

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :19.03.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.142 of 2017

and

A.No.1041 of 2017

1. Mrs. B. Radha
2. Mr.Muneshwaran
3. Mr.Rajesh ... Petitioners

vs.

1. M/s. Equitas Finance Limited,
(Formerly Known as M/s. Equitas Finance Private Ltd.)
Represented by its Authorised Representative
Mr.P.Selvamani
F 39, Spencer Plaza,
No.769, 4th Floor, Phase II,
Annal Salai,
Chennai - 600 002. Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, Read with Order 14 Rule 8 of the O.S rules to set aside the Award dated 10.06.2016 made in ARM/SME-HF/43/2016 by a sole arbitrator as opposed to the public policy of India.

For Petitioners : Mr.S.S.Swaminathan

ORDER

In the instant 'Original Petition' ('OP' for brevity), there are three petitioners and a lone respondent.

2. Instant OP has been filed assailing an 'arbitral award dated 10.06.2016 bearing reference No.ARM/SME-HF/43/2016' (hereinafter 'impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole arbitrator.

3. With regard to the three petitioners, they are mother and two sons. This Court is informed that while petitioner No.1 is the mother, petitioner Nos.2 and 3 are her two sons.

4. The sole respondent, a company incorporated in India i.e., juristic person which goes by the name 'Equitas Finance Limited' (Formerly known as M/s.Equitas Finance Pvt Ltd.), shall hereinafter be referred to as 'Finance Company' for the sake of convenience and clarity.

5. Instant OP has been filed under Section 34 of the A & C Act. Section 34 of A & C Act is under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act reveals that recourse to a Court against an arbitral award may be made by an application.

6. Section 34 itself is captioned 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, the nomenclature ' Original Petition' is being assigned to proceedings under Section 34 of A & C Act and therefore, I am referring to the instant proceedings as 'OP' for the

sake of convenience and clarity.

7. As part of the case file, entire records of the AT pertaining to the impugned award have also been placed before this Court in a sealed cover and this Court had the benefit of perusing the records of AT.

8. Be that as it may, nucleus of the entire transaction is a 'loan agreement dated 30.06.2014 bearing reference No.SEGRCPX0004627' hereinafter 'said loan agreement' for the sake of brevity, clarity and convenience. Vide said loan agreement, petitioners borrowed a sum of Rs.2,75,000/- or in other words, petitioners have borrowed a sum of Rs.2.75 lakhs from the finance company agreeing to repay the same in 60 monthly instalments. Quantum of each monthly instalment is Rs.8,240/- and repayment commenced from 10.08.2014.

9. Subject matter of the instant OP is a small house property being a small piece of land and building therein at G.R.No.251/2 admeasuring an extent of 876 sq.ft or thereabouts situated in Ettayapuram Village, Ettayapuram Taluk, Tuticorin District and the boundaries as can be culled out from the case file placed before this Court reads as follows:

<https://hcservices.ecourts.gov.in/hcservices/>

North by : Plot No.28

South by: Plot No.26

East by :Cannal

West by:Thenvadal Street

(aforesaid property shall hereinafter be referred to as 'said dwelling house').

10. To be noted, it is submitted that said dwelling house which is in a village where the petitioners were living along with first petitioner's late husband and father of petitioners 2 and 3 one Mr.Balamurugan.

11. Along with said loan agreement, an equitable mortgage or mortgage by deposit of title deeds by mortgaging said dwelling house was also created as security for the aforesaid loan and this is confirmed by a registered document being memorandum confirming deposit of title deeds. To be noted, this document has been registered as document No.2676/14 on the file of the Jurisdictional Registration Office. The fact that there is such a registered document and that it has been registered in the Jurisdictional Registration Office is not in dispute before this Court as finance company has produced a photo copy of the registered document captioned 'MEMORANDUM CONFIRMING DEPOSIT OF TITLE DEEDS' along with all the annexures therein. To be noted, it forms part of Finance Company's typed-set before this Court.

12. It is also not in dispute that aforesaid Mr.K.Balamurugan (spouse of Petitioner No.1 and father of petitioners 2 and 3) died on 15.10.2013 before the said loan agreement.

13. It is seen from the case file placed before me that instant OP has been presented on 21.10.2016 and notice has been issued on 27.02.2017. Post service of notice, sole respondent i.e., Finance Company has entered appearance through a counsel.

