

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 8TH DAY OF JULY 2021

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.P. No.872 of 2017

In the matter of Arbitration
& Conciliation Act 1996
and

In the matter of dispute between
IndusInd Bank Ltd and Mr.R.Sudesh
Babu and another arising under the
loan agreement No.TCB00071D dated
28.04.2014

In
Arbitration Matter Number
SRR/A.C.P No.1064 of 2014, Order
dated 02.05.2017

Mr.C.Mugilan,
No.41, Perambur High Road,
Perambur,
Chennai 600 012

... Petitioner/2nd Respondent

-vs-

1.M/s. IndusInd Bank Ltd
Rep.by its Power of attorney holder,
Mr.B.V.Giri,
having its Consumer Finance Division at
No.115 & 116 G.N.Chetty Road,
T.Nagar, Chennai 600 017

...Respondent/Bank

2.Mr.R.Sudesh Babu
No.18/3, 2nd Street
Poombugar Nagar,
Chennai 600 099

..Respondent/1st Respondent

3.M/s. Rajeni Ramadass,
Advocate (Sole Arbitrator)
New No.68, Basha Street
Choolaimedu, Chennai 600 094

...Respondent/Arbitrator

Original Petition praying that this Hon'ble Court be pleased to call for the records relating to the Award SRR/ACP, No.1064 of 2014 passed by the 3rd Respondent/Arbitrator, dated 02.05.2017, set aside the same.

This Original Petition coming on this day before this Court for hearing, in the presence of Mr.V.Selvaraj for Mr.V.Ravi, advocates for the petitioner herein and Mr.S.R.Sundar Advocate for the 1st respondent herein and upon reading the petition and the award dated 02.05.2017 filed herein and this Court having observed that the arbitral proceedings have been properly conducted and based on documents, the award has been passed,

it is ordered :-

That the Original Petition No.872 of 2017, be and is hereby dismissed.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
08th DAY OF JULY 2021.

Sd./-

ASSISTANT REGISTRAR (COMM.CASES)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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27.08.2021

O.P. No.872 of 2017

ORDER:-

DATED: 08.07.2021

THE HON'BLE MR.JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 31.08.2021

APPROVED ON : 02.09.2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 8/7/2021

C O R A M

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

O.P.Nos.871 to 875 of 2017

C. Mugilan	...	Petitioner in all the Original Petitions
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Vs

1. M/s. Indusland Bank Ltd
rep. By its Power of Attorney Holder
Mr.B.V.Giri
Having its Consumer Finance Division
at No.115 & 116 G.N.Chetty Road
T.Nagar
Chennai 600 017.

2. R.Sudesh Babu

3. Rajeni Ramadass	...	Respondents in all the Original Petitions
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Original Petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996, against the Arbitral Award made in SRR/ACP Nos.1062, 1064, 1065, 1063 and 1060 of 2014, dated 2/5/2017, issued on 5/5/2017.

For petitioner	...	Mr.V.Selvaraj for Mr.V.Ravi
For respondents	...	Mr.S.R.Sundar for R.1

COMMON ORDER

These Original Petitions have been filed against the Arbitral Award, dated 2/5/2017, made in SRR/ACP Nos.1062, 1064, 1065, 1063 and 1060 of 2014, respectively.

2. Challenging the award, dated 2/5/2017, passed by the sole Arbitrator in a dispute referred to him arising out of the loan agreement, dated 28/4/2014, entered between the parties, the petitioner herein is a co-borrower/guarantor; R.2 is the borrower and R.1 is the lender.

3. The facts leading to filing of these Original Petitions are as follows:-

The petitioner and second respondent availed loan from the first respondent, for the purchase of truck, entered into a loan agreement, dated 28/4/2014, in accordance with Clause 23 of the said loan agreement. The petitioner and second respondent are liable to repay the amount of Rs.9,54,200/-. The second respondent also guaranteed for the due performance of the said loan agreement and had secured the prompt repayments by the first respondent, as per the schedule of the said agreement. As the payment is not coming forward, contract was terminated and the dispute was referred to the Arbitration.

