IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 14.07.2017

PRONOUNCED ON: 24.10.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

Original Petition No.483 of 2015

1.Murugan D

2.Padmavathy .. Petitioners

Vs

1.M/s.Shriram City Union Finance Ltd.,
rep. by its authorized representative K.Rajagopal

2.A.Arokiadoss

3.Sangeetha S.V.

4.Iraniyan R

5.Manikandan R

6.Shanmugan D .. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award of the 2nd respondent dated 13.11.2013 passed in ACP EF/AAD No.140/2012 and to direct the 1st respondent to pay the costs of the petition.

For petitioners	:Mr.V.Balasubramani for Mr.M.Arunachalam
For first respondent	:Mr.Amalraj.S.Penikilapatti

ORDER

This is an Original Petition under Section 34 of the Arbitration and Conciliation Act (in short 'the Act') challenging an Award dated 13.11.2013.

2. The petitioners are D.Murugan and M.Padmavathy, who are said to have availed of a loan as co-borrowers from the first respondent finance company along with R3, the main borrower and R4, R5 and R6 who were also co-borrowers. The Arbitrator has been arrayed as the second respondent.

3.Heard Mr.V.Balasubramani, learned counsel for Mr.M.Arunachalam, learned counsel for the petitioners and Mr.Amalraj S.Penikilapatti learned counsel for the first respondent. R2 to R6 are not represented.

4.A preliminary objection is raised by the first respondent (hereinafter referred to as 'Company') on the ground that the petition is barred by limitation in so far as the petition has been filed beyond the time provided under section 34 of the Act. Countering the objection, the petitioners, mother and son, would argue that they were wholly unaware of any aspect of the transaction commencing from the application and sanction of the loan till the passing of the award. The first instance when the petitioners came to know of the same was on receipt of summons in Execution Proceedings No.542 of 2014 on the file of the IX Assistant Judge, City Civil Court, Chennai in February 2015. Upon engaging counsel in the execution proceedings, a certified copy of the Award dated 13.03.2013 in ACP EF/AAD

No.140/2012 along with connected documents had been obtained. The present petition has been filed within the period of limitation from this date and as such was within time.

5. It was only at this stage that the petitioners would claim that they came to find that the first respondent has sanctioned a loan to the third respondent and the petitioners along with R4 to R6 had been named as co-borrowers in the loan application. The petitioners would however categorically state and confirm that that there had been no documents executed by them as co-borrowers to the said loan and that they were wholly unaware of the any part of the transaction.

6. According to the company, the petitioners were co-borrowers to the loan and signatories to the loan documents. There had been defaults in re-payments resulting in proceedings for arbitration being initiated. Notices had been issued by the Arbitrator to all respondents to which there had been no response. Accordingly, an Award dated 13.11.2013 had been passed adverse to the borrowers.

7. Detailed submissions have been heard and the documents perused.

8. The borrower appears to have entered into an agreement for Enterprise Finance on 30.05.2011 with the company. A copy of the agreement has been filed which reveals signatures purportedly of both the petitioners on most of the pages. The signature of the first petitioner Murugan is however absent on some of the pages. The names of the

petitioners along with R3 to R5 are listed as co-borrowers. But curiously the address set out in the schedule is one and the same for all five individuals. The signatures stated to be those of the petitioners in the agreement are vehemently disputed by them. The signatures on the self-attested supporting documents stated to have been furnished by the petitioners are also denied by the petitioners. According to the petitioners, these documents have been obtained fraudulently by the borrower from the place of employment and filed along with application for processing of the loan.

9. No acknowledgment card is placed on record to establish service of notice issued by the Arbitrator on 10.11.2012. As regards the second petitioner, an acknowledgment card is placed on record indicating receipt of the notice by a person stated, in the course of the hearing, to be the daughter of the second petitioner. As regards service of Award, no acknowledgment is placed on file for service of the same on the second petitioner while an acknowledgment is filed indicating receipt of the Award by M.Vedha, the wife of the first petitioner.

10. The company would rely on the provisions of Section 3 to the effect that a written communication is deemed to have received if it is delivered to the addressee personally or his/her place of business, habitual residence or mailing address or last known place of business, habitual residence or mailing address by registered letter or any other means, which provides a record of attempt to deliver the same. Thus according to the

company, the acknowledgment cards filed as well as the postal track would indicate sufficient service.

