IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div.) No.132 of 2022

Vaishnavi Reddy D ... Petitioner

Vs.

1. M/s.HDFC Bank Limited
a Banking Company incorporated
Under the provisions of Indian
Companies Act and holding a license of Banking
from Reserve Bank of India
and having its registered Office at
"HDFC Bank House", Senapati Bapat Marg
Lower Parel, Mumbai, Maharashtra - 400 013

and having one of its branch office at
No.110, Cerebros, Nelson Manickam Road
Aminjikarai, Chennai - 600 029 ... Respondent

Arbitration Original Petition filed under Section 34(2)(b)(ii) and Section 34(2-A) of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award dated 24.09.2021 bearing No.HDFC/ARB/215/2021 passed by sole Arbitrator and to direct the respondent to pay the costs.

For Petitioner : Mr.J.Ravi Kumar

ORDER

Captioned 'Arbitration Original Petition' [hereinafter 'Arb.OP' for the sake of brevity] has been presented in this Court on 03.01.2022 assailing an 'arbitral award dated 24.09.2021 bearing reference Arbitration Case No.HDFC/ARB/215/2021' [hereinafter 'impugned award' for the sake of convenience and clarity]. To be noted, impugned award has been made by an 'Arbitral Tribunal' ['AT'] constituted by a sole Arbitrator.

2. Owing to the limited legal landscape qua a legal drill under Section 34 of A and C Act, short facts shorn of elaboration will suffice. Factual matrix in a nutshell containing essential facts that are imperative for appreciating this order are that the petitioner before me, who is an individual and (who shall be referred to as 'borrower' for the sake of convenience and clarity), admittedly took a personal loan from the respondent before me [hereinafter 'said Bank' for the sake of convenience and clarity] vide a 'loan agreement dated 16.03.2018 bearing No.55629979' [hereinafter 'primary contract' and /or 'said loan agreement' for the sake of convenience and clarity]; that the borrower was sanctioned personal loan of

a little over Rs.5.47 Lakhs (Rs.5,47,908/- to be precise); that this personal loan was disbursed by said Bank; that the borrower had to re-pay this loan in 69 monthly instalments of Rs.13,280/- each; that admittedly borrower committed default after paying some instalments; that the said Bank sent a loan recall notice dated 19.01.2021 calling upon the borrower to pay the outstanding as on 07.01.2021; that the borrower did not pay the outstanding in spite of such notice, repeated requests, reminders and further notices; that said loan agreement consists of a arbitration clause; that this arbitration clause in the said loan agreement (primary contract) serves as an arbitration agreement between the parties i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of 'the Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity]; that the said Bank invoked the arbitration agreement in and by notice dated 02.03.2021 bearing reference HDFC/ARB/215/2021 appointing a learned member of the Bar (Advocate) as sole Arbitrator; that this 02.03.2021 notice was admittedly received by the borrower; that the borrower neither replied nor responded to this 02.03.2021 arbitration agreement invocation notice; that sole Arbitrator i.e., 'Arbitral Tribunal' ['AT'] entered upon reference; that as captured in the impugned award AT sent atleast two notices to the borrower, one for the sitting of AT on 03.08.2021 and a second notice for the sitting of AT on 10.08.2021; that the borrower admittedly received these notices from the AT but did not go before AT; that AT proceeded with the arbitration, framed issues on the basis of available pleadings i.e., claim statement (to be noted borrower did not go before the AT and file a counter); that AT considered the issues on merits; that there was oral and documentary evidence on behalf of the said Bank before the AT (to be noted, said Bank was claimant before AT); that one witness was examined on behalf of the said Bank; that five documents i.e., Exhibits were marked by the said Bank as Ex.C.1 to Ex.C.5; that vide the impugned award, AT determined that the borrower is liable to pay a little over Rs. 4.43 Lakhs (Rs.4,43,828.52/- to be precise) together with future interest besides saying that the borrower is liable to pay Rs.10,000/- (Rupees Ten Thousand Only) towards costs; that vide the impugned award, AT had also held that on failure to pay the aforementioned quantified amount by the borrower within the stipulated 30 days time, the same can be recovered by attachment and sale of personal assets and properties of the borrower; that a signed copy of this impugned award was admittedly delivered to the borrower by the AT by mail (speed post with acknowledgement due) under cover of a letter dated 27.09.2021 (served on the borrower on 06.10.2021); that the borrower has now come up with captioned Arb.OP assailing the impugned award.

