

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.10.2018

CORAM

THE HON'BLE MR. JUSTICE **D. KRISHNAKUMAR**

O.P. No.69 OF 2015

1. Karthikeyan P.

2. Purushothaman G.

..Petitioners

Vs.

1. M/s. Chola mandalam Investment
and Finance Company Limited

2. Mr. V. Paul Das,
Sub Judge (Retired) Sole Arbitrator

..Respondents

The Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed to set aside the Award passed by the second respondent in PD049/2013 dated 10.10.2014.

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For Petitioner : M/s. Indumathi Ravi

For Respondent : Mr.D. Pradeep Kumar

O R D E R

This Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed to set aside the Award in PD049/2013 dated 10.10.2014 passed by the arbitrator/second respondent.

2. Brief facts of the case as under:

2(a). The first petitioner being a borrower entered into loan agreement bearing No.XVFPCHN00000696656 dated 03.01.2012 along with the second respondent, who is a guarantor for the purchase of Tata LPT 1109 with the first respondent Company. The petitioners obtained a vehicle loan of Rs.10,00,000/- (Rupees Ten Lakhs only) and calculated interest for the Principal loan amount for Rs.3,40,017/- (Three Lakhs Forty Thousand and Seventeen only). The petitioner has to repay the loan amount along with interest by 47 equated monthly instalments of Rs.28,500/-(Rupees Twenty Eight thousand and Five Hundred Only) commencing from 01.03.2012 to 01.01.2016 and committed default, in making payment of the monthly instalments. Despite repeated requests and reminders regarding the dues payable by the petitioners, no response from the petitioners. Hence, the first

respondent has taken possession of the subject, vehicle for sale proceedings, for recovery of loan amount. Even after sale proceedings carried out for Rs.6,25,000/- (Rupees Six Lakhs Twenty Thousand only) for the said vehicle, the petitioners are liable to pay balance amount of Rs.3,16,731/-(Rupees Three Lakhs Sixteen thousand and Seven Hundred and Thirty one only), after deducting, the sale proceedings amount. Therefore, the first respondent has initiated arbitration proceedings, for recovery of a sum of Rs.3,16,731/- (Rupees Three Lakhs Sixteen thousand and Seven Hundred and Thirty one only) from the petitioners. In this regard, the Arbitrator/second respondent has sent a notice on 03.01.2014 along with the claim petition to the petitioners. The said notice was duly served to the petitioners. Even though, both the petitioners are staying in the same roof, the first petitioner only appeared on 11.04.2014 before the Arbitrator and the second petitioner did not appear on that day. Thereafter, both petitioners were neither appeared in person nor through their counsel in the subsequent proceedings. In view of the absence of the petitioners in the arbitral proceedings, the petitioners were set ex-parte and ex-parte award was passed on 10.10.2014 by the arbitrator/second respondent, whereby the claim petition filed by the first respondent was allowed and directed the petitioners to pay a sum of Rs.3,16,731/- (Rupees Three Lakhs Sixteen Thousand Seven

Hundred and Thirteen Only) together with interest @18% p.a. to the first respondent, finance company. Being aggrieved, the petitioners have filed this Original Petition for setting aside the ex-parte award, passed by the Arbitrator/second respondent.

3. The learned counsel for the petitioners would submit, after receiving the arbitration notice issued by the arbitrator/second respondent, the first petitioner appeared on 11.04.2014 before the Arbitrator and sought for time to file his objections by engaging a counsel to resist the claim made by the first respondent company. Hence, the case adjourned to 02.05.2014 on which date, the learned counsel Mr.Rajesh Ramanathan, entered appearance and sought time for filing his objections. Thereafter, neither the petitioners were informed nor sent any notice about next hearing of the arbitral proceedings. Further, the petitioners were not provided sufficient opportunity for filing objections by the Arbitrator/second respondent. The aforesaid ex-parte award was passed by the arbitrator, without providing sufficient opportunities to the petitioners, to prove their case and the said award violates principles of natural justice and the same is liable to be quashed.

4. The learned counsel for the petitioners would further submit, the loan was sanctioned for the purchase of EICHER 42HD EX BS II vehicle, whereas actually, the vehicle was financed for TATA LPT 1109 vehicle. Further, the claim has also been given for EICHER 42HD EX BS II vehicle, not for TATA LPT 1109 vehicle. Hence, the Arbitrator/second respondent, without considering the discrepancies in the loan agreement, has passed the erroneous award and the same is liable to be set aside.