11. Moreover, the provisions of section 21 of the Act state as follows:

21. Commencement of arbitral proceedings.—

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

In the present case, the company has not indicated or established anywhere the date on which proceedings for arbitration were in fact initiated. The provisions of section 43 of the Act dealing with limitation states thus:

43. Limitations.—

(1) The Limitation Act, 1963 (36 of 1963), shall, apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes 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.

Though the basis of this petition is that the petitioners are wholly unaware of the loan taken by R3 or the proceedings for arbitration thereafter, no attempt has been made by the company to establish compliance with the provisions of section 21 of the Act. I am thus of the view that proceedings for arbitration have not commenced in terms of section 21 r.w. section 43 of the Act. I rely in this regard on the decision of a Division

Bench of this court in *Indus Ind Bank Ltd. vs. Mulchand B Jain and others* dated 13.02.2013 in O.S.A. No.266 of 2011.

12. Learned counsel for the company would repeatedly point out that all parties, the borrower and the co-borrowers/guarantors, hailed from Guduvancherry and that they had colluded to defraud the company. He would submit that there had been defaults in repayment of the installments and in such circumstances, the co-borrowers are fully liable to make good the amounts, bound as they were by the documentation executed by them in this regard.

13. The foundation of proceedings for Arbitration is the agreement between parties to submit to the process of Alternate Dispute Resolution. The provisions of the Act require a valid agreement wherein the parties agree to submit to arbitration disputes inter se. Thus the validity of the arbitration agreement vis-a-vis the parties to the transaction would have to be established first. Thereafter and assuming that the first test is satisfied, one would have to proceed with the validity of service of notice in the course of proceedings for Arbitration as well as service of the Award itself based on the evidences available in the records produced before me.

14. A comparison of the alleged signatures of the petitioners on the documentation would show differences even to an un-trained eye such as mine. The signatures of Murugan are missing in some pages of the agreement while the signature of Padmavathy is seen without the initial in

one instance. It is also curious as to how the schedule to the agreement lists all the co-borrowers as residing in Vazhgavalamudan Street, Nandhivaram, 211, TTC Nagar, Madamppakam Post, 16/3, Sathasiva Nagar, Madampakkam, 423 (page No.25) when admittedly they are not all related or from the same family. I have no doubt that all is not well as regards the execution of the document vis-a-vis the borrower and the company. The availability of the self attested documents, the duty cum identity card, the ration card and the salary slip of D.Murugan and the ration card and salary slip of M.Padmavathy, by themselves, do nothing to advance the case of the company and have to be seen in the context of the transaction as a whole.

15. If the parties to the agreement are not in consensus or ad idem as regards the transaction, the agreement for arbitration would unequivocally fail. I am of the view that the documents filed do not inspire any confidence. It is incumbent upon the company to have ensured that there was proper verification of the parties who are alleged to have signed the loan agreement as co-borrowers and this is nowhere reflected in the execution of the documents, containing several blanks and discrepancies as noted above. The fact that proper address for each of the parties has not been furnished and does not find place in the agreement, the differences in signatures and absence of signature and initials on some of the pages lead to the conclusion that the documentation executed does not evidence a collaborative

transaction involving the petitioners. In the absence of a proper agreement entered into by the parties to which the petitioners are signatories the substratum of the Award falls and the same fails.

16. Coming to the services of notice and Award, the notice issued by the Arbitrator dated 10.11.2012 has not been served on D.Murugan and has been received, in the case of M.Padmavathy by her daughter. Further there is no acknowledgment for the receipt of the Award by the second petitioner and the Award has been received by the wife of the first petitioner, M.Vedha. Mr.Balasubramani would stress on the fact that the provisions of Section 3 read with 31(5) of the Act have been clearly satisfied in the present case and the postal track would indicate service of the notices as well as the Award on the petitioners. This according to him was sufficient to establish the service of the Award. I do not agree. The provisions of Sections 3 and 31(5) of the Act cannot be applied in a vacuum. Arbitration is a process that has to be based on consensus ad idem between the parties. In the clear absence of consensus between the parties to either the transaction or the clause for arbitration, the entire edifice, not merely the substratum, fails. The petitioners rely on the decisions in *Impex Corporation and others vs. Elenjikal Aquamarine Exports Ltd* (AIR 2008 Kerala 119), *Naveen G.Rolands*

vs. M/s.Cholamandalam DBS Finance Ltd and others (CDJ 2017 MHC 1336) and *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.* CDJ 2017 DHC 077 that support its case.

17. Petition allowed with no order as to costs.

.10.2017

Vga

Speaking order/Non speaking order

Index:Yes/No

Dr.ANITA SUMANTH,J.

Pre-delivery order in

Original Petition No.483 of 2015

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