3. Mr.J.Ravi Kumar, learned counsel for borrower (petitioner before me) notwithstanding very many averments in the captioned Arb.OP and notwithstanding several grounds raised in the captioned Arb.OP, in his campaign against impugned award, made focused submissions on two points and they are as follows:

(i) The very appointment of Arbitrator is bad in law as it is unilateral;

(ii) The impugned award travels beyond the scope of arbitration in saying that the monies can be recovered from the borrower by attachment of assets of the borrower if the award amount is not paid within the time stipulated;

4. I carefully considered the detailed arguments made by learned counsel for petitioner in captioned Arb.OP (borrower) in support of the aforementioned contentions. In other words, I heard out the matter for admission in accordance with Rule 8 of the Madras High Court Arbitration Proceedings Rules, 2017 and clause 8.5 of the Practice Directions thereat. After careful consideration, I am not inclined to admit or issue notice in the captioned Arb.OP. The reasons will be set out infra. In the course of setting out the reasons, I shall consider the points, discuss the same and also give my dispositive reasoning in the light of the factual matrix which has been captured / set out supra. Reasons are as follows:

(i) Though six case laws have been placed before this Court as a compilation, learned counsel pressed into service four of these case laws and they are ***TRF Ltd. Vs. Energo Engineering Projects Ltd.*** reported in ***MANU/SC/0755/2017, HRD Corporation Vs.GAIL (India) Limited*** reported in ***MANU/SC/1066/2017, Bharath Broadband Network Limited Vs. United Telecoms Limited*** reported in

MANU/SC/0543/2019 and ***Perkins Eastman Architects DPC Vs. HSCC (INDIA) Ltd.*** reported in ***MANU/SC/1628/2019*** to buttress his first argument that the appointment of Arbitrator is unilateral and therefore the appointment is bad in law;

(ii) Before I respectfully refer to the aforementioned case laws, I remind myself of the celebrated ***Padma Sundara Rao*** case law rendered by a Hon'ble Constitution Bench of Supreme Court in ***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in ***(2002) 3 SCC 533. Padma Sunda ra Rao*** case law having been rendered by a Constitution Bench, the principle laid down thereat is elevated from the status of a ratio to a declaration of law. In ***Padma Sundara Rao*** case law, it was *inter alia* made clear that a case law should be cited by referring to the fact setting and even one difference in fact can make a world of difference to the ratio. Most relevant paragraph in the celebrated/oft quoted Constitution Bench Judgement (***Padma Sundara Rao*** case law) is paragraph 9 and the same reads as follows:

> *'**9.**Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'*

(iii) I respectfully applied ***Padma Sundara Rao*** principle to the aforesaid four case laws. It is very clear that the aforesaid four case laws do not come to the aid of the petitioner/borrower in the case on hand and the reasons are as follows:

