

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

ARBITRATION PETITION NO.1751 OF 2015

Paresh Prakash Pavetekar	...	Petitioner
Versus		
Phoenix ARC Pvt. Ltd.	...	Respondent

.....

Mr. Rahul S. Kadam for the Petitioner.

Mr. Charles DeSouza a/w Mr. Nikhil Rajani I/b V. Deshpande & Co. for the Respondent.

.....

CORAM : S.C. GUPTE, J.

DATE : 27 FEBRUARY 2019

(Oral Judgement)

. Heard learned Counsel for the parties.

2 This petition challenges an award passed by a sole arbitrator in a reference arising out of a loan agreement.

3 The Petitioner had taken a loan from the Respondent. There is no dispute about the loan. The loan was repayable in equated monthly installments. The Petitioner had committed a default in payment of installment due on 5 November 2018. There is no dispute that the default did occur. The case of the Petitioner, who was the Respondent before the arbitral tribunal, was that upon happening of this default, the Respondent (original claimant) was contractually bound to recall the entire loan together with interest and overdue charges. It is submitted that on the date of the first default, the Respondent's cause of action arose and within

three years of such accrual, the Respondent had to invoke the arbitration agreement, so as to be within limitation. It is submitted that since that was not done, the reference was barred by limitation and the arbitrator was accordingly bound to reject the claim, since there was neither acknowledgment of liability nor part payment within three years prior to invocation of the arbitration agreement.

4 In the impugned award, the arbitrator has held that the tenure of the loan was 5 years, so that the Petitioner was liable to repay the entire loan in sixty equal monthly installments (EMIs) or the whole sum along with interest and other charges as applicable at the end of the tenure, i.e. on or before 22 November 2012. The arbitrator held that the Respondent having initiated the arbitration on 29 January 2013, the invocation was within time.

5 The arbitrator's view in this behalf is clearly a possible view on a reasonable application of the law of limitation to the dispute raised by the Respondent. If one has regard to the contract of loan in the present case, which was for a tenure of 5 years, it provides for the right of the creditor to recall the entire loan and demand immediate payment of all amounts outstanding or payable, including interest and overdue charges, upon the occurrence of any event of default. Non-payment of any installment is indeed one of the events of default mentioned in this behalf. Clause 6.3 of the terms and conditions of the loan agreement, however, makes it clear that whereas the lender had the option to recall the entire loan and demand immediate payment of all amounts outstanding or payable under the loan agreement on the happening of an event of default, there was no

obligation on him to do so. In the face of this clause, the arbitrator's conclusion that the cause of action in the present case arose at the end of the tenure of the loan, i.e. on or before 22 November 2012, appears to be a reasonable and possible view of the contract between the parties. Based on such reasonable and possible view, no fault can be found with the application of the law by the arbitrator to the facts of the case whilst determining the issue of limitation.

6 Learned Counsel for the Petitioner relies on various judgments of our court as well as a decision of the Supreme Court in **Sundaram Finance Limited Vs Noorjahan Beevi**¹ in support of his case that the cause of action ought to be treated as having accrued to the claimant-lender upon first non payment of installment. In **Sundaram Finance Limited**, the respondent-hirer was financed by the appellant-financier for purchase of a vehicle under an agreement of hire purchase. The respondent, who was required to clear the entire loan by thirty six monthly EMIs, committed a default in payment of installments with effect from 20 May 1984. This led to the appellant-financier seizing the vehicle on 9 February 1985. The financier, vide notice dated 12 February 1985, called upon the respondent-hirer to settle the entire hire purchase dues within 10 days of receipt of the notice. The respondent-hirer failed to make any payment. The vehicle was thereafter sold by financier on 30 May 1985. After adjusting the sale proceeds, a notice for balance dues was issued to hirer on 12 July 1985. Since there was no response to the notice, a suit was filed by the plaintiff on 25 May 1988. One of the issues in the suit was of the bar of limitation. After considering the relevant provisions of the Limitation Act, 1963, in