14. Mr.S.S.Swaminathan, learned counsel on record for the petitioners and Mr.S.Suresh, learned counsel on record for the sole respondent are before this Court.

15. This Court heard both the learned counsel and by consent main OP itself was heard out.

16. As already alluded to supra, besides the case file, this Court had the benefit of perusing the records of AT also, which was placed before this Court in a sealed cover.

17. With regard to the trajectory before AT, petitioners 1 to 3 before this Court have been arrayed as Respondents 1 to 3 respectively and the sole respondent before this Court is the sole claimant before AT. Case of the sole respondent before this Court (claimant before AT), which is being referred to as 'finance company' in this order, is that petitioners repaid 20 monthly instalments i.e., upto 10.03.2016 and thereafter committed default. On this basis, the arbitration agreement between the parties, which is in the nature of a clause in the said loan agreement was invoked, Sole Arbitrator constituting AT was appointed and a claim was made *inter alia* claiming a sum of Rs.2,86,134/- together with interest and costs.

18. A careful perusal of records of AT reveals that AT has issued notice to the respondents before it i.e., three petitioners before this Court, notices were returned with the postal acknowledgement 'NO SUCH ADDRESSEE'. On this basis, AT has set the respondents *ex parte* on 03.06.2016 and proceeded to make the impugned award vide which AT has acceded to the entire claim made by the Finance Company i.e., Rs.2,86,134/- together with interest and costs.

19. Petitioners before me, assailing the impugned award submit that they did not receive any notice either about appointment of the Arbitrator or about the arbitral

proceedings and therefore, the petitioners were unable to present their case before AT. In other words, petitioners have predicated instant OP on all three limbs of Section 34 (2) (a) (iii) of A & C Act and say that they were therefore under an incapacity before AT. In other words the petitioners' campaign against impugned award i.e., grounds on which impugned award is assailed in instant OP neatly and snugly fit into Sections 34(2) (a) (iii) and 34(2) (a) (i) of A & C Act.

20. This takes the discussion to the question whether the petitioners were put on notice at all. A perusal of records of the AT reveal that all notices including pre-arbitral notice (Ex.A4) were sent to the address of the petitioners, which reads as 151, Karnatic Mill line, Perambur, Chennai-600 012.

21. It is the case of the petitioners that the first petitioner is illiterate, she had given official documents such as Ration Card, Bank Passbook of her two sons and her husband's Death Certificate based on which the finance company filled in the said loan agreement and got the equitable mortgage loan deed executed. In other words, it is the case of the petitioners that petitioners were not even aware of the contents of the said loan agreement and copy of the document confirming the equitable mortgage,

both dated 30.06.2014. It is the case of the petitioners that they were not given a copy of said loan agreement.

22. Saying so, an affidavit dated 11.03.2019 sworn to by the first respondent has been placed before this Court and the same reads as follows:

' I, Radha, Wife of Balamurugan, aged about 40 years, residing at No.7 Uppanndi Babu Lane, Arunthathiyar Nagar, Mettupalayam, Perambur, Chennai-600 012 do hereby solemnly affirm and sincerely state as follows:

1. I am the 1st petitioner herein and as such well acquainted with the facts of the above case. I am filing this affidavit on my behalf and on behalf of the other petitioners also who are my children.

2. I submit that I have filed the above original petition to set aside the Arbitral Award of the Learned Arbitrator dated 10.06.2016 under Section 34 of the Arbitration & Conciliation Act and I crave leave of this Hon'ble Court to treat the grounds of original petition as part and parcel of this affidavit also.

3. I submit that I married my husband Balamurugan in October 1991 and came in Chennai in 1991. We started to live in the rented house at No.165, Carnatic Mills Road, Perambur, Chennai from October 1991. I live in the above said rented house along with my family till July 2013 and shifted to the present address in August 2013. When I was residing in the old address, I assisted my husband in the platform tea stall. My husband started a small Tea shop in a rented

place from August 2013. My husband expired on 15.10.2013 in the present premises only. After the death of my husband, I am looking after that tea shop and maintaining the family with great difficulty.

4.I submit that my first son i.e., the 2nd petitioner herein is a B.Sc Physics graduate, completed in Jaya College in Pattabiram. At the time of applying loan with the Respondent in 2014, he was studying Second Year in the college. Now, the 2nd petitioner is working in a Private Company. I applied for the loan only for the education of the 3rd petitioner, my second son who was interested in pursuing Engineering. The 3rd petitioner got admission in Electrical & Electronic Engineering at Appollo Engineering College, Urappakkam. The 3rd petitioner discontinued the course in the Second year due to non-payment of fees and now he is searching for any job.

