IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: **28.09.2020**

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.213 of 2012

1. Mr.T.Rajasekar,
   63-2-8, Patamata Lanka,
   Near Pumpset,
   Vijayawada.

2. Mr.K.Naga Malleswara Rao,
   Door No.1-261/1 Lakshmipuram Colony,
   Poranki, Vijayawada.

... Petitioners

-Vs.-

1. IndusInd Bank Ltd.,
   115 & 116, G.N.Chetty Road,
   T.Nagar, Chennai-600 017.

2. Ms.S.Rajeni Ramadass,
   Advocate
   New No.68, Basha Street,
   Choolaimedu, Chennai-600 094.
   (R2 is deleted in and by this order)

.. Respondents

This Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the award/order dated 18.01.2012 passed by the 2nd respondent in Arbitration SRR/ACP No.146 of 2011.

For Petitioners : Mr.C.Ramesh

For Respondents : Ms.Meera Gnanasekar for R1

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ORDER

Mr.C.Ramesh, learned counsel on record for the two petitioners and Ms.Meera Gnanasekar, learned counsel on record for the contesting first respondent are before me in this web hearing on a video conferencing platform.

2. Aforementioned both learned counsel consented for captioned OP being taken up for final disposal in this web hearing on a video conferencing platform i.e., virtual Court and therefore, captioned OP was heard out.

3. Captioned OP is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of convenience and clarity. Captioned OP has been filed assailing an 'Arbitral Award dated 18.01.2012' (hereinafter 'impugned award' for the sake of clarity) made by an 'Arbitral Tribunal' ['AT' for the sake of brevity] constituted by a sole Arbitrator, who

has been arrayed as second respondent in captioned OP.

4. Considering the nature of the challenge to impugned award, following the procedure followed by Hon'ble Supreme Court in ***Zonal General Manager, Ircon International Ltd. Vs. Vinay Heavy Equipments*** reported in ***(2015) 13 SCC 680*** judgment, second respondent is deleted from the array of parties in and by this order. Therefore, the contesting first respondent Bank now becomes the sole respondent.

5. Short facts shorn of elaboration will suffice as captioned OP is one under Section 34 of A and C Act. Suffice to say that there was a 'loan agreement dated 05.08.2008' between petitioners and sole respondent, which shall hereinafter be referred to as 'said Contract' for the sake of convenience and clarity; that petitioners 1 and 2 are borrower and co-borrower respectively in said contract; that the sole respondent Bank is the lender in said contract; that said contract is a loan agreement, wherein, sole respondent purchased VOLVO-EC-290 and this Court is informed that the same is an earth moving equipment/Excavator or in other words a bulldozer; that the loan amount is Rs.29,00,000/- (Rupees twenty nine lakhs only) is repayable in 35 instalments; that EMIs 1 to 20 are for Rs.1,05,980/- and EMIs 21 to 35

are Rs.1,04,980/-; that this Court is informed that petitioners committed default after payment of 9 EMIs; that said bulldozer was repossessed by respondent Bank; that repossessed bulldozer was sold on 11.02.2010 for a sum of Rs.17,25,000/- (Rupees Seventeen lakhs and twenty five thousand only) according to sole respondent Bank; that there is an arbitration clause in said contract, the same is Clause 23 captioned 'Law, Jurisdiction, Arbitration'; that this Clause 23 in said contract is the arbitration agreement between the petitioners and respondent within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that a trigger notice qua arbitration being notice dated 21.04.2011 was issued by the respondent Bank (Ex.P5 before AT); that the petitioners as respondents before AT filed (through post/mail) a counter statement dated 27.05.2011 but did not participate in the arbitral proceedings; that AT after examining the material before it, made the impugned award for sum of Rs.18,38,379.51/- (Rupees Eighteen Lakhs Thirty Eight Thousand three hundred and seventy nine and fifty one paise only) together with further interest at 18% per annum on the said sum from 01.04.2011 to the date of payment besides imposing costs; that captioned OP has been filed by respondents before AT in this Court and the date of

presentation is 14.03.2012.

