IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2019

CORAM:
THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

ORIGINAL PETITION No.846 of 2012

1. M.Periasamy
2. Muthumalai Nadar, V.S. ... Petitioners

vs.

1. M/s.Cholamandalam DBS Finance Limited,
rep. By its Associate – Legal Co-ordinator,
G.Senthamilselvan,
No.2, NSC Bose Road,
Parrys, Chennai 600 001.

2. K.S.Gowthaman,
Sole Arbitrator,
Flat No.A8, Plot No.102/A6, New No.198/6,
Rangarajapuram Main Road,
Kodambakkam, Chennai 600 024. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the exparte Arbitral Award dated 17.02.2010 made in Arbitration Case No.KSG/CHOLA/3507/09 passed by the sole Arbitrator.

For Petitioners : Mr.M.Thamizhavel

For 1st Respondent : Mr.D.Pradeep Kumar

O R D E R

Respondents before the Arbitrator are Petitioners before this Court seeking to set aside the Arbitral Award dated 17.02.2010 made in Arbitration Case No.KSG/CHOLA/3507/09 passed by the sole Arbitrator.

2. The 1st Respondent herein is the Claimant before the Arbitrator. It is their case that the Petitioners herein entered into a Loan Agreement with them on 14.02.2007 towards purchase of a vehicle and a sum of Rs.1,93,500/- was extended as loan. As per the Loan Agreement, the Petitioners are liable to pay the entire sum along with interest in 36 monthly instalments regularly.

3. According to the 1st Respondent/Finance Company, since the Petitioners defaulted in payment of instalments, the vehicle in question was taken possession by them and sold for the best available market price on 24.02.2009 for a sum of Rs.70,000/- and even after appropriating the sale proceeds, the Petitioners are liable to pay a sum of Rs.1,71,517/- as on 26.02.2009. Thereafter, the 1st Respondent/Finance Company vide Legal Notice dated 26.02.2009, informed the Petitioners herein of the sale of the vehicle and called upon them to pay the shortfall dues.

4. Since the Petitioners failed to pay the outstanding amount, the 1st Respondent/Finance Company initiated Arbitration proceedings against them. After examining the oral and documentary evidence available on record, the Tribunal passed the following Award:

> "9. In the result, the Award is passed in favour of the claimant herein:
>
> The Respondents are hereby directed to pay to the claimant the following amounts:

(a) The claim sum of Rs.2,03,698/-;

(b) Also further interest @ 12% per annum for Rs.2,03,698/- from 02-Sep-09 till the same is realised in full;

(c) Also a sum of Rs.500/- towards Arbitrators fee and

(d) A sum of Rs.500/- towards cost."

5. Learned counsel for the Petitioners submitted that the Petitioners have not received any notice from the Arbitrator and they are not aware about the appointment of an Arbitrator. He further submitted that even after passing of the Award, a copy of the same has not been served on the Petitioners and only based on the Execution Proceedings pending before the X Assistant City Civil Court, Chennai, they came to know about the Arbitral Award and the liability foisted on them. According to the learned counsel, in any event, passing of an exparte Award is illegal and it has to be interfered with.

6. Learned counsel appearing for the 1st Respondent/Finance Company submitted that the contention of the Petitioners that Arbitration notice was not served on them, is incorrect, as not all notices sent to the Petitioners were returned, but, some of the notices have been received by the Petitioners herein. He further submitted that the 2nd Petitioner viz. Muthumalai Nadar, the father of the 1st Petitioner, who stood as the Guarantor to the Loan Agreement, is no more and that the 1st Petitioner is the principal borrower, who

is contesting the present Original Petition. He went on to state that the Receipt dated 30.05.2008 vide No.2308258 (as could be seen at page No.9 of the Typed Set of papers) said to have been produced by the Petitioners stating that the loan account is closed, is a forged and fabricated one, as the name of one 'Ramakrishnan is entered before the name of the 1st Petitioner.

7. It is further submitted by the learned counsel appearing for the 1st Respondent/Finance Company that the vehicle in question was sold only on 24.02.2009 and the question of issuing Receipt on 30.05.2008 by including the name of the 1st Petitioner and his brother in one Receipt, as if the vehicle was sold on 24.02.2009, is impossible.

