IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2018

CORAM

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

O.P. No.285 OF 2013

Hariharan K. Seelamiar ..Petitioner

Vs.

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

2.Mr. G. Dharmaraj
   District Judge (Retd.)
   & Sole Arbitrator. ..Respondents

The Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996, has been filed to set aside the Award dated 20.02.2013 passed by the Second respondent/Arbitrator in ARB/010/2012.

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For Petitioner : Mr. S.A. Akbar
For Respondents-1 : No Appearance
Amicus Curiae :Mr. D. Pradeep Kumar

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The Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996, has been filed to set aside the Ex-parte award dated 20.02.2013 passed by the Second respondent/Arbitrator in ARB/010/2012.

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.4,80,000/-(Rupees Four lakhs and Eighty Thousand only) from the first respondent finance Company. Since the petitioner has committed default in making payment of monthly instalment from 05.08.2008, the first respondent has served notice to the petitioner on 06.11.2012 calling upon him to repay the total outstanding amount of Rs.6,53,434/-(Rupees Six Lakhs Fifty Three Thousand Four Hundred and Thirty Four 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

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by directing the petitioner to pay a sum of Rs.6,53,434/- (Rupees Six Lakhs Fifty Three Thousand Four Hundred and Thirty Four 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 15.12.2012, 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 the principle of natural justice.

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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,

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whether the ex-parte award dated 20.02.2013 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*

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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 06.11.2012 demanding

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outstanding amount of Rs.6,53,434/-(Rupees Six Lakhs Fifty Three Thousand Four Hundred and Thirty Four Only) along with interest thereon. Since there is no response from the petitioner, the first respondent filed a Claim petition No.ARB/010/2012 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 the 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

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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 06.11.2012 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.

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

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served before passing the award. The first respondent finance company has not chosen to enter appearance before this Court to explain the said allegation 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. Therefore, this Court is of the view that principles of adverse inference will be drawn against the first respondent. Hence, the award passed by the Arbitrator violates the principles of natural justice and this Court has no hesitation to set aside the ex-parte award passed by the second respondent.

12. This Court appreciates the assistance rendered by the learned Counsel Mr.Pradeep Kumar as amicus curie for the disposal of the present original petition.

13. At this stage, the learned counsel for the petitioner has stated that if the first respondent file a fresh claim petition, the period of arbitral proceedings, be excluded.

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14. In the facts and circumstances of the case, the impugned award passed by the second respondent is set aside. It is made clear

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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. There shall be no order as to costs.

15.The learned counsel for the petitioner shall forward a copy of the order to the first respondent within a period of two weeks from the date of receipt of a copy of the order.

24.10.2018

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Index:Yes
Internet:Yes
Speaking/Non-speaking

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