

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 16.04.2019

Judgment Delivered on : 04.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

O.S.A.No.38 of 2016

and

C.M.P.Nos.3632 of 2016 and 8781 of 2019

Mrs.Moona Abousher ... Appellant/Petitioner

Vs.

1. M/s.Cholamandalam DBS Finance Ltd.,
Rep. by its Senior Manager Mr.K.Rajesh Pai,
having its registered office "Dare House",
No.2, N.S.C.Bose Road,
Chennai-600 001.

2. Mrs.Meera Gnanasekaran,
Sole Arbitrator,
Old No.155, First Floor,
Linghi Chetty Street,
Chennai-600 001.

3. Dr.Yunus Saleem.M.H.

(Third Respondent impleaded as
party respondent, vide Order of
Court, dated 01.03.2017

made in C.M.P.No.7866 of 2016

in O.S.A.No.38 of 2016) .. Respondents 1 & 2/Respondents 1 & 2

Original Side Appeal filed under Order 36 Rule 1 of the
Original Side Rules, against the order dated 12.01.2016 passed
by the learned Single Judge in O.P.No.24 of 2014 on the file of
this Court.

For appellant:Mr.P.Wilson, Senior Counsel for Mr.R.Krishna Kumar
For respondents:Mr.R.Uma Shankar for M/s.Sri and Shankar
Associates for R-1

R-2 - Arbitrator

Mrs.Geetha Ramaseshan for R-3

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal (O.S.A) has been filed against the order dated 12.01.2016 passed by the learned Single Judge in dismissing O.P.No.24 of 2014 filed by the appellant herein to set aside the award dated 06.10.2010 passed by the second respondent-Arbitrator.

2. Brief facts which are necessary to decide the issue raised in this appeal, are as follows:

(a) The property bearing Door Nos.28/1 and 28/2 originally belonged to the appellant's father, namely Ameen Abousher. The appellant's father gifted a part of the above property bearing Door No.28/1, Hains Road, Bangalore, measuring an extent of 2207 Sq.Ft. consisting of ground and first floors on 26.07.2005, registered as Document No.1906 of 2005 on the file of the SRO, Bangalore, in favour of the appellant.

(b) The appellant and her father have applied for a loan from Cholamandalam DBS Finance Limited, the first respondent herein, for meeting out their personal and family expenses. The first respondent granted a loan of Rs.30 lakhs and the same has to be repaid in 126 equal monthly instalments. The first respondent, at the time of granting the loan, as per their usual practice, obtained the signatures of the appellant and her father in blank white papers, promissory notes and cheques.

(c) In order to secure the amount due under the said loan agreement, the appellant who is the sole and absolute owner of the property, had deposited the title deeds pertaining to her property at Bangalore with the first respondent with an intention to create an equitable mortgage in favour of the first respondent. The factum of the said deposit was also confirmed by a Memorandum of Deposit of Title deeds, dated 18.01.2008, registered as Document No.3867 of 2008 on the file of the Sub-Registrar, Shivajinagar, Bangalore. In the said loan transaction between the appellant and the first respondent, the father of the appellant joined as a co-borrower. The appellant was regularly paying the monthly instalments. Due to some problems with her husband in the family and also due to some financial difficulties, she was not able pay the monthly instalments on due dates every time, but nevertheless, she has been paying the dues every month.

(d) Hence, a dispute has been raised and an Arbitrator was appointed. The sole Arbitrator passed an Award dated 06.10.2010 and the operative portion of the Award reads as follows:

"In the result the Award is passed in favour of the claimant herein as follows:

The First Respondent is hereby directed to jointly and severally pay to claimant the following amounts:

i) The Claim sum of Rs.31,54,660/- (Thirty one lacs fifty four thousand and six hundred and sixty) as on 28.02.2010.

ii) further interest of 18% per annum for Rs.31,54,660.00 from the date of claim petition until the date of actual payment.

iii) The Respondents are directed to pay all the above amounts within one month from the date of this order, failing which, giving liberty to the claimant herein to take possession of the schedule mentioned asset and to sell the same at the best market price, appropriate the sale proceeds to meet the outstanding amounts i.e. Principal, interest and costs awarded by the tribunal and also the sale expenses incurred by this claimant and return the excess of the sale proceeds, if any to the respondents.

iv) in the event of sale proceeds falling short of the claim/award amount or in the event of claimant being unable to sell the asset owing to unforeseen circumstances, I hereby permit the claimant to proceed executing the award for recovery of the balance amount from the respondents."

(e) The said claim before the Arbitrator was made as against the appellant herein and her father who was the co-borrower. Since the father of the appellant who was the co-borrower of the loan, died even before passing of the Award, originally, O.P.No.822 of 2012 was filed by the mother of the appellant herein, i.e. wife of the co-borrower to set aside the Award. The said O.P. was dismissed by this Court on 30.09.2013 on the ground that the mother of the appellant was a third party to the arbitration proceedings, if at all, she is entitled to challenge the Award only as a legal representative of the deceased judgment-debtor, but her husband, who was the second respondent before the Arbitrator, was not even a judgment-debtor and no Award was passed against her husband, and therefore, even as legal representative of the second respondent, the mother of the appellant is not entitled to challenge the Award, as her husband did not suffer any Award. Thereafter, the present O.P.No.24 of 2014 is filed by the appellant herein who is the borrower of the loan. By order dated 12.01.2016, the said O.P.No.24 of 2014 was dismissed by the learned Single Judge, against which, the present Original Side Appeal is filed by the appellant.

