

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 304 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 258 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 274 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 291 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 400 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 408 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 434 OF 2014****ALONGWITH****ARBITRATION PETITION NO. 435 OF 2014**

Mr.Krishnabhagwan Rajaram Sharma,)
age 60 years, Proprietor of M/s.Kandla Cargo)
Carriers (Kutch), having his address at)
Plot No.269-1-A, Sector – 9,)
Gandhidham – 370201, Gujrat) **..... Petitioner**

Versus

M/s.Tata Motors Finance Ltd.,)
a Company incorporated under Companies Act)
1956, having its Corporate office at Building -A)
2nd Floor, Lodha 1 Think, Techno Campus,)
Off Pokhran Road 2, Thane (West),)
Thane – 400 607.) **..... Respondents**

Mr.Rohan Cama, a/w. Mr.Sunil Chaturvedi for the Petitioner.

Mr.Dinyar Madon, Senior Advocate, a/w.Mr.Kingshuk Banerjee, Mr.Yuvraj Choksy, i/b. Wadia Ghandy & Co. for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 18th FEBRUARY, 2015

PRONOUNCED ON : 4th MARCH, 2015

JUDGMENT :

Admit. The respondents waive service. By consent of parties, matter is taken on board for final hearing. In view of the identical facts in all the eight petitions, by consent of parties all the petitions were heard together and are being disposed of by a common order.

2. The petitioner in each of the petition aforesaid was the original respondent in the arbitration proceedings whereas the respondents herein were the original claimants.

ARBITRATION PETITION NO. 304 OF 2014

3. I will first summarize the facts in Arbitration Petition No.304 of 2014 which is the main matter which has been argued by the learned counsel for the parties.

4. By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, (for short the said 'Arbitration Act'), the petitioner has impugned the arbitral award dated 7th October, 2013 thereby allowing some of the claims made by the respondents. Some of the relevant facts for the purpose of deciding this petition are as under :-

5. Sometime in the month of December 2009 the petitioner approached the respondents for a loan in the sum of Rs.19,64,000/-for refinancing/purchasing the

vehicle. The respondents sanctioned the said loan and entered into an agreement with the petitioner on 30th December, 2009. The said loan amount with interest was repayable in the monthly installment of Rs.50,797/- w.e.f. 2nd March, 2010 and the entire repayment was to be completed by 2nd January, 2014. The petitioner had issued 47 postdated cheques in favour of the respondents towards repayment of the monthly installment. It is the case of the petitioner that till 2nd February, 2012 the petitioner made payment to the respondents.

6. On 2nd May, 2012 the respondents through their advocates issued a loan recall notice calling upon the petitioner to pay a sum of Rs.12,07,650.77 and terminated the said loan agreement. The respondents also called upon the petitioner to take notice as notice under section 21 of the Arbitration and Conciliation Act, 1996 making it clear that failure on the part of the petitioner to comply with the said demand notice within the stipulated time, the respondents would be constrained without any further reference/notice to the petitioner to refer the matter to the arbitration by the sole arbitrator appointed by the respondents as per the relevant arbitral clause as contained in the said agreement under the Arbitration and Conciliation Act, 1996 and also to take notice that on failure on the part of the petitioner to comply with the said demand notice within the stipulated time, respondents would be constrained to take legal action against the petitioner and would be further constrained to take out appropriate legal proceedings including but not limited to proceedings under section 17 and/or section 9 of the Arbitration and Conciliation Act, 1996 for the legal repossession and sale of the said vehicle.

7. On 11th May, 2012, the respondents addressed a letter to Mr.Nitin Chavan,

Chartered Accountant appointing him as a sole arbitrator with a request to adjudicate upon the claims/disputes and requested to send a copy of the said reference letter to the borrower/co-borrower/guarantor in accordance with and in compliance with section 21 of the Arbitration and Act. Copy of the said letter was also forwarded to the petitioners.

8. On 11th May, 2012, the learned arbitrator issued a notice to the petitioner informing the petitioner of appointment of the learned arbitrator by the respondents in terms of the loan agreement and also that the respondents had filed a claim petition and compilation of documents and had made an application under section 17 of the Arbitration Act. The learned arbitrator also informed that the *ex-parte* ad-interim order was passed on such application filed by the respondents. The learned arbitrator issued a notice to the petitioner to remain present on 16th June, 2012 at 11.30 a.m. in his office cautioning that in case of failure the matter shall be dismissed or proceeded *ex-parte*. Alongwith the said notice, the learned arbitrator enclosed a copy of the claim petition, copy of the application filed under section 17 by the respondents, copy of the order passed by the learned arbitrator and copy of the reference letter.

9. It is the case of the petitioner that pursuant to the said ad-interim order passed by the learned arbitrator under section 17 of the Arbitration Act, the respondents took possession of the vehicle of the petitioner. It is alleged that it was for the first time the petitioner was served with the said letter dated 11th May, 2012 addressed by the learned arbitrator inter alia calling upon the petitioner to remain present in Mumbai on 16th June, 2012 and informing that an *ex-parte* ad-interim order was passed by him.

10. On 16th June, 2012 the petitioner filed an application under section 13(2) of the Arbitration Act through his advocate Mr.M.L.Chaturvedi inter alia challenging

the appointment of the learned arbitrator. The said arbitration matter was accordingly adjourned to 28th July, 2012 for filing the reply of the respondents. It is the case of the petitioner that on 28th July, 2012 the representative of the petitioner attended the matter and informed the learned arbitrator that Mr.M.L.Chaturvedi was not well and he could not attend the matter on that day. But the learned arbitrator refused to entertain the representative of the petitioner. It is the case of the petitioner that thereafter the learned arbitrator did not give any notice of the hearing. The respondents did not file any reply to the said application filed by the petitioner under section 13(2) of the Arbitration Act.

11. It is the case of the petitioner that the respondents had appointed the learned arbitrator without knowledge and consent of the petitioner. The petitioner received a copy of the award dated 7th October, 2013 passed by the learned arbitrator calling upon the petitioner to pay a sum of Rs.12,07,650.77 alongwith interest at the rate of 18% per annum.

12. Mr.Cama, learned counsel appearing for the petitioner submits that the respondents did not serve any copy of the reference letter addressed to the learned arbitrator appointing him as the sole arbitrator in the matter. Except the notice dated 11th May, 2012 issued by the learned arbitrator, the petitioner was not issued with any other notice of the hearing from the learned arbitrator. The respondents had also did not file any reply to the application filed under section 13(2) of the Arbitration Act though had sought time. On 1st September, 2012 there was no hearing before the learned arbitrator. There was no notice of hearing after 1st September, 2012. Even in the hearing purported to have been held on 13th May, 2013, the learned arbitrator did not issue any notice to the petitioner.