5.I further submit that at the time of applying for loan, I have furnished the copy of the Aadhar card, Voter's Identity card and Ration Card to the staff of the respondent. The entire loan papers were filled in by the staffs of the Respondent as I am an illiterate. I am not fully aware of the details filled in by the Respondent in the loan application and in other papers. The respondent had not furnished the copy of the loan agreement and other papers to me. I am totally ignorant about the address mentioned in the loan application. The collection staff of the Respondent used to collect the amounts from me

only from the present address right from the beginning of the loan.

6.I therefore once again affirm that no notice has been received by me till date in respect of the Arbitral proceedings or even from the Respondent prior to initiation of Arbitral Proceedings.'

23. The Death Certificate of K.Balamurugan dated 06.12.2013 is as follows:

Corporation of Chennai
DEPARTMENT OF PUBLIC HEALTH
DEATH CERTIFICATE

NAME OF DECEASED: K. BALAMURUGAN
AGE: 24 YEARS
SEX: Male
DATE OF DEATH: 10-DEC-2013
TIME OF DEATH: 8:00 PM
CAUSE OF DEATH: SUICIDE BY HANGING
REGISTRATION NUMBER: 2013/0607000186/C
DATE OF REGISTRATION: 23-OCT-2013
DATE OF ISSUE: 06-DEC-2013
REMARKS (If Any):

Address of the deceased at the time of death: NO 1A, UPPANDEBASKU STREET ARUMATHI NAGAR, METTUPALAYAM CHURCH, 600012

Signature of the Registrar: [Signature]

Official Seal: [Seal]

Notes: This certificate is computer generated and does not require any Govt Signature in original. The authenticity of this certificate can be verified at www.chennaicorporation.gov.in. The Registration number is unique to each death.

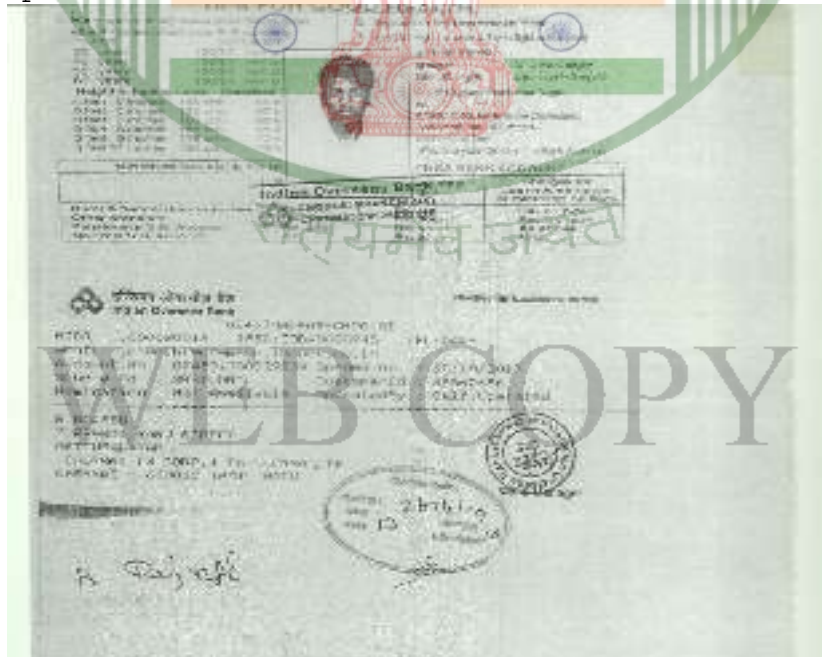
<https://hcservices.ecourts.gov.in/hcservices/>

To be noted K.Balamurugan is 1st petitioner's spouse and

father of petitioners 2 and 3.

24. To be noted, the date of issue of aforesaid certificate itself is prior to the said loan agreement and that is the reason why equitable mortgage has been created making the first petitioner and her two sons alone as mortgagors.