3. At the time of commencement of arguments, the learned Senior Counsel appearing for the appellant submitted that the

appellant has filed C.M.P.No.8781 of 2019 to direct the Arbitrator to produce the original records relating to the arbitration proceedings, which culminated in passing the Award dated 06.10.2010 and modified Award, dated 02.03.2012. While hearing the said C.M.P. on 04.04.2019, the Arbitrator appeared before this Court and she had stated that she would produce the records by 09.04.2019. When the C.M.P. was called on 10.04.2019, the Arbitrator stated that the matter pertains to the year 2010 and the records were misplaced. Despite due diligence in tracing out the records, the Arbitrator could not trace the same. The Arbitrator has also filed an affidavit dated 09.04.2019 to that effect and the same was recorded and taken on file by this Court.

4. The learned Senior Counsel appearing for the appellant, at the outset, by inviting the attention of this Court to the prayer made in the claim petition, submitted that the claim petition is to liquidate the secured equitable mortgaged property at Bangalore, which is offered as security for the loan amount of Rs.30 lakhs in the event of non-payment of outstanding dues under a loan agreement, and hence, the claim cannot be arbitrated by Arbitration and it is hit by Section 34 (2) (b) (i) of the Arbitration and Conciliation Act. Therefore, the Award passed by the second respondent-Arbitrator is without jurisdiction and the same is void and nullity.

5. The learned Senior Counsel appearing for the appellant further submitted that no notice for reference of arbitration is given to the appellant and received by her as contemplated under Section 21 of the Arbitration and Conciliation Act. Therefore, there is no commencement of arbitration proceedings in the eye of law and hence, the Award is void-ab-initio and is a nullity. Further, the original records were with-held by the second respondent-Arbitrator by not producing the same and thus, the learned Senior Counsel appearing for the appellant submitted that the Arbitrator has not followed the principles of natural justice while passing the Award and has not given a fair hearing and proceeded to decide the matter ex-parte. Therefore, the appellant was otherwise unable to present her case as contemplated in Section 34(2)(iii) of the said Act. By withholding the original records relating to arbitration proceedings, the Court under Section 34 of the Act, is prevented from finding out as to whether there is substantial compliance of Sections 24, 25 and 28 of the said Act. Therefore, on this ground, the Award is liable to be set aside.

6. The learned Senior Counsel appearing for the appellant further submitted that the father of the appellant died even before the claim petition was filed, but the claim petition was filed against a dead person, and the second respondent-Arbitrator has passed the Award against a person who was not alive even at the time of filing the claim petition. No records about the factum of death was brought to the knowledge of the

learned Arbitrator, however, without bringing the legal heirs on record, the learned Arbitrator proceeded to pass the Award against a dead person and therefore, it is hit under Public Policy of India.

7. The learned Senior Counsel appearing for the appellant further submitted that the appellant has mortgaged only the ground and first floors of the property under the loan transaction with the first respondent-claimant, even though the property consists of ground plus four floors. But the Award has been granted to re-possess and sell the entire property including second and fourth floor also. Thus, the second respondent-Arbitrator had gone beyond the secured assets, which is evident from the description of schedule to the deposit of title deeds, dated 18.01.2008. The learned Senior Counsel appearing for the appellant further submitted that the learned Arbitrator has passed a modified Award, dated 02.03.2012 after statutory limit of 30 days without notice to the appellant, which is evident from the Execution Proceedings filed by the first respondent before the City Civil Court, Bangalore. Therefore, the modified Award dated 02.03.2012 is patently illegal, as it has been passed in violation of Section 33 of the Arbitration and Conciliation Act and against the principles of natural justice. In this regard, the learned Senior Counsel appearing for the appellant invited the attention of this Court to Section 33 of the Act and submitted that any correction in the Award can be done within 30 days from the date of the Award and not beyond the time specified under Section 33 of the Act and that too after issuance of notice to the parties. Thus, the entire conduct of the Arbitrator during the arbitration proceedings and also after passing of Award by creating modified Award, dated 02.03.2012, affects the basic notions of morality/justice, besides it is in contravention of fundamental policy of Indian law.

