

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.09.2018

CORAM :

THE HONOURABLE MR.JUSTICE M. SATHYANARAYANAN
and
THE HONOURABLE MR.JUSTICE N. SESHASAYEE

O.S.A.No.219 of 2018
and
C.M.P.No.11015 of 2018

1. M/s Digital Illusion India Pvt.Ltd.
Represented by its Managing Director
Mr.S.V.Subramaniam
No.A Block, 1st Floor, Mena-Kempala Arcade,
No.113, Sir Thyagaraya Road, T.Nagar,
Chennai-600 017.

Also at:
No.23, 1st Floor,
Kodambakkam High Road,
Nungambakkam,
Chennai-600 034.

2. Mr.S.V.Subramanyam

Appellants

-vs-

1. M/s Shriram City Union Finance Limited,
Having its registered office at:
No.123, Angappa naicken Street,
Chennai-600 001.
and its Administrative Office at:
No.221, Royepettah High Road,
Mylapore, Chennai-600 004.
Represented by its Authorized Signatory
Mrs.C.Gracy.

2. Mr.S.Abhaya Kumar

Respondents

Prayer: Memorandum of Grounds of Original Side Appeals filed under Order 41 Rule 1 of CPC Rules read with Clause 15 of the Letters Patent against the fair and decretal order passed by this Court in O.P.No.380 of 2017 and Application No.3118 of 2017 dated 12.12.2017.

For Appellants : Mr.M.Krishnappan, Senior Counsel
assisted by Mr.V.Srinivasa Babu

For Respondents: Mr.T.V.Ramanujam, Senior Counsel
assisted by Mr.R.Umashankar for R1

JUDGMENT

(Judgment of the Court was delivered by Justice
M. SATHYANARAYANAN)

By consent, this appeal is taken up for final disposal. The respondents in the Arbitration Award dated 25.01.2017 and the petitioners in O.P.No.380 of 2017, are the appellants herein.

2. The 1st respondent has filed the claim petition in Arbitration Case No.94 of 2015, before the 2nd respondent under Section 23 of the Arbitration and Conciliation Act 1996 [in short "Arbitration Act"] stating among other things that the appellant/1st respondent therein had approached with a request to extend the financial facility to the tune of Rs.3,00,00,000/- and it was favourably considered and the loan amount was sanctioned in their favour and they also accepted the terms and conditions and entered into a Loan Agreement dated 24.11.2011. The respondents 2 and 3 in the claim petition, joined as co-borrowers guaranteeing the due performance of the obligations under the Contract.

3. In terms of the said loan agreement, the loan amount of Rs.3,00,00,000/- was disbursed in favour of the 1st respondent/appellant herein and as per the terms and conditions of the the Agreement executed, 1st respondent/appellant herein was liable to repay the same with monthly interest of Rs.5,25,000/- on or before 25.01.2012, and the first monthly interest amount of Rs.5,25,000/- is to be paid on or before 25.12.2011 and repay the principle amount along with interest for the second month of Rs.5,25,000/-, aggregating to the sum of Rs.3,05,25,000/- on or before 25.01.2012. The agreement further contemplates that in the event of delay in repayment of the loan or any other amount due to pay, the borrower has to pay interest at the rate of 24% per month from the date of Agreement till the date of payment of such amount due. According to the 1st respondent herein/ petitioner in the claim petition, the appellant herein had paid 1st monthly interest at the rate of Rs.5,25,000/- on 25.12.2011 and paid the second monthly interest on 25.01.2012 and subsequently, defaulted in payment of Principal sum of Rs.3,00,00,000/- and as on 21.09.2015, they are liable to pay 6,58,10,650/-. In terms of Section 11 of the Loan Agreement, the 1st respondent herein has invoked the Arbitration Clause and he has sent a communication to the Arbitrator, who in

turn sent a notice to the Claimants.

4. The appellants, upon service of notice, had entered appearance through their authorised representative and sought time time for filing counter and thereafter, sought further time to settle the issues and subsequently they did not appear.