4. The Arbitrator after considering the submissions made on either side, directed the respondents to jointly and severally pay the claim sum of

Rs.5,06,775/- (Rupees Five lakhs six thousand seven hundred and seventy five only) with a further interest @ 18% p.a., from 11/10/2014 until the date of actual payment.

5. Challenging the same, the petitioner herein had come forward with these Arbitration Original Petitions, under Section 34 of the Arbitration and Conciliation Act.

6. Heard Mr.V.Selvaraj, learned counsel for the petitioner and Mr.S.R.Sundar, learned counsel for R.1.

7. Though various allegations raised, the main ground of attack, assailing the award is that the first respondent has not followed the procedure contemplated under Section 133 of the Contract Act, as the vehicle has been sold at a very low price, without calling for any tender or auction. As per Section 133 of the Contract Act, the petitioner is entitled for discharge.

8. The main contention of the learned counsel appearing for the petitioner is that the Arbitrator was appointed, on 20/10/2014. Notice of appointment of Arbitrator, dated 20/10/2014 was not served on the petitioner. Even before the notice said to have been sent as termination letter, the claim petition has been numbered. Hence the entire arbitral proceeding is bad in law and the award has to be set aside.

9. It is the further contention that Arbitrator has not disclosed the

non-interest with the respondent Company. Therefore, the appointment of Arbitrator itself is not according to law and finally, notice under Section 21 of the Act has not been properly issued.

10. Learned counsel appearing for the first respondent Bank submitted that proper notice has been issued and the first respondent has in fact participated in the arbitration proceedings from the year 2014. He further submitted that sufficient opportunities were given for the petitioner to verify the documents. Award came to be passed finally on 2/5/2017.

11. Further, even assuming that there is a violation of the provision of any Act, the petitioner could have raised the same at earlier point of time. The allegations made by the petitioner is nothing but a method adopted to disown his liability to the respondent Bank. Hence submitted that absolutely, there is no merit in these Original Petitions and prays for dismissal of these Original Petitions.

12. It is to be noted that dispute has been referred to in respect of the loan agreement entered between the parties. The petitioner herein stood as both Co-borrower and guarantor and the appointment was made prior to the amendment in the year 2014. It is the contention that the appointment procedure is not proper and there is no justifiable reason as assigned by the Arbitrator to continue his proceedings.

13. It is to be noted that in case of any Arbitrator appointed, the

same has to be challenged by the party, who is entitled to challenge the same, within fifteen days after he comes to know of the Constitution of the Tribunal or after becoming aware of any circumstances referred to in Sub-Section 3 of Section 12 for making a written objection to the Tribunal.

14. In the absence of any such objection specifically made, the Tribunal has no other option except to proceed with arbitration. The award itself indicate that from the date of hearing, i.e., 28/11/2014, till the award is passed, on 2/5/2017, the parties are in fact participated in the proceedings and taken all possible defence except the objection as to the appointment of Arbitrator. Despite the fact that the application in I.A.No.2 of 2016 filed by the petitioner, under Section 133 of the Contract Act, came to be dismissed, which resulted in filing of C.M.As before this Court, in C.M.A.Nos.2579 to 2583 and vide order, dated 24/11/2016, the same were got dismissed by a learned Single Judge of this Court. Now it is submitted by the learned counsel that Review Application is pending as against the above order, i.e., not germane to consider these Original Petitions.

15. Be that as it may. An arbitral award can be set aside only on the following limited ground, under Section 34 of the Act.

- (i). Incapacity of the party
- (ii). Invalidity of the arbitration agreement
- (iii). Absence of proper notice for appointment of an arbitrator

- (iv). Non arbitrability of disputes
- (v). Composition of the arbitral not being in accordance with the agreement.
- (vi). Subject matter not capable of being settled by way of arbitration
- (vii). Award is in conflict with the public policy of India and
- (viii). the award is vitiated by the patent illegality.

