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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.03.2021
Delivered on : 13.05.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.A.No.1395 of 2020

M/s.Shriram City Union
Finance Ltd.,
Rep. by their Authorised signatory,
having office at
No.114, Suriyavel Tower,
Near Balaji Theatre,
Kamaraj Salai,
Puducherry - 605 001.

...Appellant

Vs

K.Selvam (Died)

1.S.Kavitha

2.Subash Chandra Bose (Minor)

3.Vaishnavi (Minor)

...Respondents

(Minor Respondents 2 & 3 are
Represented by their mother/Guardian
ad litem the 1st Respondent)

Prayer: Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, against the order and decreetal order dated 25.02.2020 passed by the learned Principal District Judge, Puducherry in Arbitration O.P.No.13 of 2016.

For Applicant : Mr.K.V.Ananthakrishnan

For Respondent 1 : Mr.T.P.Manoharan
Senior Counsel
for Mr.T.M.Naveen

For Respondents 2 & 3: Minors (Represented by R1)



JUDGMENT

The claimant is the appellant before this Court and the challenge is to the order setting aside the Arbitral Award passed by the Principal District Judge, Puducherry in Arbitration O.P.No.13 of 2016 dated 25.02.2020.

2.The brief facts preceeding the filing of this appeal are as follows:

The claimant had extended a personal loan of Rs.10,00,000/- to the 1st respondent. The loan agreement was entered into on 26.10.2013 between the claimant and the first respondent and his wife, the second respondent who had executed the same as a guarantor. As per the terms of the deed the sum extended as loan together with interest was repayable in 36 equated monthly installments (EMI) of Rs.41,550/- each and the 1st of the EMIs fell due on 10.12.2013.

3.In addition to the loan agreement, the respondents had also executed a promissory note and issued post dated cheques. After making some payment the respondents completely stopped paying the EMIs. The claimant would submit that the respondents did not come forward to clear their dues. In fact by letter dated 10.04.2015 issued to the respondents, the claimant had invoked the Arbitration Clause and had informed them about the appointment of the arbitrator and that as on 08.04.2015 a sum of Rs.11,84,177.90/- was due.

4.The arbitrator by letter dated 13.06.2015 had informed the respondents that he had been appointed as the sole arbitrator and that he intended to hold the first hearing on 25.07.2015. This notice was received by the respondents on 08.07.2015. The claimant meanwhile had submitted their claim statement. However, the respondents did not choose to appear before the Arbitral Tribunal.

5.Although the respondents had been served on 08.07.2015 they did not appear either in person or through pleader and the matter was adjourned to three dates, namely, 18.08.2015, 22.08.2015 and 09.09.2015 for their appearance. On 09.09.2015, since the respondents did not appear they were set ex parte and the arbitrator had proceeded to hear the claimant and passed an ex parte award directing the respondents to pay a sum of Rs.13,33,116/- together with interest at the rate of 36 % per annum from the date of filing of the claim statement till the payment. The award was also forwarded to the respondents who received the same on 19.11.2015.



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6. After the receipt of the award, the respondents had filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter after referred to as the Act, to set aside the award on the file of the Principal District Judge, Puducherry. The said petition was numbered as Arbitration O.P.No.13 of 2016.

7. The main grounds on which the petition had been filed was that the notice under Section 21 dated 10.04.2015 was not served on the 2nd respondent / guarantor. Even the notice that has been served on the 1st respondent is suspect since the same is said to have been served on him on 01.05.2015. The 1st of May being a holiday on account of the labour's day, it is not known as to how the claimant can submit that the notice has been served on the first respondent. The respondents would further submit that there is a suppression of fact on the part of the claimant. The claimant had not brought to the notice of the arbitrator the fact that there was a mortgage deed in favour of the claimant. The claimant had further not given credit to the sum of Rs.4,41,000/- which had been paid by the respondents. The respondents had admitted the borrowal.

8. The respondents would also state that the interest calculated was usurious. They would further state that the arbitrator had not given a fair chance to the respondents to submit their evidence. That apart, the oral testimony of the claimant was totally contradictory to the documents that had been submitted.

9. The Principal District Judge, Puducherry, after hearing the parties set aside the arbitral award. The main reasons that had prompted the learned Judge, to arrive at this conclusion was on account of the following:

(a) Notice under Section 21 of the Act has not been served properly on the respondents.

