

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29-06-2012

CORAM

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

Tr.O.P.No.449 of 2006

Chandulal Aggarwal : Petitioner

vs.

1.M/s.Ashok Leyland Finance Ltd.,
rep. by Sri.V.Govindarajan,
having its office at
Sudharsan Building,
No.86, Chamiers Road,
Alwarpet,
Chennai-600 018.

2.S.K.Srinivasan : Respondents

Prayer: Petition filed under section 34(i) of Arbitration and Conciliation Act 1996, to set aside the award dated 23.06.2001 and signed on 11.10.2001 passed in Claim Petition No.13 of 1997 by the second respondent as against the petition and to pass an awarding favour of the petitioner as prayed for with costs.

For Petitioner : Mr.S.Subbiah

For Respondents : Mr.K.Moorthy

O R D E R

The above said Original Petition was filed under

<https://hcservices.ecourts.gov.in/hcservices/>

section 34(1) of the Arbitration and Conciliation Act 1996

to set aside the award, dated 23.06.2001 passed by the Arbitrator.

2.The case of the petitioner is that the petitioner was the owner of the bus bearing registration No.DL-1P-4405 and the bus was hypothecated to the first respondent under a hire purchase agreement, dated 20.01.1992 and the hire purchase agreement was executed in New Delhi at the Regional Office of the first respondent and the amount secured under the hire purchase agreement, dated 20.11.1972 was Rs.3,00,000/- to be repaid in 35 monthly installments at the rate of Rs.13,900/-, which includes interest at the rate of 16% per annum and insurance premium. The petitioner paid a sum of Rs.1,53,000/- between 20.01.1993 and 31.01.1994 and the petitioner did not pay the installment for the month of June 1993 as the bus was impounded for 30 days by the Delhi Police and the installments for the months of February and March 1994 were also not paid due to ailment of the the petitioner and the petitioner also informed the first respondent to extend the period to make the payment. But the first respondent, without responding to the request of the petitioner and even without issuing notice to him, illegally and unauthorizedly seized the bus on 30.03.1994, even though the petitioner tendered a cheque for a sum of Rs.27,800/- towards part payment. As the first respondent did not encash the cheque, the petitioner sent a demand draft for a sum of Rs.27,800/- towards monthly

installments payable and the same was accepted by the first respondent representing the dues payable by the petitioner for other bus bearing registration No.DL-1P-1637. Further, the first respondent also manipulated the records as if the bus was sold for non-payment and by reason of the illegal act of the first respondent in seizing the vehicle and selling the vehicle without informing the petitioner, the petitioner has suffered a loss of Rs.2,88,474/-. As per the hire purchase agreement, in the event of any dispute between the parties, the dispute has to be referred to arbitration and therefore, the petitioner requested the first respondent to refer the matter to the arbitration and the first respondent appointed the second respondent as 'Arbitrator' and the second respondent is a practicing Advocate at Chennai and his appointment as arbitrator is illegal and the second respondent conducted the arbitration in Chennai and the entire Arbitration Proceedings is without jurisdiction as no part of cause of action arose at Chennai. Therefore, a preliminary objection was raised by the petitioner regarding the jurisdiction and that was overruled by the second respondent on the ground that as per the hire purchase agreement, the arbitration shall be at Chennai and therefore, the place of arbitration at Chennai cannot be challenged and decided to adjudicate the dispute.

3.It is further stated that by reason of the constitution of Arbitral Tribunal at Chennai, the petitioner was not able to properly represent his case and the learned arbitrator without appreciating the term 'owner', held that the petitioner has no *locus standi* to maintain the dispute as he had already assigned his interest in the bus under the Assignment deed, dated 21.05.1993 in favour of Mr.Pawn Anand and after the assignment, the petitioner has no control over the vehicle and as per the Assignment deed, his liability goes along with the assignees Mr.Pawan Anand and therefore, the petitioner cannot maintain the dispute claiming damages for the sale of the vehicle. Therefore, the arbitrator has misconducted himself in conducting the proceedings at Chennai, where no cause of action arose and also passed the award without properly appreciating the assignment deed, which is inadmissible in evidence and which is inchoate and erred in holding that the petitioner has no *locus standi* to challenge the award. Therefore, the award is liable to be set aside.

4.The respondents contested the application stating that as per clause 22 the the agreement, the venue of arbitration shall be in Madras and the Courts at Madras alone and no other courts whatsoever, will have jurisdiction to try any suit in respect of any claim of dispute arising out of an agreement and therefore, the

arbitrator has got jurisdiction to conduct the proceedings at Chennai. He further submitted that even though, no part of cause of action arose at Chennai, the parties are bound by the terms of contract and they are not not bound by the provisions of section 20 of CPC and hence, the contention of the petitioner that the arbitrator has no jurisdiction to conduct the proceedings at Chennai cannot be sustained.

