

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.06.2017

Pronounced on: 10.11.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P. No.430 of 2014

1.Venkatesh Naidu G.

2.Geetha G.

3.Shashidar V.

.. Petitioners

Versus

1.M/s.Cholamandalam Investment and
Finance Company Limited,
represented herein by its Director

2.J.Ravikumar

.. Respondents

Prayer: Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award passed by the second respondent in Case No.NoARB/CIFCL 07 of 2013 dated 10.02.2014.

For petitioners : Mr.S.Ravi for
M/s.S.Indumathi Ravi

For Respondents : Mr.V.Balasubramani for
Mr.M.Arunachalam

ORDER

This Original Petition is filed challenging an award passed by the

<http://www.judis.nic.in> Arbitrator dated 10.02.2014.

2. The petitioners comprise a family, petitioners 2 and 3 being the wife and son of the first petitioner respectively. Under Loan Agreement dated 11.08.2008, the first respondent granted a loan of Rs.34 lakhs to the first petitioner as borrower and petitioners 2 and 3 as co-borrowers. Monthly repayments of Rs.60,524/- were to be effected that carried interest of 14.75% per annum. Property belonging to the petitioners located at Banasankari, 1st stage, Bangalore was offered as security for the loan.

3. The petitioners would aver that the monthly repayments were being effected as per schedule notwithstanding which proceedings for arbitration in accordance with Clause 26 of the Loan Agreement were initiated for alleged defaults in repayments by the 1st respondent. Before the Arbitrator, the petitioners filed an application under Section 16 of the Arbitration and Conciliation Act 1996 (in short 'the Act') questioning his jurisdiction on various grounds.

4. The arguments advanced were to the effect that there was no loan agreement entered into by the 1st petitioner with Chola Mandalam DBS Finance Limited, the first respondent herein and as such neither

privity of contract nor the existence of an arbitration agreement inter se the parties.

5. Notwithstanding the jurisdictional objection raised by the petitioner, an award came to be passed by the Arbitrator dated 10.02.2014 wherein the claim of the company, the claimant in Arbitration was allowed awarding an amount of Rs.31,99,569 along with interest at the rate of 18% from date of claim till date of actual payment.

6. With respect to the preliminary and jurisdictional objections raised, the Arbitrator notices that, admittedly, the documents of title in respect of the property offered as security by the petitioner were in the possession of the claimant. This, along with the match in the signatures of the borrowers in the vakalathnama filed by their counsel before the Arbitral Tribunal and the signatures in the loan agreement executed with the 1st respondent led the Arbitrator to infer and thus conclude that the petitioners had, in fact, signed the loan agreement and had a privity of contract with the 1st respondent company. On the merits of the matter, the Arbitrator concludes that there had been defaults in the repayment of the loan instalments. The claim of the respondent was thus allowed.

7.Heard Mr.S.Ravi, learned counsel appearing for the petitioners and Mr.V.Balasubramani, learned counsel appearing for the respondents.

8.Before me, Mr.Ravi, would reiterate the preliminary objection taken before the Arbitrator, arguing that the agreement entered into by the petitioner was with *Cholamandalam DBS Finance Limited*, whereas the proceedings for arbitration had been initiated by *Cholamandalam Investment and Finance Company Limited* (1st respondent in the OP). Thus there was no privity of contract between the borrower and the first respondent. As a consequence and in the absence of any contract between the parties or an arbitration clause, the proceedings were invalid.

9.Mr.Balasubramani, would counter the argument stating that the respondents had undergone a change in name consequent upon which the name of *Cholamandalam DBS Finance Limited* stood changed to *Cholamandalam Investment and Finance Company Limited*. A Certificate of Incorporation issued by the Government of India, Ministry of Corporate Affairs dated 02.06.2010 incorporating the name change

was circulated. Mr.Ravi would seriously object to the document filed stating that it was not liable to be taken on file at this stage.

10. Having heard learned counsel and perused the papers, I am of the view that this challenge is liable to be accepted. An award may, under section 34 of the Act be challenged on the following grounds:

34. Application for setting aside arbitral award.

.....

