M/S.Shriram City Union Finance Limited vs S.Kavitha on 5 October, 2023

Author: C.Saravanan

Bench: C.Saravanan

Arb.O.P.(Com.Div.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.71 of 2023

M/s.Shriram City Union Finance Limited,
(Presently Shriram Finance Limited),
Represented by its Authorized Representative
Pugazenthi.V,
Senior Manager,
Having Regional Office at
No.114, Suriyavel Tower,
Near Balaji Theatre,
Kamaraj Salai, Puducherry - 605 011. ... Petition

Vs.

1.S.Kavitha,
W/o.K.Selvam

2.Subash Chandra Bose (Minor)
S/o (late) K.Selvam
Represented by his Mother & Guardian
S.Kavitha ... Respond

Prayer: Original Petition is filed under Section 11(5) of the Arbitratio
Conciliation Act, 1996, praying to appoint a sole Arbitrator under Secti
of the Arbitration and Conciliation Act to adjudicate the dispute betwee

petitioner and the respondents as per Clause No.17 of the Loan/Hypotheca Agreement dated 26.10.2023 entered between the petitioner and the respondents.

For Petitioner : Mr.T.Karthi
for M/s.Aiyar and Dolia

For Respondents : Mr.T.P.Manoharan
Senior Counsel

ORDER

The petitioner has filed this Original Petition under Section 11(5) of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator.

2. The petitioner herein had earlier issued a Pre-Arbitration Notice dated 10.04.2015 to the first respondent's husband and to the first respondent, who had borrowed a sum of Rs.10,00,000/- from the petitioner's company.

3. It appears a loan for Rs.10,00,000/- was advanced by the petitioner to Late K.Selvam, husband of the first respondent/father of the second respondent. The first respondent stood as a guarantor for the loan advanced to Late K.Selvam. The said loan was to be repaid within a period of 36 equated monthly instalments.

4. The loan is secured by an Equitable Mortgage Deeds/by Deposit of Title Deeds dated 18.10.2023, which has also been registered before the Sub- Registrar, Thirukanur vide Document No.2499 of 2013. It appears that the first respondent husband Late K.Selvam serviced the loan up to a particular point of time.

5. In view of the above, a Pre-Arbitration Notice is said to have been issued on 10.04.2015 purportedly under Section 21 of the Arbitration and Conciliation Act, 1996. The said notice was also sent to the first respondent.

6. The arbitrator appointed by the petitioner proceeded to pass an Award on 08.10.2015. The award was challenged by Late K.Selvam and by the first respondent, who stood as a guarantor before the Principal District Judge at Puducherry in O.P.No.13 of 2016.

7. During the pendency of Arbitration O.P.No.13 of 2016 before the learned Principal District Judge at Puducherry, the first respondent husband/father of the second respondent died on 05.12.2016. The learned Principal District Judge at Puducherry, allowed the Arbitration O.P.No.13 of 2016 by holding that there

were large scale irregularities committed in the initiation of the arbitral proceedings as the Pre-Arbitration Notice dated 10.04.2015 was not received by Late K.Selvam, the deceased husband of the first respondent/father of the second respondent and that there were no service of notice as is contemplated under Section 21 of the Arbitration and Conciliation Act, 1996 on the first respondent.

8. The petitioner had challenged the above order dated 25.02.2020 passed by the learned Principal District Judge at Puducherry in Arbitration O.P.No.13 of 2016 before this Court in C.M.A.No.1395 of 2020.

9. The Principal District Judge at Puducherry after considering the arguments advanced by the learned counsel for the petitioner (appellant therein) and the learned Senior Counsel for the respondents herein (respondents therein) dismissed the C.M.A.No.1395 of 2020 vide order dated 13.05.2021.

10. The Court found certain discrepancies in the date of the loan agreement. The Court also concluded that it was highly improbable that the Pre-Arbitration Notice dated 10.04.2015 would have been received by the deceased borrower on 01.05.2015.