5.It is further contended that as per the hire purchase agreement, the first respondent was the owner of the vehicle and the petitioner was the hirer and after paying some installments, the petitioner committed default in the payment of installments and latter, under a valid Assignment deed, dated 21.05.1993, the petitioner assigned the hire purchase agreement in favour of Pawan Anand for consideration and as per the Deed of Assignment, a sum of Rs.50,000/- was paid by Pawan Anand to the petitioner and after the assignment of his right under the hire purchase agreement, the petitioner has no *locus standi* to maintain the cause and that was rightly appreciated by the learned arbitrator and held that the petitioner has no *locus standi* to raise any dispute, after the assignment deed.

6.It is contended that the arbitrator has already rejected the preliminary objection, by order, dated 23.06.2001 and that was not challenged and that has become final and the petitioner having participated in the

arbitration proceedings is also estopped from challenging the jurisdiction of the arbitration.

7.Mr.S.Subbiah, the learned counsel appearing for the petitioner reiterated the contentions raised in the petition and submitted that the learned arbitrator ought not to have relied on the Assignment deed produced by the petitioner and the Assignment deed is without consideration and therefore, it is not a valid document and the consideration was left blank in the Assignment deed and that was latter filled up by the first respondent without the knowledge and consent of the petitioner and the assignee, the Power Agent also filed an affidavit sworn to on 29.07.2000 stating that there was no consideration for executing the Assignment deed and no consideration was passed for assigning the bus and the installments were continued to be paid by the petitioner and the petitioner continued to be the hirer and Pawan Anand also reassigned the bus to the petitioner on 09.06.1993 and he has no claim over the bus and that was not properly appreciated by the learned arbitrator and when the assignee himself declared that he was not the owner and no consideration was passed under the Assignment deed, dated 21.05.1993, the assignment was invalid and the learned arbitrator ought not to have relied upon the Assignment deed to arrive at the conclusion that the petitioner has no *locus standi* to maintain the dispute after the Assignment deed.

8.He further contended that as per the definition of owner under the Motor Vehicle Act, a person in whose name a Motor vehicle stands registered shall be the owner and in relation to a motor vehicle, which is the subject matter of a hire purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under the agreement is the owner and a person, who paid the consideration will also become the owner of the vehicle, even though his name has not been endorsed in the Registration Certificate, merely because a person's name is mentioned in the Registration Certificate, he cannot per se become the owner of the vehicle and admittedly, the vehicle was produced by the petitioner and the Registration Certificate stood in his name and the assignee Pawan Anand also admitted that the petitioner was the owner of the vehicle, even though the Registration Certificate was transferred in his name after the Assignment deed and considering all these aspects, the learned arbitrator ought to have held that the petitioner is entitled to maintain the dispute and ought not to have dismissed the claim of the petitioner.

9.He further contended that the learned arbitrator erred in invoking sections 91 and 92 of the Evidence Act to exclude the oral evidence regarding the ownership of the vehicle and the provision of sections 91 and 92 ought not

to have been invoked.

10.He further contended that even though, as per the agreement, the venue of arbitration will be at Chennai, when no part of cause of action arose at Chennai, the jurisdiction cannot be conferred at Chennai and therefore, the entire proceedings initiated at Chennai is also without jurisdiction. He also relied upon the judgment reported in **2008(1) TNLJ 17(Civil)** in the case of **Central Warehousing Corporation, No, 4 Saidapet, Chennai15 vs. M/s.A.S.A Transport J-136 M.M.D.A. Colony, Arumbakkam,Chennai**, in support of his contention that the venue of arbitration at Chennai is without jurisdiction.

11.He also relied upon the judgment reported in **2003 AIR SCW 3041 in the case of Oil and Natural Gas Corporation Ltd., vs, SAW Pipes Limited**, to contend that the award is liable to be set aside, as it is against the principles laid down by the Hon'ble Supreme Court in that judgment.

12.He also relied upon the judgment reported in **2007-1-LW 880**, in the case of **Manager, I.C.I.C.I. Bank Ltd., vs. Prakash Kaur & others**, in support of his contention and contended that the seizure and subsequent sale of the vehicle by the first respondent is illegal and therefore, the first respondent is liable to compensate the petitioner as claimed by him and the arbitrator ought to have awarded the amount.

13. On the other hand, Mr. K. Moorthy, the learned counsel appearing for the respondents relied upon the judgment reported **(2003)5 SCC 705 in the case of Oil & Natural Gas Corporation Ltd., vs. SAW Pipes Ltd.**, in support of his contention and contended that the award can be set aside only on the basis of the law laid down by the Hon'ble Supreme Court in the above judgment and the petitioner has not brought his case within the parameters stated in the judgment. He also relied upon the judgment reported in **(2006)2 SCC 598** in the case of **The Managing Director, Orix Auto Finance (India) Ltd., vs. Shri Jagminder Singh and another**, in support of his contention that the owner under the hire purchase agreement is entitled to seize the vehicle.

