

Thereafter in May 2007 the Petitioner inquired with the said dealer regarding delivery of the tractor when he was informed that a new model has arrived which will cost approximately Rs.4,62,000/-. For this new model the Petitioner was asked for a new deposit of Rs.1,62,000/- and remaining amount of Rs.3 Lacs was to be taken from Respondent No.1 as a loan. Accordingly, a Loan-Cum-Hypothecation agreement dated 5th June, 2007 was executed between the Petitioner and Respondent No.1 along with a Promissory Note dated 6th June, 2007. Over and above this, a Hire Purchase Agreement dated 5th June, 2007 was also executed.

3 Since the Petitioner failed and neglected to pay the installments that were due on the loan taken by him, Respondent No.1 took forcible possession of the said tractor on 27th February, 2008 by pressurizing the Petitioner's son. Thereafter Respondent No.1 sold the said tractor for a sum of Rs.2,51,000/- on 6th June, 2008 and for the remaining amount of Rs.94,757/- along with interest, Respondent No.1 sent numeral demand notices to the Petitioner. Since no payment was forthcoming, as per Condition Nos. 14(1) and 14(2) of the

agreement dated 5th June, 2007, Respondent No.1 vide its letter dated 5th July, 2008 referred the disputes to the Arbitral Tribunal and appointed Mr Bharat Jain as the Sole Arbitrator. The Sole Arbitrator accepted the proposal vide its letter dated 29th August, 2008 and also conveyed fixed preliminary meeting of the parties on 14th October, 2008. In the interregnum Respondent No.1 (the claimant) filed its statement of claim dated 24th September, 2008 before the Arbitrator.

4 In the meeting held on 14th October, 2008 Respondent No.1 was represented by their Assistant Manager (Legal) and the Petitioner was represented through an Advocate Mr Tushar Pimple. The Petitioner's advocate requested for four weeks time to file a reply/Written Statement on behalf of the Petitioner. In these circumstances, the Petitioner was directed to file his reply within four weeks from 14th October, 2008 and the matter was adjourned to 14th November, 2008. On this date, the advocate for the Petitioner once again appeared and sought a week's time to file the reply/Written Statement on behalf of the Petitioner. Despite this request, no reply/Written Statement was filed on behalf of the Petitioner. Accordingly, the Arbitral Tribunal vide

its letter dated 1st December, 2008 fixed next date of hearing on 18th December, 2008.

5 At the hearing on 18th December, 2008, the Assistant Manager (Legal) appeared on behalf of Respondent No.1 and the advocate for the Petitioner also appeared before the Arbitral Tribunal. On the said date, the Advocate for the Petitioner submitted that he was not receiving any instructions from his client and he had made it clear to the Petitioner that the matter before the Arbitral Tribunal was kept for hearing but he still did not receive any response from the Petitioner. The advocate for the Petitioner, therefore, separated himself from the proceedings. It is considering these facts and looking at the conduct of the Petitioner, the Arbitral Tribunal thereafter heard Respondent No.1 and passed the impugned award. By the impugned award it was directed that the Petitioner should pay Respondent No.1 a sum of Rs.94,757/- together with interest at the rate of 18 % per annum from 8th June, 2008 till payment and/or realization. It is this award that is impugned before me under Section 34 of the Act.

6 Mr Ghadigaonkar, learned advocate appearing on behalf of the Petitioner, made only one submission to assail the impugned award. He submitted that no proper notice was given to the Petitioner to represent himself before the Arbitral Tribunal which vitiated the award. In this regard Mr Ghadigaonkar placed reliance on Section 34(2)(a)(iii) of the Act which *inter alia* stipulates that, an award may be set aside by the Court only if the party making an application furnishes proof that he was not given proper notice of appointment of an Arbitrator, or of the arbitral proceedings, or was unable to present his case. Mr Ghadhgaonkar submitted that if his advocate decided to distance himself from the arbitration proceedings, the Arbitrator ought to have given notice to the Petitioner and adjourned the hearing so as to enable the Petitioner either to appear himself in person or engage a suitable advocate. This was admittedly not done, and therefore, a clear case is made out as set out in Section 34(2)(a)(iii) of the Act. For all these reasons, Mr Ghadigaonkar submitted that the impugned award needs to be quashed and set aside.

7 On the other hand, Ms Joshi, learned advocate

appearing on behalf of Respondent No.1 submitted that this argument proceeds on completely incorrect assumptions. She brought to my notice the findings in the award in this regard and more particularly paragraph Nos.3 to 9 thereof. She submitted that ample opportunity was given to the Petitioner to appear before the Arbitral Tribunal and yet the Petitioner chose not to go either in person or give proper instructions to his advocate. This being the case, Ms Joshi submitted that the Petitioner cannot be allowed to take advantage of his own wrong and assail the impugned award on this ground.

