

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.12.2017

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

**Original Petition No.380 of 2017
and Appln. No.3118 of 2017**

1.M/s.Digital Illusion India Pvt. Ltd.,
rep. by its Managing Director
S.V.Subramanyam

2.S.V.Subramanyam

.. Petitioners

Vs.

1.M/s.Shriram City Union Finance Limited
Having its Registered Office at
No.123, Angappa Naicken Street,
Chennai - 1 and its Administrative
Office at No.221,
Royapptah High Road, Mylapore,
Chennai - 4 rep. by its
Authorized Signatory C.Gracy

2.S.Abhaya Kumar

.. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation

Act, 1996 to set aside the Award dated 25.01.2017.

For Petitioners : Mr.V.Srinivasa Babu
For Respondents : Mr.Uma Shankar

ORDER

By consent, the main original petition itself is taken up for final disposal.

2. Seeking to set aside the award dated 25.01.2017, the present Original Petition has been filed.

3. The first petitioner is the principal borrower. The second petitioner and the second respondent are the guarantors. The first petitioner herein has entered into loan agreement with the first respondent on 24.11.2011. This agreement is an enterprise finance agreement. The loan was sought for the purpose of augmenting the work capital for the business of the first petitioner. Accordingly, a sum of Rs.3 crores was paid by the first respondent in favour of the first petitioner. The amount was to be paid with interest in two months and thereafter, the principal to be paid immediately, in failure to pay the principal amount, 24% interest per annum would be levied.

4.The first petitioner herein paid first month interest amount of Rs.5,25,000/- but paid only partial amount for the second month interest. Admittedly, the principal amount has not been paid. After issuance of notice demanding payment, the arbitration clause was invoked by the first respondent.

5.The reference letter is dated 07.07.2015. There is no dispute that this letter was served on the petitioners. The learned Arbitrator initiated the proceedings. The petitioners sought time on the ground that the matter would be resolved amicably by way of settlement. However, despite several adjournments and the procedural compliance as recorded by the learned Arbitrator, they did not appear. Accordingly, an award was passed on merit on 25.01.2017. Challenging the same, the present original petition has been filed.

6.There is no dispute on the agreement inter se parties coupled with non-payment of the amount with the last of the payment having been made on 25.01.2012, the only question raised in this original petition by the learned counsel for the petitioner is that the question of limitation. It is submitted that Section 3 of the Limitation Act

mandates the Court or an adjudicating forum to test its jurisdiction by proving the compliance of limitation. This has not been done. The period of limitation being not raised before the learned Arbitrator being a question of law can be raised before this Court. Such a plea is permissible under Section 34 of the Arbitration and Conciliation Act, 1996. To buttress his submission, learned counsel has made reliance upon the following decisions:

- (i) State of Goa Vs. Praveen Enterprises
((2012) 12 SCC 581)**
- (ii) State of Gujarat Vs. Kothari and Associates
((2016) 14 SCC 761)**

7. Learned counsel appearing for the respondents would submit that Section 4 of the Limitation Act forbids such a plea being raised having been given up by the petitioners before the Arbitral Tribunal. As there is no dispute on facts, no interference is required.

8. The plea of limitation can be a question of fact and question of fact and law depending upon the case to case basis. In the case on hand, there is no dispute on two facts. The first is with respect to the payment made. The last payment was made by the first petitioner on

25.01.2012. The second is with respect to the invocation and initiation of arbitration proceedings on 07.07.2015 in terms of Section 21 r/w 43 of the Arbitration and Conciliation Act, 1996. Now when these facts are not in dispute, the onus is on the petitioners to establish that the claim is barred by limitation. As rightly submitted by the learned counsel for the respondents, there is no dispute that the letter dated 07.07.2015 having been served on the petitioners. Therefore, in this case, the issue pertaining to limitation can only be termed as mixed question of fact and law. It is also to be seen that the petitioners also consciously did not raise this plea but on the contrary, agreed to settle the matter. Therefore, the decision relied upon by the learned counsel for the petitioners, in the considered opinion of this Court, cannot be made applicable. In **State of Goa Vs. Praveen Enterprises ((2012) 12 SCC 581)**, the Apex Court was concerned with the scope of Section 21 r/w 43 of the Arbitration and Conciliation Act, 1996, vis-a-vis Section 3 of the Limitation Act, 1963. The petitioners being chronic defaulters cannot be permitted to take a plea for the first time before this Court on a mixed question of fact and law. In the decision referred above, the issue was with reference to the claim which was not sought to be adjudicated earlier. Therefore, the issue of limitation was sought to be applied to the same. As observed by the Apex Court,

Section 3 of the Limitation Act, 1963 while specifies the date of institution of the suit does not deal with the date of institution for arbitral proceedings.

9. Another decision relied upon by the learned counsel for the petitioners in **State of Gujarat Vs. Kothari and Associates ((2016) 14 SCC 761)** also has got no application. The Apex Court in the said case deals with the power of the Appellate Court under Section 96 of Civil Procedure Code. But the aforesaid power can never be compared with the power available under Section 34 of the Arbitration and Conciliation Act, 1996. In fact, the role of the Court under Section 34 Arbitration and Conciliation Act, 1996 is more retrospective than the one provided under Section 100 C.P.C. Hence the aforesaid judgment has got no application.