14. The learned counsel appearing for the first respondent further submitted that after the assignment of the agreement in favour of the assignee for consideration, the petitioner has no *locus standi* and the Deed of Assignment is not an inchoate agreement as contended by the petitioner and the consideration of Rs.50,000/- was paid under the agreement and that is also mentioned in the original agreement and that was taken into consideration by the learned arbitrator and held that the Assignment deed is a valid one and as per the Assignment deed, the petitioner has lost all his rights and the liability alone continued and hence, the petitioner has no *locus standi* and

therefore, there is no need to set aside the award and the learned arbitrator has not misconducted himself. He also submitted that as per the agreement, the arbitration venue is fixed at Chennai and having agreed to have the arbitration at Chennai, it is not open to the petitioner now to contend that Chennai has no jurisdiction as no part of cause of action arose and section 20 of CPC need not be applied to arbitration proceedings and the learned arbitrator is bound to apply the substantial and not procedural law as per the judgment of the Hon'ble Supreme Court and hence, it cannot be contended that the arbitration award is liable to be set aside on the ground of jurisdiction.

15. Before going into the merits of the case, we will have to see the law laid down by the Hon'ble Supreme Court in the matter of setting aside the arbitration award.

16. In the judgment reported in (2000)9 SCC 552, in the case of the *Grid Corpn. of Orissa Ltd. v. Balasore Technical School*, the Hon'ble Supreme court considering the scope of section 34(2) of the Arbitration and Conciliation Act 1996 held as follows:-

"17. The grounds/circumstances mentioned in sub-section (2) of Section 34 have been considered by this Court in various decisions. In Grid Corpn. of Orissa Ltd. v. Balasore Technical School [(2000)9 SCC 552] this Court in para 3 held as under: (SCC pp. 556-57)

"3. In this case, the High Court is of the view that a civil court does not sit in appeal against the award and the power of the court when an award is challenged is rather limited. The award of the arbitrator is ordinarily final and conclusive as long as the arbitrator has acted within his authority and according to the principle of fair play. An arbitrator's adjudication is generally considered binding between the parties for he is a tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to the court to speculate where no reasons are given by the arbitrator, as to what impelled him to arrive at his conclusion. If the dispute is within the scope of the arbitration clause it is no part of the province of the court to enter into the merits of the dispute. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award. In *New India Civil Erectors (P) Ltd. v. ONGC* [(1997) 11 SCC 75] this Court considered a case of a non-speaking award. In that case the arbitrator had acted contrary to the specific stipulation/condition contained in the agreement between the parties. It was held that the arbitrator being a creature of the contract must operate within the four corners of the contract and cannot travel beyond it and he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In that contract it was provided that for construction of

a housing unit, in measuring the built-up area, balcony areas should be excluded. However, the arbitrator included the same which was held to be without jurisdiction. In the same manner it was also held that the price would be firm and not subject to any escalation under whatsoever ground till the completion of the work and awarding any sum as a result of escalation was not permissible. To the same effect is the decision in *Associated Engg. Co. v. Govt. of A.P.* [(1991)4 SCC 93]- It was stated that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error and an umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award. The principle of law stated in *N. Chellappan* case [(1975)1 SCC 289] on which strong reliance has been placed by the learned counsel for the respondent would make it clear that except in cases of jurisdictional errors it is not open to the court to interfere with an award. That proposition is unexceptionable. However, from a reading of the decisions of this Court referred to earlier it is clear that when an award is made plainly contrary to the terms of the contract not by misinterpretation but which is plainly contrary to the terms of the contract it would certainly lead

to an inference that there is an error apparent on the face of the award which results in jurisdictional error in the award. In such a case the courts can certainly interfere with the award made by the arbitrator."

17. In the famous case reported in **(2003) 5 SCC 705** in the case of **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.**, the Hon'ble Supreme Court, after considering the law on that aspect held as follows:-

"74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods

within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

18. In **McDermott International Inc. v. Burn Standard Co. Ltd.**, reported in (2006) 11 SCC 181, it is held as follows:-

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the

arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter."

19. In the judgment reported in **2003 (6) SCC 595, in the case of Roop Kumar vs. Mohan Thedani**, the Hon'ble Supreme Court held that section 91 and 92 of the Evidence Act are substantial law and when the terms of the contract are reduced into a document, as per the sections 91 and 92 oral evidence to prove the contents of the document is prohibited.