(b) The claimant have suppressed the mortgage deed and the interest payable therein (16.5% p.a) and also clause 5 therein which provided that under the mortgage deed the respondents were bound to take a comprehensive insurance policy and the same had to be paid by the respondent mortgagors. In case they default then the premium paid would be added to the mortgage money.

(c) The insurance amount had not been adjusted towards the outstanding.

(d) The claimant had not proved the arbitral agreement between them and the respondents and further the said agreement dated 26.10.2013 had not been filed before the arbitral tribunal.

On the above basis the learned Principal Judge, Puducherry had set aside the arbitral award dated 08.10.2015.



11.Mr.K.V.Ananthakrishnan, learned counsel for the appellant/ claimant would submit that the learned Principal Judge, Puducherry in a Section 34 Petition has proceeded to record evidence construing it to be an appeal under Section 96 of the C.P.C. He would argue that the finding of the Principal District Judge, Puducherry regarding the insurance amount being adjusted towards dues of the respondents is totally erroneous.

13. The learned counsel would further argue that the learned Judge had failed to appreciate the fact that the only ground on which the award has been challenged is on the ground that the notice has not been served on the respondents. The 1st and the 2nd respondents are husband and wife and even assuming that notice under Section 21 has not been served on the 2nd respondent, the same has been served on the 1st respondent and the notice having been addressed to both parties at the same address there is a presumption of knowledge to the 2nd respondent.

15. Per contra, Mr. T. P. Manoharan, learned Senior Counsel appearing on behalf of Mr. T. M. Naveen, learned counsel for the



respondents would submit that the claimant has not come forward with a definite case. The arbitration proceedings has been initiated on the basis of an agreement dated 26.10.2013. However, the document, which has been filed as the loan agreement is dated 16.09.2013. The demand promissory notice filed would show the date as 26.10.2013. Further, there appears to be overwriting on the same. The cheque is dated 26.10.2013. However, the deed of mortgage dated 18.10.2013 refers to an Enterprise Finance Agreement dated 18.10.2013. Therefore, the learned senior counsel would submit that the pleadings and the documents do not correlate. Further, the claim statement is absolutely silent about the mortgage deed.

16. He would further contend that issue of a Section 21 notice is mandatory and this is the commencement of the arbitral proceedings. Admittedly, there is no document filed by the claimant to show that Section 21 notice dated 10.04.2015 has been received by the 2nd respondent. He would rely on the Judgement reported in 2013 (2) CTC 533 (DB) - Indus Ind Bank Ltd., Vs. Mulchand B.Jain and others, in support of the above contention.

17.The learned senior counsel would further argue that the claimant has deliberately suppressed the best evidence. He would contend that the amounts outstanding to the claimant could be settled from out of the amounts due under insurance policy. This insurance policy has not been produced by the claimants. In support of his contention that the claimant has failed to prove their case and that they have failed to produce the best evidence the learned senior counsel would rely on the following Judgments:

(i)(2014) 4 SCC 693 - Rajasthan State Road Transport Corporation and Another Vs. Bajrang Lal.

(ii)(2012) 8 SCC 148 - Union of India Vs. Ibrahim Uddin and Another.

(iii)AIR 1968 SC 1413 - Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif and others.

(iv) (2009) 14 SCC 541 - Mussauddin Ahmed Vs. State of Assam.

(v) (2019) 5 SCC 719 - Ashatai Vs. Shriram City Union Finance Limited.

18.The learned senior counsel would argue that the claimant is therefore guilty of fraud and suppression. He would submit that the claimant has come to the Court with unclean hands. The claim statement would talk about the agreement dated 26.10.2013. They have not mentioned anything about the simple mortgage deed executed by the 1st respondent nor the insurance policy that was



directed to be taken in respect of the property (as per terms and conditions of the mortgage deed) and the group life insurance policy taken by the 1st respondent which could be set off towards the dues of the respondents under the loan agreement. He would submit that this is clearly a case of fraud played on the Court. To buttress his argument he would rely on the following Judgement:

(i) (2012) 1 SCC 476 - Union of India and others
Vs. Ramesh Gandhi.

(ii) (2012) 11 SCC 574 - Badami Vs. Bhali

(iii) (2018) 1 SCC 656 - Venture Global
Engineering LLC Vs. Tech Mahindra Limited and Another.