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11. Relevant portion of the order dated 13.05.2021 of the learned Single Judge of this Court in C.M.A.No.1395 of 2020 upholding the order of the learned Principal District Judge in Arbitration O.P.No.13 of 2016 reads as under:-

> "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.
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> 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 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 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 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 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) https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 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 with 34(2)(iii), we have no doubt that the arbitral proceedings have not been commenced insofar as the first respondent is concerned. "

28. In order to show that the claimant has not come to Court with a definite case (with reference to the date of agreement) and that the Arbitral proceedings have not been commenced in the manner provided under the Act the respondents have to be given an opportunity to let in evidence. This is an exceptional circumstance as the defense put forward if proved would affect the very initiation of the Arbitral proceedings and the Award passed thereafter. In the instant proceedings the respondents who admit borrowal however questions the arbitral proceedings.

29. No doubt, the proceedings under Section 34 of the Act is summary in nature and what is contemplated under the provisions of Section 34 is to find out whether any ground as provided under Section 34(2) has been made out or whether grounds as provided under Section 13(5) or Section 16(6) of the Act is made out. It is imperative that the petition under Section 34 of the Act has to be disposed of expeditiously based on the pleadings and available documents. However, this does not mean that the aggrieved party should be denied an opportunity to prove the existence of grounds under Section 34(2) of the Act.

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30. The Hon'ble Supreme Court in the case of Fiza Developers and Inter-trade Private Limited v. AMCI (India) Private Limited and another [(2009) 17 Supreme Court Cases 796] taking note of the language of Section 34(2)(a) of the Act held that "applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent/defendant, followed by the opportunity to the application to "prove" the existence of any ground under Section 34(2)."

31. The Hon'ble Supreme Court in another Judgment reported in (2018) 9 SCC 49 - Emkay Global Financial Services Ltd., Vs. Girdhar Sondhi relying on the Judgment reported in Fiza Developers supra made the following observation:

> "We are constrained to observe that Fiza Developers (supra) was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Section 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award 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."

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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 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 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."

12. The petitioner attempted to review the aforesaid order dated 13.05.2021 by filing Review Petition No.173 of 2021. Review Petition No.173 of 2021 was dismissed vide order dated 30.08.2022. https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023

13. In the light of the order passed by the learned Single Judge of this Court, the petitioner has issued a fresh Legal Notice on 22.11.2022 under Section 21 of the Arbitration and Conciliation Act, 1996.

14. Since the respondents have failed to respond to the same for consenting with the appointment of an arbitrator, the petitioner is before this Court in this Original Petition under Section 11(5) of the Arbitration and Conciliation Act, 1996.

15. The learned Counsel for the petitioner has drawn attention to the following decisions rendered by the Hon'ble Supreme Court and various High Courts:

(i) McDermott International Inc. Vs. Burn Standard Company Limited, (2006) 11 SCC 181.

(ii) M/s.Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited in SLP(C).No.11476 of 2018 dated 27.11.2019.

(iii) Magesh Kumar S. and another Vs. Cholamandalam Investment and Finance Company, 2021 SCC Online Mad 16578/AIR 2021 Mad 287.

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(iv) Siva S. and another Vs. Shriram City Union Finance Limited, Represented by its Authorized Representative, 2021 SCC Online Mad 10476.

(v) M/s.Bativala and Karani Vs. K.I.Johny and other in Arb.A.No.34 of 2011 dated 25.03.2022.

(vi) Steel Authority of India Limited Vs. Indian Council of Arbitration and another, 2016 SCC Online Del 1921.

(vii) Bharti Airtel Limited and others Vs. Union of India, 2016 SCC Online Del 2872.