13. Learned counsel submits that in any event the learned arbitrator ought to have issued a caution notice to the petitioner before proceeding with the matter *ex-parte* against the petitioner and in absence of such caution notice informing the petitioner that the learned arbitrator would proceed *ex-parte* against the petitioner in case of the petitioner failing to remain present, the learned arbitrator could not have proceeded *ex-parte* against the petitioner. The award rendered by the learned arbitrator is thus in violation of principles of natural justice. The petitioner was unable to remain present before the learned arbitrator. In support of this submission, learned counsel placed reliance on the judgment of the Kerala High Court in case of ***Impex Corporation and Ors. vs. Elenjikal Aquamarine Exports Ltd.*** 2008(2) Arb.LR 560 (Kerala) (DB) and in particular paragraphs 1, 4, 5 and 6 which read thus :-

1. Main question to be decided in this case is the application of principles of natural justice and fair hearings in Arbitration proceedings. Appellant filed an application to set aside the award passed by the arbitrator under Section [34](#) of the Arbitration and Conciliation Act, 1996 (herein referred to as 'the Act'). Various contentions were raised by the appellants. First contention was that there was no proper arbitration agreement. Second contention was that the arbitrator was not properly appointed and appellants never agreed for the arbitration or arbitrator. Thirdly, it was argued that former junior of the arbitrator was appearing for the claimant and, therefore, there are circumstances to doubt the impartiality of the arbitrator as provided under Section [12\(3\)](#) of the Act. Finally it was contended that arbitrator decided the matter *ex parte* and award was passed without issuing proper notice and hence there is violation of the principles of natural justice. The District Court found all these points against the appellants in the impugned order.

4. Finally, it was contented that arbitrator was not fair to the petitioners and he had not given them a fair opportunity to participate in the proceedings. No proper notice was issued

and there is violation of principles of natural justice. According to the appellants, after receipt of Annexure III, notice regarding the appointment of arbitrator, they never received any communication from the arbitrator. Copy of the claim petition filed was not forwarded to them before they were declared ex parte. They were not given any opportunity to file written statement or counter to the claims. After receipt of Annexure III, they received for the first time a communication from the arbitrator with the proceedings dated 12.11.1999 and copy of the claim petition with supporting documents filed by the claimant from the arbitrator, stating that the appellants' case is adjourned to 20.12.1999. The proceedings dated 12.11.1999 show that appellants were declared ex parte on that date. According to the appellants they were not informed of the posting on 12.11.1999. On 20.12.1999, even though its advocate with representative of the appellants went to the arbitrator's office, arbitrator was out of station and proceedings were adjourned and adjourned date of posting was not intimated. On 03.01.2000, advocate of appellants sent a registered letter requesting the arbitrator to inform the date. In the reply to the above, by letter dated 07.01.2000 appellants were informed that arbitration was completed and by proceedings dated 12.11.1999 the appellants were declared ex parte and the copy of the same was sent to the appellants by registered post as well as by courier and that the arbitration proceedings scheduled on 20.12.1999 was adjourned to 03.01.2000 on which day the respondent/claimed adduced evidence and the proceedings closed and the case was reserved for award. It is submitted that even though the appellants were served with a copy of the proceedings dated 12.11.1999 posting the case to 20.12.1999, arbitrator did not send any proceedings to the appellants herein, postponing the hearing from 20.12.1999 to 03.01.2000. That also shows that arbitration proceedings on 20.12.1999 was adjourned and there was no sitting on that day and no further notice was given. A copy of the statement of facts filed by the claimant along with supporting documents was also received along with the said proceedings dated 12.11.1999. It was only when the said proceedings dated 12.11.1999 was received by the appellants, they became aware for the first time that arbitral proceedings

had commenced, that some fax confirmation Report had been produced by the respondent/claimant before the arbitrator to show that the appellants had received notice issued by the arbitral tribunal, that the appellants were declared ex parte and that the next arbitration sitting would be held on 20.12.1999. The very fact that a copy of the Statement of claims of the respondent/claimant along with supporting documents was sent along with proceedings dated 12.11.1999 would clearly show that no attempt had been made prior to that by the arbitrator or the respondent to serve a copy of the statement of claims along with supporting documents on the appellants. It is their contention before they were declared ex parte, they never received any communication from the arbitrator regarding the date of posting earlier. Without issuing notice they cannot be declared ex parte. No evidence was adduced by the respondent or arbitrator to the effect that arbitrator issued notice of posting of the case to the appellants before the date of posting on 12.11.1999 or before appellants were declared ex parte. It is also not disputed that appellants were intimated that case has been posted on 20.12.1999. But case was adjourned to 03.01.2000 as arbitrator was out of station. Admittedly, appellants were not informed of the date of posting on 03.01.2000. No A Diary or B Diary is kept like civil case. Notice was also not given intimating that arbitration case posted on 20.12.1999 was postponed to 03.01.2000. Explanation of the respondent is that it was not necessary to send such notice as appellants were already declared ex parte on 12.11.1999. Here the appellants were not given a fair opportunity to present and contest the matter. The proceedings of 12.11.1999 was sent to the appellants by the arbitrator along with statements of claims indicating that even the statement of claims was not forwarded to the appellants before they were declared ex parte. The proceedings of the arbitrator cannot be equivalent to the proceedings in a civil Court. The Code of Civil Procedure as such is not applicable before the arbitrator. Since no procedure is contemplated in the arbitration agreement, the arbitral tribunal can adopt the proceedings in the manner it considers appropriate. But the proceedings adopted shall be fair and in accordance with the principles of natural justice. Arbitrator also cannot violate the provisions of

the Act.

5. Now we will consider some of the relevant provisions regarding the proceedings to be adopted by the arbitrator. Section 18 read 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.”

It shows that though arbitrator is not bound by technical rules of procedure, he cannot ignore basic principles of natural justice. Thread of natural justice should run through the entire arbitration proceedings and the principles of natural justice require that sufficient notice of posting shall be given to both sides and equal opportunities shall be given to both sides to prosecute the case and that the arbitral tribunal is not bound by technical rules of CPC. Section 19 reads as follows:

“ 19. Determination of rules of procedure –

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (V of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in Sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under Sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

Section [24](#) of the Act also deals with hearings and written proceedings. Section [24](#) reads as follows:

“24. Hearing and written proceedings -

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the

presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

It shows that sufficient advance notice must be given regarding dates of oral hearing and inspection of documents and pleadings filed by one party shall be communicated to the other party. Admittedly, even the claim statement was given to the appellants after they were declared ex parte and thereafter no notice was send on the appellants.

6. It is also not correct to hold that if one of the parties declared ex parte, it cannot appear before the arbitrator in further proceedings or that may not entitle to any further notice of hearing. In Law and Practice of Commercial Arbitration in England by Mustill and Boyd (1982 Ed.,P.261) the principles of fair hearing to be adopted by the arbitrator is stated as follows:

“ (1) Each party must have a full opportunity to present his own case to the tribunal.

(2) Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.

(3) The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.”

With regard to oral hearing it is stated at pages 263-64 as follows:

“(1) Each party must have notice that the hearing is to take place.

(2) Each party must have a reasonable opportunity to be present at the hearing together with his advisers and witnesses.

(3) Each party must have the opportunity to be present throughout the hearing.

(4) Each party must have a reasonable opportunity to present evidence and arguments in support of his own case.

(5) Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral arguments.

(6) The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and arguments.”

With regard to ex parte procedure, arbitral tribunal is not bound by provisions in CPC but by Section [25](#) of the Act dealing with the situations when parties are absent on the date of hearing. Section 25 reads as follows :

“ **25. Default of a party**— Unless, otherwise agreed by the parties, where, without showing sufficient cause,-

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section [23](#), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section [23](#),

the arbitral tribunal shall continue the proceedings without treating the failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.”