19. He would further argue that equal opportunity has not been given to both the parties and this vitiates the entire award. In support of the above contention, the learned counsel would rely on the Judgement reported in 2015 (3) SCC 49 - Associate Builders Vs. Delhi Development Authority.

20. He would further rely upon the Judgement reported in (2018) 9 SCC 49 - Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi, in support of his contention that even in Section 34 petition evidence can be let in, in case parties are able to prove that vital evidence has been kept away by another party.

21. Heard the counsels and perused the records.

22. The primary objection that has been put forward by the claimant/appellant to the order under appeal is that the learned Principal District Judge, Puducherry has erroneously recorded the evidence when there is no scope for the same. In order to answer the above, it is necessary to briefly recapitulate the basis of the claim. The claimant has invoked the arbitral clause in the agreement between the claimant and the respondents. Dispute had arisen in respect of payment of the dues. The claim statement in very clear terms would mention the date of agreement as 26.10.2013. The claimant would also state that on the same day the demand promissory note and post dated cheques had been issued. Further the list of documents filed along with the claim would also indicate the date of the agreement as 26.10.2013. However, the document that has been produced before this Court which the claimant submits has been filed before the Arbitral Tribunal is a loan agreement dated 16.09.2013.

23. In fact the date of the agreement is given only in the first schedule to the agreement. The agreement per se and the terms are contained in a three page printed format, signed at the end of the each page by the borrower, the guarantor and the



lender, i.e., respondents 1 & 2 and the claimant. It is schedule I of this Agreement which gives the detail about the date of agreement, the parties to the agreement, the loan amount etc., The date of agreement is given as 16.09.2013. The agreement dated 26.10.2013, which is the basis for the claim has not been produced either before the Court or before the Arbitrator. However, the learned arbitrator in his award would refer to Ex.A.1 as the loan agreement dated 26.10.2013.

24. Another reason for not relying upon the loan agreement provided by the claimant is on account of the fact that the mortgage deed dated 18.10.2013, which was produced as Ex.P.1 in the Section 34 proceedings refers to an enterprise finance agreement of the same date, namely, 18.10.2013. The claim statement gives the date of the loan Agreement as 26.10.2013, the mortgage deed Ex.P.1 refers to an Enterprise Finance Agreement dated 18.10.2013 and the document produced before the Court as Ex.R1 does not contain any date or the names of the parties to the Agreements. Before me, a document with a schedule has been filed in which the date of the Agreement is shown as 16.09.2013. Therefore, the claimant has come forward with three different dates on which the loan is said to have been extended to the respondent i.e., 16.09.2013, 18.10.2013 and 26.10.2013. It is an admitted fact that the 1st respondent has only availed one loan from the claimant. The receipt of the loan amount has been admitted by the respondent.

25. Another argument which was put forward by the respondents was that the commencement of the Arbitral proceedings itself is questionable. The claimant would submit that they had issued the notice under Section 21 of the Act dated 10.04.2015 to both the respondents and the 1st respondent had received the same. However, there is no proof to show receipt of notice by the 2nd respondent. Even the notice sent to the 1st respondent is questionable the notice which is sent to the 1st respondent has been received on 01.05.2015 and the name of the person who originally received it has been scored out and the signature alleged to be that of the 1st respondent has been affixed. This signature does not tally with the signatures in the admitted documents at all.

26. Therefore, the issue of notice under Section 21 of the Act which is the sine qua non for initiation of the Arbitration proceedings has not been complied with as provided under Section 21 of the Act. The language of the said Section is peremptory in nature. It provides that the arbitral proceedings would commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent. The Section does not stop with saying that the date of commencement



is the date of notice being issued but in very clear terms the date of commencement is the date of receipt of the notice by the respondent. In the instant case, the notice has not been received by the 2nd respondent and the notice sent to the 1st respondent has not been received by him as is evident from the signature found in the Acknowledgment Card.