8. The learned Senior Counsel appearing for the appellant further submitted that the learned Single Judge has dismissed the O.P. on the ground of limitation. Assailing the reasons assigned by the learned Single Judge with regard to the limitation, the learned Senior Counsel appearing for the appellant submitted that since the appellant was not furnished with a copy of the Award passed in arbitration, she has addressed a letter dated 23.11.2012 to the second respondent-Arbitrator and thereafter, on 30.11.2012, the Award copy was furnished and thereafter, the O.P. was filed and therefore, it cannot be said that filing of the O.P. is hit by limitation. But the learned Single Judge has not considered the various points raised by the appellant and dismissed the O.P. on the ground of delay and laches without appreciating the subsisting law and judgments on this aspect. The learned Single Judge has dealt with O.P.No.822 of 2012 filed by the appellant's mother to dislodge the present petition filed by the appellant under

Section 34 of the Arbitration and Conciliation Act on the ground that the appellant had knowledge about the Award. But the said finding is not correct; on the other hand, the O.P. was filed within time. Thus, the learned Senior Counsel appearing for the appellant prayed for setting aside the Award.

9. Further, learned Senior Counsel appearing for the appellant submitted that challenging the appointment of the Arbitrator, the appellant has filed a petition under Section 12 of the Arbitration and Conciliation Act before the learned Arbitrator no sooner the Arbitration Proceedings were initiated. The claimant-Finance Company had not chosen to file any reply questioning the challenge of appointment of the Arbitrator to the said petition. Under such circumstances, the learned Arbitrator ought to have allowed the said petition filed under Section 12, but instead, the learned Arbitrator has dismissed the same and proceeded with the Arbitration Proceedings. Hence, for all the above reasons, the learned Senior Counsel appearing for the appellant prayed to allow the appeal.

10. Countering the above submissions, the learned counsel appearing for the first respondent submitted that the loan agreement dated 27.12.2007 was entered into between the appellant and the first respondent on security of the residential property owned by her. Under the said loan agreement, the first respondent has disbursed a sum of Rs.30 lakhs to the appellant, which was repayable with interest at the rate of 13.50% p.a. in 126 monthly instalments. The appellant did not pay the amount regularly on due dates and last of such payment was made on 30.11.2009. Moreover, the cheques issued towards the repayment of instalments, have been returned as dishonoured by the first respondent's banker. The claimant made several personal visits and oral and telephonic demands to the appellant for the instalment amounts due and payable as per the schedule, but there was no response from the appellant. Hence, the loan account was classified and declared as Non Performing Asset (NPA) in accordance with the directions and guidelines relating to asset classification issued by the Reserve Bank of India and the appellant turned out to be a chronic defaulter. After adjusting the amount paid by the borrower to the credit of the borrower account, remaining amount of Rs.31,54,660/- is due and payable by the appellant to the Company.

11. It is further stated by the learned counsel appearing for the first respondent that in the loan transaction between the appellant and the first respondent, the father of the appellant Mr.Ameen Abousher (since deceased) joined as a co-borrower. In the Memorandum of Deposit of Title Deeds, dated 18.01.2008, it is specifically agreed by the parties concerned that the said Memorandum of Deposit of Title Deeds shall form part and parcel of the loan agreement between the appellant and the first respondent. The loan agreement contained Arbitration Clause. Further, as per the terms of the Equitable Mortgage

which was created by the appellant by deposit of title deeds, the first respondent is empowered to sell the mortgaged property in the event of failure to repay the amount as per the terms of the loan agreement. In the said transaction, since the appellant has defaulted in making payment, the first respondent, after due demand, initiated Arbitration proceedings for adjudication of the claim. In the said Arbitration proceedings, the appellate appeared before the learned Arbitrator and took repeated adjournments to file counter, however, no counter was filed by the appellant despite sufficient opportunities granted by the learned Arbitrator. The factum of demise of the co-borrower was informed by the Advocate appearing for the appellant only on 01.07.2010 and the Memo was filed by the first respondent regarding the death of the co-borrower. Therefore, it is incorrect to state that the Award was passed as against the dead person also. In spite of several opportunities given to the appellant by the learned Arbitrator, she has not chosen to file counter and as per Section 25 of the Arbitration and Conciliation Act, the Arbitrator proceeded with the Arbitration proceedings and based on the documents filed and evidence adduced, the learned Arbitrator passed an Award, dated 06.10.2010, directing the appellant to pay a sum of Rs.31,54,660/-. The Arbitrator also permitted the first respondent to sell the mortgaged property in the event of failure to pay the amount due under the Award so as to realise the same and passed a personal decree against the appellant in the event the sale proceeds of the mortgaged property are not sufficient to satisfy the Award.

12. It is further stated by learned counsel appearing for first respondent that though the Arbitrator has passed a Mortgaged Award, first respondent has filed Execution Petition solely based on Money Award passed by Arbitrator for attachment and sale of mortgaged property. In the said Execution Proceedings, on due service of notice, appellant, who was judgment-debtor, entered appearance on 02.04.2011 and took time for filing objection, thereby, the case was posted on 28.05.2011 and again on 30.05.2011 and when the matter was taken up on 30.05.2011, the appellant, after paying a sum of Rs.80,000/-, gave an undertaking to pay Rs.10 lakhs and the case was posted on 30.06.2011. In the meantime, since the payment was not made, an attachment order was passed on 30.06.2011, against which the appellant filed W.P.No.28372 of 2011 before the Karnataka High Court for quashing the Execution Proceedings filed by the first respondent. The Karnataka High Court passed an order of stay on 29.07.2011 on condition to pay a sum of Rs.10 lakhs on or before 29.08.2011, which was not complied with by the appellant. Hence, the Executing Court, by order dated 29.08.2011, permitted the first respondent to proceed with the Execution Proceedings. Subsequently, the Executing Court sold the property on 11.01.2012 and the third respondent purchased the property for a