16. A specific reference is made to Paragraph 52 from the decision of the Hon'ble Supreme Court in McDermott International Inc. Vs. Burn Standard Company Limited, (2006) 11 SCC 181, wherein, it has been held as follows:-

> "52. The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

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17. That apart, the learned Counsel for the petitioner would submit that provisions of the Arbitration and Conciliation Act, 1996 has been amended in 2015 and in the light of the decision of the Hon'ble Supreme Court in M/s.Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited in SLP(C).No.11476 of 2018 dated 27.11.2019, there cannot be any objections for appointing an arbitrator.

18. A specific reference is made to Paragraphs 9.8, 9.11 and 9.12 from the said decision, which reads as under:-

> "9.8 In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the Kompetenz-Kompetenz principle.
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> 9. 9 .....
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> 9. 10 .....
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> 9.11 In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre- reference stage, the issue of limitation would require to be decided by the arbitrator.
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> Sub-Section (1) of Section 16 provides that the arbitral tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.
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> 9.12 In the present case, the issue of limitation was raised by the Respondent - Company to oppose the appointment of the arbitrator under Section 11 before the High Court.
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> Limitation is a mixed question of fact and law. In ITW Signode India Ltd. v. Collector of Central Excise, a three judge bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.
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> Reliance is also placed on the judgment of this Court in NTPC v. Seimens Atkein Gesell Schaft, wherein it was held that the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34.

> In M/s.Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 UNCITRAL Model Law which enshrines the Kompetenze principle."

19. It is further submitted that even though certain discrepancies have been pointed out with regard to the date of loan on 16.09.2013 and 26.10.2013, the petitioner is not precluded from having the dispute resolved as the arbitral award has been set aside only on technical grounds and not on merits.

20. It is therefore submitted that in the light of the decisions of this Court rendered in Magesh Kumar S. and another Vs. Cholamandalam Investment and Finance Company, 2021 SCC Online Mad 16578/AIR 2021 Mad 287 and Siva S. and another Vs. Shriram City Union Finance Limited, Represented by its Authorized Representative, 2021 SCC Online Mad 10476 as also by the decision of the Hon'ble Supreme Court in McDermott International Inc. Vs. Burn Standard Company Limited, (2006) 11 SCC 181, this is a fit case for appointing an arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996.

21. Defending the stand of the respondents, the learned Senior Counsel for the respondents has submitted that the limitation under Section 43 of the https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 Arbitration and Conciliation Act, 1996 has not been saved as there was no notice under Section 21 of the Arbitration and Conciliation Act, 1996, was issued properly which has been confirmed not only by the learned Principal District Judge at Puducherry while allowing Arbitration O.P.No.13 of 2016 vide order dated 25.02.2020 which was affirmed by the learned Single Judge of this Court while dismissing the C.M.A.No.1395 of 2020 dated 13.05.2021 filed by the petitioner but also the attempt of the petitioner to review the order dated 13.05.2021 also met with a stalemate as Review Petition No.173 of 2021 filed by the petitioner came to be dismissed by the learned Single Judge of this Court vide order dated 30.08.2022.

22. The learned Senior Counsel for the respondents has drawn attention to the passages from the decision of the learned Single Judge of this Court in C.M.A.No.1395 of 2020 in the earlier round and therefore it is submitted that in the light of the decision of the Hon'ble Division Bench of this Court rendered in M/s.Indus Ind Bank Limited Vs. Mulchand B Jain and others, 2013 2 L.W.67, there is no saving of limitation and therefore on this count, there is no scope for appointing an arbitrator as there is no saving of limitation. https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023

23. The learned Senior Counsel for the respondents also drew attention to the decision of the Hon'ble Supreme Court in Ashatai Vs. Shriram City Union Finance Limited, (2019) 5 SCC 719.

