* IN THE HIGH COURT OF DELHI AT NEW DELHI

% ***Judgment Reserved on: 20th July, 2016***
Judgment pronounced on: 22nd July, 2016

\+ **O.M.P. No.159/2012, I.A. Nos.3264/2012 & 3266/2012**

PRAVEEN KUMAR ..... Petitioner
Through Mr.Ajay Paul Marken, Adv. with Mr.Geetu Paul, Adv.

versus

M/S KOTAK MAHINDRA BANK LTD. & OTHERS ... Respondents
Through Mr.Kumar Dushyant Singh, Adv. for R-1.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The Award was published in the above said matter on 3rd November, 2006. The objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") were filed in January, 2012.

2. It was an *ex parte* Award. The petitioner submits that he did not receive the notice of commencement of the arbitration proceedings nor he was aware about the passing of the Award in 2006.

3. Before dealing with the submissions of the petitioner, it is necessary to refer few facts of the case which are that the petitioner along with respondents No.2 to 4 (hereinafter referred to as "borrowers") approached the respondent No.1 for grant of loan against property for the purpose of their business. The respondent

No.1 sanctioned the loan facility to the borrowers vide Home Loan Agreement reference No.3669369 executed between the respondent No.1 and the petitioner along with respondents No.2 to 4 i.e. borrowers on 28th June, 2004 to the tune of Rs.47,00,000/- which was repayable in 144 monthly equated installments (EMI) of Rs.61,732/- each.

4. The home loan agreement was duly signed by all the borrowers including the petitioner and his property was mortgaged with the respondent No.1 against security for aforesaid loan. Accordingly, the respondent No.1 disbursed the loan amount to Punjab National Bank in the account of respondent No.4 i.e. the partnership firm and the title documents of property belonging to the petitioner were handed over to respondent No.1 by Punjab National Bank. However, subsequently, the borrowers failed to pay the EMIs and committed default in repayment as per the terms of the aforesaid Agreement. Hence, disputes arose between respondent No.1 and the borrowers.

5. The mortgage loan involved in the present case has been assigned to Kotak Mahindra Bank Limited by the respondent No.1 and this Court vide its order dated 12th December, 2012 had struck off respondent No.1 from array of parties and substituted Kotak Mahindra Bank Limited in place of respondent No.1.

6. Admittedly, the original lender, i.e. Citifinancial Consumer Finance India Limited (hereinafter referred to as "CCFIL") through its Advocate sent Notice-cum-Reference letter in respect of the aforesaid loan agreement on 28th June, 2006 wherein it was categorically stated that if the demanded amount of Rs.37,26,143.72/- outstanding as on 24th June, 2006 is not

liquidated within 30 days of receipt of the notice, disputes will be decided by the sole Arbitrator Mr.S.K.Jain, Advocate, as per terms and conditions of loan agreement for adjudication of disputes between the parties.

7. The aforesaid Notice-cum-Reference letter was duly served upon the borrowers through Registered Post/AD and UPC on their correct addressees.

8. The petitioner through his Advocate sent reply letter dated 26th July, 2006 and duly acknowledged the Notice-cum-reference letter dated 28th June, 2006 sent by CCFIL and contended that the matter could not be referred to Arbitrator. A copy of the aforesaid reply was also addressed to the sole Arbitrator.

9. It is admitted by the petitioner that the respondent No.4 is the partnership firm, in which the petitioner and respondents No.2 and 3 were the parties. All relevant documents were signed by the said parties. The petitioner has not denied his signatures on the documents as well as the factum of being partner in the partnership firm.

10. As the borrowers did not liquidate the outstanding amount, CCFIL filed its statement of claim dated 9th August, 2006 along with relevant documents before the sole Arbitrator who issued notice to all borrowers on various occasions.

11. The respondent No.2 appeared in person along with his counsel who also represented respondents No.3 and 4 on first day of appearance.

12. However, after the first appearance, respondents No.2 to 4 and their counsel chose not to appear in the subsequent proceedings.

13. The case of respondent No.1 is that the petitioner did not appear before the sole Arbitrator despite the fact that he was well aware of the initiation of arbitration proceedings before the sole Arbitrator. The petitioner had himself admitted in para 1 (k) of the aforesaid petition that he was in receipt of notice of reference sent by the respondent No.1 and it was duly replied by the petitioner through his counsel.

14. Therefore, it is stated that the petitioner was well aware of the initiation of arbitration proceedings and he deliberately avoided to appear before the sole Arbitrator.

15. The sole Arbitrator after granting reasonable time to the borrowers proceeded *ex parte* against the borrowers i.e. petitioner and respondents No.2 to 4. The CCFIL duly filed its affidavit by way of evidence.