sum of Rs.85 lakhs in the Court Auction Sale and deposited the money into the Executing Court. In the sale proceedings, the learned counsel for the appellant was also present without raising any objection and the sale was confirmed by the Executing Court in favour of the third respondent and the Sale Certificate was also issued by the concerned Court on 13.04.2012. Thereafter, the first respondent filed an application for withdrawal of the sale proceeds from the Executing Court, towards the outstanding loan amount, and the same was ordered on 21.04.2012. Simultaneously, the appellant/judgment debtor has also filed an application for withdrawal of the balance sale proceeds of Rs.42,11,928/- and the same was ordered. In the meantime, the third respondent who had purchased the property, and who was also tenant under the appellant, obtained an order of injunction restraining the appellant from withdrawing Rs.42,11,928/- by filing a suit, since the appellant has not repaid the rental advance amount paid by the third respondent to her at the inception of the tenancy. The Executing Court has not disbursed the payment to the appellant and hence, the same is lying to the credit of the abovesaid Execution Proceedings. Thus, the learned counsel for the first respondent submitted that by appearing before the learned Arbitrator as well as by filing a petition before the Executing Court for withdrawal of the balance amount, the appellant has waived her right without raising objection as per Section 4 of the Arbitration and Conciliation Act.

13. With regard to the submission made by the learned Senior Counsel appearing for the appellant that the Award was passed as against a dead person, it is replied by the learned counsel for the first respondent that only after initiation of Arbitration proceedings, the learned counsel for the appellant reported the death of the co-borrower and taking note of the said fact, the first respondent filed a Memo before the learned Arbitrator on 01.07.2010 and prayed for dismissal of the Arbitration Proceedings as against the deceased co-borrower, as abated. Accordingly, the learned Arbitrator, recording the Memo, has dismissed the Arbitration Proceedings against the deceased co-borrower and passed the Award only against the appellant herein.

14. Above all, learned counsel appearing for the first respondent submitted that none of the grounds now the appellant is raising before this Court in this appeal, were raised by the appellant before the learned Single Judge, and therefore, the submissions made by the learned Senior Counsel appearing for the appellant need not be considered.

15. With regard to the limitation, learned counsel appearing for the first respondent submitted that the Award was passed by the learned Arbitrator on 06.10.2010 and a copy of the Award was served on the appellant on 27.10.2010 or 08.12.2010, which is evident from the acknowledgement card received from the Postal

Department. Thus, the Award was served on the appellant by the learned Arbitrator and the petition to set aside the Award should have been filed within 90 days, i.e. on or before 08.03.2011, but however, in this case, O.P. was filed only after a lapse of the statutory period contemplated under the said Act. Therefore, on the ground of limitation also, the learned Single Judge has rightly dismissed the O.P.

16. The learned counsel appearing for the third respondent/auction purchaser has submitted that O.P.No.822 of 2012 was filed by the mother of the appellant challenging the Arbitration Award and it was dismissed on 30.09.2013. The first respondent was a party in the said O.P. The said O.P. was dismissed by this Court stating that the mother of the appellant was not a party to the Arbitration Proceedings and she is only a third party to the Arbitration Proceedings. The appellant was shown as the second respondent in the said O.P. In spite of that, the appellant has chosen to file the present O.P.No.24 of 2014 on 24.10.2013 beyond the statutory period and hence, on the ground of limitation, the learned Single Judge has correctly dismissed the O.P. The said O.P. was dismissed along with the application filed by the third respondent-auction purchaser to implead him as one of the respondents in O.P.No.24 of 2014 holding that the appellant had knowledge of the Award passed against her by reason of her being a party and had kept quiet from the year 2012 and she did not object to the E.P. proceedings initiated in Bangalore. Therefore, it is clear that the appellant had also acknowledged the Award and Execution Proceedings, and therefore, O.P.No.24 of 2014 is hopelessly barred by limitation as held by the learned Single Judge. Hence, the learned counsel appearing for the third respondent submitted that by filing a petition for withdrawal of the excess sale amount, the appellant had executed the Award and therefore, the appellant is not entitled to challenge the Award. Thus, the learned counsel appearing for the third respondent prayed for dismissal of the appeal.

17. It is also submitted by the learned counsel appearing for the first respondent that the appellant is assailing the Award for the first time before the learned Single Judge, and she has not challenged the order of dismissal of the petition filed under Section 12 of the Arbitration and Conciliation Act by the learned Arbitrator, and hence, she is not entitled to challenge the jurisdiction of the learned Arbitrator in the grounds of appeal. Hence, for all the reasons stated above, the learned counsel appearing for the first respondent prayed for dismissal of the appeal.