6. This Court has set out the facts as well as the trajectory of the matter, which led to filing of captioned OP in a nutshell.

7. This Court now proceeds to capture the rival submissions.

8. Learned counsel for petitioners made submissions, which are as follows:

a. Termination notice qua said contract is dated 21.04.2011 (Ex.P5), but the impugned award says that Arbitrator has been appointed on 19.04.2011 itself i.e., even prior to the termination notice or in other words even prior to the arbitrable disputes.

b. Claim statement of sole respondent dated 25.04.2011, according to the impugned award has been filed on 26.04.2011, but first notice from the AT or in other words notice of first hearing from AT to the two parties itself is dated 27.04.2011. To put it differently, AT has received the claim statement even

before issuing first notice. In the absence of any agreement regarding filing of claim statement in accordance with Section 23 of A and C Act this procedure is improper and it vitiates the arbitral award.

9. In sum and substance, the contention of learned counsel for petitioners is, impugned award is vitiated by lack of judicial approach, which is one of the juristic doctrines qua public policy culled out by Hon'ble Supreme Court in ***ONGC Ltd. v. Western Geco International Ltd.,*** reported in ***(2014) 9 SCC 263*** and reiterated by Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49.*** To be noted, as already mentioned supra, captioned OP was presented in this Court on 14.03.2012 and therefore, going by ***Ssangyong*** principle [**Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India [(2019) 15 SCC 131]** i.e., ratio laid down by Hon'ble Supreme Court in ***Ssangyong*** case law, captioned OP will be governed by pre 23.10.2015 regime, which in other words means it will be governed by A and C Act as it stood prior to amendment vide Act 3 of

2016, which kicked in with retrospective effect on and from 23.10.2015.

10. In response to the aforementioned submissions of learned counsel for petitioners, learned counsel for respondent (sole respondent now) made submissions, which are as follows:

a. 19.04.2011 is the date on which respondent took consent from the sole Arbitrator to act as Arbitrator and that date appears to have been erroneously mentioned in the impugned award as the date of appointment.

b. There is no codified procedure to be adopted by AT and therefore, there is no infirmity that vitiates the impugned award owing to AT receiving the claim statement on 26.04.2011 prior to the first notice dated 27.04.2011.

c. It is the specific say of learned counsel for respondent that AT has given adequate opportunity and held proceedings on as many as six dates or in other words six sittings on 27.05.2011, 01.7.2011, 05.08.2011, 23.09.2011, 14.10.2011 and 13.01.2012.

11. It is also the specific say of learned counsel for respondent that AT has conducted proceedings in a fair manner with judicial approach and therefore, it cannot be gainsaid that impugned award is vitiated by doctrine of lack of judicial approach.

12. By way of reply, learned counsel for petitioners submitted that the sale of repossessed bulldozer was without notice to the petitioners and that it has been sold for a song.

13. This Court, having captured the rival submissions, now proceeds to discuss the same and give its dispositive reasoning for arriving at a conclusion in the captioned OP.

14. The first point that falls for consideration is the date of appointment of Arbitrator i.e., AT being prior to the termination notice i.e., Ex.P5 dated 21.04.2011. In the case on hand, the date of appointment of Arbitrator has been mentioned as 19.04.2011 in the impugned arbitral award itself. This Court, proceeds on the basis that 19.04.2011 is the date on

which, consent of the sole Arbitrator was obtained by the respondent. Assuming this to be the date on which consent was given, the arbitrable dispute itself arose only on the date of receipt of 21.04.2011 Ex.P5 notices by the noticees. In other words, there was no arbitrable dispute at all prior to the date of receipt of Ex.P5 notice by noticees i.e., petitioners before me. This also necessarily means that there is no commencement of arbitral proceedings within the meaning of Section 21 of A and C Act. Therefore, the mention of 19.04.2011 as the date of appointment in the impugned award, is certainly a matter which qualifies as lack of judicial approach as explained by Hon'ble Supreme Court as one of the juristic doctrines in ***Associate Builders*** case.