Article 25 of the UNCITRAL Model Law is incorporated in Section [25](#). In Russell on Arbitration, 20th Edition at page 263, it is stated as follows:

“ In general, an arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside.”

This principle adopted by Calcutta High Court in *Juggilal Kamlatpat v. General Fibre Dealers Ltd.* AIR 1955 Calcutta 354(DB) held that if a party fails to attend the arbitration hearing on the due date and time, the arbitrator is at liberty to proceed ex parte, though it is advisable, but not compulsory, that he should give that party notice of his intention to proceed ex parte, if he is absent in the next hearing. Once an arbitrator makes known his intention to proceed ex parte and it is duly noted by the parties, the act of a party in not putting up an appearance on the next date fixed, would empower the arbitrator to proceed ex parte and such an act of the arbitrator does not amount to misconduct as held in *Dalmia Cement (Bharat) Ltd. v. Advance Commercial Co. Ltd. (Del)*. Since provisions of CPC is not strictly applicable in arbitration proceedings, even if one party is absent and arbitral tribunal declared him ex parte, if the case is not finished on that day and the case is only adjourned without deciding the case, both sides can appear in the next adjournment date. The meaning of the expression 'ex parte' has been considered by the Supreme Court in *Sangram Singh v. Election Tribunal Kotah* AIR 1955 SC 425 at 431. Referring to the judgment of Wallace, J. in *Venkatasubbiah v. Lakshminarasimham* AIR 1925 Madras

1274, the Apex Court opined that 'ex parte' only means in the absence of other party. In an ex parte proceedings, the Court can proceed with the case if one party is absent without sufficient cause and due notice, as if that party is present. If an ex parte decision is taken, when one party is absent without sufficient reasons, decision will be valid. But if no ex parte decision is taken on that date but case is further adjourned, both sides can participate in the subsequent date of posting as held by this Court in *St. Joseph's Hospital v. Jimmy*, (2001) 2 KLT 514. The provisions under CPC are not applicable to other proceedings unless CPC is made applicable by express provision. This Court has considered Consumer Protection Act and rules made therein and held as follows:

“ If an ex parte decision is taken, the opposite party can only file an appeal. In the present case no ex parte decision is taken. Therefore, in subsequent postings opposite party is free to attend and continue with the proceedings. I also note that date of posting was 14.04.1999. But on that day there was no sitting. Therefore, the opposite party honestly thought that the next date of posting will be intimated and, therefore, he awaited notice. Since no notice was received, he enquired on 20.04.1999 and on seeing that he has been declared ex parte after posting the case on 16.04.1999, Ex. P3 petition was filed. There is sufficient reason also for non-appearance as the petitioner, a layman, was not aware of the usual procedure adopted by the forum, when the posting date in the notice was declared as a holiday.

I may also refer to the decision of the Supreme Court in *New India Assurance Co. Ltd. v. R. Srinivasan* (2000) 3 SCC 242. There the Supreme Court held that the Consumer Disputes Redressal Forum concerned has inherent power and jurisdiction to restore the complaint dismissed for default provided the complainant shows good reasons for non-appearance. In the absence of powers under Order 9 of CPC, I am of the opinion that, if inherent power is applicable in the matter of restoration of a dismissed complaint for default, same power also can be exercised when an ex parte decision is also taken in the interest of justice. In any event, in this matter, since no ex parte

decision is taken, I am of the opinion that the petitioner will be free to attend the case on subsequent dates of hearing. Therefore, no further orders are necessary in this original petition. Petitioner is free to attend the proceedings, cross-examine the witness, adduce evidence of his defence etc. in their subsequent postings.

The word 'ex parte' was considered by the Court in FACT Employees Association v. FACT Ltd., 1976 KLT 474 on the basic ground of Rule 22 of the Kerala Industrial Tribunal Rules. Justice Kochu Thommen observed as follows:

“ The Tribunal may imagine that the absentee is present, and having done so, it may give full effect to its imagination and carry it to its logical conclusion. The tribunal has to bear in mind the purposes for which the fiction is created and has to give effect to them. Obviously, the intention of Rule 22 is to enable the tribunal to imagine that a person is present, although he is in fact absent; and to further imagine that, although present, he is unwilling to adduce evidence or argue his case.”

Therefore even if appellants were absent on 12.11.1999 and the matter was adjourned to 20.12.1999, appellants ought to have been allowed to participate in that proceedings. In fact notice of posting on 20.12.1999 was issued to them for that purpose. But admittedly, there was no sitting on 20.12.1999 and matter was adjourned to 03.01.2000 without any notice. On the facts of the case, no proper and sufficient notice was given to appellants by arbitrator before they were declared ex parte or thereafter. Even the copy of the claim was forwarded to the appellants only after they were declared ex parte. No notice at all was given for the posting on 03.01.2000. The date of posting was not intimated when the case was adjourned from 20.12.1999 as there was no sitting on that date which was the only date informed to the appellants. Hence there is violation of principles of natural justice and these are violation of Sections 18 and 25.

14. Learned counsel placed reliance on the judgment of Delhi High Court in case of ***Power Grid Corporation of India Ltd. vs. Electrical Mfg. Co.Ltd. and Anr.*** 2008(3) Arb.LR 239 (Delhi) (DB) and in particular paragraphs 17 to 20 and 24 which read thus :-

17. In relation to reasonable opportunity of being heard, in *Sohan Lal Gupta v. Asha Devi Gupta* : (2003) 7 SCC 492 = 2003(3) Arb.LR 141(SC), the Hon'ble Apex Court observed as under (paras 16, 17 and 18 of Arb. LR)

“ 20. There cannot be any dispute with regard to the proposition of law that the parties would be entitled to a reasonable opportunity of putting their case. [See *Montrose Canned Foods Ltd. v. Eric Wells (Merchants) Ltd.*, (1965) 1 Lloyd's Report 597]. A reasonable opportunity would mean that a party must be given an opportunity to explain his arguments before the Tribunal and to adduce evidence in support of his case. However, under the old Act, an oral hearing would only be permitted if a party requested one, unless there was some agreement to the contrary. [See *Henry Southeran Ltd. v. Norwich Union Life Insurance Society*, (1992) 31 EG 70].

21. What would constitute a reasonable opportunity of putting case as also qualification of the right has been stated in *Russell on Arbitration*, 22nd Edn., Paragraphs 5-053 and 5-054 which are in the following terms:

' 5-053. A reasonable opportunity of putting case--Each party must be given a reasonable opportunity to present his own case. This means he must be given an opportunity to explain his arguments to the Tribunal and to adduce evidence in support of his case. Failure to comply with this requirement may render the award subject to challenge under Section [68](#) of the Arbitration Act, 1996. It is also a ground for refusing enforcement of the resulting award under the New York Convention.

5-054. Qualification of the right.-The need to allow a party a reasonable opportunity to present his case can give rise to

difficulties. To what extent can the Tribunal intervene where, for example, a party's submissions or evidence is needlessly long, repetitive, focuses on irrelevant issues or is sought to be made over an extended period of time? What if a party ignores procedural deadlines imposed by the Tribunal but maintains he still has points to put before it in support of his case? Inevitably, each situation has to be dealt with in its own context but the following general considerations should be taken into account.