18. Keeping in mind the submissions made on either side, this Court has perused the materials available on record. Though very many contentions have been raised on factual aspects of the matter, the question that has to be decided in this case is as to whether the appellant has made out a case within the ambit

of Section 34 of the Arbitration and Conciliation Act before the learned Single Judge to set aside the Award. Answering the said question is suffice for disposal of the present appeal.

19. The sum and substance of the submissions made by the learned Senior Counsel appearing for the appellant is as follows:

(i) The Claim Petition is filed to liquidate the secured equitable mortgaged property at Bangalore, which was offered as security for the loan amount of Rs.30 lakhs in the event of non-payment of outstanding dues under the loan agreement, and therefore, the claim cannot be arbitrated by the Arbitration Proceedings and it is hit by Section 34(2)(b)(i) of the Arbitration and Conciliation Act.

(ii) The second respondent/learned Arbitrator cannot arbitrate the mortgage issue and pass an Award on the mortgage claims including the sale and possession and the Arbitrator has not adhered to the substantial provisions of law, namely the Specific Relief Act, the Transfer of Property Act and the procedures contemplated under the Civil Procedure Code, and therefore, the second respondent/Arbitrator had violated Section 28(1)(a) of the Arbitration and Conciliation Act.

(iii) The Claim Petition was filed against a dead person and the learned Arbitrator has passed the Award as against the person who was not alive even at the time of filing the Claim Petition. Therefore, it is hit under Public Policy of India.

(iv) The appellant's Advocate had been engaged by the first respondent-claimant-Company before the second respondent-Arbitrator during Arbitration Proceedings and that was the reason as to why the appellant herein was not able to put forth her case.

(v) The second respondent/Arbitrator has passed a modified Award on 02.03.2012 after statutory limit of 30 days without notice to the appellant, which is evident from the Execution Proceedings filed by the first respondent before the City Civil Court at Bangalore.

(vi) The third respondent herein is the auction purchaser of the mortgaged property and is an existing tenant under the appellant even before the purchase. The third respondent has no locus-standi to support the Award.

(vii) The appellant was not furnished with a copy of the Award as contemplated under Section 31(5) read with Section 34(3) of the Arbitration and Conciliation Act by the second respondent-Arbitrator. The Award was sent only on 30.11.2012 on the request of the appellant. Therefore, the O.P. is filed within the period of limitation.

(viii) The appellant was not given any notice for reference of Arbitration under Section 21 of the Arbitration and Conciliation Act, and therefore, there is no commencement of Arbitration proceedings in the eye of law.

20. On a perusal of the Award, it could be seen that the

claim statement and the supporting documents filed by the claimant were sent to the appellant and co-borrower along with the notice of hearing, dated 11.03.2010, by fixing the date of hearing as 01.04.2010. On the said date, the authorised representative Mr.Rakesh Rai, Senior Manager, appeared on behalf of the claimant-Company, the first respondent herein. The notice sent to both the appellant and the co-borrower got returned with postal endorsement "party refused" and hence, they did not appear. In fact, with a view to give opportunity to the appellant and co-borrower, a copy of its proceedings dated 01.04.2010 was sent to them, fixing the date of hearing as 22.04.2010. On the said hearing, one Mr.Siva Shankar appeared on behalf of the appellant and undertook to file vakalat in the next hearing. The matter was adjourned to 29.04.2010, on which date, the Advocate Mr.Siva Shankar filed vakalat and received the complete set of documents along with the claim statement and sought time to file counter statement and hence, the matter was adjourned to 20.05.2010, on which date, the proceedings were held and the Advocate Mr.Siva Shankar sought further time to file counter and time was extended till 10.06.2010 for filing counter by the appellant and the proceedings were held on 10.06.2010 and 17.06.2010 also and the learned counsel for the appellant sought time to file counter statement and the counsel for the appellant informed that the co-borrower (second respondent therein) had expired and hence, the claimant was directed to file impleading petition, if any. The proceedings were also held on 01.07.2010 and the learned counsel for the appellant had not filed counter statement, but filed a petition under Section 12 of the Arbitration and Conciliation Act. The interim application was numbered as M.P.No.1 of 2010 by the Tribunal. The claimant had not chosen to file any reply and hence, the petition was reserved for orders on 01.07.2010. On the said day of proceedings, the claimant filed Memo requesting for abatement of the co-borrower and the Memo was taken on record. Interim order was passed by the Tribunal dismissing the interim application filed by the appellant under Section 12 of the Arbitration and Conciliation Act questioning the jurisdiction of the learned Arbitrator, and thereafter, the Tribunal adjourned the proceedings to 08.07.2010. The copy of the interim order in M.P.No.1 of 2010 was also provided to the counsel for the appellant. Even on the proceedings dated 08.07.2010, the counsel for the appellant appeared and sought time to file counter. On the date of proceedings being 22.07.2010, the counsel for the appellant had not turned up and filed any reply statement. Hence, the claimant filed their deposition of witness and marked their documents. The matter was adjourned to 05.08.2010 for filing any reply statement by the appellant and for further proceedings. In the proceedings held on 05.08.2010 also, no reply statement was filed and hence, the matter was adjourned for arguments on 12.08.2010, on which date,

the appellant's counsel did not appear and the claimant argued the matter and the case was reserved for orders. All the proceedings were sent to the appellant through RPAD and duly served upon her.