16. The sole Arbitrator vide its award dated 3rd November, 2006 held that respondent No.1 is entitled to recover from borrowers jointly and severally a sum of Rs.37,26,143/- along with further interest @ 2% per month from 24th June, 2006 till its realization.

17. The sole Arbitrator vide its letter dated 8th November, 2006 sent the arbitral award dated 3rd November, 2006 to all the borrowers through speed post on 9th November, 2006. The proof of dispatch of the award has been filed in the execution proceedings initiated by respondent No.1 for enforcement of award.

18. After publishing of the award, the respondent No.1 filed execution petition bearing No.213/2007 before Tis Hazari Court, Delhi. The original arbitration record was submitted by sole Arbitrator in the execution proceedings.

19. The said execution proceedings were transferred vide order dated 4th August, 2007 to the Court of District Judge, Chandigarh.

20. The petitioner did not take any steps for more than three years and when the notice was served on him in execution proceedings, he approached this Court in the year 2010 i.e. after more than 4 years of passing of the award against him. It is submitted by the respondent No.1 that the petition under Section 34 of the Act preferred by the petitioner before the District Courts, Delhi as well as before this court is barred by limitation. The averments made in respect of condonation of delay in filing the petition are vague, false and without application of mind.

21. About the service of notice, in paras No.4 to 11 of the Award, the sole Arbitrator has recorded as under:-

> "4. That clause 10.6 of the agreement provides for service of notice. It provides that any notice or request required or permitted to be given or made under the relevant Agreement to claimant/lender or to the Borrower/Opposite parties shall be given in writing. It is further provided in the agreement that such notice or request shall be deemed to have been duly given or made when it shall be delivered by hand, mail or telegram to the party to which it is required or permitted to be given or made at opposite parties addresses specified in the schedule to the agreement or at such other address as such party shall have designated by notice to the party giving such notice or making such request.

5. That it is clear from the copy of the Notice dated 28.06.2006, sent by the Claimants through their Advocates, M/s. Sanjeev Singh & Associates, to the Respondents under Registered A.D, Post as also under U.P.C. that the Claimants have expressed their desire/intention to refer the dispute to my arbitration for adjudication in terms of the said Agreement and also have further informed the Respondents as Sole Arbitrator to determine the dispute.

6. x x x x x

7. That having accepted the Reference made to me, I posted the case for being heard on 11.09.2006 at 2.00 PM. at Room No. 303 (3rd Floor), LSC II, Plot Nos. 7&8, Opposite Ajanta Apartments, I.P. Extension, Delhi - 110092 (Phone No. 22727918) by issue of a Notice dated 17.08.2006 enclosing therewith a photocopy of the Statement of Claim advising the Respondents to file their Statement of Defence/Objections, if any, supported by documents to controvert or to rebut the claim of the Claimants by 11.09.2006. Consequently Notice dated 17.08.2006 was posted to all the parties under Speed post.

8. That on 11.09.2006 at the appointed time and venue, Mr. Amit Talwar, an Advocate from M/S Sanjeev Singh & Associates, Advocates representing the claimants attended. One Mr. J.S. Ahlawat, Advocate and one another advocate representing the Respondent Nos.1, 2 &4 attended and file their power of attorney. Mr. Bhanu Pratap Singh Rana, Respondent No. 1 also attended for self and Respondent No. 4 whereas notice dated 17.08.2006 dispatched to Respondent No. 3 Mr. Praveen Kumar under speed post have been received back as undelivered with postal remarks "UNCLAIMED". It was decided to hold the next meeting on 06.10.2006 at the same time and venue advising the claimants to file their Evidence by way of an affidavit and the Respondents to file their statement of defence/objections, if any, to controvert or to rebut the claim of the claimants. Consequently notice dated 15.09.2006 was issued to all the parties under speed post.

9. That on 06.10.2006 neither any of the Respondent or their Advocate attended nor any communication have been received from them since the notice dated 15.09.2006 sent to all the respondents as well as to their advocate under speed post have been received back as un-delivered. The Notice sent to the Respondent No. 1 & 2 have been received back with postal remarks "DID NOT MEET EVEN AFATER GOING MANY AJ TIMES - HENCE RETURN". AND THE NOTICE SENT TO THE respondent No. 3 has also been received back with postal remarks "NOT MET" whereas the notice sent to their advocate has been received back with postal remarks "INTIMATION DELIVERED - UNCLAIMED". However Mr. Satish Kumar, Advocate, from M/S Sanjeev Singh & Associates, Advocates representing the claimants attended and he filed the necessary evidence by way of an affidavit duly sworn in on 14th Sept. 2006 by the authorized representative of the claimant. Mr. Satish Kumar, Advocate, suggested to afford one more opportunity as the last opportunity to the respondent to file their statement of defence/objections if any by 31st October 2006 by issue of a formal notice sending therewith a photocopy of the Evidence as filed by the claimants. Consequently notice dated 10.10.2006 was duly sent to all the parties under speed post.