1 (2016) 13 SSC 1

particular, Articles 55 and 113 thereof, the court examined the plaintiff's submission that since the last installment of hire purchase loan was to be paid on 20 September 1986, and also since the balance liability of the defendant could be ascertained only after sale of the vehicle, which took place on 30 May 1985, and since the suit was filed within three years of both dates, it could not be said to have been barred by limitation. The court considered clause-4 of the agreement in that case, which provided for a forthwith and ipso facto determination without any notice to the hirer and absolute forfeiture of the installments previously paid by the hirer simultaneously with entitlement of the lender *inter alia* for all installments due as well as damages for breach of the agreement. In the face of this clause, the court held that there being a breach of contract on the part of the hirer, under Article 55 of the Limitation Act, the period of limitation began to run with effect from the date of the breach, i.e. from 20 September 1986. The court held that neither the date of last installment due under the hire purchase agreement nor date of the sale of the vehicle could be taken as date of accrual of cause of action under Article 55 of the Limitation Act. These facts are clearly distinguishable from the facts of our case. In our case, upon happening of any event of default, the lender merely had an option but not an obligation to recall the entire loan and claim all dues. In our case, therefore, if the lender, acting under the particular clause (clause 6.3 of the terms and conditions of loan agreement), chose not to recall the entire loan on the happening of the first default in payment of installments and instead opted to wait till the last installment, for treating the default as complete and claiming his dues, he is certainly within his rights to do so.

7 The judgment of the learned Single Judge of our court in **Amin Tharani S/o. A. Tharani Vs. Kotak Mahindra Prime Ltd.**², is also clearly distinguishable on facts. In that case the agreement provided for events of default. The agreement provided that an event of default **shall** occur thereunder if the hirer failed to pay any hire charges or part thereof or any other payment required thereunder when due and such failure continued for a period of fourteen days after a notice in that behalf was sent to the hirer; the owners were entitled to declare all sums already due or to become due thereunder for the full term of the agreement as immediately due and payable and upon the hirer failing to make such payment within fourteen days, they could pursue any remedy available to them under applicable law. A default had occurred in payment of installment. The owner thereupon served a demand notice dated 21 February 2002 in terms of the contractual stipulations referred to above. The demand notice clearly mentioned that if the hirer failed to comply with the demand within fourteen days, appropriate action as per the agreement would follow. On these facts, the court held that the cause of action had clearly accrued to the owner and if the owner failed to file a suit within three years of such accrual, the claim would be barred by limitation. The court held that in the facts of that case, it was not permissible to the creditor to wait till the last installment became due. In other words, in that case, the lender not only had the entitlement to recall the entire loan and demand its payment, but that this entitlement was infact availed of by him, by recalling the entire loan and demanding its payment ahead of the tenure of the agreement. These facts are clearly distinguishable from our facts. The judgment, in the premises, does not support the Petitioner.

2 Arb.Petn. No.513 of 2009 decided on 15 December 2009.

8 Learned Counsel for the Petitioner also relies on other authorities of our court which deal with Section 9 of the Limitation Act. These judgments suggest that once a cause of action accrues, time begins to run, and no subsequent disability or inability to institute a suit or make an application stops it. Section 9, in other words, provides for continuous running of time. The authorities referred to by learned Counsel proceed on the basis of this law. There is no quarrel with the proposition of law that once time begins to run, it continues to run and nothing can stop it. The whole point of our case, however, is whether the cause of action could be said to have accrued to the claimant and, in that sense, time could be said to have begun to run. As we have seen above, the learned arbitrator has concluded that there was no accrual of cause of action so as to begin the period of limitation. The conclusion being a possible conclusion, there is no occasion to apply Section 9.

9 In any event the arbitrator's view on the application of the law of limitation to the facts of the present case being a possible view, no fault can be found with it under Section 34 of the Arbitration and Conciliation Act, 1996. Delhi High Court in the case of **Kotak Mahindra Bank Ltd Vs. Anuj Kumar Tyagi**³, has construed a similar agreement for repayment of loan vis-a-vis limitation under Article 55 of Limitation Act. The court held that in so far as Article 55 was concerned, the respondent's failure to adhere to the schedule of repayment would not deprive the right of the appellant to treat each breach as a fresh cause of action and the other breach having occurred in May/June 2012, the suit instituted on 20 July 2012 was within time. As explained by the Supreme Court in the case of

3 2015 SCC OnLine Del 14130

Associate Builders Vs. Delhi Development Authority⁴, the challenge court under Section 34 merely has to see whether the finding arrived at by the arbitrator is a perverse finding, that is to say, an impossible finding or a finding, which no fair or judiciously minded person could or should have arrived at or something that would shock the conscience of the court. That clearly is not the case here. There is no case even of any patent illegality here. An erroneous application of law *per se* does not amount to a patent illegality appearing on the face of the award.

10 There is, thus, no merit in the challenge to the impugned award. The arbitration petition is dismissed.

(S.C. GUPTE, J.)

4 (2015) 3 SCC 49