IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2018

CORAM

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

O.P. No.728 OF 2015

Om Namasivya Thota ..Petitioner

Vs.

1. M/s. Phoenix Arc Private Limited
   No.3, Dass India Towers,
   IInd Floor, 2nd Line Beach,
   Parrys, Chennai - 600 001.

2.Sole Arbitrator Mr. G. Dharmaraj ..Respondents

The Original Petition has been filed to set aside the Award dated 15.07.2013 passed by the Second respondent/Arbitrator in ARB/84/2012.

For Petitioner : Mr. K.S. Ganesh Babu

For Respondent-1 : No appearance

Amicus Curiae :Mr. D. Pradeep Kumar

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O R D E R

The Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996, has been filed to set aside the Ex-parte award dated 15.07.2013 passed by the Second respondent/Arbitrator in ARB/84/2012.

2. The brief facts leading to the filing of the original petition are as follows:

Pursuant to the loan agreement signed by the petitioner accepting the terms and conditions of the first respondent finance company, the petitioner herein has availed a personal loan of Rs.1,84,000/-(Rupees One lakhs and Eighty Four Thousand only) from the first respondent finance Company. Since the petitioner has committed default in making payment of monthly instalment from 05.05.2009, the first respondent has served notice to the petitioner on 17.12.2012 calling upon him to repay the total outstanding amount of Rs.2,52,936/-(Rupees Two Lakhs Fifty Two Thousand Nine Hundred and Thirty Six Only) along with interest thereon within three days from the date of notice. Since, there was no response from the petitioner to the aforesaid notice, the first respondent finance company has filed a claim petition before the arbitrator/second respondent for recovery of the outstanding amount from the petitioner.

3. The Arbitrator/second respondent allowed the claim petition by directing the petitioner to pay a sum of Rs.2,52,936/-(Rupees Two Lakhs Fifty Two Thousand Nine Hundred and Thirty Six Only) with interest @18% thereon from the date of the award till the date of realisation. Being aggrieved by the aforesaid award, the present Original petition has been filed by the petitioner.

4.The learned counsel for the petitioner would submit that no notice was served on the petitioner for appearance before the Arbitrator/second respondent as contemplated under the provisions of the Arbitration and Conciliation Act, 1956 except a letter dated 17.12.2012, and no communication has been sent by the arbitrator/second respondent. The Arbitrator/second respondent has passed an ex-parte award, without providing an opportunity to the petitioner to prove his case. Hence, the award is liable to be set aside for violation of principles of natural justice.

5. Though notice has been served to the first respondent, none appeared on behalf of the first respondent either in person or through counsel before this Court.

6. The main issue involved in this Original petition is that, whether the ex-parte award dated 15.07.2013 passed by the arbitrator violates the principles of natural justice?

7.It is submitted by the learned counsel for the petitioner that the claim petition filed before the Arbitrator is beyond the limitation period of three years and the same is barred by limitation. In support of his contention, the learned counsel for the petitioner has referred to the decision of the Division Bench of this Court in **C.M.A. No.575 of 2014 in the case of "Shriram Transport Finance Co. Ltd. Vs. V. Balanisamy" (2018 (4) CTC 805)** wherein it was held in paragraph Nos. 15 and 16 as follows:

.....

"15. In the light of the above settle legal propositions, we hold that the cause of action for the Appellant to sue the respondents arose within three years from the date on which they have committed default in payment of the Loan amount. In other words, the period of three years start commencing from the date on which the respondents failed to repay the Loan amount as per the agreement with the Appellant. Even as per the agreement entered into between the Appellant and the Respondents on 01.08.2004, the entire amount would become due on commission of default in payment by the Respondents. In this regard, Reference can be made to

Section 6.1 of the Agreement dated 01.08.2004, which reads as follows:

"Section 6. Lender's rights and remedies in default by the borrowers:

6.1. Upon occurrence of any one or more "events of defaults"

(i) The entire balance of Loan, Interest thereon together with all other dues and charges becoming so liable to be paid under the agreement, shall immediately stand repayable to the Lender"

16. It is seen from Section 5 of the Agreement dated 01.08.2004 that what will be construed as events of default is clearly mentioned. As per Section 6.1 mentioned above, whenever any default is committed by the borrower, then the entire balance of Loan amount, together with Interest thereon along with other dues and charges shall become liable to be paid by the borrower immediately. Therefore, ever as per the Agreement dated 01.08.2004, the three years' period, as provided under Section 37 of the Limitation Act, has to be recokned only from the date on which the Respondent committed default in payment of Loan amount from the Second Instalment. Accordingly, we answer the question framed for our consideration as against the Appellant."