5. On the other hand, the learned counsel for the first respondent would submit that the contentions made by the petitioners is totally false and untenable. The learned counsel for the respondents denied the averments that the petitioners were not served any notice intimating date of arbitral proceedings and not provided sufficient opportunities for filing their objections, thereby prevented the petitioners from exercising their right to cross examine the first respondent's witnesses. In reply to the contention of the petitioner that there was no notice calling upon the petitioners to let in their evidence nor was there any communication from the Arbitrator/second respondent, indicating that the evidence on the side of petitioners would be closed on 05.09.2014, the learned counsel for the respondent would submit that the arbitrator had served notice to the

petitioners and the same was received by the petitioners. Therefore, the arbitral proceedings adjourned from time to time on various days for appearance of the petitioners and filing their objection as well as cross examining the first respondent's witness. However, none appeared on behalf of the petitioners, thereafter only, the arbitrator had passed the ex-parte award allowing the claim petition filed by the first respondent. Hence, the ex-parte award is correctly passed by the Arbitrator.

6. The first petitioner did not file counter affidavit, even though the proceedings was adjourned from time to time till June 2014 and no documents were marked as exhibits on the side of the petitioners. However, the first respondent was allowed to file proof affidavit and to mark the documents as Ex.A1 to A7 on 18.07.2014. Even thereafter, the petitioners were not appeared before the arbitrator for cross examination of the first respondent witness, till August 2014. Hence, the evidence was closed and adjourned to 05.09.2014 for the evidence of the petitioners. Even after several opportunities, having been granted to the petitioners, they did not appear on 05.09.2014 before the Arbitrator. As a result, the evidence of the first petitioner was closed. In the aforesaid circumstances, the ex-parte award was passed by the arbitrator/second respondent. In so far as the

discrepancy of the vehicle, the counsel for the first respondent has stated that due to inadvertence and oversight, the name of the vehicle had been wrongly described as 42 HD EX BS II in the claim petition, instead of TATA LPT 1109. Therefore, the wrong description of vehicle is not a ground to set aside the ex-parte award passed by the learned Arbitrator/second respondent.

7. Heard the learned counsel for the petitioners and the learned counsel for the first respondent.

8. The learned counsel for the first respondent has filed an affidavit by stating that due to inadvertence, vehicle's name has been wrongly mentioned. It cannot be said that the arbitrator has passed the award, without examining the specific objection raised by the petitioners, in respect of discrepancy of the vehicle. The learned counsel for the first respondent has also filed an affidavit, before this Court by stating that there is no dispute regarding the loan agreement entered into between the parties, finance availed, defaults committed by the petitioners and they have surrendered the vehicle, due to inadvertence and oversight, typographical error occurred in the description of vehicle.

9. On a perusal of the award passed by the arbitrator/second respondent, the notice was sent to both petitioners on 03.01.2014 along with the claim statements. The first petitioner is the son of the second petitioner and both are living under one roof. Despite notice has been served on the petitioners, the second petitioner has not appeared before the arbitrator/second respondent. The first petitioner alone entered appearance on 11.04.2014 before the arbitrator. Further, even after engaging an Advocate Mr.Rajesh Ramanathan, who has also filed vakalat on 02.05.2014, the petitioners have not filed counter in the arbitral proceedings, for which the case has been posted for several times till 27.06.2014. But, none appeared on behalf of the petitioners on 27.06.2014 also. Thereafter, the first respondent filed proof affidavit and marked documents as Exhibits A1 to A7 on 18.07.2014. Since the petitioners have not appeared till 18.08.2014 for cross examination of the first respondent/claimant, the evidence of the first respondent was closed. Further, when the matter was adjourned to 05.09.2014 for recording the evidence on the side of the petitioners, they did not appear before the Arbitrator. Having considered the fact that the petitioners remain absent in the arbitral proceedings despite notice was served, an ex-parte award has been passed.

10. In this regard, the decision of the Division Bench of this Court in **"S.A.Fasludeen and Another Vs. Siyauddin and Another"** reported in **MLJ (2018) 2 Volume 313** wherein it is held that as under:

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"26. The award of an Arbitral Tribunal might be set aside by recourse to a Court under Section 34 of the 1996 Act. Section 34(2) (iii) of the 1996 Act provides that an arbitral award may be set aside by the Court on the ground that the applicant for setting aside had not been give proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

27. The language of Section 34(2)(iii) of the 1996 Act makes it amply clear that the Arbitral Tribunal is not only obliged to give notice of the appointment of the Arbitral Tribunal, but also give the parties notice of the dates of arbitral proceedings to enable the parties to appear and make their submissions.

