IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.07.2022

CORAM

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

Arb.O.P.(Com.Div.)No.287 of 2022
and
A.No.2512 of 2022

Vijayalakshmi D
No.AJ 23, Indira Apartments
5th Street, 10th Main Road
Anna Nagar, Shanthi Colony
Chennai-600 040. ... Petitioner

vs.

M/s.Kotak Mahindra Prime Limited
Represented by its Authorized Signatory
Samson Towers, 6th Floor
402L, Pantheon Road
Egmore, Chennai-600 008. ... Respondent

Arbitration Original Petition filed under Section 34(2)(a)(i), 34(2)(a)(v) and 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 praying to set aside the arbitral award dated 05.12.2020 passed in Arbitral Case No.KMPL/303/2020 by the learned Arbitrator in the arbitration between the petitioner and the respondent.

For Petitioner : Mr.Anish Gopi

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ORDER

Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court on 29.04.2022 assailing an 'arbitral award dated 05.12.2020 bearing reference ARBITRATION CASE NO : KMPL/303/2020' [hereinafter 'impugned award' for the sake of convenience and clarity].

2. This being a legal drill under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', [hereinafter referred to as 'A and C Act' for the sake of brevity], it is a one issue summary procedure as prescribed by Hon'ble Supreme Court in ***Fiza Developers*** case law [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796***]. ***Fiza Developers*** case law was subsequently reiterated by Hon'ble Supreme Court in ***Emkay Global*** case [***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***] as a step in the right direction. This has been the inspiration for this Court to bring in Rule 8 of 'The Madras High Court (Arbitration) Rules, 2020' [hereinafter 'MHC Arbitration Rules' for the sake

of convenience and clarity].

3. Therefore, short facts shorn of elaboration and granular particulars will suffice.

4. The sole petitioner before this Section 34 Court is the lone respondent before 'Arbitral Tribunal' ['AT'] and sole respondent before this Section 34 Court is sole claimant before AT. Parties shall be referred to as 'lender' and 'borrower' for the sake of convenience and clarity. In other words, sole petitioner before this Section 34 Court shall be referred to as 'borrower' and lone respondent before this Section 34 Court shall be referred to as 'lender'.

5. Factual matrix in a nutshell is that the lender and borrower entered into an 'agreement dated 30.06.2019 bearing Loan Agreement No.CF17323130' [hereinafter 'primary contract' for the sake of convenience and clarity]; that clause 31 of primary contract is an arbitration clause; that this clause 31 of arbitration agreement serves as arbitration agreement

between the parties i.e., 'Arbitration Agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that under the primary contract, a sum of a little over 2.32 Lakhs was advanced by the lender for purchase of a car by borrower; that the lender had to repay the monies advanced by way of 'Equated Monthly Instalments' ['EMIs' in plural and 'EMI' in singular for convenience]; that owing to default in payment of EMIs, the arbitration agreement was invoked; that an Arbitrator was appointed and the aforementioned AT was constituted; that AT entered upon reference and made the impugned award; that the impugned award is an *ex-parte* award. Assailing the impugned award, the borrower has come before this Section 34 Court as protagonist of the captioned matter.

6. Mr.Anish Gopi, learned counsel for petitioner/borrower who is before this Court, notwithstanding very many averments and grounds raised in the captioned Arb OP made sharp and focused submissions with requisite professionalism considering the Statutory perimeter within which a section 34 legal drill should perambulate. Learned counsel made three focused points and they are as follows:

(a) The appointment of Arbitrator is unilateral and therefore, it appears to be opposed to ***Perkins*** principle [***Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.,*** reported in ***2019 SCC Online SC 1517***];

(b) There are serious doubts about the impartiality of the sole arbitrator who constituted AT as it appears that sole Arbitrator has been appointed multiple times by the lender in less than three months preceding the impugned award;

(c) The subject matter of loan agreement i.e., Automobile and other effects that have been seized have been grossly undervalued and therefore, the claim of lender before Executing Court is clearly marked up;

7. Before considering the aforementioned three points that have been articulated with clarity and specificity by the learned counsel for petitioner/borrower, this Court notices that there is one major impediment for the petitioner/borrower in the case on hand and that major impediment is, AT

has sent a notice dated 13.09.2020 through registered post with acknowledgment due directing the parties to appear before AT on 16.10.2020. There is no disputation or disagreement that this notice was duly served on the borrower and that the borrower did not go before AT. The protagonist of the captioned matter was called upon to explain this and learned counsel drew the attention of this Court to medical records of borrower's spouse which has been placed before this Court as part of typed set of papers and submitted that the borrower's spouse was seriously ill and therefore, the borrower could not go before AT. It may not be necessary to examine the correctness or otherwise of this plea as the least the borrower could have done is sent an electronic mail or responded in some other manner to AT and requested for rescheduling of the sitting, obviously and admittedly this was not done. Therefore, the borrower has simply ignored the notice from AT.