8. Heard the learned counsel on either side and perused the material documents available on record.

9. A careful scrutiny of the copy of Receipt No.2308258, dated 30.05.2008 enclosed in page No.9 of the typed set of papers and the original Receipt produced by the 1st Respondent/Finance Company reveals that both Receipts have different entries. In the Receipt produced by the 1st Respondent/Finance Company, the vehicle number is not mentioned, whereas, in the copy of the Receipt found in the typed set of papers, the Vehicle Number is entered as TN 09 Q 5123.

10. Even assuming that a single Receipt has been issued by the 1st Respondent/Finance Company, there is no need for the 1st Respondent/Finance Company to enter only one vehicle number instead of two vehicle numbers. If the 1st Respondent/Finance Company had intended to settle the claim of the Petitioners and has issued two Receipts for two separate vehicles, they ought not have retained the xerox copy of one Receipt in the other file, when they maintain proper records for the purpose of closing the accounts of vehicle loan. Though it cannot be done so, when a challan is prepared, details of the first Loan Application would be entered and thereafter, details of the second Loan Application will be entered.

11. In the case on hand, the entry made in addition to what is found in the Receipt produced by the 1st Respondent/Finance Company before this Court would make it clear that the handwriting pertaining to the name '**Periyasamy**' is completely different from the name '**Ramakrishnan, M**' found in the original Receipt produced by the 1st Respondent/Finance Company. Though it has been stated by the learned counsel for the Petitioners that the said copy of the Receipt found in page No.9 of the typed set of papers, may be sent for handwriting expert, from a naked eye view, there is a clear manipulation of records by the Petitioners for the purpose of not settling the amount due to the 1st Respondent/Finance Company.

12. It is seen that notice to the Petitioners herein were sent to their permanent address and they are deemed to have received proper notice. At this juncture, it is worth referring to a decision of this Court in the case of **M.Venugopal Munaga vs. Kotak Mahindra Bank Limited** reported in **2017 SCC Online Madras 5897,** relevant portion of which, reads as under:

> "6. ... Thus, the address mentioned in the agreement is the address furnished by the Petitioner. The Petitioner has not furnished any change of address and in the application form signed by the Petitioner while availing the credit card facility, both the addresses given by the Petitioner are one and the same. Therefore, the procedure adopted by the first respondent as well as the Arbitrator would be saved in terms of Section 3(1)(a) of the Act. The contention has been raised that when the first respondent was able to ascertain the correct address and filed the Execution Petition, such attempt should have been made even at the time of initiation of arbitration."

13. Further, in the decision rendered by the Bombay High Court in the case of **Francisco A. D'souza vs. L & T Finance Ltd., Mumbai (2015 SCC OnLine Bom 6864),** it has been categorically held that when notices are sent at the last known addresses of the parties and the same have not been returned by the postal authority, it would amount to a deemed service of such notices. It was further held therein that it is suffice that notice has been sent to the last known address of the party as mentioned in the Agreement, unless and otherwise the party is able to produce a document to the effect that change of address was duly communicated.

14. Hence, in terms of Section 24(3) of the Arbitration and Conciliation Act, 1996, it has to be presumed that there is deemed service, if the Postal Covers are returned with the endorsements, viz. 'Left', 'Door Locked' and 'Intimation given', etc. Thus, the contention of the learned counsel for the Petitioners that he is aware of the Arbitration proceedings only based on the Execution Proceedings, cannot be accepted.

15. In view of the foregoing, it is clear that the Petitioners do not have any case not only on merits, but also on the ground that the Receipt furnished by the Petitioners in the typed set of papers, is a fabricated one. Hence, this Court finds no reason to interfere with the Award passed by the learned Arbitrator and the same is confirmed. Petitioners are directed to pay the outstanding amount due to the Petitioners within a period of 30 days from the date of receipt of a copy of this order.

16. For producing fabricated documents, costs of Rs.1,00,000/- (Rupees One Lakh only) is imposed on the Petitioners, out of which, Rs.50,000/- (Rupees Fifty Thousand only) shall be payable to **'NALMANAM', No.1/23, 1st Cross Street South High Court Colony, Villivakkam, Villivakkam, Chennai, Tamil Nadu 600049, (Phone No:044-26187835)** and the **remaining sum of Rs.50,000/- (Rupees Fifty Thousand only)** shall be payable **in favour of Surabhi Trust, No.22/10, First Floor, Kumarasamy Nagar, Villivakkam,**

Chennai, (Phone No:044-26181920), within a period of twelve (12) weeks from the date of receipt of a copy of this order.

The Original Petition stands dismissed with the above directions. No costs.

22.01.2019

Index : Yes
Speaking Order : Yes

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S.VAIDYANATHAN,J.

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