8 I have heard the learned advocates for the parties at length and perused the papers and proceedings in this Petition. I have also given my careful consideration to the award passed in the above matter dated 2nd February, 2009. The facts of this case clearly reveal that Respondent No.1 filed its statement of claim dated 24th September, 2008 claiming a sum of Rs.94,757/- together with interest thereon. Thereafter a meeting was held before the Arbitral Tribunal on 14th October, 2008 when the Petitioner was represented by an advocate. That advocate requested for four weeks time to file a reply/Written Statement

on behalf of the Petitioner. Accordingly, the time was granted by the Arbitral Tribunal. Thereafter, on the next date, namely, 14th November, 2008 the Petitioner was again represented by his advocate wherein a further request of a week's time was made for filing the reply/Written Statement on behalf of the Petitioner. This time was also granted by the Arbitral Tribunal. Despite this, the Petitioner did not file his reply/Written Statement on or before 21st November, 2008. Therefore, the Arbitral Tribunal vide its letter dated 1st December, 2008 fixed the next date for hearing on 18th December, 2008. On the said date also the advocate for the Petitioner appeared but submitted that he was not receiving any instructions from his client, even though he had made it clear to the Petitioner that the arbitral proceedings were kept for final hearing. Despite this, the advocate for the Petitioner received no response from the Petitioner, and therefore, the advocate separated himself from the proceedings.

9 Looking to these undisputed facts, I fail to understand how the Petitioner can contend that he has furnished proof that he was not given a proper notice of the appointment of an Arbitrator, or of the arbitral proceedings or

was otherwise unable to present his case as contemplated under Section 34(2)(a)(iii) of the Act. The facts narrated above would clearly show that not only was the Petitioner represented through an advocate but his advocate was constrained to himself to separate himself from the arbitral proceedings because despite repeated requests, the Petitioner refused to give any instructions to his advocate. This being the factual position, I do not think that the grievance made by Mr Ghadigaonkar is well founded. When the Petitioner had ample opportunity and deliberately stay away from the arbitral proceedings by not giving any instructions to his advocate, I do not find that the Petitioner has made out any case as set out in Section 34(2)(a)(iii) of the Act to interfere with the impugned award.

10 That now only leaves me to deal with the decision of this Court cited by Mr Ghadigaonkar in the case of **Govinda Bhagoji Kamable & Ors. Vs Sadu Bapu Kamable & Ors.**¹. I have gone through this decision and I find that the same is wholly inapplicable to the facts of the present case. The question of law framed in that case was whether the Appellate Court

¹ 2004(6) Bom. C.R. 552

could have dismissed the appeal for default on the basis of the purshis of “**no instructions**” filed by the advocate appearing for the appellant when the advocate for the appellant had not obtained a discharge. It is whilst deciding this question of law that this Court examined the relevant provisions of the Code of Civil Procedure, 1908 and thereafter at paragraph 8 held that, it was obvious that the mandatory procedure laid down by the aforesaid rules had not been followed. There was nothing on record to show that before filing the “**no instructions**” purshis, the advocate had given any intimation in writing to the appellants. It was also not the case where the advocate had intimated to the appellants to withdraw his appearance. It was in this light that this Court thereafter partly allowed the Second Appeal and set aside the order of dismissal of the said appeal. This judgment, to my mind, is wholly inapplicable to the facts of the present case. As mentioned earlier, the undisputed facts clearly show that the Petitioner's advocate appeared before the Arbitral Tribunal on several occasions and sought time to file a reply/Written Statement on behalf of the Petitioner. Finally on the last occasion and even though the advocate for the Petitioner had made it clear to him that the matter was fixed for final

hearing, the Petitioner refused to give instructions to his advocate and it is in this light that his advocate distanced himself from the arbitral proceedings. In this factual scenario, I do not find that the ratio laid down in the aforesaid decision of this Court would have any application. For all the foregoing reasons, I find no merit in this Petition and it is, accordingly, dismissed. There shall be no order as to costs.

11 The amount of Rs.50,000/- with accrued interest, if any, deposited by the Petitioner pursuant to an interim order passed by the Appellate Court in Appeal No.234 of 2017 dated 7th February, 2017 is allowed to be withdrawn by Respondent No.1 and it shall be appropriated towards its dues as directed in the award.

12 At this stage, learned advocate appearing for the Petitioner request for a stay of the withdrawal of the amount. In the facts and circumstances of the present case, I do not find any merit in the request for staying this direction. The stay is, accordingly, refused.

(B. P. COLABAWALLA, J.)