10. That on 31.10.2006 at the appointed time and venue, neither any of the Respondents attended nor any communication have been received from them despite service of notice to Respondent No. 1 and Respondent No. 2 though the notice sent to Respondent No. 3 and the Advocate representing the Respondent No. 1 have been received back with postal remarks "UNCLAIMED" and "NO SUCH PERSON AT THIS ADDRESS" respectively. However Mr. Satish Kumar, Advocate from M/S Sanjeev Singh & Associates, Advocates representing the claimants attended and he insisted for making an award on the ground of non cooperation of the Respondents.

11. That it appears to me that the Respondents neither have any material nor any intention to counter or to contest or to rebut the claim of the Claimants and, therefore, I am left with no other alternative but to make an ex-parte Award, based on the Statement of Claim

lodged, other documents filed and evidence made by way of an Affidavit on behalf of the Claimants. Hence, I have kept the matter for making an ex-parte Award after having examined the said documents."

22. The objections were not filed by the other partners and the firm. It was a partnership firm. The petitioner's counsel has admitted that at the relevant time also, he was the partner.

23. Sections 25 to 28 of the Indian Partnership Act, 1932 read as under:-

> "25. LIABILITY OF A PARTNER FOR ACTS OF THE FIRM.- Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.
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> 26. LIABILITY OF THE FIRM FOR WRONGFUL ACTS OF A PARTNER.- Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.
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> 27. LIABILITY OF FIRM FOR MISAPPLICATION BY PARTNERS.- Where – (a) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or (b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss.
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> 28. HOLDINGOUT.- (1) Anyone who by words spoken or written or by conduct represent himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after partner's death the business continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death."

24. On merit, it appears that in the entire petition, the petitioner has failed to show any illegality or otherwise any ground which comes within the ambit of Section 34 of the Act against the award.

25. As per Section 3 of the Act, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

26. In the present case, the notice of reference and notice by Arbitrator for inviting objections to statement of claim as well as dispatch of Award was sent by duly recognised mode on the addresses of borrowers as covered under Section 3 of the Act. All postal receipts have been filed.

27. Therefore, objections taken by the petitioner in his entire petition regarding *ex parte* award being passed are vague, false, misleading and thus, cannot be sustained in the eyes of law. Even otherwise, the act of the petitioner is binding upon other partner/partners.

28. Learned counsel for the petitioner has not denied that the other partners appeared before the sole Arbitrator through Advocates. They did not challenge the Award. As a matter of fact, it appears to the Court that all the partners in connivance with each other have tried to mislead the Court by filing of objections through

the petitioner as he did not appear either himself or through Advocate.

29. They are trying to take advantage by raising the technical objection which is not sustainable in law as well as the provisions of the Partnership Act.

30. It is evident that the petitioner was aware of the arbitration proceedings right from its inception when the Notice-cum-Reference letter was duly served and replied by the petitioner. In fact, the petitioner who happens to be a partner in respondent No.4, in connivance with rest of the respondents/borrowers deliberately and malafidely avoided the arbitration proceedings to defeat its purpose.

31. The conduct of the petitioner is dubious and fraudulent and it is further evident from the petitioner's own document being judgment and order dated 12th November, 2010 passed by the Civil Judge (Jr. Div.), Panchkula, which categorically held that the petitioner being co-borrower along with other signatories of the home equity agreement are jointly and severally liable to re-pay the loan amount disbursed by concerned lender. Thus, the said order is of no help to the petitioner and in fact casts a serious doubt on the conduct of the petitioner.

32. Thus, the petition filed by the petitioner is barred by limitation. Even the first petition which was filed before the District Judge, Delhi was filed beyond the period of limitation.

33. The Award was passed in the year 2006 and the present petition filed in the year 2011 is much beyond the period of limitation and the averments made by the petitioner in support of condonation of delay lacks merit.

34. The petitioner has totally failed to explain in its averments as to what was the sufficient cause which prevented him to approach the Court within limitation.

35. In the present case, the petitioner was negligent as well as did not acted diligently and further remained inactive despite being aware of the arbitration proceedings. Therefore, the present petition as well as the prayer for condonation of delay in filing the objections are dismissed on the ground of limitation alone. Even otherwise, there is no merit in the petition.

36. The petitioner is also burdened with cost of Rs.10,000/-.

(MANMOHAN SINGH)
JUDGE

JULY 22, 2016