8. The aforementioned trajectory takes us to the question as to when at all the petitioner/borrower woke up.

9. This Court is informed that the borrower woke up from slumber only on 06.04.2022 almost two years later (on receipt of notice from Executing Court i.e., notice in E.P.No.4387 of 2021 on the file of XXVI Assistant Judge's Court, City Civil Court, Chennai) which has been launched by lender for executing the impugned award. Two years slumber on the part of the petitioner/borrower, given the facts and circumstance of the case on hand is clearly unacceptable to this Section 34 Court. After all, expeditious disposal is the sublime legal philosophy underlying A and C Act. This Court reminds itself of sub-section (6) of Section 34 of A and C Act which mandates that a Section 34 petition shall be disposed of expeditiously and in any event, within a period of one year from the date on which Sub-section (5) notice is served upon the party/parties concerned. Sub-section (5) notice has now been held to be directory and not mandatory by Hon'ble Supreme Court. Therefore this Court has repeatedly held that reckoning date for computation of one year under sub-section (6) shall now be the date of presentation of Section 34 petition. It may not be necessary to dilate much on this and it will suffice to refer to ***Bhumi Vikas Bank*** case law [***State of***

Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti reported in ***(2018) 9 SCC 472***]. Relevant paragraph is Paragraph 26 of ***Bhumi Vikas Bank*** case law, which reads as follows:

> *'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that <u>it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year</u> from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'*

(Underlining made by this Court to supply emphasis and highlight, besides ease of reference)

10. Aforementioned paragraph makes it clear that Hon'ble Supreme Court has observed that Section 34 Court should make every endeavour for speedy disposal. Be that as it may, even in the recently rendered ***BSNL*** case law [***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks***

India Private Limited reported in ***(2021) 5 SCC 738***], Hon'ble Supreme Court has noticed that time frames and time lines have been fixed for every stage of arbitral proceedings qua ADR mechanism and in the context of saying that time frame has not been fixed only for filing of Section 11 petition and therefore one has to take recourse to Article 137 of Schedule to the Limitation Act, 1963 and that makes it three years time frame for even kick starting arbitration. All the time frames adumbrated in A and C Act put together is much below three years and therefore, Hon'ble Supreme Court has made a recommendation to the Parliament to suitably consider this aspect of the matter. Relevant paragraphs are paragraph Nos.10, 11, 12, 13, 13.1 and 21 of ***BSNL*** case law which reads as follows:

'10. The 1996 Act has been framed for expeditious resolution of disputes, and various provisions have been incorporated in the Act to ensure that the arbitral proceedings are conducted in a time-bound manner. Various time lines have been provided in the 1996 Act such as :

10.1. Section 8 provides that an application for reference of disputes to arbitration, shall be filed not later than submitting the first statement on the substance of the dispute.

10.2. Section 9(2) provides that where a Court passes an order for any interim measure of protection, the arbitral proceedings *shall be commenced within a period of 90 days from the date of such order.*

10.3. Section 13 provides that where a challenge is made against an arbitrator, the same must be raised within 15 days from the constitution of the tribunal, or after becoming aware of any circumstances mentioned in sub-section (3) of Section 12.

10.4. Section 16 (2) provides that a plea that the tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence.

10.5. Section 34(3) provides a maximum period of 120 days after the receipt of the signed award, to file objections before the Court.

11. The 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 to incorporate further provisions for expeditious disposal of arbitral proceedings :

11.1. Section 11 has been amended to insert sub-section (13) which provides that an application made either before the Supreme Court, or the High Court, or person or institution designated by such Court, shall be disposed of as expeditiously as possible, and an endeavour shall be made to dispose of the petition within a period of 60 days from the date of service of the notice on the opposite party.

11.2. Section 29A mandates that the arbitral proceedings must be completed within a period of 12 months from the date of completion of pleadings.

11.3. Section 34 was amended to insert sub-section (6) which provides that an application under Section 34 shall be disposed of expeditiously within a period of 1 year from the date on which the notice of filing objections is served upon the other party.