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the

decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. '

11. The petitioner has filed a detailed statement of objections dated 29.4.2013 responding to the averments in the claim petition filed by the respondent herein. At the threshold the following issues were raised:

'i) There is no agreement to pay any amount much less the amount claimed;

ii) There is no agreement much less the Arbitration Agreement between the parties and therefore question of appointing Arbitrator does not arise.

iii) There is no cause of action for the claim.

iv) The claims have barred by limitation.

v) Appointment of Arbitrator has no jurisdiction to enter upon their reference.

vi) There is no consensus for the appointment of Arbitrator and the claimant has played a fraud on the Respondents in appointing the Arbitrator.

Vii) No part of cause of action has taken place at Chennai therefore the claim petition is liable to be dismissed on this ground alone.

Viii) There is no reason as to venue for Arbitration is to be fixed in Chennai that too in claimants office.

ix) The respondents have not given any consent to hold the arbitration proceedings at Chennai that too in the office of the claimant.

x) The courts at Chennai have no jurisdiction; therefore question of conducting Arbitration at Chennai does not arise.

xi) There is no contract to pay the amounts allegedly due and outstanding.

Xii) There is no contract to pay interest and therefore claim for interest is liable to be rejected.'

12. Without prejudice to the jurisdictional objections the petitioner also responded to the averments on merits. In conclusion, the petitioner

prays as follows:

'17. Without prejudice to the contentions regarding the arbitrability and maintainability of the claim, in the event this Hon'ble Tribunal, for any reason, comes to the conclusion that the disputes are arbitrable and the claims of the claimant require to be adjudicated by following principles of Natural Justice in the interest of justice and equity.'

Thus the petitioner has, in his petition under section 16, raised specific jurisdictional issues in relation to the proceedings before the Arbitrator. Section 16 provides as follows:

'16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

13. As per the scheme of section 16, the jurisdictional objections are to be considered and disposed of prior to taking up the matter for adjudication on merits, if at all. This is apparent from section 16(5) which states that the arbitral tribunal shall decide on a jurisdictional plea as set out in sub sections (2) or (3) and where the challenge is rejected, continue with the proceedings for arbitration. Thus the rejection of a challenge under section 16(1) or 16(2) has to be at a stage anterior to the continuance of arbitral proceedings. This has not been done in the present case.

14. The jurisdictional objections along with the objections on merits have been decided by way of a final award dated 10.2.2014 which is contrary to the provisions of 16(5). In fact, the petitioner has in paragraph 17 of the petition, as extracted above, specifically sought adherence to the principles of natural justice. The arbitrator does not set the petitioner *ex parte* but decides, on 5.9.2013 to proceed with the matter on the basis of the material on hand and in the absence of the petitioner. The matter was reserved for orders on 5.9.2013 and an award passed on 10.2.2014.

15. The question of violation of natural justice or otherwise is examined with reference to the dates of hearing and the appearances of the parties. The dates of hearing before the arbitrator are 15.2.2013, 14.3.2013, 29.4.2013, 6.3.2013, 4.6.2013, 8.7.2013, 31.7.2013, 5.9.2013 and 10.2.2014. The respondent appeared on 15.2.2013 through counsel. On 29.4.2013, though there was no appearance, the respondent, through counsel filed the application under section 16 along with objections on the merits of the claim petition.

16. On 8.7.2013, written arguments were filed in relation to the application filed. There does not appear to be appearance by the petitioner on any of the other dates of hearing. Be that as it may, the petitioner is seen to have participated in the proceedings for arbitration, at least sporadically, and also filed a petition raising questions on maintainability of the claim filed by the 1st respondent, that is taken to be an application under section 16 by the Arbitrator who refers as such to the same at paragraph 2(b), page 4 of the award. The principles of natural justice have thus been given a go by in the present case both with respect to the inadequacy of hearing and opportunity granted as well as the violation of the procedure set out section 16 for hearing of the jurisdictional challenge.

