



Arb.O.P(Com.Div).No.2 of 2021
and A.No.2142 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 28.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Arb.O.P(Com.Div).No.2 of 2021
and A.No.2142 of 2021

1.Chandreshkumar Amruthbhai Patel

2.Sangita Chandresh Patel

. . . Petitioners

Versus

M/s.Cholamandalam Investment
and Finance Company Ltd.,
(Formerly Known as
M/s Cholamandalam DBS Finance Limited)
Rep.by Deputy
General Manager-Legal,
'Dare House',
No.2 NSC Bose Road,
Chennai-600 001.

. . . Respondent

PRAYER : Petition filed under Section 34(2)(a)(iii),(iv) and Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration award dated 05.02.2018 passed by the Sole Arbitrator, Mr.C.Raghavan, in Arbitration Case No. CIFCL/ARB/L.IV//001/Sep.2017.

For Petitioners : Mr.S.Namasivayam

For Respondent : Mr.Devan Parikh
Senior Counsel
for Ms.M.Vidya



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ORDER

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This original petition has been filed to set aside the Arbitration award dated 05.02.2018 passed by the learned Sole Arbitrator.

2. The brief facts leading to filing of this original petition is as follows:

The petitioners have executed a loan agreement dated 31.03.2016 for a sum of Rs.79,50,000/- repayable in 180 instalments. The agreement entered between the parties provides for reference to arbitration. As the petitioners committed default in repayment, it is the case of the respondent that the matter was referred to the Sole Arbitrator in pursuant to the Clause governing the parties. Accordingly, the arbitral award has been passed.

3. Challenge has been made by the learned counsel for the petitioner mainly on the ground that neither pre-arbitration notice nor proceedings of the arbitration was served on the petitioners at any point of time. The learned Arbitrator has just proceeded on the basis of claim petition without serving any notice and passed an award on 05.02.2018. The copy of the award has also not been served till now and only before the Debt Recovery Tribunal, they came to



know that the award has been passed in the year 2012. Thereafter, they filed the petition in the year 2021 after obtaining certified copies from the respondent. Hence, it is his contention that as the entire proceedings is without proper notice and opportunity, the award cannot be sustained in the eye of law and is liable to be set aside.

4. Learned counsel appearing for the petitioners has brought to the notice of this Court the various flaws found in the award. The learned Arbitrator has in fact forfeited the rights of the petitioners under Section 25 of the Arbitration and Conciliation Act (hereinafter referred as “Act”) at the time of passing final order which can not be valid in the eye of law. Besides, no proceedings were also sent to the petitioners as mandated under Section 24 of the Act. Similarly, no opportunity whatsoever was given for filing counter or written statement. At any event, it is his contention that the petitioners have been kept away from the proceedings without serving any notice from the inception. Hence prayed for setting aside the award.



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5. Per contra, learned counsel appearing for the respondent submitted that the petition filed under Section 34 of the Act is not maintainable and barred by limitation. It is his contention that the award is said to have been received on 01.02.2021 from the Debt Recovery Tribunal. However, the petition has been filed only on 18.05.2021. Accordingly, the petition is barred by limitation. His further contention is that change of address has not been informed and therefore, the notice has been sent to proper address of the petitioners. Therefore, his contention is that the petitioners cannot complain that there is no service of notice when the notice has been sent to the correct address and it is a deemed service of notice. Hence prayed for dismissal of this original petition.

6. As for as the contention as to the limitation is concerned, this Court has called for original records of the Arbitral Tribunal. On perusal of the entire records, this Court is not able to find a single Record to find that either the appointment of Arbitrator or award proceedings were served on the petitioners. Except sending a formal notice on the first occasion i.e., on 24.10.2017, no other documents are available on entire arbitral documents to



show that notice has been served on the petitioners. Moreover, notice addressed to the petitioners on the first occasion was returned as 'left'. It is the specific contention of the respondent herein that, from the year 2017 itself, the petitioners were residing somewhere and changed their residential address which has not been disputed seriously. In this regard, though there is no material available on record to show that change of address has been notified by the petitioners, the fact remains that in the counter filed by the respondent it is admitted as follows, “after availing loan from the respondent, the petitioners suddenly absconded from the last known residential address with a view to evade the repayment.” The above statement made in the counter itself clearly indicate that in fact the petitioners were not residing in the address given in the loan agreement, at the time of sending letter or notice invoking arbitration or during the arbitration proceedings before the Arbitral Tribunal.

7. Be that as it may, from the records of Arbitral Tribunal, there is no evidence available on record to show that the award has been served on the petitioners. Though the award is said to have been passed on 05.02.2018, the Registered Postal cover returned as 'left' and the same is available on



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record. The Post was sent to the address shown in the loan agreement. Despite the fact that the respondent is aware of the fact that the petitioners are not residing in the original address, merely because the petitioners have not intimated change of address, the same will not absolve the respondent from taking steps atleast to find out the correct address which has not been done. Therefore, when the respondent himself is aware of the fact that the petitioners are absconding from the original address, by merely sending notice to the address given in the loan agreement, the presumption available under law cannot be applied automatically, unless the respondent establishes that they have taken steps to find out the new address of the petitioners, which has not been done by the respondent. However, to show that the award copy has been served immediately from the Arbitral Tribunal, this court is not able to find any record except returned covers. Therefore, when the returned cover itself was formally sent to the address where the petitioners were not residing, presumption available under Section 27 of the General Clauses Act, 1897, cannot be applied for service of notice, for either appointment of Arbitrator or relating to processing of further application under Section 34 if filed during



pandemic from the date of knowledge of award, the question of bar in processing does not arise in view of extension of limitation by Apex Court.

