
(2017) 02 KL CK 0033
In the High Court Of Kerala
Case No : Arb. A. No. 49 of 2016

Shamsudeen

APPELLANT

Vs

Shreeram Transport Finance Co. Ltd.

RESPONDENT

Date of Decision : 21-02-2017

Acts Referred:

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

Citation : (2017) 2 KerLJ 24 : (2017) 1 KLT 944

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

Bench : Division Bench

Advocate : C.A. Anoop, Advocate, for the Appellant; Philip T. Varghese, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

A.M. Babu, J.—We once dismissed this same appeal. It was as per our judgment dated 16.11.2016. That judgment was reported 2017(1) KLT SN 24 (C.No.26), (2016 (5) KHC 835, 2016 (4) KLJ 778, and ILR 2017(1) Ker.370). We reviewed and recalled the said judgment by order passed on 30.1.2017 (vide the order in R.P.No.36 of 2017).

2. We heard the learned counsel appearing for all the parties afresh.

3. The facts are these: The appellant purchased a motor vehicle. For that, a loan of Rs. 4,68,000/- was availed of. The first respondent was the financier. The motor vehicle was hypothecated to the financier. A loan cum hypothecation agreement was executed in favour of the first respondent by the appellant and the second respondent. The loan was to be repaid in instalments, but defaulted. The first respondent repossessed the motor vehicle and sold it for Rs. 2,01,000/-. The arbitration clause in the hypothecation agreement was invoked. The arbitrator by his award fixed the liability of the appellant and the second respondent at Rs. 3,22,730/-.

4. The appellant filed an application to set aside the arbitration award. The

application was filed under Section 34(1) of the Arbitration and Conciliation Act, 1996 ("the Act" for short). The application was numbered O.P.(Arb) No.25 of 2016. The District Judge, Manjeri dismissed it as not maintainable. Non-compliance of the provisions of Section 34(5) of the Act was the reason why the application met dismissal.

5. Section 34(5) of the Act insists on the issuance of a prior notice by the applicant to the other party. Such a prior notice is a condition precedent to apply under Section 34(1) of the Act. The application shall be accompanied by an affidavit by the applicant endorsing compliance with the aforesaid requirement in Section 34(5). Admittedly the appellant did not issue any prior notice to the first respondent. No affidavit was filed. The learned District Judge therefore dismissed the application as not maintainable. We concurred with the District Judge and dismissed the appeal at the threshold.

6. We wrote our reasons for dismissing the appeal at paragraphs 5 and 6 of our judgment dated 16.11.2016. We said, procedural law would operate retrospectively. We also said that there would be no vested right in procedure. We concluded that the requirements in Section 34(5) should be complied with even in cases where the arbitration proceedings commenced before the date of incorporation of the said sub-section. That conclusion of ours was wrong. The dismissal of the appeal was liable to be reviewed. We therefore on 30.1.2017 reviewed and recalled it. We happened to dismiss the appeal since we did not notice Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (for short Act 3 of 2016). Section 26 was not brought to our notice.

7. The Act was originally amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015. The Ordinance was promulgated on 23.10.2015. It was later replaced by Act 3 of 2016. Various provisions of the Act were amended and certain new provisions were introduced by Act 3 of 2016 with retrospective effect from 23.10.2015 (the date of promulgation of the Ordinance). Sub-section (5) of Section 34 of the Act was one of the provisions inserted by Act 3 of 2016 with retrospective effect from 23.10.2015. Should the requirements in Section 34(5) of the Act be complied with in the case of an arbitration proceedings which commenced before 23.10.2015 ? That is the question. Section 26 of Act 3 of 2016 is the direct answer to the question.

8. Section 26 of Act 3 of 2016 reads thus:

Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree, but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

Section 26 makes it abundantly clear that all the amendments to the Act brought in by Act 3 of 2016 shall have prospective effect unless parties otherwise agree. Admittedly the parties to this case did not agree otherwise. The amendments

came into effect on 23.10.2015. The arbitration proceedings in this case commenced much before the said date.

9. Section 21 of the Act is extracted below:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Again, the parties to this case admittedly did not agree otherwise. We find from the impugned order that the arbitration award was passed on 29.8.2011. That means the arbitration proceedings commenced long before 23.10.2015. This is thus a case where the arbitration proceedings commenced before 23.10.2015 and the parties did not agree otherwise. Therefore Section 34(5) of the Act has no application to the present case. The requirements therein need not to be complied with by the appellant to apply under Section 34(1). We hold so and set aside the order of the learned District Judge.

10. Sub-section (2-A) of Section 34 of the Act was also introduced by Act 3 of 2016. Sub-section (2-A) runs as follows:

An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

An additional ground to get an arbitration award set aside is provided by sub-section (2-A). The learned counsel for the appellant submits that providing of a new ground to set aside an arbitration award is not part of procedural law, but it is substantive law. Therefore, according to the counsel, sub-section (2-A) is retrospective in operation. If it is so, the appellant will get an additional ground to attack the award. If it is prospective, he will not get the benefit of sub-section (2-A). It is not necessary for us to go into that question for deciding the present appeal. We decided the appeal and decided to set aside the impugned order even without going into the question now raised by the learned counsel. In fact, the question is outside the scope of the instant appeal. It is for the learned District Judge to decide the question while disposing of the application. We leave it to him. He will consider whether sub-section (2-A) is also prospective in operation in view of Section 26 of Act 3 of 2016.

11. We now conclude. The appeal is allowed. The impugned order is set aside. We hold that the application in O.P.(Arb) No.25 of 2016 cannot be held not maintainable for the non-compliance of the provisions of Section 34(5) of the Act. The learned District Judge shall take back the application on file and dispose it of. It is made clear that all questions except the one concluded by this judgment shall be open for consideration. The parties are left to bear their respective costs in the appeal.