11.4. Some of these provisions have been held to be mandatory, such as Sections 8 and 34(3); while others like Section 34(6) have been held to be directory.

12. Contemporaneous with the 2015 amendments to the Arbitration Act 1996, the Commercial Courts Act, 2015 was enacted to provide for speedy disposal of high value commercial disputes, which provided for setting up Commercial Divisions or Commercial Appellate Division in High Courts, and Commercial Courts at the district level.

12.1. Section 13 of the Commercial Courts Act provides that an appeal under Section 37 of the Arbitration Act, 1996 shall be filed before the Commercial Appellate Court or Commercial Appellate Division, as the case may be within a period of 60 days from the date of judgment.

12.2. Section 14 further provides that the Commercial Appellate Court or Commercial Appellate Division shall endeavour to decide the appeals within a period of 6 months from the date of filing of such appeal.

13. To decide the issue of limitation for filing an application under Section 11, we must first examine whether the Arbitration Act, 1996 prescribes any period for the same.

13.1. Section 11 does not prescribe any time period for filing an application under sub-section (6) for appointment of an arbitrator. Since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Limitation Act, 1963, as per Section 43 of the Arbitration Act, which provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in Court.

> *"43. – Limitations --- (1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations, as it applies to proceedings in Court."*

21. Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application under Section 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period. The 1996 Act has been amended twice over in 2015 and 2019, to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29A mandates that the arbitral tribunal will conclude the proceedings *within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the Court for making an application for appointment of the arbitrator under Section 11 of the 1996 Act.'*

11. The above discussion is to say that if cases of the above nature are entertained, it will open the flood gates and it will be open to a borrower to avoid AT, ignoring the notice from AT, go into slumber, wake up couple of years later after receipt of notice from Executing Court, come before this Court and stall the award. This would militate against the entire ADR mechanism as expeditious disposal is the sublime philosophy and salutary principle underlying A and C Act.

12. This Court is conscious of the principle laid down by Hon'ble Supreme Court in ***Lion Engineering*** case law [***Lion Engineering Consultants Vs. State of Madhya Pradesh and others.,*** reported in ***(2018) 16 SCC 758***] but ***Lion Engineering*** case law may not come to the aid of the petitioner/borrower in the case on hand, as factual matrix qua ***Lion***

Engineering case law is completely different and therefore distinguishable on facts i.e., it is distinguishable on facts as that it is a case where an award has been challenged under Section 34 of A and C Act in a District Court. In Section 34 petition, the respondent wanted to file an innocuous amendment to bring legal heirs on record but the request was negatived. In the said context Hon'ble Supreme Court has held that such a plea can be raised even in a Section 34 Court though it has not been raised by way of Section 16 plea before AT. It is in this context that ***MSP Infrastructure*** case law ***[MSP Infrastructure Ltd., Vs. M.P. Road Development Corpn. Ltd.,*** reported in ***(2015) 13 SCC 713]*** was held to be not good law. In saying this, this Court respectfully reminds itself of celebrated ***Padma Sundara Rao*** case law i.e., judgment rendered by a Constitution Bench in ***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in ***(2002) 3 SCC 533***. Relevant paragraph in ***Padma Sundara Rao*** case law is paragraph No.9 which 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.'

13. Therefore, ***Lion Engineering*** case law does not come to the aid of petitioner/borrower in the case on hand. If the facts were slightly different and if only the petitioner had been a little vigilant by either going before AT or acting in some other manner and had not gone into slumber for two years it may well be possible to consider the aforementioned three points raised by learned counsel in a different perspective in this Section 34 legal drill but that is not to be in this case. Therefore first and second points ought to have been raised earlier and it is too late in the day to look into the first and second points. As already alluded to supra, it will pave the way for borrowers to delay and ultimately, derail not only proceedings but the entire ADR mechanism and collapse the expeditious disposal edifice on which it stands. The third point turns on facts and after ***Ssangyong*** judgment ***[Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131]*** there can be no review

on the merits of the matter. Therefore, third point becomes a non-starter as far as Section 34 Court is concerned.

14. Sum sequitur of narrative, discussion and dispositive reasoning supra is, captioned Arb OP fails and the same is dismissed. Consequently, connected application i.e., A.No.2512 of 2022 is also dismissed. There shall be no order as to costs.

05.07.2022

Speaking/Non-speaking order
Index : Yes / No

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M.SUNDAR. J.,

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