

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.11.2017

CORAM

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

Original Petition No.342 of 2012

Vimal Kumar Dalmia

.. Petitioner

Vs.

1.Kotak Mahindra Bank Limited,
4th Floor, Ceebros Centre,
Montieth Road, Egmore,
Chennai - 8.

2.M/s.Hind Roadways Ltd.,
1103, No.26/71-A, Birhama Road,
Kanpur, U.P. - 208 001.

3.Pradeep Kumar Dalmia/1103,
No.15-72, Civil Lines,
Kanpur - 208 001. (died)

4.N.C.Vijairagavan,
Arbitrator, Door No.89/1,
5th Street, Anna Nagar,
Chennai - 40.

.. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 18.03.2010 passed by the 4th respondent.

For Petitioner : Mr.M.Sriram
For Respondents : No appearance

ORDER

Seeking to set aside the award dated 18.03.2010, the present Original Petition has been filed.

2.Heard the learned counsel appearing for the petitioner. Despite service of notice and the names of respondents 1 to 3 having been printed in the cause list, none appears on behalf of them.

3.A loan-cum-guarantee agreement was entered into between the parties. As according to the first respondent, the petitioner has not paid the amount, the arbitration clause mentioned in the agreement *inter se* parties was invoked.

4.An award was passed by the learned Arbitrator by taking into consideration the covenants available in the loan agreement and the records indicating the non payment of the amount mentioned in the claim petition.

5. Before the learned Arbitrator, the petitioner did not appear. A finding has been given that the postal authorities could not serve the date of hearing on the petitioner. Incidentally, it was held that the first respondent/claimant has also informed the learned Arbitrator that they have sent the claim statement and other documents to the petitioner. Accordingly, an award was passed.

6. Learned counsel appearing for the petitioner would submit that the mandate of Section 34(2) of the Arbitration and Conciliation Act, 1996 has not been complied with. There was no proper notice given to the petitioner either for appointment of the Arbitrator or of the arbitral proceedings.

7. A perusal of the award would show that there was no mention about the service of notice. However, it has been stated that the petitioner could not be served. The presumption available under Section 114 of the Indian Evidence Act is the rebuttal presumption. When it is the specific case of the petitioner that there is a violation of Section 34 (2) (a) (iii) of the Arbitration and Conciliation Act, 1996 and in the absence of contra material to disprove the same, this Court is constrained to accept it. Unfortunately, in the case on hand, Section 34 (4) of the Arbitration and Conciliation Act, 1996, also cannot be

pressed into service as there is neither an application nor a request for the same. The learned Arbitrator has merely made reliance upon the submission made by the first respondent/claimant on the service of notice. In the considered opinion of this Court, the said finding cannot be accepted without there being any basis. A mere statement cannot substitute the evidence. Suffice it to state that there is no finding that the petitioner has been served as against the attempt having been made.

8. In such view of the matter, the award dated 18.03.2010 stands set aside and the Original Petition stands allowed. No costs.

Index:Yes/No
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08.11.2017

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M.M.SUNDRESH,J.



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