17. It was incumbent on the arbitrator to have passed an order specifically adjudicating upon the jurisdictional objections raised prior to taking the matter up for disposal on merits. The matter ought to have been first posted for hearing on merits after due communication of the order on the aspect of jurisdiction to both parties and then a final award passed after hearing the parties. The requirement to hear the parties on the merits of the matter flows out of the language of section 16(5) which requires the arbitrator to continue with the arbitral proceedings after a

decision is taken rejecting the jurisdictional plea raised by a party. The continuance of such proceedings can be occasioned only by the issuance of a hearing notice calling upon the parties to appear and make their submissions on merits. Moreover, the petitioner himself has, in the application filed on 29.4.2013, specifically sought an opportunity of hearing in the event that the decision on the jurisdictional issue is adverse to him. The impugned award passed by the arbitrator is thus clearly contrary to the principles of natural justice as well the procedure noticed above.

18. This court is bound to consider a challenge under section 34 of the Act in the light of the grounds set out in section 34(2), limited as they are. The provisions of section 34(2)(iii) (as extracted above) would be squarely applicable in the present case where the petitioner was neither given proper notice of the arbitral proceedings nor enabled to present his case in a proper manner, such disability arising on account of the erroneous procedure in law followed by the arbitrator.

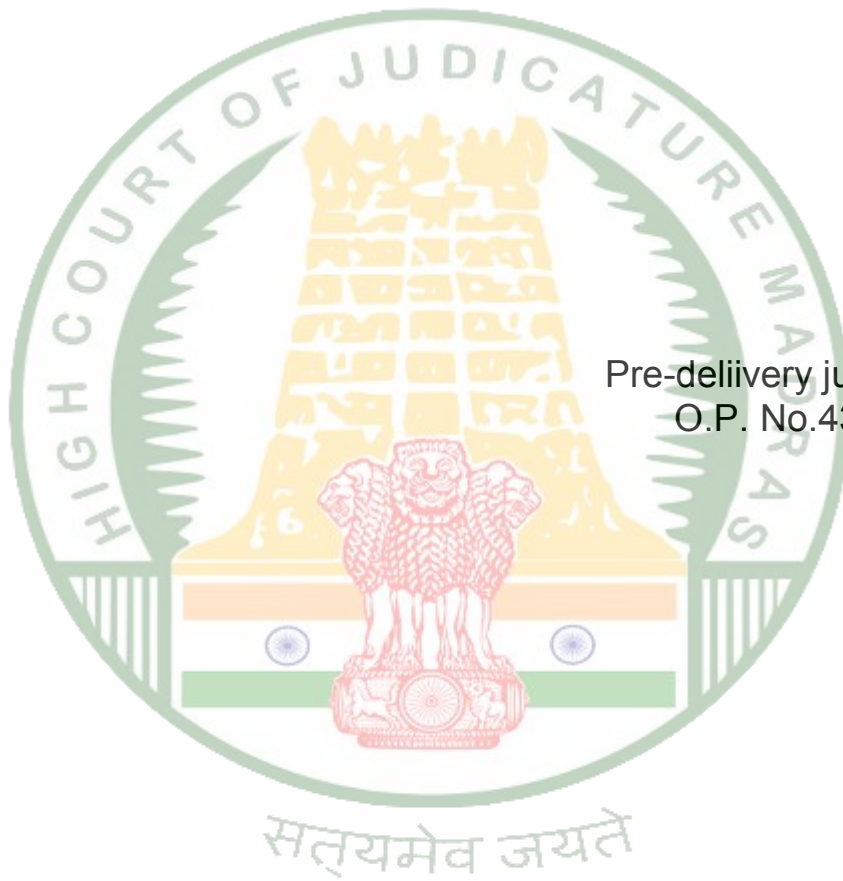
19. In fine, the Original Petition stands allowed. No costs.

10.11.2017

vga/msr
Speaking order/Non speaking order
Index:Yes/No

Dr.ANITA SUMANTH,J.

Vga/msr



Pre-delivery judgment in
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