22. There cannot, therefore, be any doubt that a party does not have an unfettered right. The arbitrator cannot only ask a party to comply with procedural orders and directions including those imposing limits as to time and content of submissions and evidence but the arbitrator also has a right of managing the hearing. In Russell on Arbitration, 22nd Edn., the law is stated thus:

' 5-057. Managing the hearing--Similarly, a Tribunal cannot be expected to sit through extended oral hearings listening to long-winded submissions on irrelevant matters. The Tribunal is entitled, and under Section [33](#) is obliged and encouraged, to avoid the unnecessary delay and expense that would be caused by such an approach. The Tribunal should take a grip on the proceedings and indicate to the parties those areas on which it particularly wishes to be addressed and those which it does not consider relevant to the real issues in dispute. If a party fails to heed such guidance, the Tribunal might seek to focus the proceedings by allocating the remaining hearing time between the parties. This the Tribunal is entitled to do, provided it will allow a reasonable time for both parties to put forward their arguments and evidence.

23. For constituting a reasonable opportunity, the following conditions are required to be observed:

- (1) Each party must have notice that the hearing is to take place.
- (2) Each party must have a reasonable opportunity to be

present at the hearing, together with his advisers and witnesses.

(3) Each party must have the opportunity to be present throughout the hearing.

(4) Each party must have a reasonable opportunity to present evidence and argument in support of his own case.

(5) Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.

(6) The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.”

18. Indisputably, the arbitrators would in law neglect their duty if they do not listen to one party who might be interested either in controverting or who is legally entitled to controvert the claim of the party approaching them. Similarly, the person who is to be affected by the evidence ought to be present to hear it so that he would be able to meet and answer it. The arbitrator is ordinarily free from the fetters of procedural law but that does not make him free from the fundamental principles of justice. Though the arbitrator may not strictly follow the rules and procedures as observed by the civil court but at the same time it would not imply that the arbitrary tribunal can ignore or circumvent the principles of natural justice and fair procedure. The omission in giving notice to a party before proceeding ex-parte is a serious irregularity in the procedure and amounts to misconduct. It is a salutary principle of natural justice that nobody should be condemned unheard.

19. In Halsbury's Laws of England, Fourth Edition, Vol. 2 Page 590, page 306 it has been stated as under:

“Where the arbitrator proposes to proceed with the reference notwithstanding the absence of one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. If reasonable excuse for not attending the

appointment can be shown, the court will set aside an award made by an arbitrator who has proceeded ex parte.”

20. In Russell on Arbitration, Nineteenth Edition, page 271 the following passage appears.

“ Notice of intention to proceed ex parte- In general, the arbitrator is not justified in proceeding ex parte, without giving the party absenting himself, due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word "Peremptory" marked on it is, however, sufficient.

If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed ex-parte at the second meeting, unless the appointment for it was also marked "peremptory" or contained a similar intimation of his intention.”

24. As already discussed above, the arbitral tribunal has acted in utter haste in rushing through the arbitration proceedings without affording proper and adequate opportunity to the appellant in presenting its case, we, therefore, feel that the interest of justice will be best served if we refer the matter again to a sole arbitrator to adjudicate the disputes between the parties afresh after giving due opportunity to both the parties. The appointment of a sole arbitrator would in our opinion cut short delay in the disposal of the controversy which will remain raging for another decade if we direct the process of appointment of the arbitrators to be started de novo.

15. Learned counsel placed reliance on Calcutta High Court in case of ***Dipti Bikash Sen and another vs. India Automobiles Ltd. AIR 1978 Calcutta 454*** and in particular paragraph (2) in support of the aforesaid submission which reads thus :-

2. As I have mentioned before, there is no dispute that no

notice had been given by the arbitrator that he would proceed ex parte on 21st June, 1977. Counsel on behalf of the respondent contended that there was no invariable rule of law which enjoined the arbitrator to give such a notice before proceeding ex parte. He further submitted that where time and place of meeting appointed by the arbitrator were reasonable and due notice had been given to the parties but one of the parties refused to attend the arbitrator might proceed with the reference in his absence. In aid of this submission, he relied on the observations of Halsbury's Laws of England, 4th Edition. Vol. II, Page 306, Para 590. The learned authors of Halsbury's Laws of England further observed that where arbitrator proposed to proceed with the reference notwithstanding absence of one of the parties it was advisable that he should give that party a distinct notice of his intention to do so. But if reasonable excuse for not attending the appointment could be shown the Court would set aside the award made by the arbitrator who had proceeded ex parte. Counsel further submitted that there was no rule of law, as such, and in this case the arbitrator was not guilty, according to him, for not giving any prior notice intimating to the parties that he would proceed ex parte. Russel in the 18th Edition on Law on Arbitration at page 222 states that every arbitrator is authorised by the nature of his office, to proceed ex parte for good cause. It is unnecessary, though not unusual, to give him power in express terms in the submission. In the case of Udaichand v. Debibux, AIR 1920 Cal 853 Sir Ashutosh Mookerjee, J. speaking for the Division Bench observed that before the arbitrator proceeded ex parte he should give notice in writing to each of the parties otherwise the award might be liable to be set aside. At page 854 the learned Judge observed that there was no statutory rule, however, that the arbitrator should give notice but it was advisable to give notice in writing to each of the parties' Solicitor giving the arbitrator's intention clearly to proceed ex parte. Though there was no statutory rule that arbitrator cannot proceed ex parte without giving any notice to the parties but if the arbitrator proceeds in that manner the award made by him may be set aside. The rule requiring the arbitrator to give notice was described as the rule of prudence and convenience. Similar view was expressed by the Division

Bench of this Court in the case of Bhowanidas Ram Govind v. Harsukhdas Balkishendas, 27 Cal WN 933 :(AIR 1924 Cal 524). There, the Division Bench further observed that the failure of the arbitrators to give a special notice to a party that they intended to proceed ex parte if he did not appear was no ground for setting aside the award which they had made in his absence where it appears that he would not have appeared in spite of such warning. The true test of the validity for such an ex parte award being whether the party complaining was prejudiced by the omission of the arbitrator to serve a special notice on him. Similar view was also expressed by the Division Bench of the Allahabad High Court in the case of Dori Lal v. [Lal Sheo](#) : AIR 1954 All 244. In the case of Juggilal Kamalapat v. [General Fibre Dealers Ltd.](#), : AIR 1955 Cal 354 the Division Bench of this Court reviewed these authorities and held that the procedural rule applicable to arbitration proceedings was more tolerant than the rule followed in the Court of Law. Broadly stated, the principles governing the arbitrator's right to proceed ex parte were: (1) If a party to an arbitration agreement had failed to appear at one of the sittings, the arbitrator could not or, at least ought not to, proceed ex parte against him at that sitting. (2) Where non-appearance was accidental or casual, the arbitrator should ordinarily proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party. (3) If, on the other hand, it appears that the defaulting party had absented himself, for defeating the object of the reference, the arbitrator should issue a notice that he intended at specified time and place to proceed with the reference and that if the party concerned did not attend he would proceed in his absence. (4) But if after making such peremptory appointment issuing such a notice the arbitrator did not in fact proceed ex parte on the day fixed, but fixed another subsequent date, he could not proceed ex parte on such subsequent date, unless he issued a similar notice in respect of that date as well. (5) If he issued a similar notice and the party concerned did not appear, an award made ex parte would be in order. But, if he did not issue such notice on the second occasion but nevertheless proceeded ex parte, the award would be liable to be set aside in spite of a notice of peremptory