24. A specific reference is made to Paragraphs 3.4 to 3.7 from the said decision in support of the above arguments/submissions, wherein, it was held as follows:-

"3.4. With respect to the second ground, the Respondent – Finance Company has admitted that it had deducted an amount of Rs. 2,120/- towards processing of the loan, and payment of stamp charges. However, it was contended by the Respondent – Finance Company that this deduction was not made towards payment of the insurance premium. A perusal of the documents shows that the Respondent – Finance Company was providing a loan facility to the borrowers, which was secured by an insurance policy issued by its own sister concern viz. M/s Shriram General Insurance Company Limited. It was a composite interlinked transaction. The Cover Note issued by M/s Shriram General Insurance Company Limited, shows that the beneficiary of the insurance policy is the Respondent – Finance Company viz. M/s Shriram City Union Finance Ltd. The Cover Note further shows that the Group Insurance Policy dated 30.03.2015 was issued to 280 borrowers, with the loan amounts mentioned against their respective names. Thus, the deduction of Rs. 2,120/- from the loan account was towards processing of the composite transaction.

https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 3.5. The deceased husband of the Appellant had fulfilled his part of the transaction, by depositing Rs. 400/- by way of the Demand Draft towards the insurance premium, and also the charges of Rs. 2,120/- towards processing of the loan transaction.

3.6. The Respondent – Finance Company however delayed in forwarding the amount to the Insurance Company for obtaining the insurance policy, which was issued on 30.03.2015 for the period 30.03.2015 to 29.03.2016. Hence, there was a clear deficiency of service by the Respondent - Finance Company in delay in obtaining the insurance policy from its sister concern.

3.7. Section 64-VB(2) of the Insurance Act, 1938 provides that :

“64-VB.(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.” It is the admitted position that the deceased husband of the Appellant had paid the insurance premium by a Demand Draft in favour of the Insurance Company. This has been acknowledged in paragraph 4(c) of the Revision Petition filed by the Respondent – Finance Company, as referred to above. As a consequence, the risk would be covered from the date of payment of the insurance premium. The loan was secured from the date on which the insurance premium was paid. The premium having been paid by the Appellant’s husband during his lifetime, the loan was to be adjusted from the insurance policy."

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25. Insofar as the limitation is concerned, the learned Senior Counsel for the respondents has referred to the following decisions of the Hon'ble Supreme Court:

i. Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited, (2021) 5 SCC 738.

ii. State of Goa Vs. Praveen Enterprises, (2021) 12 SCC 581 and iii. J.C.Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and another, (2008) 2 SCC 444.

26. Specifically, a reference is made to Paragraphs 45.1 and 52 from Bharat Sanchar Nigam Limited case (referred to supra), which reads as under:-

"45.1. In paragraph 144, the Court observed that the judgment in Mayavati Trading had rightly held that the judgment in Patel Engineering had been legislatively overruled. Paragraph 144 reads as :

“144. As observed earlier, Patel Engg. Ltd. explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted.” (emphasis supplied) While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage.

At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute. Paragraph 148 of the judgment reads as follows :

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub- section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be https://www.mhc.tn.gov.in/judis

> Arb.O.P.(Com.Div.).No.71 of 2023 the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in Premium Nafta Products Ltd., it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”
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> 52. In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is ex facie time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case."

27. Insofar the decision of the Hon'ble Supreme Court in Praveen Enterprises case (referred to supra), wherein, in Paragraph 36, it has been stated as follows:-

> "36. The issue of limitation is not an issue that has to be decided in an application under section 11 of the Act. SBP & Co. and Boghara Polyfab held that the Chief Justice or his designate will not examine issues relating to limitation, but may consider in appropriate cases, whether the application was in regard to a claim which on the face of it was so hopelessly barred by time, that it is already a dead/stale claim which did not deserve to be resurrected and referred to arbitration. The said decisions do not support the respondent's contention that the details of all claims should be set out in the application under section 11 of the Act and that details of all counter claims should be set out in the statement of https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 objections, and that a claim or a counter claim which is not referred to or set out in the pleadings in the proceedings under section 11 of the Act, cannot be entertained or decided by the arbitral tribunal."