> a) In the aforesaid case laws the appointment of Arbitrator was objected to at the first available opportunity or it was at least at the stage of

appointment of arbitrator and it was not a post award exercise in a Section 34 legal drill;

b) If the above trend is entertained it will open the flood gates and it can pave the way for parties waiting for awards to be made and thereafter raising points that were (purportedly) available to them even at the time of invocation of the arbitration clause even though they were put on notice. This will defeat the very objective of 'Alternate Dispute Resolution' ['ADR'] mechanism as expeditious dispensation of justice is one of the sanctus sublime philosophies underlying ADR;

c) Though learned counsel neither argued nor placed before this Court and did not press into service ***Lion engineering*** case law [***Lion Engineering Consultants vs. State of Madhya Pradesh and Others*** reported in (***2018) 16 SCC 758***], I deem it appropriate to set out that this Court is aware of the ratio of Hon'ble Supreme Court in ***Lion Engineering*** principle wherein it was held that a point which could have been raised before the AT (but was not raised) can be raised for the first time in Section 34. To be noted ***Lion Engineering*** principle was rendered by saying that ***MSP Infrastructure*** case law ***[MSP Infrastructure Ltd., Vs. M.P. Road Development Corpn. Ltd.,*** reported in ***(2015) 13 SCC 713]*** does not lay down the correct position of law. If ***Padma Sundara Rao*** Constitution Bench principle is applied, ***Lion Engineering*** is also distinguishable on facts and it does not come to the aid of petitioner in this case as this is a case where the petitioner (borrower) has received the invocation notice but did not respond or reply and also received not one but two notices from the AT and has simply not gone before the AT. The least the borrower could have done is to send a response to the AT or object to the unilateral appointment. To be noted, in ***Lion Engineering*** respondent State sought amendment to its objections after three years. Appellant Lion Engineering contended that amendment to objection which was not raised under Section 16(2) before Arbitrator could not be raised in Section 34 relying MSP case.

(d) The aforementioned four case laws are distinguishable on facts on another facet. In the aforementioned ***Bharath Broadband*** case law, an employee of one of the parties was to be appointed as Arbitrator. This was clearly hit by Serial No.1 of the Seventh Schedule of A and C Act. The question was whether a person who is disqualified to act as an Arbitrator owing to Serial No.1 of the Seventh Schedule of A and C Act can appoint an Arbitrator which in effect means that a disqualified person circumnavigates statutory disqualification. In the case on hand, there is nothing to suggest that an employee, consultant, advisor or a person who has past or present business relationship with the said Bank has been appointed as Sole Arbitrator. That is not the case of petitioner/borrower. On the contrary, a learned member of Bar has been appointed as Arbitrator;

e) Another point that distinguishes the case on hand (on facts) is, arbitration agreement provides for appointment by the said Bank but not an employee of said Bank. As already alluded to supra, said Bank has only appointed a learned member of the Bar and the borrower has not objected to the same in spite of adequate and ample opportunities qua invocation notice dated 02.03.2021 and two notices from AT for the sittings on 03.08.2021 and 10.08.2021. Therefore the borrower has clearly waived her right (if any) in this regard and has submitted herself to party autonomy ingrained in the arbitration agreement on hand. It is for this reason, I am of the view that ***Lion Engineering*** does not come to the aid of the borrower in the case on hand and therefore learned counsel's reference to the comparison with the IBA Guidelines captured in paragraph No.12 of ***HRD*** case law does not help the petitioner/borrower in the case on hand. Learned counsel drew the attention of this Court to Serial Nos.1 and 12. S.Nos.1 and 12 are a replication of Serial Nos.1 and 12 of the Seventh Schedule of A and C Act. To be noted, the case on hand, the sole Arbitrator is an independent member of the Bar;

f) Another distinguishing feature on facts is, there is nothing before this Court to demonstrate that the Arbitrator suffers from any disqualification qua Fifth Schedule;

(iv) In the case on hand, neither the primary contract (said loan agreement) nor the arbitration agreement i.e., arbitration clause in the primary contract are before this Court. Only an extract from the claim statement is before this Court. It is also not clear as to whether this is an ad-verbatim extract as there is only a mention about arbitration clause.

(v) Petitioner/borrower submits that a copy of the said loan agreement was not given to her. There is nothing to demonstrate as to what prevented the petitioner/borrower from asking for a copy at least at the (arbitration agreement) invocation stage if not earlier.