21. Therefore, from a reading of the above details of notice, appearance, etc., before the learned Arbitrator, it is clear that several opportunities were given to the appellant to contest the matter. This is not denied by the appellant before the learned Single Judge. Having submitted herself to the Arbitration Proceedings by engaging a Lawyer, now, she cannot turn around and say that no notice was given to her. Similarly, we find that the learned Arbitrator has not passed any Award against the dead person and so far as the father of the appellant is concerned, the learned Arbitrator, while recording the factum of death, dismissed the claim as abated as against the father of the appellant. Furthermore, we find that though the Award was passed on the mortgaged property, the first respondent has filed E.P. proceedings solely based on the Money Award, in which the property was attached and brought to sale. The third respondent had participated in the auction and purchased the property for a sum of Rs.85 lakhs. In the said E.P. also, after issuance of notice, the judgment-debtor entered appearance and took time to file counter. The appellant has also challenged the E.P. proceedings before the Karnataka High Court to quash the E.P. proceedings, in which interim order was passed directing to pay Rs.10 lakhs and since the appellant had not complied with the same, the High Court of Karnataka has permitted the first respondent to proceed with the E.P. and subsequently, the property was sold on 11.01.2012 and the third respondent had purchased the property for Rs.85 lakhs in the Court Auction Sale and the counsel for the appellant was also present at the time of auction without raising any objection and the sale was also confirmed by the Executing Court in favour of the third respondent and the Sale Certificate was also issued on 13.04.2012. In fact, the first respondent has filed an application for withdrawal of the sale proceeds from the Executing Court and the same was ordered on 21.04.2012; simultaneously, the appellant who was the judgment-debtor in the Executing Court, had also filed an application for withdrawal of the balance sale proceeds of Rs.42,11,928/-, which was also ordered and the same was objected to by the third respondent-auction purchaser, since the third respondent has filed a suit against the appellant for recovery of rental advance amount given to her. This conduct of the appellant would show that by filing an application for withdrawal of the amount, she has accepted the Award. Furthermore, the appellant has appeared and participated and took several adjournments to proceed with the arbitration and thus she has waived her right without raising any objection to the claim petition filed by the first respondent as per Section 4 of the Arbitration and Conciliation

Act. In this regard, it is appropriate to extract Section 4 of the Arbitration and Conciliation Act, which reads as follows:

Section 4. Waiver of right to object. -A party who knows that--

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a the limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

22. In the above context, it is appropriate to notice a decision of the Supreme Court reported in 2009 (2) SCC 337 (Bharat Sanchar Nigam Ltd. Vs. Motorola India Pvt. Ltd), wherein it has been held with regard to the Doctrine of Waiver, as follows:

"39. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."

23. Therefore, we are of the opinion that having waived her right and participated in the proceedings, without raising any objection, now the appellant cannot raise a ground that no notice for reference of Arbitration was given to her and it has

to be construed that there is no commencement of Arbitration proceedings in the eye of law. Moreover, as stated earlier, by filing an application to withdraw the excess amount deposited by the auction purchaser, the appellant had waived her right to challenge the Award by her conduct.

24. With regard to limitation, we find on a perusal of the records that earlier, the appellant's mother filed O.P.No.822 of 2012, in which the appellant herein was second respondent therein. The said O.P. was dismissed by this Court on 30.09.2013 stating that her mother is a third party to the Arbitration Proceedings and therefore, the appellant is well aware of the Arbitration Proceedings. According to the learned Senior Counsel appearing for the appellant, since the appellant was not furnished with a copy of the Award passed in Arbitration Proceedings, she has addressed a letter dated 02.11.2012 and 23.11.2012 to the second respondent-Arbitrator and thereafter, on 30.11.2012, the Award copy was furnished and thereafter, the O.P. was filed and therefore, it cannot be said that filing of O.P. is hit by limitation. In this regard, it is appropriate to quote the relevant portion of the letter dated 30.11.2012 addressed by the learned Arbitrator to the appellant, as follows:

"I am in receipt of your letter dated 02.11.2012 and 23.11.2012 with an request to issue Certified copy of Award passed in Arbitration Case No.CDBS.No.22 of 2010.

On perusal of the file, I find that the Certified copy of Award dated 06.10.2010 was already sent to you as registered post with Acknowledgement Card due on 24.10.2010 and the certified copy of award was duly served on you on 27.10.2010. But in your letter you have mentioned that the award was not served on you, for the reasons best known to you.

The Acknowledgement cards photo copies are enclosed herewith.

Any how, on considering your request, again I am inclined to provide you another certified copy of Award."