5. The 1st respondent / Claimant in support of his claim have marked Ex.s A1 to A6, especially Ex.A6 Statement of Accounts and they did not make any oral evidence. The appellant /1st respondent ,though entered appearance through their authorised representative, sought time for filing counter and to settle the issue amicably and subsequently remained exparte. The Arbitrator, based on the submission made in the claim statement as well as documents marked as Exs.A1 to A6, has passed an award dated 21.05.2017 by directing the appellant as well as Co-guarantors to jointly and severally pay the amount of Rs.6,58,10,656/- along with future interest at 18% per annum from the date of claim petition till the date of realization and also further awarded a sum of Rs.10,000/- towards cost of proceedings.

6. The appellants 1 and 2, upon receipt of the copies of the Award dated 25.01.2017, has filed O.P.No.310 of 2017 under Section 34 of the Arbitration Act for setting aside the Award and notices were ordered to the respondents and the 1st respondent / Claimant had entered appearance.

7. The learned Single Judge, upon perusal of the materials, has formulated the issue relating to limitation and on going through the Award found that the issue relating to the claim barred by limitation have not been raised before the learned Arbitrator and remained ex-parte and however, entertained the plea considering the question of limitation.

8. The learned Single Judge, on a perusal of the materials as well as the judgment stated before him reported in 2012 [12] SCC 581 (State of Goa Vs. Praveen Enterprises) and 2016 [14] SCC 761 (State of Gujarat Vs. Kothari and Associates) had found that the appellant had consciously avoided appearance before the learned Arbitrator and therefore, they cannot be permitted to raise issues regarding limitation, which involved mixed question of fact and the scope of interference under Section 34 of the Arbitration Act is very limited and citing the said reasons, has dismissed the original petition, vide impugned order dated 12.12.2017.

9. The petitioner in the said original petition, aggrieved by the disposal of the original petition, had filed this appeal under Section 37 of the Arbitration Act.

10. Mr.Krishnappan, learned Senior counsel assisted by Mr.V.Srinivasa Babu, learned counsel appearing for the appellant made a submission that the Loan Agreement came to be executed on 24.11.2011 and the second monthly interest was paid on 25.01.2012 and admittedly, the claim petition came to be filed on 22.09.2015 and therefore, it is hopelessly barred by limitation. Secondly, it is contented by the learned Senior Counsel that in the light of the fact that the claim is hopelessly barred by limitation, the Arbitrator ought not to have passed the Award, as it was time barred and on that ground also, it is liable to be set aside. The learned Senior Counsel appearing for the appellant, in support of his submission, placed reliance upon the judgment of the Apex Court reported in 2012 (12) SCC 581.(Cited supra)

11. Per contra, Mr.T.V.Ramanujam, learned Senior Counsel assisted by Mr.R.Uma Shankar appearing for the 1st respondent has invited the attention of this Court to the typed set of documents filed on behalf of the 1st respondent and would submit that as per the Statement of Accounts marked as Exs.A6, the last payment was made on 10.07.2012 and as per Section 21 of the Arbitration Act, letter of reference / nomination dated 07.07.2015 has been addressed to the 3rd respondent/Arbitrator with copies marked to the appellant as well as to the Guarantors and notices sent to the address of the 1st appellant herein to their address at No.A Block, 1st Floor, Mena-Kempala Arcade, No.113, Sir Thyagaraya Road, T.Nagar, Chennai-600 017 were returned and therefore, notices sent to their Guarantor office had been served on 09.07.2015 and it was followed by the Arbitration notice dated 12.08.2015, and in the light of the same, the claim petition was well within the period of limitation. It is the further submission of the learned Senior Counsel appearing for the first respondent by drawing the attention of this Court to the decision reported in CDJ 2010 MHC 5014 (Tamil Nadu Water Supply & Drainage Board vs. Adhul Kareem and others) that the appellant, having entered appearance through authorised representative, initially sought time to file counter affidavit and subsequently further prayed for time to settle the matter amicably and thereafter, they did not participate in the proceedings and the learned Arbitrator while going through the contentions in the claim petition and by appreciating the documentary evidence, has rightly reached the conclusion and upheld the claim of the 1st respondent and would further add that objection as to the issue relating to limitation should be raised at the earliest opportunity and the appellants have not entered appearance and did not raise that plea and even as per the statement of account, as well as the notice dated 07.07.2015, nominating the Arbitrator, the claim is well within the period of limitation and therefore, this Court, in exercise of it's jurisdiction under Section 37 of the

Arbitration Act, may interfere with the well considered order passed by the learned Judge in O.P.No.380 of 2017 and prays for dismissal of the application with exemplary costs.