8. A perusal of records shows that the first respondent finance company sent a notice to the petitioner on 17.12.2012 demanding outstanding amount of Rs.2,52,936/-(Rupees Two Lakhs Fifty Two Thousand Nine Hundred and Thirty Six Only) along with interest thereon. Since there is no response from the petitioner, the first respondent filed a Claim petition No.ARB/084/2012 in the year 2012.i.e. after three years. According to the petitioner, the claim petition filed by the first respondent finance company is beyond the period of three years and the same is barred by limitation under Section 37 of the Limitation Act, 1963. It is useful to extract Section 37 of the Limitation Act, as follows:

> *"37. On a promissory note Three years. When the default is or bond payable by made, unless where instalments, which the payee or obligee provides that, if waives the benefit default be made in of the provision payment of one or and then when fresh more instalments, the default is made in whole shall be due. respect of which there is no such waiver."*

Therefore, the claim petition filed by the first respondent is barred by limitation.

9. D. Pradeep Kumar, the learned counsel appearing as amicus-curiae, to assist the Court. According to the learned counsel D.Pradeep Kumar, under Section 36 of the Limitation Act, limitation commence on the expiry of the first term of payment and for other

parts, on expiry of the respective terms of payment. Under Section 37 of Limitation Act, limitation commence when default is made, unless where the payee or obligee waives the benefit of the provision and when fresh default is made in respect of which there is no such waiver. According to him, the instant case falls under Section 37 of Limitation Act. However, the arbitrator/second respondent did not discuss in the award as to whether Sections 36 or 37 of Limitation Act, would attract in filing the claim petition, before the Arbitrator. The arbitrator has not decided the issue on merits and passed the ex-parte award.

10. According to the petitioner, the demand notice dated 17.12.2012 has not been received by the petitioner. In order to prove the service of notice, no material has been placed before the Arbitrator and none appeared before this Court to represent for the first respondent. The dispute ought to have been decided by the Arbitrator by providing opportunities to the parties concerned. The learned counsel for the petitioner fairly conceded that the first respondent finance company may be permitted to file a fresh claim petition before the arbitrator/second respondent.

11. According to the petitioner, there is no evidence or materials placed before this Court to prove the allegation that notice has been

served before passing the award. The first respondent finance company has not chosen to enter appearance before this Court to disprove the said allegation levelled against the petitioner. In the absence of any materials placed before this Court, this Court has no other option except to accept the contention of the counsel for the petitioner. Thus, adverse inference has to be drawn against the first respondent. Hence, the award passed by the Arbitrator violates principles of natural justice and this Court has no hesitation to set aside the ex-parte award passed by the second respondent.

12. It is fairly submitted by the learned counsel for the petitioner that if any fresh claim petition is filed by the 1st respondent, the pendency period of arbitral proceedings may be excluded.

13. In the facts and circumstances of the case, the impugned award passed by the second respondent is set aside and consequently, the Original petition is allowed. It is made clear that this order will not stand in the way of first respondent to proceed the claim afresh, if permissible under law, within a period of two months from the date of receipt of a copy of the order and pendency period of arbitral proceedings shall be excluded for the purpose of limitation. There shall be no order as to costs.

14.This Court placing on record by appreciating the service rendered by the learned counsel Mr. Pradeep Kumar as Amicus Curiae for disposal of the original petition.

24.10.2018

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Index:Yes
Internet:Yes
Speaking/Non-speaking

D. KRISHNA KUMAR, J.

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