IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 17.07.2017

PRONOUNCED ON: 24 .10.2017

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

ORIGINAL PETITION NO.653 OF 2016

Villas Chandrakant Gaokar .. Petitioner

Versus

1. M/s.Cholamandalam Investment and Finance Company Ltd. (formerly known as Cholamandalam DBS Finance Ltd.)
   rep. By its Deputy Manager – Legal – Home Equity R.Sivakumar,
   "Dare House", 1st Floor,
   No.2, NSC Bose Road,
   Chennai 600 001.
2. Shashikant Jogal
   1/13, Ramachandra Bhuvan,
   Plot 182, J.B.Road, Parel,
   Mumbai 400 012.
3. Ganesh Puralkar,
   1/13, Ramachandra Bhuvan,
   Plot 182, J.B.Road, Parel,
   Mumbai 400 012.
4. Shree Swami Samarth Med & General Store,
   1/13, Ramachandra Bhuvan,
   Plot 182, J.B.Road, Parel,
   Mumbai 400 012.
5. Shree Swami Samarth Trading ENT Pvt. Ltd.,
   1/13, Ramachandra Bhuvan,
   Plot 182, J.B.Road, Parel,
   Mumbai 400 012.
6. Shree Swami Samarth Surgical & Medical
   1/13, Ramachandra Bhuvan,
   Plot 182, J.B.Road, Parel,
   Mumbai 400 012.
7. J. Ravikumar (Arbitrator)
   Flat No.F1, 1st Floor, Door No.10,
   Muralidharan street,

Ayyavoo Colony,
Aminjikarai,
Chennai 600 029. .. Respondents

Original Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 praying to (i) set aside the Arbitration award dated 03.02.2014 on the file of the respondents to pay cost of the petition.

For Petitioner : Mr.S.Kamalesh Kannan

For Respondents : Mr.S.Namasivayam

ORDER

The petitioner was the first respondent borrower in proceedings for arbitration that culminated in an award dated 3.2.2014 in Case No.ARB/CIFCL 23 of 2013.

2. Brief facts:

2.1) The 1st respondent company, Cholamandalam Investment and Finance Company Ltd, ('company' in short) had executed a loan agreement bearing No.XOHEMA100000554408 for the grant of a home equity loan to the petitioner and five others dated 29.1.2011, the latter standing guarantee for the loan. Immovable property, being apartment No.2803 in Tower-D of 'Ashok Towers', Dr. Baba Sahib Ambedkar Road, Dr. S.S.Rao Road, Parel, Mumbai 600 012 was offered as security for the loan. In terms of the loan agreement, the petitioner herein was liable to repay the amount of Rs.2,38,00,000/- in equated monthly installments.

2.2) Defaults had been committed in effecting re-payments of instalments. The agreement between the parties provided for alternate dispute resolution in terms of clause 26, and as such, proceedings were referred to a sole arbitrator for resolution. The following issues were framed for consideration;

'Whether the respondents are jointly and severally liable to pay a sum of Rs.2,33,30,321/- as on 31.07.2013 together with interest to the claimant which arise out of the default in payment of instalments as per the Loan Agreement dated 29.01.2011?

2. Whether the claimant is entitled to costs?'

2.3) Notice was first issued on 29.6.2013 by the arbitrator. A claim petition was filed by the company along with various documents to establish its claim, on 30.9.2013. Notices enclosing the proceedings of hearing dated 30.9.2017 and the claim statement were sent to the respondents with a direction to file counter by 18.9.2017, duly served upon the respondents. On 18.9.2017, the claimant was represented but the respondents failed to appear. The counter was also not forwarded for filing.

2.4) The arbitrator, after recording the position that the respondents had not appeared pursuant to notices dated 29.6.2013, 31.7.2013 or 18.09.2013 set the respondents exparte on 18.09.2013 and proceeded with the issue on the basis of documents available on record. An amended claim statement was filed on 18.09.2013 seeking to correct typographical errors in the description of the schedule of property in the original claim statement dated 31.7.2017. The memo enclosing the amended claim statement was taken on record since the amendment sought was only formal and did not affect the overall claim. The arbitrator proceeded to adjudicate upon the issues framed as extracted in the earlier portion of the order and upon an examination of the claim and the annexed documents, comes to the conclusion that the respondents had committed breach of the agreement and defaulted in payment of installments and are thus jointly and severally liable to pay the sum of Rs.2,33,30,321/- to the company as on 31.7.2017. The arbitrator also awards interest of 18% per annum from the date of claim till realisation and permits the claimant to enforce the charge created over the property offered as security towards the loan. He also proceeds to avoid costs of the proceedings.

3. The present petition is filed challenging the aforesaid award. The submissions of Mr.Kamalesh Kannan, learned counsel appearing for the petitioner and Mr. S.Namasivayam, learned counsel appearing for the respondents have been heard in detail.