12. This Court paid its best attention to the rival submissions and also perused the materials placed before it and the decisions rendered by the respective learned Senior Counsel appearing on both sides.

13. The sole question arises for consideration in this appeal is whether, the claim petition filed by the 1st respondent before the Arbitrator, is barred by limitation?

14. It is not in dispute that the appellant availed loan amount of Rs.3,00,00,000/- from the 1st respondent and to guarantee the payment, two Guarantors had also executed Deeds of Guarantee in their favour. As per the terms of the Agreement, first monthly interest amount of Rs.5,25,000/- is to be paid on 25.11.2011 and the principal amount of Rs.3,00,00,000/- along with second monthly interest of Rs.5,25,000/- is to be paid on or before 25.01.2012.

15. It is the specific case of the 1st respondent / Claimant that interest amount even payable under the due instalments have not been paid. Along with Second monthly interest, the appellant ought to have paid the principal sum of Rs.3,00,00,000/-, but, they did not pay the same and the last payment was made by them on 10.07.2012 and the limitation would end on 09.07.2015 and though sent letter of reference cum nomination dated 07.07.2015 to the 3rd respondent Arbitrator with copies marked to the appellant as well as to the Guarantors and notices were received by the office of the appellant on 09.07.2015.

16. The Arbitrator has entered reference and issued the arbitration notices dated 12.08.2015 to the appellants as well as to the Guarantors, fixing the date of hearing on 28.08.2015 and upon receipt of the notices, the appellants had entered their appearance through their authorised representative and sought time and it was adjourned to 22.09.2015 and on that date, the representative of the appellants had sought further time and it was adjourned to 06.10.2015 for filing counter and on that date, once again they sought time for settling the issue and it was adjourned to 28.10.2015 and on that date, they appeared and posted for filing list of documents by 13.11.2015. The claimant / 1st respondent had filed the list of documents on 18.05.2016. The respondents 1 and 2 appeared, but the 3rd respondent/Guarantor was called absent and set as ex-parte and for filing counter and for settling the matter, it was adjourned to 18.05.2016. On 18.05.2016, the matter was adjourned to 14.10.2016 and from 14.10.2016, the appellant continuously absented themselves for hearing and therefore, the Arbitrator

Tribunal took a decision to proceed further in terms of Section 25 of the Arbitration Act and granted time till 11.11.2016 to the 1st respondent / Claimant for filing proof affidavit and on that date, proof affidavit was filed and the first respondent/claimant was examined as CW1 and through him, Exs.A1 to A6 were marked.

17. The primordial submission made by the learned Senior Counsel appearing for the appellant is that since the second month interest was paid on 25.12.2012 and thereafter, no payment was made, the default commence on the next date on 26.12.2012 and therefore, the claim petition ought to have been filed on or before 24.11.2015 and however, the claim petition was filed only on 22.09.2015 and it was hopelessly barred by limitation.

18. Per contra, it is the submission of the learned counsel appearing for the 1st respondent by drawing the attention of this Court to the terms of the loan agreement as well as Section 21 of the Arbitration Act that the date of commencement of limitation is the notice appointing the Arbitrator and that apart, last payment was made on 10.07.2012 and the notice of Arbitration was sent on 07.07.2015 itself and therefore, the claim petition was well within the period of limitation.

19. It is relevant to extract Section 21 of the Arbitration and Conciliation Act, 1996:

"21. Commencement of arbitral proceedings:- unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

20. Scope of Section 21 of the Arbitration Act as well as the counter claim under Section 23 of the Arbitration Act came up for consideration before the Apex Court in the case reported in 2012 (12) SCC 581 (cited supra) and it is relevant to extract Paragraph.Nos.10, 13, 16 and 19:

What is "reference to arbitration"

10. "Reference to arbitration" describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration

agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

13. "Reference to arbitration" can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While Section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide sub-section (6)], Section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject-matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application under Section 11 of the Act for appointment of an arbitrator. The judicial authority "referring the parties to arbitration" under Section 8 of the Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.