hearing having been given in respect of the earlier date, subject however to the condition that prejudice was caused to the party against whom the ex parte order was made. But this duty to give notice of the intention to proceed ex parte was not an absolute one. Where a party by its conduct had made his position clear that he would not attend in any event then the formality need not be followed. Bearing the aforesaid principles, in this case, it appears that from the previous conduct of the petitioner there was no evidence that the petitioner would not attend the arbitration proceedings. On the other hand, the petitioner had in fact, attended the previous arbitration sitting and had suggested that a date might be fixed after the second week of June when he would attend. If the petitioner's version is to be accepted then he had sent his documents on the 21st June, 1977. If these facts are taken in conjunction with the other evidence then the intention to proceed and participate in the arbitration proceedings by the petitioner would be apparent. It is true that the petitioner did not take any action until he received the letter dated 12th July, 1977 on 14th July, 1977. But from his inaction from 21st June, 1977 to 14th July, 1977, in the background of the facts and circumstances of this case and in the background of the previous conduct, this inference in my opinion, cannot be drawn that he would not have participated in the arbitration proceedings had he been given the notice. In this view of the matter, in my opinion, the arbitrator in not following the rule of prudence enjoined by the Courts and in not giving the peremptory notice had acted in such a manner in which there was the possibility of miscarriage of justice and prejudice being caused to the petitioner.

16. Learned counsel placed reliance on the judgment of Queen's Bench Division in case of ***Surrendra Overseas Ltd. vs. Government of Sri Lanka (1977) 2 All ER 481.***

17. Mr.Madon, learned senior counsel appearing for the respondents on the other hand submits that under clause 23.1 of the loan agreement which recorded an

arbitration agreement, the exclusive right to appoint an arbitrator was with the lender i.e. the respondents herein. The consent of the petitioner was thus not required for appointment of the arbitrator by the respondents. He submits that a copy of the letter dated 11th May, 2012 addressed by the respondents to the learned arbitrator thereby appointing him as a sole arbitrator was also forwarded to the petitioner. He invited my attention to the notice dated 11th May, 2012 issued by the learned arbitrator to the petitioner in which the learned arbitrator had informed the petitioner that he was nominated by the respondents herein under the arbitration agreement. Alongwith the said notice of arbitration proceedings dated 11th May, 2012, the learned arbitrator had also enclosed copy of the claim petition, copy of the application filed under section 17 by the respondents, copy of the interim order passed by the learned arbitrator and copy of the reference letter dated 11th May, 2012. It is submitted that the petitioner has admittedly received a copy of the said notice alongwith enclosures thereto.

18. Learned senior counsel invited my attention to the application filed by the petitioner under section 13(2) of the Arbitration Act dated 16th June, 2012 and submits that even in the said application the petitioner has acknowledged the receipt of the first notice dated 11th May, 2012 alongwith annextures thereto including reference letter dated 11th May, 2012. The petitioner therefore cannot be allowed to urge that the petitioner was not informed about the appointment of the learned arbitrator by the respondents.

19. Learned senior counsel submits that the petitioner had attended the meeting before the learned arbitrator on 16th May, 2012 however did not participate in the said meeting and/or did not attend subsequent meetings. He submits that after 2nd April, 2012 several cheques issued by the petitioner towards loan installments were

dishonoured and were returned to the respondents. The petitioner even did not bother to give any response to the loan recall notice dated 2nd May, 2012 issued by the respondents.

20. The learned arbitrator adjourned the hearing on 16th June, 2012 to 28th July, 2012 and granted time to the respondents to file its reply to the application filed by the petitioner under section 13(2) of the Arbitration Act. On 28th July, 2012, neither the petitioner nor his advocate remained present before the learned arbitrator. It is submitted that on 28th July, 2012, the respondents made a submission before the learned arbitrator that the application filed by the petitioner under section 13(2) of the Arbitration Act would be opposed by the respondents orally with the relevant citations in support of their contentions. None appeared for the petitioner in the said meeting. The learned arbitrator accordingly adjourned the matter to 1st September, 2012 for arguments on the application filed under section 13(2) filed by the petitioner. The learned arbitrator directed the office to issue notice. Learned senior counsel invited my attention to the averments made by the petitioner in the arbitration petition alleging that on 28th July, 2012 the representative of the petitioner had attended the hearing before the learned arbitrator and sought an adjournment on the ground that the advocate of the petitioner Mr.Chaturvedi was unwell. It is submitted that none had appeared for the petitioner on 28th July, 2012 and the said allegation made in the petition is false.

21. The matter was thereafter adjourned from 28th July, 2012 to 1st September, 2012, from 1st September, 2012 to 6th October, 2012, from 6th October, 2012 to 19th January, 2013 and finally from 19th January, 2013 to 18th May, 2013 since the petitioner and/or his advocate had remained absent on all these dates of hearing.

22. Learned senior counsel submits that though in the application filed by the respondents under section 9 of the Arbitration Act, 1996 before the District Court at Gandhidham against the petitioner and though the learned District Judge had passed an order under section 9 on 2nd November, 2012 inter alia directing the petitioner to furnish the bank guarantee in favour of the respondents, the petitioner did not comply with the said order. He invited my attention to the order dated 31st May, 2013 passed by the learned arbitrator rejecting the application filed by the petitioner under section 13(2) of the Arbitration Act which application was adjourned from time to time in view of the petitioner or his advocate remaining absent.

23. The learned arbitrator thereafter issued a notice dated 31st May, 2013 informing the advocate of the petitioner and the respondents for the hearing of the arbitral proceedings on 22nd June, 2013 and directed them to remain present. The said notice was addressed to the advocate representing both the parties at their respective addresses. By the said notice, the parties through their advocates were informed that the matter was adjourned to 22nd June, 2013 at 3 p.m. for proceeding further with the application and arbitration case. In the said notice, it was made clear that if any of the parties fail to remain present personally or through their advocates on the date, time and place mentioned therein, then in that event the matter shall be dismissed/proceeded *ex-parte* and shall be determined accordingly. Learned senior counsel also invited my attention to the postal receipt dated 5th June, 2013 showing the name of the M.L.Chaturvedi advocate. Learned senior counsel submits that the learned arbitrator thereafter adjourned the hearing of the arbitral proceedings to 6th July, 2013, 27th July, 2013, 16th August, 2013 and finally on 28th September, 2013 on account of the petitioner and/or his advocate not remaining present before the learned arbitrator. Since none appeared on 7th

October, 2013, the learned arbitrator proceeded with the hearing of the matter *ex-parte* and rendered an award.

24. Pursuant to the directions issued by this court, the respondents filed additional affidavit on 7th August, 2014. Learned senior counsel invited my attention to the notice of the arbitration proceedings dated 14th August, 2012 addressed to Mr.M.L.Chaturvedi, advocate for the petitioner informing the next date of the hearing on 1st September, 2012 at 11.30 a.m. in his chamber and making it clear that the matter would proceed *ex-parte* in absence of any of the parties. Learned senior counsel showed the receipt issued by the postal department showing the name of Mr.M.L.Chaturvedi as addressee.