27. The claimant has not been able to show any proof whatsoever to show that the 2nd respondent had also received the notice under Section 21. In the absence of such evidence the case would fall within the contours of the Judgement of the Division Bench reported in 2013 (2) CTC 534 (DB) - Indus Ind Bank Ltd., Vs. Mulchand B. Jain and others. The Division Bench had observed as follows:-

"8. Therefore, the learned single Judge clearly held that there is absolutely no material to hold that Section 21 of the Act has been complied with. A perusal of Section 21 of the Act would go to show that the proceedings would commence on the date on which a request for the dispute to be referred to arbitration, is received by the concerned respondent. Therefore, the commencement of arbitral proceedings is incumbent on the receipt of the notice to be sent in accordance with Section 21 of the Act, which in other words, if no notice is received by the concerned respondent, then there is no commencement of arbitral proceedings at all. The provision is very clear to the effect that it does not even say that it should be served, but it specifically says that such notice will have to be received. Section 21 will have to be read with Section 34 of the Act. Section 34 (2) (iii) provides for a ground for setting aside an award, in a case where the applicant was not given proper notice of the appointment of an Arbitrator or the arbitral proceedings. In this case, the factual position is that the first respondent was not given proper notice of an appointment of an Arbitrator. Here again, we have to consider the specific language used under Section 34(2)(iii) of the Act, which clearly mandates that the applicant will have to be given a proper notice. Therefore, proper notice is the notice, which has to be served and received by a person concerned. We are of the view that Section 34 (2) (iii) has to be read with Section 21 of the Act. On a conjoint reading of Section 21 read



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will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22.09.2016. The appeal is accordingly allowed with no order as to costs."

32.Yet another Judgement reported in 2019 (9) SCC 462 - Canara Nidhi Ltd. vs M. Shashikala, the Hon'ble Supreme Court considered the issue as to whether parties could adduce evidence to prove specified grounds in an application under Section 34 of the Act. The learned Judges observed that the Judgment in Fiza Developers supra had led to the amendment of Section 34 by Act 3 of 2016 with the introduction of Sub-Section (5) and (6) to Section 34 of the Act. The Judgment in Fiza Developers was considered by the Jus. B.N.Srikrishna Committee which was tasked with the duty of reviewing the institutionalisation of the Arbitration mechanism. The Committee recommended an amendment to Section 34(2)(a) by substituting the words "furnishes proof that" with the words "establishes on the basis of the record of the Arbitral Tribunal that". This recommendation was accepted and introduced as an Amendment to Section 34(2)(a) vide the Arbitration and Conciliation (Amendment) Act, 2019.

33.The learned Judges, relying upon the Judgement in Fiza Developers and the judgment in Emkay Global Supra, held that a Section 34 application can, in the normal circumstances, be disposed of on the basis of the records produced before the Arbitrator and nothing beyond this is required. The Bench held that the cross examination of the persons swearing to an affidavit should be permitted only in exceptional circumstances. Ultimately the learned Judges set aside the order of the High Court of Karnataka permitting cross examination stating that the case did not fall within the exceptional circumstances.

34.Let us now consider the instant case in the backdrop of the Judgments cited supra to find out if exceptional circumstances have been made out in the instant case warranting the taking of evidence. The respondents in their Section 34 petition has taken several defences touching upon the merits of the case, i.e., the execution of the Mortgage Deed not being



brought to the notice of the Court, adjusting the premium towards the amounts due etc,. The respondents despite receipt of notice from the Arbitral Tribunal had not chosen to appear before the Arbitral Tribunal and put forth their claim and for this reason they ought not to have been given an opportunity to adduce evidence in the petition filed under Section 34 of the Act. However, two defenses which questions the very initiation and existence of the Arbitral proceedings/Arbitral Agreement has been raised by the respondents for which purpose evidence could be let in. The defense with reference to the issue of Section 21 notice and the same being served/unserved on the respondents is available from the perusal of the award and the documents Ex.R2 and Ex.R.3 filed by the claimant in the Section 34 proceedings. Likewise to prove that the claimant has not come with the definite case regarding the date of the Loan Agreement also it was imperative that the respondents be given an opportunity. Therefore, the recording of evidence to this limited extent would fall within the exceptional circumstances. However in all other respects, the learned Principal District Judge, Puducherry, has exceeded his jurisdiction under section 34(2) of the Act. The Respondent have proved that the initiation of the Arbitral proceedings is not in accordance with the mandatory provisions of the Act and further, the claimant has not set out a definite case vis-a-vis the date of the Loan Agreement.

35. For the above reasons, I do not find any ground to set aside the order passed in Arb.O.P.No.13 of 2016 by the learned Principal District Judge, Puducherry. In fine, C.M.A.No.1395 of 2020 stands dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kan/mps

To
The Principal District Judge,
Puducherry.

C.M.A.No.1395 of 2020

AK II(CO)
A.SK(15.09.2021)