IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	**29.10.2018**
Orders prounced on	**13.3.2019**

CORAM

THE HONOURABLE Mr.JUSTICE **D.KRISHNAKUMAR**

O.P.No.802 of 2012

1 K.Vaithi
2 K.Saraswathy
3 V.Kathirvel ... Petitioners

Vs.

1. Kotak Mahindra Bank Ltd.,
   Rep. By Legal Manager,
   2nd Floor, 3, Dass India Towers,
   2nd line Beach, Parrys,
   Chennai 600 001.

2. D.Saravanan
   Sole Arbitrator,
   Orient Chambers,
   No.90, 4th Floor,
   Armenian Street, Chennai-1.

3. K.Muniyan ... Respondents

Prayer:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award, dated 8.9.2012 passed in A.C.P.(Kotak) No.347 of 2010 on the file of the second respondent.

For Petitioner : Mr.N.Suresh
For Respondent No.1 : Mr.K.Moorthy

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ORDER

The brief facts of the case runs as follows:

The first respondent Bank advanced Tractor loan of Rs.3,40,000/- to the first petitioner. The petitioners 2 and 3 herein are co-borrowers. A tractor bearing registration No.TN 32 D 6878 Mahindra Bhumiputhira was purchased for Rs.4,59,000/- by the petitioner under loan account No.TFE 257890. The petitioners submit that the repayment schedule is 20 equal monthly instalments of Rs.27,005/-. The following are the amount paid by the petitioners on different dates:

SL.No.	*Date*	*Amount in Rs.*
1.	02.06.2008	27,000/-
2.	27.08.2008	27,005/-
3.	20.01.2009	10,000/-
4.	09.03.2009	20,000/-
5.	30.03.2009	15,000/-
6.	25.05.2009	9,010/-
7.	31.08.2009	7,005/-
	Total	1,15,020/-

It is further submitted that the third petitioner is looking after the entire loan account and he is the father of the first petitioner and the husband of the second petitioner. The second petitioner's husband's name is wrongly stated in the claim petition as well as in Award as "Mani". The third petitioner is very aged and he was very sick and as such there was some delay in repayment of loan. The tractor which was hypothecated to the second respondent herein was seized through their henchmen. The first respondent had taken away the vehicle in the month of October, 2009 and did not give it back. Despite the request made by the third petitioner, without the knowledge of the petitioners, the vehicle had been sold. The petitioners were not served any notice before sale of vehicle. According to the petitioners, the repayment schedule is tri-monthly which starts from 20th May 2008 and comes to end by 20th February, 2013, totalling 20 tri-monthly equal instalments. Further, it is stated that the repayment period was not expired when the vehicle was seized. Even after seizure of the vehicle, the first respondent initiated arbitration proceedings for recovery of Rs.84,815/- from the petitioners towards balance payment. According to the petitioners, no amount is due as the vehicle itself was seized and sold. At the time of purchase of the vehicle, the vehicle is worth of Rs.4,59,000/- and the amounts were paid upto August, 2009. The vehicle was secretly and clandestinely put into auction by the first respondent and the petitioners were not informed about the amount realised from the auction sale of the vehicle and the first respondent Bank had not furnished true and proper accounts to settle their loan account long back and also not informed about the buyer of the vehicle. In the arbitration proceedings also, the petitioners were not served proper notice to defend the case. Even the claim petition filed before the Arbitrator also did not state anything about the auction sale of the tractor. According to the petitioners, as per the claim statement filed by the first respondent Bank, the vehicle was sold for Rs.2,75,000/- which is not a fair price. The petitioners denied that they were informed by the second respondent about the reference of the dispute on 30.9.2010. The petitioners submits that the first respondent Bank taking advantage of the auction sale of the vehicle, appropriated more amount then that of the amount actually payable by the petitioners, by way of realizing the entire amount of the sale consideration from the auction sale of the vehicle. Even as per their own statement the loan amount of Rs.3,40,000/- advanced to the petitioners, the petitioners have repaid nearly Rs.1,15,020/- to the first respondent Bank. The auction sale of the tractor fetched to the first respondent Bank even according to them is Rs.2,75,000/-, The auction sale has been conducted in the month of October, 2009 , just within a year of the advancement of the loan. The first respondent Bank had realised nearly Rs.4,00,000/- within a year from the petitioners for the loan amount of Rs.3,40,000/- advanced to the petitioners. The first respondent bank even after realising over and above the amount actually repayable by the petitioners, initiated arbitration proceedings to realise exorbitant amount of Rs.84,815/- The petitioners further submits that the Arbitral Award deals with the dispute not contemplated or not following within the terms of submission of Arbitration or it contains decisions on matters beyond the scope of Arbitration. The petitioners submits that the first respondent Bank is not entitled to 36% usurious interest and the award of 18% interest is also totally illegal. The petitioners are doing cooly work and the third petitioner being affected by jaundice could not attend Arbitration proceedings. Hence, the award passed by the Arbitrator is liable to be set aside.