4. At the outset, an objection is raised to maintainability of the present petition on the ground that the same is barred by limitation.

5. Mr.S.Namasivayam appearing for the respondents would point out that the award was dated 3.2.2014 but the petition has been filed only on 27.1.2016 beyond the time permissible under section 34 (3) of the Act. He would rely upon the following cases, copies of which have been circulated:

1. *Associate Builders vs. Delhi Development Authority C.A.10531 of 2014 dated 25.11.2014;*

2. A.Rama Goud Vs. M/s.Lakshmi General Finance Ltd. and two others in OSA.No.250 to 253 of 2009, decision dated 9.9.2009;

3. Laxmi Mathur Vs.The Chief General Manager, Mtnl (2000(4)Bom CR89);

5. Logic Eastern India Pvt. Ltd. Vs.KEC International Ltd., (Mumbai; 2016(6) Bom.C.R.382);

5. Apex Encon Projects Pvt. Ltd. And others Vs. L & T Finance Ltd and others and others (Manu/MH/3351/2015);

6. The thrust of the argument of Mr.Kamalesh Kannan, appearing for the borrower, the guarantors not choosing to challenge the award, is that the petitioner was unaware of the proceedings before the arbitrator or the passing of the award and had come to know of the same only when a warrant dated 8.10.2015 had been served on him pursuant to proceedings for execution initiated by the company. He would draw attention to Section 31(5) of the Arbitration and Conciliation Act 1996 (in short, 'Act') as per which a signed copy of the award shall be delivered to each party. According to him, limitation in the present matter would commence only from the date on which the signed copy of the award was delivered to the party filing the challenge and as such the present petition was within time.

7. The counsel for the petitioner relied on a decision of the learned Single Judge of this Court in *Naveen G. Rolands vs M/s. Cholamandalam DBS Finance Ltd., and two others* dated 15.2.2017 in O.P.No.369 of 2013.

8. The preliminary question thus to be decided is the question of limitation. Substantial reliance is placed by the petitioner on the provisions of section 3 of the Act reading as follows:

'3. Receipt of written communications. - (1) Unless otherwise agreed by the parties,-

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.'

9. According to the petitioner, the provisions of section 3 r/w.31 (5) of the Act require service upon the addressee personally or at his place of business, habitual residence or mailing address or, in the alternative to the last known place of business, habitual residence or mailing address of the addressee by registered letter or any other means which provides a record of the attempt to deliver it. The records of the arbitrator were called for to determine compliance with the aforesaid position.

10. On merits, the main contention of the petitioner is to the effect that no proper opportunity was afforded to him to participate in the proceedings for arbitration. He would aver that the notices stated to have been issued by the arbitrator were not received by him and as such, the entire proceedings are vitiated by non compliance with the provisions of natural justice.

11. A careful perusal of the records is thus called for to determine the question of maintainability as well as the grounds relating to violation of the

principles of natural justice. The opportunities stated to have been extended by the arbitrator are as follows:

Date of notice and mode sent	***Response/appearance by respondents in arbitration***	***Availability of proof***
Notice dated 29.6.2013 posting the matter to 31.07.2013	Respondents in claim called absent	Acknowledgment card evidencing service on respondents on 10.07.2013
Notice dated 31.07.2013 sent by RPAD	Respondents in claim called absent	Receipt dated 22.8.2013 and acknowledgment card bearing date of receipt as 24.08.2013
18.09.2013	Respondents called absent and set exparte	----
Award dated 3.2.2014	--	Postal receipt dated 27.2.2014 available but no acknowledgment card available on file.

12. The records do not reveal service of the award on the respondent though postal receipts do indicate that a cover has been dispatched on 22.8.2013 by the arbitrator. Even assuming that the covers contained the awards, no acknowledgment cards have been placed on record to establish service of the awards on the petitioner. The provisions of sec.3 r/w.31(5) extracted above require service upon the borrower. This has not done in the present case and as such, the first instance when the borrower was aware of the award was in the course of execution proceedings in E.P.No.1153/2014, that is, on 20.10.2015. The challenge under section 34 was filed on 27.1.2016 within the period set out in terms of section 34 and the proviso thereunder. The Original Petition is thus held to be maintainable.

13. On merits, the sheet anchor of the petitioner's case is violation of the principles of natural justice. The arbitrator in the course of the award elaborates on

the notices sent to the petitioner and the co-borrowers. However, the details of service as culled out from the records reveal that out of three notices issued, there was no acknowledgment for the receipt of the final notice posting the matter for hearing on 18.09.2013, when in fact, the borrowers were set exparte. No doubt proceedings for arbitration call for speedy and efficacious disposal, however this cannot mean that the parties do not have to be heard fairly. In the present case, I am not convinced that sufficient opportunity has been afforded to the respondents to make its case before the arbitrator.