16. The purpose of Section 21 is to specify, in the

absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceeding in regard to a dispute commences. This becomes relevant for the purpose of Section 43 of the Act. Sub-section (1) of Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of Section 43 provides that for the purposes of Section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21 of the Act. Having regard to Section 43 of the Act, any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the Arbitral Tribunal will have to reject such claims as barred by limitation.

19. There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding Claims A and B and seeking reference thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said Claims A and B. Subsequently if the claimant amends the claim statement by adding Claim C [which is permitted under Section 23(3) of the Act] the additional Claim C would not be preceded by a notice seeking arbitration. The date of amendment by which Claim C was introduced, will become the relevant date for determining the limitation in regard to the said Claim C, whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims A and B. Be that as it may.

21. As per the decision, the date on which the notice seeking Arbitration was served on the other party is the relevant date for deciding the limitation with regard to the claim.

22. The appellant did not dispute the correctness of the Statement of Accounts marked as Ex.A6 before the Arbitrator and a perusal of the same would disclose that last payment was made on 10.07.2012.

23. The 1st respondent / Claimant sent a letter of reference cum nomination dated 07.07.2015 to the Arbitrator with copies marked to the appellant / Guarantors and they have been served and the Arbitrator has accepted the reference and entered upon the reference and sent arbitration notice dated 12.08.2015 to the appellant as well as to the Guarantors and also sent a communication as to the date of arbitral pleadings and the

appellant through their authorised representative has entered appearance and initially time was sought to file counter affidavit and thereafter, further time was sought to settle the issues and thereafter, subsequently, the matter has been adjourned quite number of times, as pointed by this Court in the earlier paragraphs. Subsequently, they did not participate in the proceedings and the Award itself came to be passed on 25.01.2017.

24. The judgment relied on by the learned Senior Counsel appearing for the 1st respondent reported in CDJ 2010 MHC 5014 (cited supra) also relates to the plea regarding the claim petition barred by limitation. The Division Bench of this Court had placed reliance upon the judgment of Vimal G. Jain vs Vertex Financial Services Pvt. Ltd., reported in 2007 (4) Arbitration LR 18 (Bom), wherein it was held that a party to the arbitration proceedings seeking to raise the point of bar of limitation for initiating the arbitration proceedings should raise the issue at the earliest opportunity and in any case not later than the submission of the statement of defence, otherwise it would be deemed to have been waived and also placed reliance on the decision of the Bombay High Court in the case of Bharat M. Nagori vs Mr. Satish Ashok Sabni reported in 2003 (4) RAJ 47 Bombay, wherein also it was held that the respondent in his affidavit did not raise the plea that his claim is barred by limitation. Consequently the said contention came to be rejected. This issue, therefore, not an issue for consideration before the Arbitral Tribunal. The issue of limitation on the facts pleaded would be a mixed question of fact and law. Under these circumstances considering the pleadings it is not possible to hold that the claim filed is barred by limitation. The Division Bench of this Court in the above cited decision had found that the question of limitation has mixed question of fact and law and did not interfere with the dismissal of the original petition and the original impugned award and dismissed the appeal.

25. In the considered opinion of this Court, the said decision is squarely applicable to the present case on hand for the reason that the appellant lastly made the payment on 10.07.2012 and on 07.07.2015, letter of reference cum nomination was issued well within the period of limitation i.e., on 07.07.2012 and as per Section 21 of Arbitration Act and also as per the ratio laid down in the 2012 [12] SCC 581 (State of Goa Vs. Praveen Enterprises) [cited supra], it is held that Commencement of Arbitral Proceeding- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent and the said notices were received by them on 10.07.2015, subsequently, the Arbitrator, upon entering reference, has sent

arbitration notice on 12.08.2015. Upon receipt of the same they entered appearance through their authorized representative and initially sought time for filing counter and subsequently, sought time to settle the matter and on the request made by them, the Arbitrator had adjourned the matter for very many times and despite that they did not file their counter statement and subsequently, remained *exparte*. The appellants / respondents in the claim petition though entered appearance, did not raise any plea that the claim petition was barred by limitation and therefore, they are precluded from raising the said issue before this Court. In the considered opinion of this Court, the learned Judge has taken note of the fact that the question of limitation is amongst question of law and fact and rightly concluded that the award passed by the Arbitrator does not warrants interference.

