IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.P.No.385 of 2015

Mrs.Prasanna .. Petitioner

Vs.

1. Mr.Inderchand Jain

2. Mr.Kumarichelvan Bosco
   Advocate Arbitrator
   No.294, Law Chambers,
   High Court, Chennai – 600 104. .. Respondents

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Impugned Award herein in respect of Loan Agreement dated 27.05.2013.

For Petitioner : M/s.M.Minnie
for M/s.T.Mathi

For Respondents : Mr.Rajkumar,
M/s.s.Rasamy Law Associates

ORDER

Challenge has been made in this petition as against the Award passed by the Arbitrator dated 17.05.2013.

2. The claim has been referred to the Arbitrator for recovery of a sum of Rs.29,60,000/- on the basis of a loan agreement and promissory note executed by the petitioner. The Arbitrator has issued a notice which was admittedly received by the respondent. Thereafter, during the arbitral proceedings, the respondent had not filed any counter and remained exparte even after publication. Therefore, based on the documents and evidence, the Arbitrator passed the Award which was put into challenged before this Court.

3. The main contention of the learned counsel for the petitioner is that the Arbitrator has not given copies of the documents and claim petition also not filed and no opportunity has been given to the petitioner and the petitioner is an aged widow and there is no privity of contract between herself and the first respondent. Hence, the entire Award is vitiated and and has not considered all these facts. Hence, the Award is liable to be set aside.

4. The learned counsel appearing for the respondent submitted that the petitioner had appeared in the Arbitral proceedings. But no counter, whatsoever has been filed. Now for the first time, it cannot be alleged that there is no privity of contract. Hence submitted that that there is no need to interfere with the well considered Award of the Arbitrator.

5. It is now well settled that the award can be interfered only when the grounds set out under Section 34 of the Arbitration Act is made out. A perusal of the entire award, there is no patent illegality which goes into the root of the matter. Similarly, to contend that there is violation of public policy, I find no materials available on record. Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honoruable Apex Court has held that an Award can be set aside if it is contrary to:

a) fundamental policy of Indian law; or

b) the interest of India; or

c) justice or morality; or

d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

6. In a subsequent judgment in ***McDermott International Tnc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** when the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34

is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

7. A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]*** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

8. In **Swan *Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739*** the Honourable Apex Court has held as follows:

> "12. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently

illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally

acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

9. From the above judgments, it is very clear that only if there is violation of public policy and if there is patent illegality, the Award can be interfered. This Court has also called for the records from the Arbitrator and found that before commencement of Arbitral proceedings, notice has been sent to respondent by registered post, which has been received and acknowledged by the petitioner. Thereafter, the arbitral proceedings has commenced. Even in the arbitral proceedings, the petitioner is represented by an advocate for several hearings. Thereafter, as the counter has not been filed, the Arbitrar has issued publication in order to give one more opportunity to the petitioner. Despite such publication,

the petitioner did not file her counter nor filed any objections. Therefore, the Arbitrator has perused the documents, viz., namely the loan agreement, promissory note and letter of undertaking namely acknowledgement and the legal notice and also taking note of the evidence of the applicant, has passed the Award. Therefore, the contention of the petitioner that there is no privity of contract and documents have been forged cannot be raised at this stage, when she had an opportunity to raise her objections before the Arbitrator, such plea cannot be raised for the first time under section 34 of the Arbitration and Conciliation Act. Further, the contention that no opportunity was given to the petitioner is also falsified on perusal of the records.

10. In view of the above, I do not find any merits in the contention of the petitioner. However, I am of the view that awarding interest from the date of the Award till the date of realization is certainly excess. Admittedly, the loan agreement does not contemplate interest during Arbitral proceedings at the rate of 18% per annum. Hence, Interest during the pendency of the arbitral proceedings, till the termination of the arbitral proceedings alone is set aside and thereafter, interest is restricted to 7.5% from the date of Award till the date of realization.

11. This Original Petition is ordered accordingly.

13.06.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

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N.SATHISH KUMAR, J.

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