8. The proceedings recorded by the Arbitral Tribunal from 24.10.2017 shows that the first notice was returned as unclaimed and that itself is not on the basis of the factual aspects. The first notice sent was returned with an endorsement 'left'. There is no endorsement found in the cover as if the petitioners have not claimed the letters. Thereafter, the matter has been adjourned to 20.11.2017 directing the parties to appear before the Arbitral Tribunal either in person or through any representative. On the said date, the petitioners were called absent and set *ex parte*. The matter has been adjourned to 11.12.2017 and for further proceedings on 24.01.2018. Proof affidavit was received and Exhibits C1 to C6 marked. Thereafter, on 05.02.2018, award has been passed by the learned Arbitrator.

9. It is to be noted that none of the proceedings dated 20.11.2017, 11.02.2017, 10.01.2018, 24.01.2018 and 05.02.2018 were communicated to the petitioners or no steps whatsoever has been taken either by the learned



Arbitrator or by the respondent to communicate the above proceedings to the petitioners. It is relevant to note that it is mandatory on the part of the Arbitral Tribunal to give notice of any hearing and send proceedings to the parties as per Section 24(2) of the Act which has not been done which is in fact violating the very provisions of the Arbitration and Conciliation Act. Further, the learned Arbitrator while passing the award has held that the right of the respondent has been forfeited under Section 25 of the Act. Without going into the compliance either under Section 23 or 24 of the Act, the learned Arbitrator mechanically has passed an order as if the right of the respondent has been forfeited which is also against the very substantial provisions of law. Yet another aspect is to be noted that the learned Arbitrator also directed the respondent to enforce the security, namely, the equitable mortgage of the award which in fact is not an arbitrable issue, whereas, the learned Arbitrator directed the respondent to take legal action to sell or enforce the mortgaged property. Such a direction itself is not permissible.

10. Be that as it may, from the Arbitral Records, this Court is able to see that no proceedings have been communicated nor any notice has been



sent, at any point of time,. if the petitioners were residing in the original address, this Court can certainly draw the presumption of service of notice by invoking the provision under Section 27 of the General Clauses Act, but in the given case, the respondent also in the counter has clearly stated that from the inception when the petitioners availed the loan, they were absconding from the above address. Same clearly indicate that they are not residing in the particular address and to substantiate the same, the documents have also been filed by the petitioners, of course, this Court cannot rely upon those documents in this stage independently. However, counter of the respondent itself indicates that the petitioner is not residing in the above address at the relevant point of time. Therefore, when an opportunity was not granted and notice has not been served as required under law, such award cannot be sustained in the eye of law.

11. Learned counsel for the petitioners relied upon the judgment of the Hon'ble Apex Court reported in (2013) 10 SCC 402 in the case of *Taranjeet Singh Mohan Singh Sawhny and Ors. vs. District Deputy Registry Cooperative Societies and Ors.* In para Nos. 15 and 18 of the aforesaid judgment, it is held as follows:



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“ 15.Shri Shyam Divan, learned senior counsel for Respondent No.3, supported the decision of Respondent No.1 to prepone the date of hearing by pointing out that the officer concerned was compelled to do so because he was required to decide the application within six months of its institution. Shri Divan referred to letter dated 15/18.2.2013 sent by Senior Superintendent of Post Offices, Mumbai City (North 2) to Ms.Pritha Dave and argued that the intimation given to the Appellants' counsel was sufficient to make them aware of the decision taken by Respondent No.1 to prepone the date of hearing. Shri Divan submitted that the Appellants cannot plead denial of hearing by Respondent No.1 as the ground for quashing the order passed by him because their advocate had been duly intimated about the changed date of hearing. However, learned senior counsel could not offer any clarification about the delivery of notice to the sender on 22.5.2012.



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18. Secondly, the documents produced before this Court unmistakably show that notice issued to the Appellants to apprise them about the changed date of hearing was not delivered to them. The statement made in paragraph (Z) of the counter affidavit filed by Respondent No.1 substantially supports the Appellants' assertion that they had not received intimation about preponement of the date of hearing. It also belies the assertion of Respondent No.3 that notice was delivered to the Appellants before the date of hearing, i.e., 21.5.2012. If the notice had been duly served upon the Appellants, then Respondent No.1 would have produced the receipt of delivery. His failure to do so leads to an irresistible inference that the Appellants were not made aware of the fact that the date of hearing had been changed from 19.6.2012 to 21.5.2012. The documents produced by Respondent No.3 do not help us in resolving the controversy regarding service of notice on the Appellants. The contents of these documents



only adds to the confusion. If the second letter dated 15.2.2013 sent by the Senior Superintendent of Post Office was delivered on 22.5.2012 then we have no option but to hold that the notice issued by the office of Respondent No.1 was delivered to the addressee on 22.5.2012,i.e., one day after the date fixed for hearing.”

12. Considering the above judgment and on perusal of the Arbitral records, this Court is of the view that no proof what so ever is available on record to substantiate the contention that the notice has been served with regard to the appointment of the Arbitrator and also the proceedings said to have been conducted by the learned Arbitrator.

13. Considering this aspect, the award passed by the learned Sole Arbitrator on 05.02.2018, which is an *ex parte* order, is liable to be interfered with and in fact, such award is a result of not giving proper opportunity to the parties which falls within the ambit of Section 34(2)(iii) of the Act, since the respondent has not shown any steps taken to find out the new address of the



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petitioners, particularly, when they were already aware of the fact that the
petitioners are not residing in the particular address.

14. In view of the above, this original petition is allowed and the
award passed by the learned Arbitrator is set aside. Consequently connected
application is closed.

28.10.2021

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N. SATHISH KUMAR, J.

msv

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