

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.11.2017

CORAM

THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

O.P.No.1009 of 2015

1. K.Pavi
2. Sulochana

... Petitioners

Vs

1. M/s.Cholamandalam Investment and Finance
Company Limited, Dare House,
2, N.S.C.Bose Road,
Parrys, Madras - 600 001.

2. V.Pauldas,
Sole Arbitrator,
81/106, Perambur High Road,
Jamalia, Chennai-600 012.

... Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 18.09.2015 passed by the sole arbitrator, Mr.V.Paul Das, the second respondent herein, as perverse, illegal and without jurisdiction and to award the costs in the present proceedings.

For Petitioner : Mr.Sharath Chandran

For Respondents : Mr.M.Santhosh Nagavaja for R1

ORDER

The petitioners being the borrower and guarantor entered into an agreement with the first respondent for obtaining loan. As the petitioners failed to pay the instalments, arbitration clause was invoked by the first respondent on 14.11.2014. Notice dated 21.11.2014 along with the claim statement was sent by the learned Arbitrator to the petitioners. Unfortunately, the letter dated 14.11.2014 was despatched only on 25.11.2014.

2. Though, the petitioners did not participate in full, before the arbitration proceedings, they did raise this issue through the counsel's notice. This issue was not answered and the award was passed on merits, of course, in the absence of the petitioners.

3. The learned counsel for the petitioners raised only one issue. He submits that the records produced by the first respondent would clearly show that the letter invoking the arbitration clause by which appointment of Arbitrator was made, was despatched only on 25.11.2014, though dated 14.11.2014. Therefore, it is impossible for the learned Arbitrator to assume charge and issue his notice on 21.11.2014. Despite this issue have been raised, it has not been answered and therefore, the entire proceedings would vitiate.

4. The learned counsel for the first respondent, though unable to contradict the said factual position which actually borne out from the records produced by him, would submit that subsequently, the petitioners participated and even assuming there is violation, this Court can call back upon Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

5. Considering the very mandate of Section 21 of the Act, this Court in *Indus Ind Bank Ltd., vs. Mulchand B. Jain and others reported in 2013 (2) CTC 533*, held as follows:

"8. Therefore, the learned Single Judge clearly held that there is absolutely no material to hold that Section 21 of the Act has been complied with. A perusal of Section 21 of the Act would go to show that the proceedings would commence on the date of which a request for the dispute to be referred to arbitration, is received by the concerned Respondent. Therefore, the commencement of Arbitral proceedings is incumbent on the receipt of the notice to be sent in accordance with Section 21 of the Act, which in other words, if no notice is received by the concerned Respondent, then there is no commencement of Arbitral proceedings at all. The provision is very clear to the effect that it does not even say that it should be served but it specifically says that such notice will have to be received. Section 21 will have to be read with Section 34 of the Act. Section 34 (2)(iii) provides for a ground for setting aside an award, in a case where the Applicant was not given proper notice of the appointment of an Arbitrator or the Arbitral proceedings. In this case, the factual position is that the Firs Respondent was not given proper notice of an appointment of Arbitrator. Here again, we have to consider the specific language used under Section 34 (2)(iii) of the Act, which clearly mandates that the Applicant will have to be served and received by a person concerned. We are of the view that

Section 34(2)(iii) has to be read with Section 21 of the Act. On a conjoint reading of Section 21 read with 34(2)(iii), we have no doubt that the Arbitral proceedings have not been commenced insofar as the First Respondent is concerned.

9. In view of such position, Section 43 of the Act will have to be pressed into service. Section 43 speaks about limitation. Section 43(2) states that for the purpose of this Section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.

10. In view of the said deeming provision, applying the facts of the case, we have no hesitation to hold that the Arbitral proceedings in the eye of law. Therefore, we are of the view that we cannot remand the matter once again for arbitration, as the proceedings are hit by Section 43 of the Act."

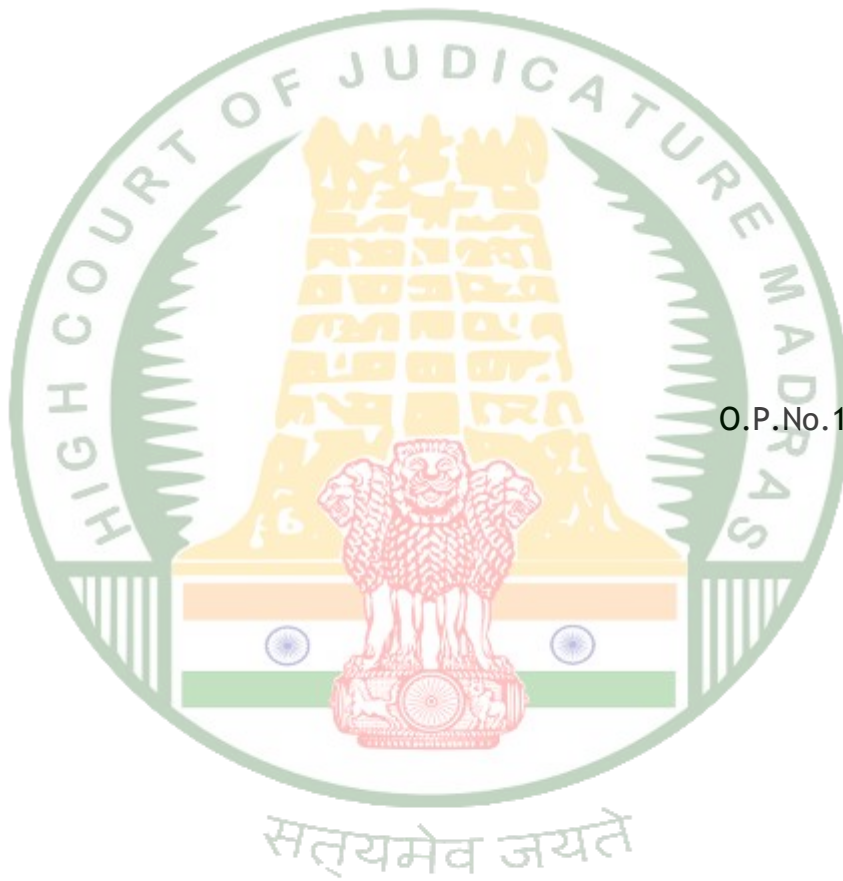
6. In the case on hand, no application has been filed by the first respondent, seeking invocation Section 34 (4) of the Act. Secondly, what is challenged is the very initiation of the arbitral proceedings through the appointment of the arbitrator. Therefore, the defect cannot be termed as curable, as it goes into the root of the matter. However, taking into consideration the fact, especially, the existence of the agreement is not in dispute, while setting aside the award passed, liberty is given to the 1st respondent to proceed afresh, if so advised. Accordingly, the original petition stands allowed, leaving all the issues open. No costs.

21.11.2017

rrg/cgi

M.M.SUNDRESH, J.,

rrg/cgi



O.P.No.1009 of 2015

WEB COPY

21.11.2017