

THE HON'BLE HIGH COURT OF JUDICATURE, MADRAS

Reserved on: 21.07.2017

Pronounced on: 14.11.2017

CORAM

THE HON'BLE JUSTICE DR.ANITA SUMANTH

O.P.No.649 of 2013

1. Mr.Sriram Kesavan

2. Mrs. Sathyabama Kesavan

...Petitioners

Versus

1. M/s. Cholamandalam Investment and Finance Company limited,
(Formerly Known as M/s. Cholamandalam DBS Finance Limited)
Dare House, No.2, N.S.C. Bose Road,
Chennai – 600 001.

2. Mr.Y.K.Rajagopal

...Respondents

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to allow the present OP and set aside the impugned award dated 31.10.2011 passed by the learned Sole Arbitrator Mr.Y.K.Rajagopal in Arbitration Case No.R/C.D.B.S./3 of 2011 against the Petitioners and in favour of the first respondent and direct the first respondent to pay to the petitioners the cost of this petition.

For Petitioners :Mr.A.S.Narasimhan

For Respondents : Mr.S.Namasivayam

ORDER

This Original Petition is filed by the petitioners challenging award dated 31.10.2011 passed by the Sole Arbitrator in Arbitration Case No.R/C.D.B.S./3 of 2011 and praying for a direction to the first respondent (company) to pay to the petitioners the costs of this petition.

2.The company was the claimant in the proceedings for Arbitration and the petitioners were the respondents.

3.Heard Mr.A.S.Narasimhan, appearing for the petitioners and Mr.S.Namasivayam, appearing for the company.

4. The petitioners approached the company for availing a home equity loan. An agreement was entered into during the month of January 2007 and a loan of Rs.10,80,000/- extended. Immovable property belonging to the first petitioner was offered as security for the loan. The agreement provided for a top-up loan facility for a sum of Rs.26,23,000/- and this was also sanctioned by the Company. It was the case of the company that after the repayment of the first few installments, there were defaults by the petitioner in repayment of the amounts outstanding. The last payment was made on 17.02.2011 and despite notice, no amounts were forthcoming thereafter. Proceedings for arbitration were commenced in accordance with the clause for arbitration as provided in the agreement. The company would state that as on the date of filing of the claim, a sum of Rs.38,77,142/- together with interest at the rate of 24% per annum till the date of realisation of the amount, was due from the petitioners.

5.Before the Arbitrator, the petitioners were un-represented. The records of arbitration were called for in the course of hearing of this petition that revealed that the first communication was issued by the Arbitrator on 07.01.2011, fixing the matter for hearing on 09.02.2011. The parties were called upon to attend the proceedings on 09.2.2011 and the claimant directed to file its claim statement along with supporting documents. Notices were duly received by both parties.

6.On 09.02.2011 the company filed its claim but there was no appearance on behalf of the respondents. Accordingly, the arbitrator issued notice dated 09.03.2011 enclosing the claim statement filed by the company, calling upon the petitioners to file a statement of defence thereto and intimating them that the matter was posted on 06.04.2011. It is relevant to note that the aforesaid communication specifically

puts the petitioners to notice that failure to appear on their part would result in the invocation of section 25 of the Act. Section 25 reads thus:

'25.Default of a party – Unless otherwise agreed by the parties, where, without showing sufficient cause,

a) The claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

b) The respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

c) A party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.'

7. In view of the continued absence of the petitioners, the arbitrator proceeded to pass an award upon hearing the company and based on available evidence. The petitioners were held liable to pay the claim amount of Rs.38,77,142/- jointly and severally to the company together with interest at the rate of 18% per annum till the date of realisation along costs and expenses of arbitration. The award was duly communicated to both parties.

8. The petitioners do not dispute the receipt of notices dated 07.01.2011 and 09.03.2011 putting them to notice of the dates of hearing. The petitioners, in all fairness also do not dispute the factum of non-payment of the instalments to the company as per the agreement. However they would state that an amount of Rs.15,95,368/- has been re-paid as far as the first loan was concerned and an amount of Rs.5,57,040/- in respect of the top-up facility that has not been taken note of in the award. The only other plea advanced to justify non-payment was financial crisis and medical ailments suffered by the 1st petitioner. Two medical certificates have been filed dated 10.02.2011 and 07.04.2011 advising the petitioner rest

between 08.02.2011 and 10.02.2011 and 05.04.2011 to 07.04.2011 on account of viral fever.