20. In the judgment reported in **(2010) 1 SCC 549, at**

page 554 in the case of *Madnani Construction Corporation Private Limited v. Union of India*, it has been held as follows:-

"It is well settled that the arbitrator is the master of facts. When the arbitrator on the basis of record and materials which are placed before him by the Railways came to such specific findings and which have not been stigmatised as perverse by the High Court, the High Court in reaching its conclusions cannot ignore those findings. But it appears that in the instant case, the High Court has come to the aforesaid finding that the items mentioned above are excepted matters and non-arbitrable by completely ignoring the factual finding by the arbitrator and without holding that those findings are perverse."

21. In the judgment reported in (2008)13 SCC 80, in the case of *Delhi Development Authority vs. R.S. Sharma and Company, New Delhi*, the Hon'ble Supreme Court discussed the entire law on that aspect, confirmed the judgment of the Honourable Supreme court rendered in *SAW PIPE* case and laid down the following principles:-

"From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

- (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

- (b) The award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

- (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

- (d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

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With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

22. Bearing these principles in mind, we will have to see whether the award is liable to be set aside. As stated supra, as held by the Hon'ble Supreme Court in the judgment reported in **(2010)1 SCC 549**, the arbitrator is the master of facts and when the arbitrator on the basis of record and materials placed before him, came to any specific finding, which could not be stigmatized as perverse by the High court, the High court cannot ignore those findings.

23. Further, an arbitration award cannot be set aside on the ground that it is illegal and as per the judgment reported in **(2006)11 SCC 181**, an illegality must be patent and it must be also go to the root of the matter. Further, the award should be contrary to the substantial provisions of law or the provisions of Arbitration and Conciliation Act or against the terms of respective contract or prejudicial to the rights of the parties and award can be set aside, if it is contrary to the fundamental policy of Indian Law, the interest of India or justice or morality or in addition to, if it is patently illegal, against justice or morality or unfair and unreasonable that it shocks the conscience of the court.

24. According to me, having gone through the award of the learned arbitrator, the petitioner is not able to bring the award within the parameters laid down by the Hon'ble Supreme Court for setting aside the award. The arbitrator

has given a detailed award, framed points for consideration and dealt with each points by stating the reasons, which cannot be stated to be perverse and the High court cannot re-appreciate the evidence and come to the different conclusion from that of the arbitrator while considering the application for setting aside the award. Therefore, the scope of the power of interference under section 34 of the Arbitration and Conciliation Act is very narrow as prescribed by the Hon'ble Supreme court in various judgments referred to above. The learned arbitrator has framed the issues whether the petitioner has lost his right to make any claim under the agreement. While discussing that point, the learned arbitrator has considered the affidavit sworn to by the Pawan Anand, dated 29.07.2000 stating that the Assignment deed was not acted upon and it was executed for the sake of records and no consideration was passed and held that when the original assignment deed mentions about the passing of consideration of Rs.50,000/- as section 91 and 92 of the Evidence Act, the petitioner is precluded from giving oral evidence contrary to the terms of the Assignment deed.

25.As stated supra, the arbitration award must be in accordance with the substantial provisions of law and therefore, the arbitrator was justified in invoking the provisions of section 91 and 92 of the Evidence Act, which are substantive laws and rightly held that the oral

evidence contrary to the Assignment deed cannot be permitted.

26.Further, the execution of the Assignment deed is admitted and the said Pawan Anand in his affidavit, dated 29th July 2000 also admitted that under the Assignment deed, the RC was transferred in his name and as per RC, he was the owner of the property. Considering all these aspects, the learned arbitrator has rightly held that the petitioner has no *locus standi* to maintain a dispute after executing the Assignment deed and also rightly held that the Assignment deed was for consideration and Rs.50,000/- was paid, as seen from the original Assignment deed produced by the first respondent and answered the second point. The learned arbitrator also rightly held that as per the agreement, the venue shall be at Chennai and the arbitrator is bound by the terms of the contract and therefore, even though no part of cause of action arose at Chennai, as per the terms of contract, the venue shall be at Chennai and therefore, the appointment of the arbitrator and conducting of the arbitration proceeding at Chennai cannot be said to be without jurisdiction. Further, under section 20 of the Arbitration and Conciliation Act 1996, parties are free to agree on the place of arbitration and under sub section (2) only in the event of failure, the Arbitral Tribunal can fix the place. In this case as per the agreement, the parties agreed to have the place of arbitration at Chennai. Hence,

the argument of the learned counsel for the appellant cannot be accepted. I, therefore, hold that no materials have been placed before me to set aside the award in the light of the judgments of the Hon'ble Supreme court referred to above and the learned arbitrator, after considering all these aspects, dealt with all the submissions of the petitioner and passed the award and hence, I do not find any reason to interfere with the award or to set aside the award passed by the learned arbitrator.

27. In the result the petition is dismissed. No costs.

sd/.R.S.R.J
29.06.2012

//Certified to be a true copy//

Dated this the day of 2013.

R.s/ 06.02.2013

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