsement “Left”.

8. Thereafter, the arbitrator has issued a notice dated 09.09.2019. It is only thereafter that the respondents have appeared through counsel and have immediately taken out an application under Section 16 (2) for dismissing the proceedings on the ground that the constitution of the tribunal is in utter disregard with the procedure mandated under the agreement and that the Jurisdiction was only at Delhi and not Chennai as provided under the loan agreement. When this application was pending before the arbitrator the present application has been moved before this Court.

9. With reference to the 1st argument that the respondents have not been served with the notice as contemplated under Section 21, this Court finds there is force in this argument advanced by the respondents. Admittedly there is no proof to show that Section 21 notice has been served on the respondents. That apart, even the notice appointing the arbitrator has not been served on the respondents. Therefore, there is a violation of the procedure contemplated under Section 21 of the Act.

10. As regards the second argument with reference to the jurisdiction, this Court finds that under the loan agreement, clause 21 which deals with the Law, Jurisdiction and Arbitration. This clause provides that the venue of arbitration would be at Chennai and the language would be English. Therefore, the seat is at Chennai. The letter of continuing guarantee which is given by the co-borrowers clearly states that the guarantee has been offered for the loan borrowed by M/S.A.K.Automobiles, the 1st respondent. The guarantee deed does not contain a separate arbitration clause. However, considering that under the

loan agreement the seat of arbitration has been shown as Chennai and taking into account the fact that the guarantee deed is issued as security for the loan agreement the same is intertwined with the loan agreement. The decision in **2013 (1) SCC 641 – Cholero Controls India Pvt. Ltd Vs. Severn Tent Water Purification** would apply to the facts of this case.

11. Considering the fact that the very initiation of the arbitration proceedings is flawed, the mandate of the arbitrator is not extended and consequently the application stands dismissed. The original records submitted by the learned arbitrator is returned to her.

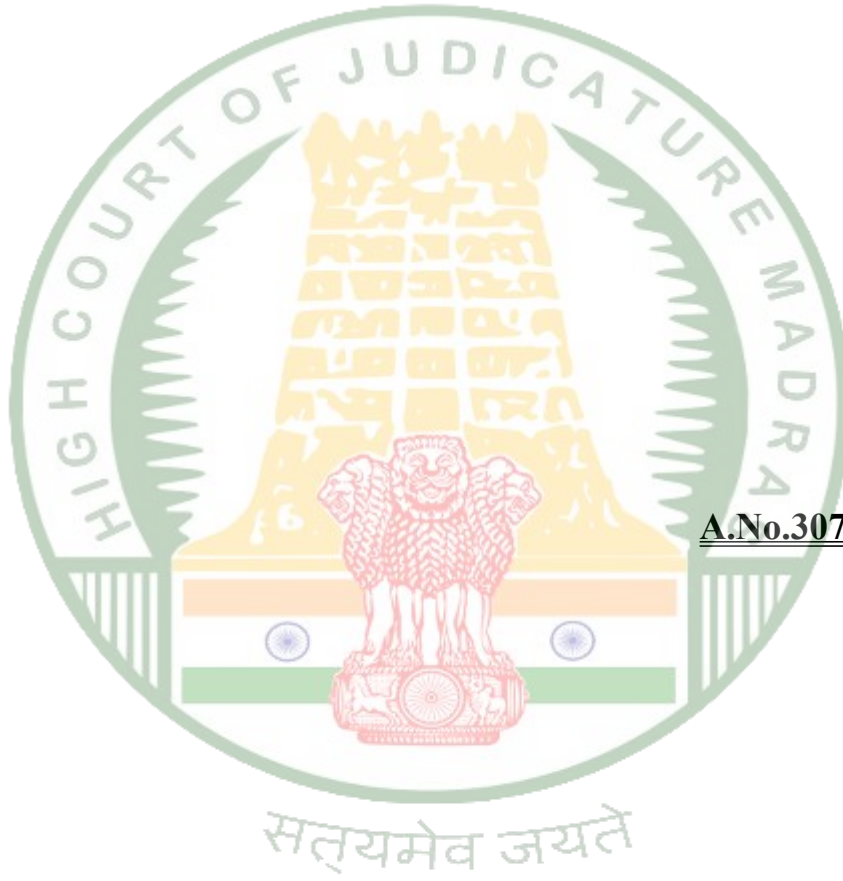
01.03.2021

Internet : Yes/No
Index : Yes/No
Speaking / Non-Speaking
kan

WEB COPY

P.T. ASHA. J.

kan



A.No.3077 of 2020

WEB COPY

01.03.2021