25. From the above letter, it is seen that the Award dated 06.10.2010 was already sent to the appellant and only in order to create a limitation period, again another Award copy was obtained. To the above letter dated 30.11.2012, the appellant has not replied denying the statement of the learned Arbitrator

by stating that she has not received the Award as stated by the Arbitrator. Hence, we are of the opinion that the learned Single Judge has correctly dealt with the point of limitation and dismissed the O.P..

26. Above all, we are of the view that none of the grounds raised by the appellant in this appeal, will fall within the scope and ambit of the grounds for setting aside the Award.

27. With regard to the intervention of the award if it is against public policy, it is worthwhile to note the following judgment of the Supreme Court reported in 2003 (5) SCC 705 (Oil and Natural Gas Corporation Ltd. Vs. Shah Pipes Ltd), in which, the Apex Court also held that it is settled law that the intention of the parties is to be gathered from the words used in the agreement and further, the essence of the judgment is to the effect that an award contrary to the substantive provisions of law or the provisions of the Arbitration and Conciliation Act or against the terms of the contract, would be patently illegal:

"16. The next clause which requires interpretation is clause (ii) of sub-section (2)(b) of Section 34 which inter alia provides that the court may set aside the arbitral award if it is in conflict with the "public policy of India". The phrase "public policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions."

" 74. In the result, it is held that:-

A. (1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication

thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(2) The Court may set aside the award:-

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:-

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:-

(a) as provided under Section 13(5): and

(b) Section 16(6) of the Act

B. (1) The impugned award requires to be set

aside mainly on the grounds:-

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

28. In the abovesaid decision, the Supreme Court has quoted the view expressed by an eminent Jurist that, "Courts of law may intervene to permit challenge to an arbitral award which is based on irregularity of a kind which has caused substantial injustice".

29. In the decision reported in AIR 1967 SC 249 (U.P. Co-op. Federation Ltd. Vs. Sunder Bros., Delhi), the Supreme Court, with regard to the discretion vested in the Court under Section 34 of the Indian Arbitration Act to interfere in the award passed, held as follows:

"8. It is well settled that where the discretion vested in the Court under S.34 of the Indian Arbitration Act has been exercised by the lower court the appellate

court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contract conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion."

30. Further, in the decision reported in AIR 1971 SC 1646 (The President, Union of India Vs. Kalinga Construction Co. (P) Ltd), it has been held by the Apex Court as follows, regarding the Court sitting in appeal over the conclusion of the arbitrator:

"9. A bare perusal of the judgment of Misra, J., would show that he decided the matter as if he was entertaining an appeal against the award itself. He re-examined and re-appraised the evidence which had been considered by the arbitrator and held that the arbitrator was wrong in coming to the conclusion that the work contemplated by the contract to be done by manual labour alone... The arbitrator had believed the statement of the Chief Engineer that Ext.P-6 had neither been issued under his authority nor with his approval. Once this part of his statement was believed by the arbitrator it was not open to Misra, J., to sit in appeal over the conclusion of the arbitrator in proceedings for setting aside the award."

31. This Court, while dealing with the scope and discretionary power vested in the Court under Section 34 of the Arbitration and Conciliation Act, held as follows in AIR 1985 Madras 272 (Yeswant Hiralal Veecumsee Vs. Usha Kumar Betala and others), observed as follows:

"Unless the discretionary power vested in the trial Court under Section 34 is found to be used arbitrarily or perversely, the appellate authority will not interfere with such a discretionary order passed by the trial Court. Where the trial Court both on the conduct and also on the delay committed by the defendant in coming forward with such applications for stay under S.34 of the Arbitration Act, had refused to use his discretion, there was no arbitrariness or perverseness in the order."

32. Moreover, with regard to the interference in the reasoned award passed by the arbitrator, the Apex Court, in the decision reported in 2007 (9) SCC 503 (BOC India Ltd. Vs. Bhagwati Oxygen Ltd.), held as follows:

"24. In the case of Trustees of the Port of Madras Vs. Engineering Construction Corporation Ltd. (AIR 1995 SC 2423), while this Court dealing with a situation when an award can be set aside under Section 30 of the Arbitration Act held as under:

"The above decisions make it clear that the error apparent on the face of the award contemplated by Section 16 (I) (c) as well as Section 30(c) of the Arbitration Act is an error of law apparent on the face of the award and not an error of fact. It is equally clear that an error of law on the face of the award means an error of law which can be discovered from the award itself or from a document actually incorporated therein. A note of clarification may be appended viz., where the parties choose to refer a question of law as a separate and distinct matter, then the Court cannot interfere with the award even if the award lays down a wrong

proposition of law or decides the question of law referred to it in an erroneous fashion. Otherwise, the well settled position is that an arbitrator "cannot ignore the law or mis-apply it in order to do what he thinks is just and reasonable. (See Thawardas Perumal Vs. Union of India, (1955)'-) SCR 48 : (AIR 1955 SC 468)."