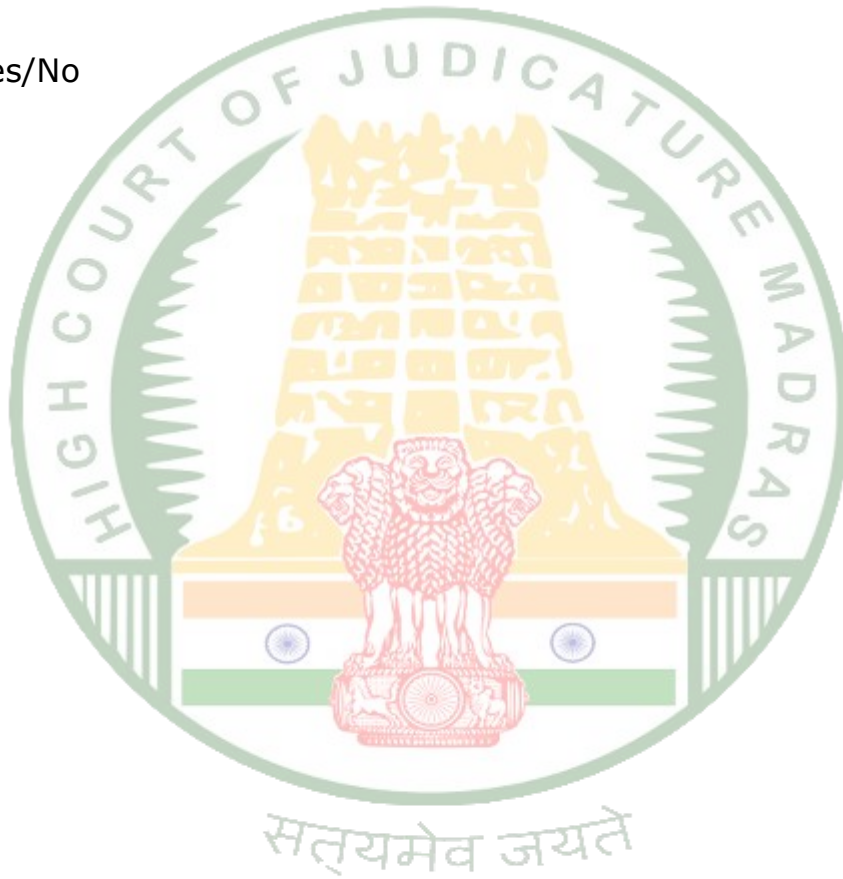
10. The petitioners while consciously avoiding the proceedings before the learned Arbitrator cannot be permitted to raise the issue involving mixed question of fact and law. As already discussed, when once the letter dated 07.07.2015 is served, then the question as to whether it is served within the period of limitation or otherwise becomes the question of fact, which cannot be permitted to be

adjudicated under Section 34 of the Arbitration and Conciliation Act, 1996. Hence the original petition stands dismissed. No costs. Consequently, connected application is closed.

12.12.2017

Index:Yes/No

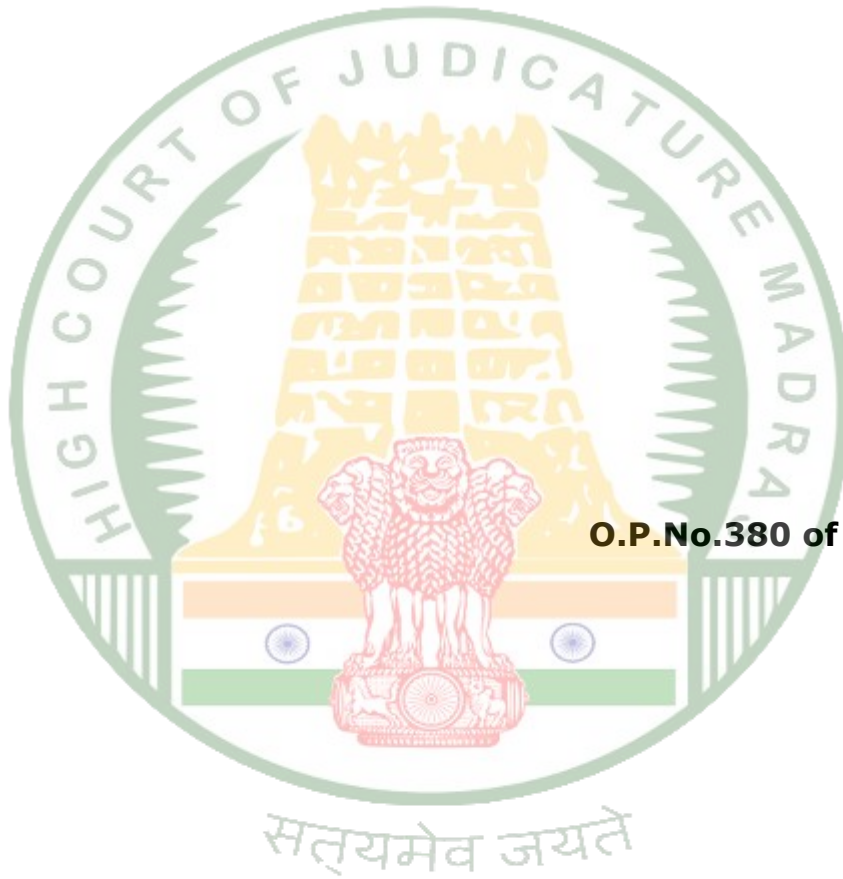
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M.M.SUNDRESH,J.

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