25. Be that as it may, it is necessary to go by the records before this Court without relying on any extraneous material as instant OP is under Section 34 of A & C Act. A perusal of the Memorandum Confirming Deposit of Title Deeds and the documents attached thereto, reveal that first petitioner's Voters Identification Card and Bank Passbook of petitioners 2 and 3 have been annexed thereto. Most relevant part of the said document is as follows:



26. To be noted, the aforesaid scanned extracts form part of a registered document which has been placed before

this Court by the Finance Company. Be that as it may, it is also to be noted that the aforesaid document has not been produced by the petitioners who are borrowers, but it has been produced by the finance company itself vide a typed-set dated 11.03.2019 and this registered document dated 30.06.2014 is SI.No.4 in Pages 41 to 54. From and out of the aforesaid documents placed before this Court by the Finance Company in the aforesaid typed-set, most relevant parts of the document have been scanned and reproduced supra.

27. This brings to light that there was certain material to show that the petitioners have shifted their residence from 151, Karnatic Mill line, Perambur, Chennai- 600 012 to No.7, Uppanndi Babu Lane, Arunthathiyar Nagar, Mettupalayam, Perambur, Chennai - 600 012. A perusal of the impugned award also reveals that no paper publication has been caused and no substituted service has been resorted to. The impugned award also makes it clear that notices sent to the petitioners before me i.e., petitioners 1, 2 and 3, who are Respondents 1, 2 and 3 respectively before the AT have been returned with the postal endorsement 'NO SUCH ADDRESSEES'. All these are clearly adumbrated and articulated in the impugned award itself. Though the AT is not bound by the provisions of

the Evidence Act for that matter, though the AT can evolve its own procedure, what comes into sharp focus is that both the addresses i.e., address were the petitioners living upto July 2013 and the address to which they shifted from August 2013 were available with the Finance Company and the same is part of registered document No.2.

28. Notwithstanding this, the Finance Company has not chosen to bring the registered document to the notice of AT. However, the pre-arbitration Notice dated 18.02.2016 was before the AT. The same was marked as Ex.A3 and a perusal of the same reveals that the said notice also remains unserved as is evident from the records of AT.

29. Therefore, AT was clearly in error in holding that pre-arbitration notice has been served.

30. AT has framed an issue in this regard and answered the same notwithstanding the fact that records of the AT reveal that the pre-arbitration notice remains unserved as the envelope has been returned unserved.

31. Finance Company also, is unable to give any explanation as to why the factum of equitable mortgage and a registered document confirming such equitable mortgage qua said dwelling house was not brought to the notice of

the AT. Even if this is ignored, it is clear from the typed-set of papers placed before this Court by the finance company itself that Finance Company had knowledge about the present address of the petitioners i.e., No.7, Uppanndi Babu Lane, Arunthathiyar Nagar, Mettupalayam, Perambur, Chennai - 600 012, as is evident from the registered Document No. 3016/2014. In other words umbrage cannot be taken under Section 3(1)(a) of A & C Act owing to the peculiar facts and circumstances of this case. While AT erred in holding that the pre-arbitral notice regarding appointment of arbitrator has been given to the petitioner vide the impugned award, finance company erred in not bringing to the notice of AT or in not sending the pre-arbitral notice to the present address.

32. Finance Company could have certainly brought to the notice of AT about the present address and sought notice to be sent to the present address also. Be that as it may, this has resulted in a situation where the petitioners were not given notice of the appointment of the Arbitrator and the petitioners were not given notice regarding the arbitral proceedings also.

33. No elaboration is required to buttress the submission that this has resulted in petitioners being unable to present their case before the AT. Therefore, all

three limbs of Section 34(2)(a)(iii) of A & C Act are satisfied in instant case.

34. In the light of the discussion supra, this Court has no difficulty in coming to the conclusion that the petitioners have made out a case for having the impugned award of AT set aside as proof has been furnished qua Section 34(2)(a)(i) and 34(2)(a)(iii) of A & C Act.

35. Before parting with this case, this Court deems it appropriate to make it clear that this order has been made owing to the peculiar facts and circumstances of this case and this would, therefore, not serve as a precedent for all and every case of change of address.

Resultantly, instant OP is allowed and the impugned award dated 10.06.2016 bearing reference No.ARM/SME-HF/43/2016 is set aside. Considering the nature of the submissions and trajectory of the hearing parties are left to bear their respective costs. Consequently, the connected miscellaneous petition is closed.

Sd./-M.S.J
19.03.2019

Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 16/07/2019

COURT OFFICER(O.S.)

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