16. Though much has been emphasised that no notice for invocation has been served on them, which has not even raised during the entire arbitral proceedings either under section 13 or 16 of the Arbitration and Conciliation Act, 1996, despite several adjournments had taken by them, now it cannot be said that there no notice is served. Even assuming that any provision has been violated, despite the same, the party participated in the proceedings, without any objection with regard to such violation, the conduct shall be taken as a waiver of any such violation.

17. Section 4 of the Act is very clear that any provision of this Part from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

18. Another ground raised by the learned counsel for the petitioner is

that before sending notice intimating appointment of arbitration and fixing the hearing date, claim application has already been filed. It is the contention that as per Section 23 of the Act, claim statement can be filed only after fixing the hearing date.

19. On a careful perusal of Section 23 of the Arbitration and Conciliation Act, 1996, makes it very clear that the claim statement can be filed within the period of time agreed upon by the parties or determined by the arbitral tribunal.

20. Though letter addressed by the arbitrator fixing the date of hearing as 28/11/2014, indicating the number of arbitration proceedings, the letter in fact, indicate that the claim statement along with necessary documents in support thereof is appended with notice. Receipt of this notice is not disputed. What was sought to be disputed is the claim statement ought not to have been received prior to fixing any hearing date.

21. Even assuming that there is any infraction of the procedure when the same is not objected to by the party, who proceeded to continue, to participate in the arbitral proceedings, without any such objection, his conduct deemed to have waived such violation. Therefore, the same cannot be a ground to interfere with the arbitral award which is passed, otherwise, on the basis of all the documents filed by the claimant. It is after all a loan transaction.

22. Admittedly, the applicant is a co borrower and it is further to be noted that as far as Section 133 is concerned, it is to be noted that Clause 9.7 of the loan agreement makes it very clear that the co borrower expressly agree that they shall not be exonerated from their liability to the lender under any circumstances, including without any limitation, the following:

- (a). by any variance made without their consent in terms of this contract or transaction between the Lender and the Borrower
- (b). by any contract made between the Lender and the Borrower by which the Borrower be released, or
- (c). by any act or omission of the Lender the legal consequences of which may discharge the borrower
- (d). by the Lender making a compromise with, or promising to give time to or not to sue the Borrower or
- (e). by the Lender losing the security.

23. Clause agreed between the parties makes it clear that any variation even made without the consent of the co borrower, he cannot be exonerated. The Hon'ble Supreme Court in (2002) 5 SUPREME COURT CASES – 433 (BUILD INDIA CONSTRUCTION SYSTEM Vs. UNION OF INDIA), has held that the contract may give one of the parties the power to unilaterally vary the obligations under a contract, and if such power can be spelled out from the terms of the contract, then the unilateral

variation of obligation shall be binding on the other party.

24. In 1998 3 LAW WEEKLY – 391 (STATE BANK OF INDIA, AMBATTUR INDUSTRIAL ESTATE, MADRAS 58 Vs. DHARAM KUMAR & ANOTHER), this Court has held that as per Section 23 of the Act, if the consideration or object of an agreement is said to be unlawful, then the said agreement is void.

25. In such a view of the matter, I do not find any merit in these Original Petitions. Award in fact was passed, on the basis of documentary evidence. In fact, the proceedings recorded in the award itself indicate that from 28/11/2014, initial hearing date, adjournments were taken till 7/1/2017 by the respondents, who participated in the proceedings and filed application for discharge of surety also under Section 133 of the Contract Act. It was also disposed of by the learned Arbitrator. All these facts clearly show that the arbitral proceedings have been properly conducted and based on documents, the award has been passed.

26. Accordingly, these Original Petitions are dismissed.

Sd./-N.S.K.J.
08.07.2021

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Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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