9. Learned counsel appearing for the petitioners would plead that the second petitioner was not educated and hence not equipped to handle matters of the present nature. As far as the allegation relating to non-grant of credit in respect of payments made by the petitioner is concerned, the company was directed to produce complete statements of accounts in relation to the loan availed and repayments effected. The statements are comprehensive and contain all particulars and date wise transactions in relation to each loan, from date of availment of the loan till date of statement being July 2017. The statements have been made available to the petitioner and sufficient opportunity granted to them to bring to the notice of the Court any error or omission therein. However no such instance has been pointed out by the learned counsel for the petitioners. In the light of this, I do not find any substance in the allegation made. The defence relating to medical ailments is also merely stated to be rejected as neither the nature of ailment suffered nor the duration of the same would have stood in the way of the petitioners appearing and participating in the proceedings. This then, are the sum and substance of the grounds raised in this petition.

10. In addition the petitioners would also orally challenge the levy of interest awarded, being 18% arguing that the interest as per contract was only 13%. I find that the company had, in fact, sought interest at the rate of 24% that was declined by the Arbitrator, who, in accordance with the provisions of Section 31(7)(a) and (b) of the Act levies interest of 18% from date of claim till date of realization thereof. The

<http://www.judis.gov.in> provisions of Section 31(7) read as follows:

'31 (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the

arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment. '

11. The terms of the loan agreement available in the records of the Arbitrator provide for interest at the rate of 14.5% along with another 4% additional interest in the case of default. The Arbitrator has, upon a consideration of section 31(7) extracted above levied interest at the rate of 18% from date of claim till realization and I find no infirmity in the same. The decision of the Bombay High Court in *Angel Infin Pvt. Ltd. vs. Echjay Industries Ltd.* (2007(3) ARBLR 110 Bom) relied upon by the respondent also supports this conclusion.

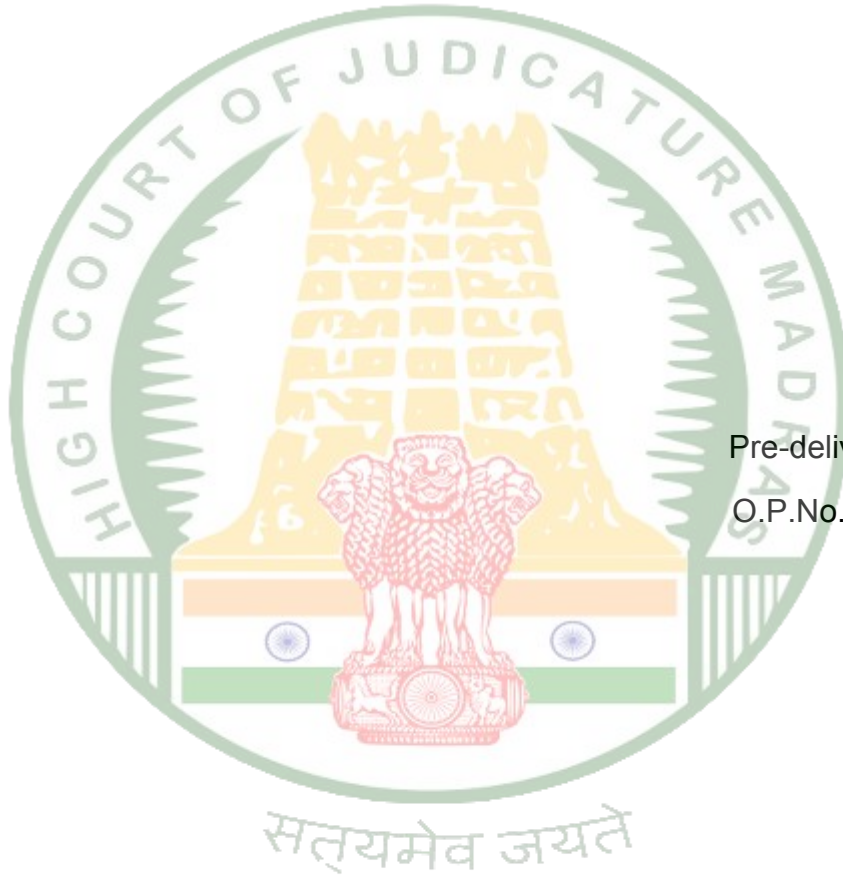
12. The provisions of Section 34(2) of the Act provide for limited scope of interference in challenging an arbitration award. The facts in the present case fall far short of the statutory requirement for such interference. The impugned award has considered the facts and circumstances in the proper perspective and I find no reason or justification to interfere with the same.

13. In the above circumstances, no interference is called for in the impugned award and this petition stands dismissed.

14.11.2017

DR.ANITASUMANTH, J.

raja/vga/msv/sl



Pre-delivery order in
O.P.No.649 of 2013

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