14. The provisions of section 34(e) enumerate the grounds for challenging an award and sub-section (iii) relating to a violation of the principles of natural justice reads thus:

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

……..

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

……..

15. It is a settled position that prior to setting a party exparte, a peremptory notice is issued as part and parcel of the proceedings to put to notice the party that non-appearance on a stipulated date will result in him being set exparte, in view of prior continued absence. In the present case, such a peremptory notice has not been issued. The arbitrator proceeds to set the respondents exparte at the hearing on 18.09.2013 for which hearing, there is not even an acknowledgment of service on

the respondents. A Division bench of the Calcutta High Court in *Juggilal Kamlapat vs General Fibre Dealers Ltd.* (AIR 1955 Cal 354) broadly states the principles which govern the matter of issue of peremptory notices.

> *14. The question as to the right of an arbitrator to proceed ex parte and the effect of his doing so when he does not issue a notice that he would proceed in the absence of any party who would fail to attend on the date of hearing has been discussed in "Russell on Arbitration". In the fifteenth edition of the book, the discussion is to be found at pages 144 and 145. It appears from the four, decisions to which I have already referred and the statement of the law in Russell that the procedural rule applicable to arbitration proceedings is more tolerant than the rule followed in Courts of law. Broadly stated, the principles which govern the matter are the following. If a party to an arbitration agreement fails to appear at one of the sittings, the arbitrator cannot or, at least, ought not to, proceed ex parte against him at, that sitting. Where in such a case it does not appear that the non-appearance was anything but accidental or casual, the arbitrator ought ordinarily to proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party.*
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> *If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend, he will proceed in his absence. But if after making such a peremptory appointment and issuing such a notice, the arbitrator does not in fact proceed ex parte on the day fixed, but fixes another subsequent date, he cannot proceed ex parte on such, subsequent date unless he issues a similar notice in respect of that date as well.*
>
> *If he issues a similar notice and the party concerned does not appear, an award made ex parte, will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceeds ex parte, the award will be liable to be set aside, in spite of a notice of a peremptory hearing having been given in respect of the earlier date, subject, however, to the condition that prejudice was caused to the party against who is ex parte order was made. But this duty to give notice of an intention to proceed ex parte is not 'an absolute duty.*
>
> *If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitrators in any event, as when he has openly repudiated either the reference itself or the particular arbitrators and has shown no desire to recant, the arbitrators are not required ' issue a notice of an intention to proceed ex parte*

against such a recusant person and may proceed ex parte and make a valid award without issuing a notice. The better course, however, even in such a case is to issue a notice and give the party concerned a chance to change his mind.

15. The above is what the arbitrators are required on their own part to do…..

16. As Sir Asutosh Mookerjee, J. (as he then was) observes in the case of *Udaychand v. Debibux* (AIR 1920 Cal 853) the giving of such peremptory notices prior to proceeding ex parte was a requirement not of law but of prudence. All the more in the case of proceedings for arbitration that are themselves a regulated mode of settlement and where, as Chief Justice Chakravartti observes in Juggilal Kamlapat (supra), *'the procedural rule applicable to arbitration proceedings is more tolerant than the rule followed in Courts of law'.*

17. For the above reasons, I set aside the award. I do not, in the factual nature of the matter as elaborated by me above and based on the records of the arbitrator, deem it necessary to elaborate on the case law that have been circulated by both parties. My conclusion as aforesaid is based upon the records maintained by the arbitrator and forming part of the court files.

18. I cannot however lose sight of the fact that the borrowers/co-borrowers have a liability to repay the loan availed of from the company. The conclusion arrived at by me is solely on the violation of natural justice by the Arbitrator and not on the determination made by the Arbitrator on the merits of the matter, holding the petitioner and the guarantors liable for the re-payment of the loan in respect of which no arguments were advanced. The provisions of section 34 of the Act do not admit of any but two consequences – one, the setting aside of the award on the grounds

mentioned in section 34 (1) of the Act or where it is appropriate and if so requested by a party, to adjourn the proceedings challenging the arbitral award, in order to give the arbitral tribunal an opportunity to resume the proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. The latter power can be exercised only upon request of a party, which has not been made in the present case, and in the event the award has not been set aside by the Court. The position that section 34 does not include the power to remand in any other circumstance has been confirmed by the Supreme Court in its recent decision in *Kinnari Mullick and another vs Ghanshyam Das Damani* (2017 SCC Online sC 528).

19. The present order is kept in abeyance for a period of four (4) weeks from date of receipt of order. The security furnished shall not be encumbered or alienated by either party in the interim.

.10.2017

Speaking/Non speaking order

Index: Yes/No

msr

DR.ANITA SUMANTH,J.

msr

Pre-delivery order in

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