

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**ARBITRATION PETITION NO.399 OF 2014
ALONGWITH
CHAMBER ORDER NO.90 OF 2019**

Filament Production India Pvt. Ltd.Petitioner
vs
Kotak Mahindra Bank Ltd. ...Respondent

**WITH
ARBITRATION PETITION NO.492 OF 2014
ALONGWITH
CHAMBER ORDER NO.89 OF 2019**

Uday Muddu ShettyPetitioner
vs
Kotak Mahindra Bank Ltd. ...Respondent

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Mr. Vivek Khemka, i/b. Mr. Nilesh S. Das, for the Petitioner.

Mr. Chinmay Gupte, i/b. Mohit Gadkari & Co., for the Applicant in
CHOL/90/91 and 89/19.

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CORAM : S.C. GUPTE, J.

DATED: 1 FEBRUARY, 2019

P.C.:

. Heard learned Counsel for the Petitioner. The Respondent is absent, though duly served. The matter has appeared before this Court on a number of occasions, when either none has appeared for the Respondent or Counsel appearing for the Respondent has made a statement that the Advocates of the Respondent were proposing to withdraw their appearance for want of instructions from the Respondent. On 3 January 2019, this Court noted the Advocates' proposal to withdraw their appearance. The Advocates were directed to make an

application to the Registry. Office was directed to issue a notice to the Respondent. The Petitioner's Advocate was also given liberty to make a private service on the Respondent communicating the next date of hearing. It was made clear that no accommodation would be granted to the Respondent on the next occasion. (There is an office report of service effected on the Respondent.)The matter, thereafter, appeared on 22 January 2019. It was, however, stood over to today's date. None appears even today for the Respondent. The Respondent's Advocates have already applied for their discharge by way of chamber orders (Chamber Order Nos.90 and 89 of 2019). The chamber orders are yet to be decided. The chamber orders are not on board, but called out by consent and taken up. The chamber orders are allowed and the Advocates discharged.

2. The main ground of challenge in the present arbitration petition (Arbitration Petition No.399 of 2014) is want of invocation of the arbitration agreement by the Respondent. The Petitioner has raised a specific ground in this behalf in paragraph 5 of the petition stating that it did not receive any letter from the Respondent invoking the arbitration agreement or appointing the arbitrator for adjudicating the disputes. There is no proper reply to this averment of the Petitioner. The only reply of the Respondent, which is to be found in paragraph 20, is a general averment that the Respondent was constrained to initiate arbitral proceedings before the learned arbitrator and the latter, by his notice dated 10 February 2012, had directed the parties to appear before him. Even the arbitrator's notice appears to have been returned with the postal inscription "left". Further notice directed by the arbitrator also appears

to have been returned with postal remark of “unclaimed”. The arbitrator has proceeded on the ground that there was a deemed service under the provisions of Section 27 of General Clauses Act.

3. Apart from the fact that want of a notice invoking the arbitration agreement goes to the root of the matter and could be said to have undermined the validity of the arbitration reference and the award rendered thereunder, it is clear that, in the present case, there was no notice to the Petitioner of the arbitration proceedings. Section 27 of the General Clauses Act merely provides for a presumption. It is, however, a rebuttable presumption. When, on the Respondent's own showing, the packets of service were returned undelivered, there was no way the arbitral tribunal could have acted on a presumption of service. Besides, the Petitioner has taken an express ground in its petition that these notices were not served and yet, there is no effective reply on the part of the Respondent. No material is produced before the Court to show that the notices were duly served or that the Petitioner had adequate notice of the arbitration proceedings. The Petitioner's averments that it had no notice of appointment of the arbitrator as also of the arbitral proceedings and was even otherwise unable to present its case, must be, accordingly, taken as correct. The award, thus, deserves to be set aside on the ground of clause (ii) of sub-section (2)(a) of Section 34 of the Arbitration and Conciliation Act, 1996.

4. Accordingly, the arbitration petition is allowed by setting aside the impugned ex-parte award dated 14 June 2012. No order as to costs.

5. Learned Counsel for the Petitioner submits that the facts of the companion petition, namely, Arbitration Petition No.492 of 2014, are also similar. Arbitration Petition No.399 of 2014 invoke an award against the principal debtor, whereas Arbitration Petition No.492 of 2014 challenges an award passed against the guarantor. In both cases, there was neither notice of the arbitration agreement nor of appointment of the arbitrator or the arbitration proceedings. Accordingly, even that award deserves to be set aside. Arbitration Petition No.492 of 2014 is allowed by ordering accordingly.

(S.C. GUPTE, J.)