28. In our view, the learned Single Judge patently erred in proceeding on the basis that once notice of constitution of the arbitral proceedings and the first date of hearing had been given, there was no obligation on the part of the Arbitral Tribunal to give any further notice to the appellant.

29. *The Arbitral Tribunal is duty bound to arrive at its decision in substantial compliance of the principles of natural justice. A party can be said to have been given reasonable opportunity to appear and make submissions not only by service of notice of constitution of the Arbitral Tribunal, but also by notice of the proceedings and or in other words notice of the dates on which the proceedings are scheduled to be held.*

30. *The arbitral proceedings, where are informal in nature, heard and adjudicated before a Tribunal constituted by the respective parties by agreement cannot be equated with proceedings before a Court of Law, where the daily/weekly/monthly cause lists serve as notice of the hearing dates."*

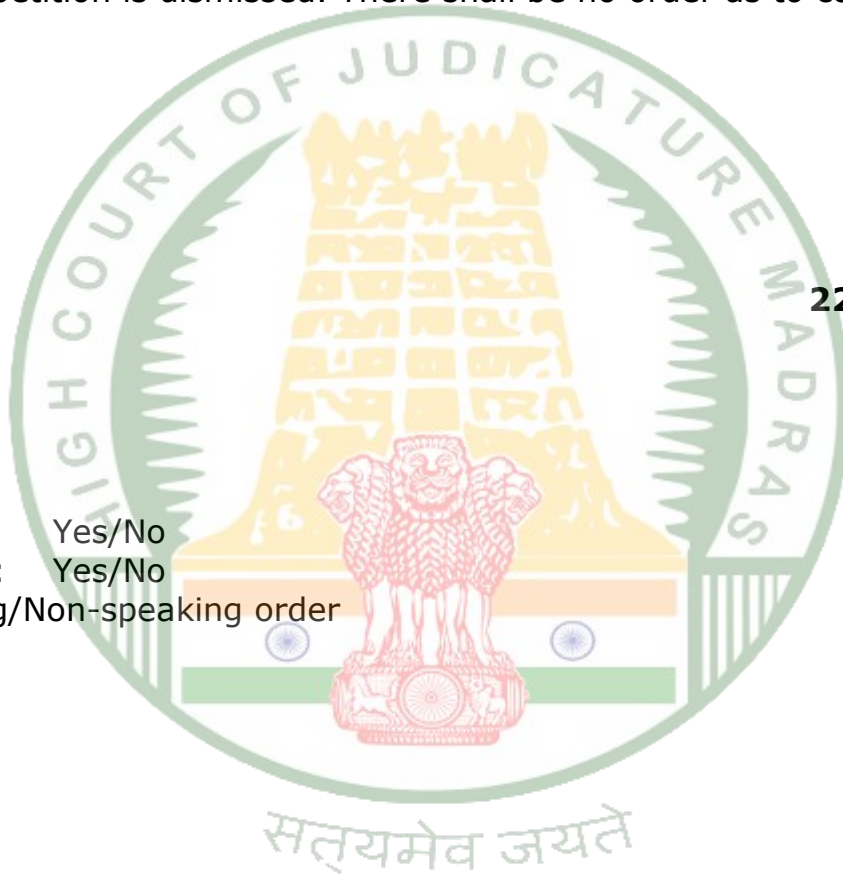
11. The first petitioner appeared on 11.04.2014, after receiving the notice along with claim petition and his counsel had entered appearance on 02.05.2014 and sought time for filing objections. Thereafter, the petitioners did not choose to appear in person or through counsel. Also, the petitioners have not furnished satisfactory reasons for non appearance, during the arbitral proceedings. Therefore, there is no error and illegal in the Award passed by the Tribunal.

12. In view of the foregoing reasons and in the light of the decision cited supra, this Court does not find any scope to interfere with the ex-parte award passed by the arbitrator. Accordingly, the original petition is dismissed. There shall be no order as to costs.

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Index: Yes/No
Internet: Yes/No
Speaking/Non-speaking order

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D. KRISHNA KUMAR, J.

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