

(2016) 11 KL CK 0051

In the High Court Of Kerala

Case No : Arb. A. No. 49 of 2016 ()(Against The Order In OPARB 25 of 2016 Of District Court, Manjeri Dated 30.7.2016)

Shamsudeen

APPELLANT

Vs

M/s. Shreeram Transport Finance Co. Ltd.

RESPONDENT

Date of Decision : 16-11-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(1), Section 34(5)

Citation : (2017) 1 ILRKerala 370 : (2016) 4 KerLJ 778

Hon'ble Judges : Mr. P.N. Ravindran and Mr. A.M. Babu, JJ.

Bench : Division Bench

Advocate : Sri. C.A. Anoop, Advocate, for the Petitioner; Sri. Philip. T. Varghese (B/o), for the Respondent No. 1

Final Decision : Dismissed

Judgement

A.M. Babu, J. - A loan of Rs. 4,68,000/- was availed of by the appellant and the second respondent from the first respondent. The loan was availed of for the purchase of a vehicle. The vehicle purchased was hypothecated to the first respondent. The loan was to be repaid in instalments. The instalments were defaulted. This led to the repossession of the vehicle by the first respondent. It sold the vehicle for Rs.2,01,000/-. The balance was stated to be Rs.2,25,000/-. There was an arbitration clause in the hypothecation agreement. The arbitrator awarded Rs.3,22,730/- as the amount to be paid to the first respondent by the appellant and the second respondent. It appears that the appellant and the second respondent did not appear before the arbitrator.

2. O.P.(Arb.)No.25 of 2016 was filed before the District Court, Manjeri under section 34(1) of the Arbitration and Conciliation Act, 1996 ("the Act" for short). It was filed by the appellant to get the arbitration award set aside. The learned District Judge heard the maintainability of the application and dismissed it as not maintainable. It was found that there was a breach of section 34(5) of the Act.

3. We heard the learned counsel for the appellant and the first respondent.

4. It is under section 34(1) of the Act an application may be filed to set aside an arbitration award. Sub-section (5) of section 34 provides that an application under sub-section (1) shall be filed by a party only after issuing a prior notice to the other party. It is also provided that such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. Admittedly no notice under section 34(5) of the Act was issued. Admittedly no affidavit was filed to the effect that notice was issued. Therefore the learned District Judge dismissed the application.

5. Sub-section (5) of section 34 was inserted by Act 3 of 2016 with retrospective effect from 23.10.2015. 23.10.2015 is the date of promulgation of the Arbitration and Conciliation (Amendment) Ordinance which preceded Act 3 of 2016. All applications filed under section 34 of the Act after 23.10.2015 shall be in compliance with sub-section (5). The argument that sub-section (5) has no application to an arbitration proceeding commenced before that date cannot be accepted. Procedural law operates retrospectively as there is no vested right in procedure (vide *M/s. Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board*, AIR 2012 SC 3167). What is important is the date of filing of the application under section 34(1) of the Act.

6. Section 34(5) is a mandatory provision. No application under section 34(1) is maintainable without compliance with the provisions of section 34(5). Therefore the learned District Judge had no option but to dismiss the application of the appellant. We find little scope to interfere with the impugned order. Therefore the appeal is liable to be dismissed.

7. Learned counsel for the appellant has submitted that his client has not received a signed copy of the arbitration award yet. If that be the case, it appears that the appellant has the right to move the District Court once again under section 34(1) after compliance with section 34(5) of the Act. We said so because the period of limitation starts to run only from the date of service of a copy of the award duly signed by the arbitrator (vide section 34(3) of the Act). It has been held so by the Apex Court in *State of Maharashtra v. M/s. Ark Builders Pvt. Ltd.* (AIR 2011 SC 1374). The decision of this court on the same point is *Saju v. Muthoot Vehicle and Assets Finance Ltd.*, (2015 (4) KLT 394).

With the above observation, we dismiss the appeal. No costs.