15. In this regard, before proceeding further, it is to be noted that it has already been delineated supra that captioned OP has been presented in this Court on 14.03.2012 and therefore, going by ***Ssangyong*** principle, A and C Act as it stood prior to 23.10.2015 would apply. In ***Ssangyong*** principle, Hon'ble Supreme Court has also clarified that for such of those matters which qualify to be heard under this regime, the principles laid down

in ***Western Geoco*** and reiterated in ***Associate Builders*** would apply. Therefore, this Court applies one of the three juristic doctrines namely judicial approach. In the celebrated ***Associate Builders*** case, while reiterating ***Western Geoco***, Hon'ble Supreme Court held that three distinct juristic doctrines are culled out qua public policy. Those three distinct juristic doctrines are a) judicial approach, b) 'Natural Justice Principle' ('NJP' for brevity) and c) irrationality/perversity. After culling out these three distinct juristic doctrines, Hon'ble Supreme Court also laid down the tests for these three juristic doctrines and they are a) fidelity of judicial approach; b) *audi alteram partem* and c) *wednesbury* principle of reasonableness respectively.

16. Therefore, besides lack of judicial approach, impugned award will also be vitiated by irrationality though not perversity. The reason is, the date of appointment of Arbitrator being shown as a date prior to the arbitrable dispute, is a clear case of putting the cart before the horse and therefore, it does not pass the test of *wednesbury* principle of reasonableness.

17. This takes us to the next point that claim statement dated 25.04.2011 was received by AT on 26.04.2011 even before the first notice dated 27.04.2011 was issued fixing 27.05.2011 as the first date of hearing. Though the argument in this regard was predicated on Section 23 of A and C Act by learned counsel for petitioners, this Court is of the considered view that it would be more appropriate to see this in the light of Section 18 of A and C Act, which talks about equal treatment of parties. Section 18 of A and C Act reads as follows:

> *'18. **Equal treatment of parties**. –The parties shall be treated with equality and each party shall be given a full opportunity to present his case.'*

18. Ideally, when the first notice is issued by AT, fixing the first sitting or first hearing, the pleadings should be received in the first sitting in the presence of both parties. Though the copy of the claim statement was duly served on the petitioners and though the petitioners have even filed counter statement dated 27.05.2011 (this Court is informed it was sent by post), receiving the claim statement and supporting documents in the absence of one of the parties may fall foul of the equal treatment of parties

principle ingrained in Section 18 of A and C Act. Therefore, this point also finds favour with this Court qua judicial approach and NJP doctrines. To be noted, both are two of the three distinct doctrines culled out by Hon'ble Supreme Court, which has been delineated supra.

19. Though captioned OP is governed by pre 23.10.2015 regime, the one year time line prescribed for disposal of Section 34 applications vide Sub Section (6) of Section 34 of A and C Act cannot be ignored in its entirety. This is owing to expeditious disposal being one of the important determinants of arbitration which is an important pillar of ADR mechanism. Captioned OP has been languishing in this Court for more than eight years now. Eight years, is a fairly long time in one tier of litigation and in the light of this being an arbitration matter, where expeditious disposal is of utmost importance, it pushes the captioned OP into vintage matter classification.

20. In the light of the narrative thus far i.e., discussion and dispositive reasoning, this Court finds for the petitioners. In other words captioned OP is allowed and impugned award dated 18.01.2012 made by the Sole

Arbitrator in arbitration SRR/ACP No.146 of 2011 is set aside. There shall be no order as to costs.

28.09.2020

Speaking order: Yes

Index: Yes / No
kmi

M.SUNDAR, J.

kmi

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