26. The scope of interference by the Court over an arbitral award came up for consideration in the case of M/s.Sundarsan Trading Co., Vs. The Government of Kerala and another reported in AIR 1989 SCC 890, wherein it was observed as under:

29. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole Judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

'31. An award may be remitted or set aside on the ground that the arbitrator in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside the award

.....'But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. See the observations in *Anisminic Ltd.v.Foreign Compensation Commission* [(1969) 2 AC 147 : (1967) 2 All ER 986 : (1968) 2 QB 862] and *Regina v. Nosedo, Field, Knight & Fitzpatrick*[(1958) 1 WLR 793".....'

27. The scope of interference in the impugned order passed by the learned Single Judge is very limited under Section 37 of the Arbitration Act.

28. This Court on an independent application of mind to the entire materials, is of the considered view that there is no

error apparent on the face of the record and finds no merit in this appel.

29. In the result, the Original Side Appeal is dismissed, confirming the order dated 12.12.2017 in O.P.No.380 of 2017 and Application No.3118 of 2017. However, there shall be no order as to costs. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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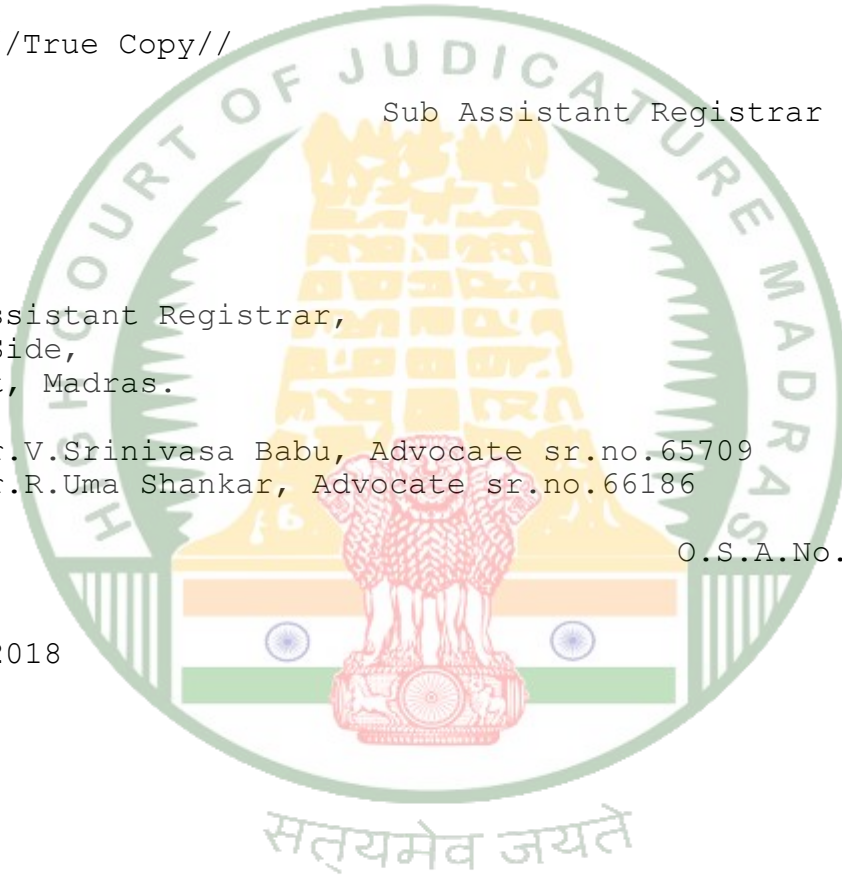
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O.S.A.No.219 of 2018

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