2 The sole Arbitrator upon hearing the claimant/first respondent Bank and upon perusing the documents produced before the Arbitrator, passed an award in favour of the first respondent Bank, directing the petitioners to pay a sum of Rs.84,815/- along with interest at 18% p.a. from the date of reference till the date of realisation.

3 Heard the learned counsel appearing for the petitioner and and the learned counsel appearing for the first respondent Bank and perused the materials available on record.

4. According to the learned counsel appearing for the petitioners, no proper notice was served on the petitioners to appear before the Arbitrator. Even the claim petition filed by before the Arbitrator did not state anything about the clandestine auction sale of the tractor. The claim of the first respondent Bank that the tractor was sold for Rs.2,75,000/- cannot be accepted. The Arbitral Award passed by the Arbitrator is beyond the scope of Arbitration. Therefore, the Award passed by the Arbitrator is liable to be set aside.

5. According to the learned counsel appearing for the first respondent Bank, notice served by the Arbitrator to the petitioners returned with an endorsement, "refused". The petitioners neither appeared before the Arbitrator nor filed any objection. Therefore, the petitioners were called absent and set exparte. The Arbitrator upon considering the documents marked by the first respondent Bank as exhibits A1 to A9, passed an award in favour of the first respondent Bank. The award passed by the Arbitrator is within the ambit of Arbitration and Conciliation Act and the same is legally sustainable. Therefore, there is no warrant to interfere by this Court, with the award passed by the Arbitrator.

6. The main ground raised by the petitioners is that they were not served notice by the Arbitrator. A perusal of record shows that the notice served by the Arbitrator to the petitioners were returned with an endorsement, "Refused". The Arbitrator while passing the award recorded that, notice along with claim statement and documents sent to all the four respondents had been duly served and acknowledged by them. Therefore, the petitioners were called absent and set exparte. The abovesaid facts are not disclosed in the petition. The petitioner has approached the Court with unclean hands. The decision of the Hon'ble Supreme Court in **S.P.CHENGALVARAYA NAIDU (DEAD) BY L.RS. VS. JAGANNATH (DEAD) BY L.Rs. & OTHERS [1994-1 L.W. 21].** It is useful to extract the relevant paragraphs which reads as under:

> *"5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and*

> *prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."*

The aforesaid judgment is squarely apply to the facts of the case in hand. Therefore, the petitioner is not entitled for relief in the present Original petition.

8. The scope of interference by this Court under Section 34 of the Arbitration and Conciliation Act, in the award passed by the Arbitrator is very limited. The Division Bench of this Court in the case of "**Project**

Director, Tamil Nadu Road Sector Project II Vs. M/s.RNS Infrastructure Ltd- GPL (JC) and Others (O.S.A No.301 of 2017 and C.M.P. No.18730 of 2017) held as follows:

> *"20. The scope for interference to an Arbitration award is very limited. Unless and until the applicant satisfies the requirements of Section 34 of the Act, the Arbitration Award cannot be set aside by this Court.*
>
> *21. The scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, to an Arbitral Award is covered by the decision of Hon'ble Supreme Court in*
>
> *(a) Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Limited reported in (2003) 5 SCC 705, wherein it was held that the Court can set aside the award, if -*
>
> *1) It is contrary to:-*
>
> *(a) fundamental policy of Indian Law; (or)*
>
> *(b) Interest of India; (or)*
>
> *(c) Justice and morality.*
>
> *2) It is patently illegal*
>
> *3) It is so unfair and unreasonable that it shocks the conscience of the Court.*

9. The Division Bench of the Delhi High Court in its recent decision dated 25.09.2017 in the case of **OGENE SYSTEMS INDIA PVT., LTD., VS. TECHNOLOGY DEVELOPMENT BOARD REPORTED IN 2017 SCC ON-LINE DL 11136** delineated the following propositions after considering all the decisions of the Hon'ble Supreme Court relating to the scope of Section 34

of Arbitration and Conciliation Act right from **RENUSAGAR POWER COMPANY 1994 SUPP(1) SCC 644 TO THE RECENT ASSOCIATED BUILDERS VS. DDA (2015) 3 SCC 49.**

(i) The four reasons motivating the legislation of the Act, in 1996 were:-

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by Courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if:-

(a) It is contrary to the fundamental policy of Indian Law

(b) It is contrary to the interest of India

(c) It is contrary to justice or illegal, or

(d) It is patently illegal, or

(e) It is so perverse, irrational, unfair, or unreasonable that it shocks the conscience of the Court.

On the facts of the case in hand, no satisfactory grounds raised by the petitioner to interfere with the award passed by the Arbitrator.

10. Considering the facts and circumstances of the case and in the light of the decisions cited supra, the award passed by the Arbitrator cannot be termed as perverse nor there is any error or illegality in the award passed by the Arbitrator. Therefore, this Court is not inclined to interfere with the award passed by the Arbitrator. Consequently, the original petition is dismissed. No costs.

13.3.2019

Speaking/Non Speaking order
Internet: Yes/No
Index: Yes/No
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D. KRISHNAKUMAR, J.

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Pre-Delivery order in
O.P.No.802 of 2012

Dated: 12.3.2019