25. It is submitted that the petitioner had neither challenged the order passed by the learned arbitrator under section 13(2) nor under section 17 of the Arbitration Act. The petitioner thus cannot be allowed to make any grievance in respect of the said two orders across the bar. It is submitted that though it is the case of the petitioner himself in paragraph (10) of the petition that on 28th July, 2012 the representative of the petitioner attended the matter and informed the learned arbitrator that Mr.M.L.Chaturvedi was not well and would not attend the matter, the petitioner did not address any letter to the learned arbitrator for finding out the next date of the hearing. He submits that the petitioner was all throughout aware of the dates of hearing and chose not to remain present deliberately.

26. Learned senior counsel submits that neither the petitioner nor his advocate Mr.M.L.Chaturvedi has denied the factum of receipt of the notice dated 31st May, 2013 sent by the learned arbitrator to the respective advocates of the petitioner and the respondents. The learned advocate did not file any affidavit denying that he had not received the said notice from the learned arbitrator. Reliance is placed on

section 27 of the General Clauses Act and it is submitted that once notice was sent by the registered A.D. at the last known address and the packet has not been returned, such notice was deemed to have been served. Reliance is also placed on section 3 of the Arbitration and Conciliation Act, 1996 in support of the submission that a written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address.

27. Mr.Madon placed reliance on the order dated 30th June, 2011 passed by this court in **Arbitration Petition No.165 of 2011** in case of **Rina Samanta & Anr. vs. Tata Motors Finance Ltd.** and in particular paragraph (2) and submits that since the petitioner had not appeared before the learned arbitrator despite receipt of the notice, the court cannot interfere with the impugned award.

28. Learned senior counsel also placed reliance on the order passed by this court on 15th June, 2010 in Arbitration Petition No.937 of 2010 in case of **Noor Shaikh Mohammed Hussain vs. Tata Motors Limited** and submits that once the petitioner was served with notice and he had remained absent before the learned arbitrator, he could not have been served upon with the proceedings and further notices and since the petitioner had chosen to remain absent, the learned arbitrator was right in going ahead with the proceedings in the absence of the petitioner. Reliance is placed on paragraphs 2 and 3 of the said order which read thus :-

2. I have heard learned Advocates on both sides at the stage of admission. Learned Advocate appearing on behalf of the Petitioner submitted that statement of Claim was not served upon the petitioner. The petitioner, in the course of hearing had to admit that the first date of hearing of the Arbitration Proceeding was on 19.9.2009 and that the Petitioner had received notice of the same which is annexed by

the Petitioner at Exhibit G to the petition. The Petitioner had to admit that the petitioner could not go before the learned Arbitrator on 19.9.2009 and thereafter according to the petitioner, the petitioner made number of attempts to contact the Arbitrator. No such record is created by the petitioner in support of his said statement. The argument advanced by learned Counsel for the petitioner that the statement of claim was not served on the petitioner and thus ex-parte award was passed cannot be accepted. If petitioner would have remained present before the Arbitrator on 19.9.2009, surely the learned Arbitrator would have served upon the petitioner statement of claim and the proceedings would have followed thereafter. Once the petitioner has failed to attend the proceeding on 19.9.2009 and even thereafter, certainly learned Arbitrator was right in going ahead with proceeding, may be in the absence of the petitioner. Hence the ground that ex-parte award was passed cannot be accepted. The petitioner contended that efforts were made to settle the matter before the Arbitration proceeding commenced. This would go to show that the petitioner had practically admitted his liability. Even otherwise, in para 7 of this petition there is admission that the petitioner could not repay the loan instalments in time for three months.

3. Having considered the text of the award and having considered the arguments on behalf of the Counsels on both the sides, I am inclined to observe that no ground is made out for interference with the award which is passed and therefore the petition need not be admitted.

29. Learned senior counsel placed reliance on the order dated 11th February, 2014 passed by this court in ***Arbitration Petition No.909 of 2013*** in case of ***Pankaj Kumar Singh vs. Tata Motors Finance Limited*** and in particular paragraph (6) and submits that since the petitioner chose not to participate in the proceedings inspite of full knowledge, he cannot be allowed to urge that the learned arbitrator proceeded *ex-parte*. Paragraph (6) of the said order reads thus :-

6. The Petitioner was served with a notice on 7 May 2012. This notice clearly specified that if the Petitioner did not participate in the proceedings, the Arbitrator will proceed ex parte. There is absolutely no reason placed on record why inspite of notice, the Petitioner chose to ignore the arbitration proceedings. Only inference can be drawn is that the Petitioner deliberately stayed away from the arbitration proceedings so that a technical challenges can be laid to the award as is sought to be done in the present matter. This is not a case where the Petitioner was prevented any manner from appearing before the Arbitrator. When inspite of full knowledge, the Petitioner chose not to participate in the proceedings, then he cannot make grievance that the arbitrator proceeded ex parte. Decisions cited by the learned counsel for the Petitioner regarding duties of the Court while passing ex parte decree, are in the matters of civil suits. The arbitration proceedings cannot be equated to a civil suit especially in the cases of this nature, where the loan was admittedly advanced and admittedly not repaid. Even in the decision of C.N. Ramappa Gowda (supra) relied upon by the petitioner, the Apex Court while considering the provisions of Order VIII Rule 10 has stated that if the Court is of the view that the plaintiff's case is prima facie unimpeachable and the defendant's absence is clearly a dilatory tactic to delay the passing of a decree, Court would be justified in proceeding to pass a ex parte decree. In the present case, in view of the admitted service of notice on the Petitioner and an admitted position of default in repayment, no fault can be found in the arbitration proceedings in the manner as the Arbitrator had done.

30. Learned senior counsel distinguished the judgment of Delhi High Court in case of ***Power Grid Corporation of India Ltd. (supra)*** and submits that the said judgment would not apply to the facts of this case. In this case, learned arbitrator had given a notice that if the petitioner failed to remain present, he would proceed with the arbitration proceedings *ex-parte*. It is submitted that in any event the said judgment of Delhi High Court is not binding on this court. Learned senior counsel

distinguished the judgment of Calcutta High Court in case of ***Dipti Bikash Sen and another (supra)*** on the ground that there was no dispute that no notice had been given by the arbitrator that he would proceed *ex-parte* whereas in this case the learned arbitrator had given such notice. It is submitted that in any event such caution notice to proceed *ex-parte* in case of a failure of a party to remain present is not mandatory and atmost it could be said that it was advisable to issue such notice.

31. Insofar as judgment of Kerala High Court in case of ***Impex Corporation and Ors. (supra)*** relied upon by the petitioner is concerned, learned senior counsel distinguished the said judgment on the ground that it is held by Kerala High Court that such notices is not compulsory but is advisable that the arbitrator would proceed with the matter *ex-parte* if a party remains absent in the next hearing.

32. He submits that though the petitioner was served with the statement of claim, for about 1 and ½ year, no written statement came to be filed by the petitioner. He submits that since the petitioner has deliberately chosen to remain absent inspite of notice served upon him from time to time, he cannot be allowed to urge that he was not given proper notice or otherwise unable to present his case.

33. Mr.Cama, learned counsel in rejoinder submits that once it is urged by the petitioner that the petitioner was not served with any notice or with the affidavit in reply to his application, the burden had shifted to the respondent to prove that the petitioner was served with the notice which burden has not been discharged by the respondents.