(vi) No reason much less valid reason has been given for not going before AT in spite of two notices from AT. If the party i.e., petitioner/borrower was under some incapacity and if any of the grounds under Section 34(2)(a)(i) of A and C Act is attracted, the dimension and dynamics of the case on hand may have well been different.

5. This takes me to the second point. As already alluded to supra, the primary contract (said loan agreement) is not before this Court. If the loan agreement (primary contract) is before this Court it may well be possible to test if there was any breach of sub-section (3) of Section 28 of A and C Act. In the absence of the same, the argument that the directive of the AT that monies can be recovered by attachment and sale of personal assets of the property of the petitioner is outside the scope of primary contract is a non-starter. The argument is, it is beyond the scope of the prayer in the claim petition. I am unable to accept this argument as the prayer in the claim petition reads as follows:

> '*It is therefore prayed that this Hon'ble Tribunal may be pleased to pass an award;*
>
> *a) The respondent be ordered and an Award be passed directing the respondent to pay to the claimant an outstanding amount of Rs.4,43,828.53/- (Rupees Four Lakh(s) Forty Three Thousand Eight Hundred Twenty Eight And Paise Fifty Three Only) being due and payable till 07.01.2021, with further interest at the*

rate of 18% p.a. due and payable from the date of claim petition till the payment/realization thereof with all costs, charges and expenses that may be incurred from the date of filing of this claim till payment and/or realization by the claimant;

b) Any other relief that may be deemed just and proper in the facts and circumstances of the case be granted;

c) Be pleased to Award cost of the petition and Arbitration proceedings;'

Clause (b) of the prayer covers the above directive of the AT. In any event, even if this directive is resorted to, said Bank will have to only file an execution petition in the jurisdictional Civil Court/Execution Court to seek attachment and sale of the properties (if any) of the borrower to realize the monies .

6. To be noted, this is admittedly a case of unsecured loan. It is not a case of secured loan where there is any mortgage. If it is a case of mortgage, it may well be possible to say that mortgage or redemption suit is not arbitrable. That is not the case here. It is admittedly a unsecured loan. Therefore, even if that limb of the impugned award is resorted to by the

award holder i.e., said Bank, the same can be done only by launching execution proceedings in the jurisdictional Civil Court/Execution Court.

7. Ergo there is nothing egregious or any material to demonstrate something implausible in the impugned award. In this regard this Court before writing the concluding / operative portion reminds itself that a Section 34 legal drill is not an appeal or revision. It is not even a full fledged judicial review. It is a mere challenge to an arbitral award and test / drill is to examine if any of the ground/grounds of challenge fits into the slots adumbrated thereunder or if there is violation of any provisions of A and C Act. To be noted, this Court repeatedly held that the slots adumbrated in Section 34 are pigeon holes. As regards the procedure adopted for Section 34 legal drill, Hon'ble Supreme Court in oft-quoted ***Fiza Developers*** case law [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796***] had made it clear that a Section 34 legal exercise is one issue summary procedure. Hon'ble Supreme Court has also gone on to explain that 'one issue' does not mean that issue turns on lone issue but it only means that arbitral award being put to challenge before Section 34 Court itself becomes an issue.

This ***Fiza Developers*** principle was held to be a step in the right direction by Hon'ble Supreme Court in subsequent judgment ***Emkay Global*** case [***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***] . It is also to be noted that in an oft-quoted ***Ssangyong*** case law [***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131***]**,** Hon'ble Supreme Court has made it clear that in a Section 34 legal drill, review on the merits of the matter is impermissible.

8. In the light of the narrative, discussion and dispositive reasoning set out supra it follows as an inevitable sequitur that the petitioner has not made out a case for admission or issue of notice. A further sequitur is captioned Arb.OP fails. Therefore, Captioned Arb.OP is dismissed. There shall be no order as to costs.

12.04.2022

Speaking/Non-speaking order
Index : Yes / No
gpa/nsa

M.SUNDAR.J.,

gpa/nsa

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