"25. In para 20 of the said decision this Court also, held that the proposition that emerges is that in the case of a reasoned award, the court can interfere if the award is based upon a proposition of law which is unsound in law and that the erroneous proposition of law must be established to have vitiated the decision. It has also been held in that decision that the error of law must appear from the award itself or from any document or note incorporated in it or appended to it. This Court also held that it was not permissible to travel and consider materials not incorporated or appended to the award. So far as the facts of the present case are concerned, we do not think that the award of the arbitrator can at all be interfered with as the award was not based upon either a proposition of law which is unsound or an erroneous proposition of law was established to have vitiated the decision. As noted herein earlier, the arbitrator had considered all aspects of the matter including the terms of the contract and all the materials on record and the statement of claim and has come to a conclusion of fact. Such being the position, we cannot but hold that the award was not based upon a proposition of law which is unsound or an error of law must have appeared from the award itself or from any document or note incorporated in the award or appended to it."

33. Further, the Supreme Court, in the case of Union of India Vs. Rallta Ram, reported in AIR 1963 SC 1685, has clearly pointed out that, "it is from the terms of the arbitration agreement that the arbitrator derives his authority to

arbitrate. If in law there is no valid arbitration agreement the proceedings of the Arbitrator would be unauthorised."

34. Furthermore, in the decision reported in 2006 (11) SCC 181 (Mcdermott International Inc. Vs. Burn Standard Co. Ltd and another), the Apex Court held that interference on ground of 'patent illegality' is permissible only if the same goes to the root of the matter and a public policy violation should be so unfair and unreasonable as to shock the conscience of the Court. What would constitute "public policy" is a matter dependent upon the nature of the transaction and the statute. The relevance of pleadings and particulars on record in this regard, are explained therein.

35. In the decision of the Supreme Court reported in 2018 SCC Online SC 3222 (Civil Appeal No.419 of 2018, arising out of Petition for Special Leave to Appeal (C).No.31532 of 2010 (K.Sugumar and another Vs. Hindustan Petroleum Corporation Ltd. and another), by judgment dated 16.01.2018, while dealing with Section 34 of the Arbitration and Conciliation Act, the Supreme Court observed as follows:

"3. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the Civil Court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the Court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.

4. In the present case, we have considered the award of the arbitrator and the order of the learned trial court refusing to set aside the same in exercise of jurisdiction under Section 34 of the Act.

5. The jurisdiction of the High Court in appeal under Section 37 of the Act would naturally be limited to what has been conferred under Section 34 of the Act insofar as an appeal against an order setting aside or refusing to set aside the

award is concerned.

6. A reading of the materials placed on record, including the award and the order passed under Section 34 of the Act, would disclose that the view taken by the arbitrator is on a consideration of the evidence and materials placed before him and the conclusion that the respondents are liable to compensate the appellants is a possible and reasonable conclusion. This is precisely what has been held by the Court while exercising jurisdiction under Section 34 of the Act. If that is so, we do not see how in an appeal under Section 37 of the Act, the High Court could have reappreciated the evidence to come to a contrary finding. The High Court was not sitting in appeal over the award of the arbitrator but it is the order passed under Section 34 of the Act, which was the subject matter of challenge before the High Court. The High Court seems to have missed the subtle difference between the two jurisdictions and thereby committed an error which would require to be corrected in this appeal.

7. We, accordingly, set aside the order of the High Court and affirm the award and the order passed by the learned trial court under Section 34 of the Act. The appeal, consequently, is allowed."

36. From a reading of the judgments relied on by the learned counsel appearing for both parties, and also the said decisions cited by us, and on a reading of the materials placed on record, we are of the opinion that the learned Arbitrator has considered the evidence and the materials placed before her in arriving at a just conclusion and the first respondent is to be paid the loan agreement amount by the appellant, which is a plausible and reasonable conclusion. This is precisely what has been held by the learned Single Judge while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, and therefore, we cannot re-appreciate the evidence to give contrary findings and this Court is not sitting as an appellate authority over the award of the Arbitrator and the order passed under Section 34 of the said Act is the subject matter of challenge before us. Absolutely, the appellant has not made out any case for interference with the order passed by the learned Single Judge. We do not find any scope or ground to interfere in the award passed by the learned Arbitrator as well as the order

passed by the learned Single Judge. If an award is in conflict with the Public Policy, and only if it is in contravention with the fundamental policy of Indian law and if it is in conflict with the most basic notions of morality or justice and only if the award shocks the conscience of the Court, the award can be interfered with by this Court. We do not find any such situation in this case.

37. Further, this Court cannot conduct any roving enquiry in the matter by sitting as an appellate authority. Absolutely, we do not find any infirmity in the impugned order passed by the learned Single Judge. Accordingly, the O.S.A. is dismissed. No costs. Consequently, C.M.Ps. are closed.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

cs

To

The Sub-Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to Mrs.Geetha Ramaseshan, Advocate SR.No.45850

+1cc to Mr.R.Krishnakumar, Advocate SR.No.45623

+1cc to M/s.Sri and Shankar Associates, Advocate SR.No.45303

सत्यमेव जयते

O.S.A.No.38 of 2016

MP (CO)
GMY (11/07/2019)

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