34. Learned counsel distinguished the order of this court dated 30th June, 2011 in case of ***Rina Samanta & Anr. (supra)*** on the ground that no reasons are rendered

by this court in the said order and thus the said order cannot be considered as a precedent. Learned counsel distinguished the order dated 15th June, 2010 in case of **Noor Shaikh Mohammed Hussain (supra)** on the ground that the petitioner had not attended the arbitration proceedings inspite of the service of notice upon him whereas in this case though the petitioner had attended the hearing held on 16th July, 2012, the petitioner was not served with any subsequent notice though the petitioner was contesting the proceeding filed by the respondents under section 9 of the Arbitration and Conciliation Act, 1996 and had contended that the application of the petitioner filed under section 13(2) of the Arbitration Act was pending before the learned arbitrator.

35. Learned counsel distinguished the order passed by this court on 11th February, 2014 in case of **Pankaj Kumar Singh (supra)** on the ground that the petitioner had failed to appear before the learned arbitrator though service was effected whereas in this case no service was effected upon the petitioner of the subsequent dates of hearing.

RELEVANT FACTS IN OTHER ARBITRATION PETITIONS

ARBITRATION PETITION NO. 258 OF 2014

36. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of sum of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.11,76,705.92 with interest thereon.

Rest of the facts are identical to the Arbitration Petition No. 304 of 2014.

ARBITRATION PETITION NO. 274 OF 2014

37. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.11,76,709.16 with interest thereon.

ARBITRATION PETITION NO. 291 OF 2014

38. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.11,74,396.53 with interest thereon.

ARBITRATION PETITION NO. 400 OF 2014

39. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.11,76,740.11 with interest thereon.

ARBITRATION PETITION NO. 408 OF 2014

40. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.11,76,709.16 with interest thereon.

ARBITRATION PETITION NO. 434 OF 2014

41. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.12,29,534.90 with interest thereon.

ARBITRATION PETITION NO. 435 OF 2014

42. On 30th December, 2009, the petitioner and the respondents entered into a loan agreement for the loan of Rs.19,64,000/-. It is the case of the petitioner that the petitioner paid all the installments till 2nd February, 2012. By an award dated 7th October, 2013, the learned arbitrator directed the petitioner to pay a sum of Rs.11,77,782.12 with interest thereon.

REASONS AND CONCLUSIONS :-

43. A perusal of the petition indicates that it was the case of the petitioner himself that he was served with a copy of the notice dated 11th May, 2012 by the learned arbitrator calling upon him to remain present on 16th June, 2012, making it clear that if the petitioner failed to remain present, the learned arbitrator would proceed *ex-parte*. On 16th June, 2012 the petitioner admittedly filed an application under section 13(2) of the Arbitration & Conciliation Act, 1996 before the learned arbitrator for challenging his appointment. The matter was adjourned to 28th July, 2012. On 28th July, 2012 neither the petitioner nor his advocate was present before the learned arbitrator at the time of hearing of the application under section 13(2) of the Arbitration & Conciliation Act, 1996, which was filed by the petitioner.

44. A perusal of the minutes of the meeting dated 28th July, 2012 indicates that

none had appeared for the petitioner. It is however, alleged in the petition that on 28th July, 2012, a representative of the petitioner attended the hearing before the learned arbitrator and sought an adjournment on the ground that Mr.M.L. Chaturvedi, advocate representing the petitioner was unwell. If according to the petitioner, the learned arbitrator had not recorded the appearance of the representative of the petitioner in the minutes of the meeting held on 28th July, 2012, the petitioner could have applied for correction of the minutes of the meeting which the petitioner failed.

45. A perusal of the record indicates that the matter was adjourned from 28th July, 2012 to 1st September, 2012, from 1st September, 2012 to 6th October, 2012, from 6th October, 2012 to 19th January, 2013 and 19th January, 2013 to 18th May, 2013. Neither the petitioner nor his advocate chose to remain present before the learned arbitrator.

46. On 18th May, 2013, the learned arbitrator therefore, proceeded with the hearing of the application under section 13(2) of the Arbitration & Conciliation Act, 1996 filed by the petitioner and rejected the said application. In the said meeting, the learned arbitrator directed that the arbitral proceedings be proceeded with on 22nd June, 2013. The learned arbitrator thereafter issued the notice dated 31st May, 2013 to the advocates representing the parties for the hearing of the arbitral proceedings on 22nd June, 2013. A perusal of the copy of the notice as well as the postal receipt clearly indicates that the said notice was dispatched at the address of both the advocates, who were representing the parties. The said notices were never returned unserved. A perusal of the said notice also indicates that the learned arbitrator had made it clear that the matter shall be dismissed / proceeded *ex-parte* if the parties remain absent on 22nd June, 2013. Since none appeared for

the petitioner on 22nd June, 2013, the learned arbitrator granted further opportunity and adjourned the hearing of the arbitral proceedings to 6th July, 2013, 22nd July, 2013, 16th August, 2013 and finally on 28th September, 2013. The learned arbitrator ultimately made an award on 7th October, 2013 by proceeding with the matter *ex-parte* and after considering evidence available on record allowed the claims made by the respondents.

47. A perusal of the notice dated 14th August, 2012, issued by the learned arbitrator which is annexed at Exhibit B-1 to the additional affidavit filed by the respondents dated 7th August, 2014 clearly indicates that even in the said notice the learned arbitrator while enclosing the minutes of the meeting dated 28th July, 2012 had made it clear that if the parties fail to appear either personally or through advocates on 1st September, 2012, the matter shall be dismissed / proceeded *ex-parte* and shall be determined accordingly. A copy of the said notice was sent to Mr.M.L. Chaturvedi, advocate who was representing the petitioner in the arbitral proceedings. The petitioner has not filed any rejoinder to the averments made in the affidavit in reply and also in the additional affidavit filed by the respondents placing all these facts on record. The petitioner also did not file any affidavit of the learned advocate Mr.M.L. Chaturvedi, who was representing the petitioner before the learned arbitrator that the notices sent by the learned arbitrator at the address of Mr.M.L. Chaturvedi were not received by him. I am thus not inclined to accept the submission that the petitioner was not served with any notice of hearing from the learned arbitrator. A perusal of the record indicates that the petitioner who had appeared through his advocate before the learned arbitrator on 16th June, 2012 did not bother to address a single letter to the learned arbitrator to find out further date of hearing if according to the petitioner he was not served with any notice of hearing from the learned arbitrator.

48. Section 24(2) of the Arbitration & Conciliation Act, 1996, provides that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property. Under section 25(c) of the Arbitration & Conciliation Act, 1996, if a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it. Neither section 24 nor section 25 or any other provisions of the Arbitration & Conciliation Act, 1996 makes it mandatory for an arbitrator to issue a caution notice to a party for every meeting stating that in absence of such party, the learned arbitrator would proceed with the proceedings *ex-parte*.

49. This is not a case in which the petitioner was absent once though was served with a notice by the learned arbitrator and on the next date of hearing without any notice the learned arbitrator proceeded with the matter *ex-parte*.

50. A perusal of the record clearly indicates that the learned arbitrator had adjourned the hearing from time to time to give sufficient opportunity to the petitioner to remain present and to file the pleadings before the learned arbitrator. Even the advocate representing the petitioner was served with the notices which were duly served upon him but he had chosen not to remain present on behalf of his client. In my view, if inspite of sufficient opportunity having been given by sufficient advance notice of hearing, if such party fails to appear without any sufficient cause before the learned arbitrator, the learned arbitrator is entitled to proceed with the matter *ex-parte* and to make the arbitral award on the evidence available before it. In this case, the petitioner was given sufficient advance notice from time to time by the learned arbitrator of the oral hearing and thus no grievance of the alleged non-compliance of the principles of natural justice or that

the learned arbitrator did not give sufficient notice to the petitioner can be made.

