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OSA.Nos.333 & 334 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

OSA.Nos.333 & 334 of 2019

M/s.Sundaram Finance Limited,
No.21, Patullos Road,
Chennai - 600002.

...Appellant in both appeals

Vs.

1.S.Sivakumar

2.M.Sowundarapandian

3.R.Manoharan

...Respondents in both appeals

Common Prayer: Original Side Appeals filed under Section 13 of the Commercial Courts Act r/w. Section 37 of the Arbitration and Conciliation Act, 1996, against the orders and decree dated 23.04.2019 passed in O.P.Nos.155 of 2016 & 154 of 2016.

For Appellant in both appeals

: Mr.R.Umashankar

For Respondents in both appeals

: Mr.K.Suresh Babu for R1

R2 - Arbitrator

R3 - Left

COMMON JUDGMENT



(Judgment of the Court was made by R.SUBRAMANIAN, J.)
These two appeals arise out of an order passed by the Section 34

Court (Section 34 of the Arbitration and Conciliation Act, 1996), setting aside the award of the Arbitrator on the sole ground that there was no notice under Section 21 of the Arbitration and Conciliation Act before commencement of the arbitration proceedings.

2.The appellant, which is a finance company had advanced monies to the 3rd respondent for purchase of lorries on 29.11.2011. There were two loan agreements on the said date between the same parties. The 1st respondent herein stood as a guarantor for the said transaction. Since the 3rd respondent failed to repay the loan, the appellant initiated arbitration proceedings and two exparte awards were passed on 05.11.2015 & 30.11.2015. The learned Arbitrator had allowed the claims. The contention of the guarantor to the effect that there was no notice under Section 21 and that, he, not being a party to the loan agreement, he cannot be made a party to the arbitration proceedings were rejected by the Arbitrator. Aggrieved, the Guarantor / the 1st respondent herein filed two applications under Section 34 in Arbitration O.P.Nos.154 of 2016 & 155 of 2016.

3.Three main contentions were raised before the learned Single Judge



and they have been extracted in Paragraph 14 of the order made under Section 34, which reads as follows:-

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"a) petitioner in instant OP, who is a guarantor is not a party to the aforesaid to the aforesaid loan agreement Ex.A1.

b) the provisions of Contract Act have been given a go by with regard to the status of a guarantor as the documentation before the AT is in contravention of Sections 128, 142 and 143 of the Contract Act besides Section 133 of the Contract Act.

c) the impugned award is vitiated owing to lack of notice within the meaning of Section 21 of A & C Act."

Of the above three grounds, two grounds were rejected by the Section 34 Court. On the third ground, however, the Hon'ble Judge who dealt with the application under Section 34 concluded that the contention of the appellant is not sustainable.

4.On a reading of the Article 22 (Arbitration Clause) of the loan agreement, Section 34 Court concluded that the appointment of Arbitrator cannot be said to be by a third party in as much as it is to be made by the "Managing Director of the Lendor". On the said conclusion, the Section 34 Court held that the commencement and conduct of the arbitration proceedings without a notice under Section 21 by itself a ground for setting aside the award following the judgment of the Hon'ble Supreme Court in



Associate Builders Vs. Delhi Development Authority reported in (2015) 3

SCC 49. Having held so, the Hon'ble Judge allowed the Original Petitions, setting aside the awards. Hence, these appeals.

5. We have heard Mr.R.Umashankar, learned counsel for the appellant and Mr.K.Suresh Babu, learned counsel appearing for the 1st respondent.

6. Mr.R.Umashankar, learned counsel for the appellant would apart from reiterating the submissions made before the Section 34 Court, seek to contend that Ex.A11 & A13 dated 25.02.2014 at least would qualify as a notice under Section 21 of the Act. He would also make an attempt to bring Ex.A14 & A16 also dated 25.02.2014 within the scope of Section 21 of the Arbitration and Conciliation Act, 1996 with a view to convince us that these two letters would satisfy the legal requirement of Section 21 and therefore, the order of the Section 34 Court setting aside the award on the ground of non-compliance with Section 21 is bad.

7. Contending contra, Mr.K.Suresh Babu, learned counsel for the 1st respondent would submit that such a contention was not raised before the



Section 34 Court. The only contention that was argued before the Section 34 Court was that since the Arbitrator is to be appointed by a third party, compliance with Section 21 is unnecessary based on Section 14 of the English Arbitration Act, 1996. The said contention having been considered and rejected by the Hon'ble Judge, it is not open to the appellant to now raise a completely new ground, which was not considered by the Section 34 Court. We have considered the rival submissions.

8. We have no hesitation in upholding the interpretation of the Section 34 Court on the language of the Article 22 (Arbitration Clause) of the loan agreement. If an Arbitrator is to be nominated by the Managing Director of the Lendor in a loan agreement, the lender, being a juristic person has to be represented by somebody. In such situation, it would only mean that an Arbitrator has to be appointed by the Lendor through its Managing Director.

9. We cannot substitute our own reasons to differ with the conclusions of the Section 34 Court. We therefore, do not think, we could entertain a new plea as to whether the provisions of Section 21 has been satisfied or not by the appellant, who had contended that Section 21 would not apply at all. From the order of the Section 34 Court, we are unable to see that this



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question was addressed before the Court at all. Hence, we do not think, we can allow the appellant to raise a completely new plea in an appeal. We do not see any merit in both the appeals. These Original Side Appeals are therefore, **dismissed**. However, there shall be no order as to costs.

(R.S.M., J.) (R.S.V., J.)
30.01.2024

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Internet: Yes

Index: No

Speaking

Neutral Citation : No

R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

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