28. Finally, the learned Senior Counsel has also drew attention to the decision of the Hon'ble Supreme Court in Hope Plantations Ltd., Vs. Taluk Land Board, Peermade and another, (1999) 5 SCC 590, wherein, in Paragraph 26, the Hon'ble Supreme Court held as under:-

> "26. It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even he demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'cause of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments

> or adduce further evidence directed to showing that issue was wrongly determined. their only remedy is to approach the higher forum if available. the determination of the issue between the parties gives rise to as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operated in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

29. It is submitted that clearly there is a res judicata and therefore, on this count also, the present Original Petition has to be dismissed.

30. I have considered the arguments advanced by the learned Counsel for the petitioner and the learned Senior Counsel for the respondents.

31. The records that have been filed before this Court and the admitted position is that the first respondent husband/second respondent father Late K.Selvam had indeed borrowed a sum of Rs.10,00,000/- from the petitioner's company. The first respondent has also stood as a guarantor and has signed in the loan agreement. There is also no dispute on this aspect.

32. According to the petitioner, the loan was given by the petitioner to the first respondent's deceased husband K.Selvam on 26.10.2023, whereas, the special adhesive stamp on the loan agreement is dated 16.09.2023. The first respondent's husband was also issued with an insurance cover, which was valid for the period between 24.09.2015 and 23.09.2016. https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023

33. The first respondent's husband (borrower) died on 15.12.2016. The loan was partly serviced up to 05.03.2015. The loan is also secured by an Equitable Mortgage Deeds/by Deposit of Title Deeds on 18.10.2023, which has also been registered before the Sub-Registrar, Thirukanur vide Document No.2499 of 2013.

34. The provisions of Limitation Act, 1963 is applicable in terms of Section 43(1) of the Arbitration and Conciliation Act, 1996.

35. For the purpose of Section 43 of the Arbitration and Conciliation Act, 1996, an arbitration shall be deemed to have commenced on the date referred in Section 21. Section 21 of the Arbitration and Conciliation Act, 1996, reads as under:-

> "21. Commencement of arbitral proceedings: Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

36. The question of limitation is a mixed questions of fact and law. The Hon'ble Supreme Court in M/s.Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited in SLP(C).No.11476 of 2018 dated https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 27.11.2019, has categorically held that in view of the legislative mandate contained in Section 11(6A) of the Arbitration and Conciliation Act, 1996, Court is now only required to examine the existence of arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16 of the Arbitration and Conciliation Act, 1996, which enshrines the Kompetenz-Kompetenz principle, which implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement.

37. Prima facie, it appears that the limitation for enforcing payment of money secured by an equitable mortgage is twelve years in terms of Article 62 Part V (suits relating to immovable property) of the Limitation Act, 1963. These are the issues which can be decided by the arbitrator. Therefore, it cannot be said arbitration proceedings are barred by limitation.

38. These issues cannot be decided at this stage before this Court and the same have to be decided by the Arbitral Tribunal. https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023

39. Court is of the view that the petitioner has made out a case for appointment of the Arbitrator for adjudication of the dispute between the parties as per Clause No.17 of the Loan/Hypothecation Agreement dated 26.10.2023 entered between the parties.

40. With the consent of Counsels, Court is inclined to appoint Mr.D.Ramabathiran, District Judge (Retd.), residing at Door No.19, First Cross Street, Sri Sithanandaswami Nagar, Navarkulam, Lawspet, Puducherry - 605 008, (Cell No.9443331869), as an Arbitrator to enter upon reference and adjudicate the inter se dispute between the parties.

41. The learned Sole Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months from the date of receipt of a copy of this order, without getting influenced by any of the observations made in this order touching on the limitation.

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42. The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain ex parte, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

43. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.

44. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under the provisions of Arbitration and Conciliation Act, 1996, before the Arbitrator.

05.10.2023 Index : Yes/No Internet : Yes/No Speaking Order/Non-Speaking Order Neutral Citation : Yes/No arb https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.).No.71 of 2023 C.SARAVANAN, J.

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