51. Insofar as the judgment of the Kerala High Court in the case of ***Impex Corporation and others (supra)***, relied upon by the learned counsel for the petitioner is concerned, a perusal of the said judgment indicates that in that matter the petitioner was not sent any proceedings by the learned arbitrator or notice postponing the hearing from one date to another. No evidence was adduced by the respondent or the learned arbitrator to the effect that the learned arbitrator had issued the notice of posting of the case to the petitioner or before the petitioner was declared *ex-parte*. In that case, the matter was adjourned as the arbitrator was out of station and admittedly the petitioner was not informed of the date of next hearing where the learned arbitrator proceeded with the matter *ex-parte*. With these facts in hand, the Kerala High Court held that if a party fails to attend the arbitration proceedings on the due date and time, the arbitrator is at liberty to proceed *ex-parte*, though it is advisable, but not compulsory, that he should give that party notice of his intention to proceed *ex-parte*, if he is absent in the next hearing. The Kerala High Court referred to a judgment of the Division Bench of the Calcutta High Court in the case of ***Juggilal Kamlapat vs. General Fibre Dealers Ltd., AIR 1955 Calcutta 354***. In my view, the said judgment of the Kerala High Court does not assist the petitioner.

52. In this case, the petitioner was issued notices from time to time to remain present. The petitioner having chosen to remain absent deliberately without any sufficient cause though several opportunities were rendered by the learned arbitrator. In my view the absence of the petitioner before the learned arbitrator was obviously with an intention to some how delay the out come of the arbitration proceedings. A party cannot be allowed to cause unnecessary delay in proceeding

with the arbitral proceedings. Such party, who has chosen to remain absent though served with the advance notices without any sufficient reasons cannot be shown any indulgence by this Court under section 34 of the Arbitration & Conciliation Act, 1996.

53. Insofar as the judgment of the Calcutta High Court in the case of ***Dipti Bikash Sen & Anr. (supra)*** relied upon by the learned counsel for the petitioner is concerned, it is held by the Calcutta High Court that if it appears that the defaulting party had absented himself for defeating the object of the reference, the arbitrator should issue a notice that he intended at specified time and place to proceed with the reference and that if the party concerned did not attend he would proceed in his absence. In the facts of that case, the Calcutta High Court held that from the previous conduct of the petitioner, there was no evidence that he would not attend the arbitration proceedings. In the facts of this case however, though the petitioner was served with the notices from time to time making it clear that the learned arbitrator would proceed *ex-parte* in absence of any of the parties, the petitioner or his advocate chose to remain absent without any sufficient reasons. No enquiry has been made by the petitioner or his advocate about the progress of the matter. The judgment of the Calcutta High Court referred to aforesaid therefore, does not assist the petitioner.

54. Insofar as the judgment of the Delhi High Court in the case of ***Power Grid Corporation of India Ltd. (supra)*** relied upon by the learned counsel for the petitioner is concerned, the Delhi High Court adverted to the judgment of the Supreme Court in the case of ***Sohan Lal Gupta vs. Asha Devi Gupta, (2003) 67 SCC 492***, in which the Supreme Court quoted with approval few paragraphs from Russell on Arbitration and has held that there cannot be any doubt that a party does

not have an unfettered right. In my view the said judgment of the Delhi High Court also does not assist the petitioner. The judgment of Queen's Bench Division in case of ***Surrendra Overseas Ltd. (supra)*** does not apply to the facts of this case.

55. This court in the case of ***Noor Shaikh Mohammed Hussain (supra)*** has held that once a party had failed to attend the proceedings on a particular date and even thereafter, the learned arbitrator was right in going ahead with the proceedings in absence of the petitioner. This court did not interfere with the *ex-parte* award rendered by the learned arbitrator in view of the petitioner remaining absent from time to time.

56. This court in its order dated 11th February, 2014 in the case of ***Pankaj Kumar Singh (supra)*** has held that if a party inspite of full knowledge has chosen not to participate in the proceedings, he cannot make any grievance that the learned arbitrator proceeded *ex-parte*. This court has adverted to the judgment of the Supreme Court in the case of ***C.N. Ramappa vs. C.C. Chandregowda***, reported in **(2012) 5 SCC 265** in which it was held while considering the provisions of Order VIII Rule 10 that if the Court is of the view that the plaintiff's case is *prima-facie* unimpeachable and the defendant's absence is clearly a dilatory tactic to delay the passing of a decree, the court would be justified in proceeding to pass an *ex-parte* decree. After adverting to the judgment of the Supreme Court, this court held that in view of the admitted service of notice on the petitioner and an admitted position of default in repayment, no fault could be found in the arbitrator proceedings in the manner as the arbitrator had done. This court refused to interfere with an *ex-parte* award.

57. In the facts of this case also, a perusal of the record indicates that the

petitioner had admittedly not responded to loan recall notice issued by the respondents. The petitioner did not file any written statement. It is not the case of the petitioner even in the petition that the petitioner was not a defaulter. The learned arbitrator in my view has considered the evidence on record made available by the respondents and has rightly allowed the claims made by the respondents in absence of the petitioner.

58. Insofar as the submission of the learned counsel that the petitioner was not served with a copy of the notice dated 11th May, 2012 i.e. reference letter issued by the respondents appointing the learned arbitrator is concerned, a perusal of the notice issued by the learned arbitrator of 11th May, 2012 clearly indicates that the learned arbitrator along with the said notice of the arbitration proceedings had enclosed a copy of the claim petition, copy of the application filed under section 17, copy of the order passed by the learned arbitrator and a copy of the reference letter. A perusal of the application filed by the petitioner himself under section 13(2) of the Arbitration & Conciliation Act, 1996 clearly indicates that the petitioner has admitted in the said application that he was served with the said notice dated 11th May, 2012 and also various enclosures thereto. In my view, the submission made by the learned counsel for the petitioner on this issue is contrary to the record, including the submissions made in the application filed by the petitioner himself under section 13(2) of the Arbitration & Conciliation Act, 1996.

59. Under clause 23.1 of the loan agreement, power to appoint the arbitrator vests in the respondents exclusively, which in my view was rightly exercised by the respondents. A copy of such reference letter was not only served upon by the respondents but also by the learned arbitrator. There is thus no merit in this submissions of the learned counsel for the petitioner.

60. I am not inclined to accept the submission of the learned counsel for the petitioner that there was no advance notice issued by the learned arbitrator for hearing of the arbitral proceedings or that no notices were served upon the petitioner except notice dated 11th May, 2012. Under section 3 of the Arbitration & Conciliation Act, 1996 any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. The notices sent by the learned arbitrator at the last known address of the petitioner was thus deemed to have been received by the petitioner. Once the petitioner was represented through an advocate, the notice served upon the advocate on behalf of the petitioner is also a proper notice deemed to have been received by the petitioner through his advocate, which was sent by the learned arbitrator at the office address of the learned advocate representing the petitioner.

61. The aforesaid petitions are thus devoid of merits and are accordingly, dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)