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Sarla Devi Vs. M/S Ge Money Financial Services Pvt. Ltd.

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Court : Delhi

Decided On : Apr-25-2014

Judge : Manmohan Singh

Appellant : Sarla Devi

Respondent : M/S Ge Money Financial Services Pvt. Ltd.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Order decided on: April 25, 2014 + O.M.P. 902/2012 SARLA DEVI Through: ..... Petitioner Mr. Kailash Vasulev, Sr. Advocate with Ms. Jyoti Taneja, Adv. versus M/S GE MONEY FINANCIAL SERVICES PVT LTD ..... Respondent Through: Mr. Ajay Uppal, Adv. CORAM: HON'BLE MR.JUSTICE MANMOHAN SINGH MANMOHAN SINGH, J.

(Oral) 1. The petitioner filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) read with Order IX Rule 13 CPC for setting aside the ex-parte award dated 10th April, 2012 passed by the Sole Arbitrator.

2. When the matter called on one application on behalf of respondent. It was passed over. Even on second call there was no representation on behalf of respondent. The learned counsel for petitioner has advanced the submissions and the matter was kept for orders. However, in post lunch, the matter was mentioned by Mr. Ajay Uppal, Advocate who made submissions for some time.

3. The brief facts are that Shri Sampath Kumar had allegedly obtain a home equity loan of ` 10,01,000/- (Rupees Ten Lakhs One Thousand only) from the respondent on 13th May, 2005. As per the Agreement the said loan was to be repaid in 84 monthly instalments of `19,037/-. The instalment was to start from 7th June, 2005. At the time of obtaining the loan, he had mortgaged the property bearing No.A-36/1, Vinod Nagar (West), Street No.10, Delhi with the respondent. Shri Tanmay Kumar, son of the petitioner has signed the Agreement as a guarantor. It is alleged in the petition that husband of the petitioner paid 12 instalments starting from 7 th June, 2005 to 7th May, 2006 i.e. `2,28,444/- against the aforesaid loan. Shri S.P. Sampath Kumar, husband of the petitioner, died on 17th May, 2006 due to cardiac arrest. Copy of the death certificate and his wifes election card is also filed as Annexure P-1 and Annexure P-2 respectively. On 12th September, 2012 the petitioner was informed by one of her son about the filing of the Execution Petition No.271/2012 against the late husband of the petitioner and one guarantor for execution of the Award dated 10th April, 2012. In the said execution, respondent has prayed for attachment and to sell the mortgaged property bearing No.A-36/1, Block A, West Vinod Nagar, New Delhi-110092 to satisfy the decreed amount. After having knowledge of passing of the Award dated 10th April, 2012, the petitioner filed the objection under Section 34 of the Act. In para 6 of the petition, specific statement has been made that sometime in July-August 2006 some officials from the respondent company visited with a demand towards the pending instalments. The son of the petitioner informed the said official about the death of Sh. S.P. Sampath Kumar and also handed over original copy of the death certificate. Thereafter the petitioner neither received any communication nor any demand notice from the respondent with respect to any transaction between them and her late husband.

4. The argument of the petitioner were not replied by the respondent. There is no affidavit on behalf of respondent to deny the stand taken by the petitioner except it is submitted by Mr. Uppal that the respondent was not aware about the death of Mr. S. Sampath Kumar and Manoj Kumar, counsel did not even inform the Arbitrator when he appeared on 15 th November, 2011, which has also been recorded in para no.11 of the Award. As no one appeared on behalf of Sh. S.P. Sampath Kumar the Award was passed in favour of the claimant and against the

respondents. It is alleged that respondent is entitled to recover the claim amount i.e. a sum of ` 31,12,635/- along with interest payable @ 18 % per annum from 23rd October, 2011 till its realization/satisfaction and the said Award was passed on 10th April, 2012.

5. It is the admitted position that the arbitration in the present case was invoked in the year 2011, the husband of the petitioner late Sh. S.P. Sampath Kumar died on 17th May, 2006, death certificate is also placed on record, which is denied by the respondent. It is evident from the material available on record that on the date of invocation of the arbitration, the date of arbitration proceeding and on the date of rendering the Award, the proceeding were conducted against the death of Sh. S.P. Sampath Kumar. She is failed to understand that he expired in the year 2006, nor could he give vakalatnama to Manoj Kumar, who allegedly appeared on 15th November, 2011. Learned counsel for the petitioner has referred the decision of the Supreme Court in the case of Rajendra Prasad and Anr. Vs. Khirodhar Mahto and others

199. Supp (3) Supreme Court Cases 314 in which under the similar situation it has been held that the decree as against the dead person is a nullity. Similarly in the case of N. Jayaram Reddi and another vs. The Revenue Divisional Officer and Land Acquisition Officer, AIR1979 Supreme Court 1393 it has been held that a decree against the a dead person is necessarily a nullity for all purposes the relevant paras 5 and 6 reads as under:

5. But even if it were assumed that the government appeal deserved to be dismissed as a whole because of its abatement against the deceased respondent, there is no justification for Mr. Sens further argument that the High Courts decree dated February 4, 1969, was a nullity merely because it was passed against a dead person, namely Y. Prbhakr Reddy. It has to be appreciated that a decree against a dead person is not necessarily a nullity for all purposes. It will be sufficient to say that such a decree has been held to be a nullity because it cannot be executed against his legal representative for the simple reason that he did not have a full opportunity of being heard in respect of it, and the legal representative cannot be condemned unheard. So if a respondent to an appeal dies, and the

appeal abates because of the failure his legal representative on the record within the time limited by law, and the appellate court loses sight of that development or ignores it, will still be permissible for the court hearing the appeal to bring his legal representative on the record on an application to that effect and to examine any application that may be made for condonation of the delay. It is also permissible, and is in fact the common practice, to remand the case for disposal according to law to the court in which it was pending at the time of the death of the deceased party. The law has therefore provided, and accepted, modes for re-opening and hearing the appeal in such cases.

6. The basis fact remains that a decree against a dead person is treated as a nullity because it cannot be allowed to operate against his representative when he was never brought on the record to defend the case. Any other view would not be possible or permissible for it would fasten on him a liability for which he did not have any hearing. So while the law treats such a decree as a nullity qua the legal representative of the deceased defendant or respondent, there is nothing to prevent him from deciding that he will not treat the decree as a nullity, but will bide by it as it stands, or as it may be modified thereafter on appeal. If a legal representative adopts that alternative or course of action, it cannot possibly be said that his option to be governed by the decree is against the law or any concept of public policy or purpose, or the public morality. It is thus a matter entirely at the discretion of legal representative of a deceased respondent against whom a decree has been passed after his death to decide whether he will raise the question that the decree has become a nullity, at the appropriate time, namely, during the course of the hearing of any appeal that may be filed by the other party, or to abandon that obvious technical objection and fight the appeal on merits. He may do so either because of his death in the strength of his case on the merits, or because of incorrect legal advice, or for the reason that he may not like to rely on a mere technical plea, or because in the case of cross-appeals, he may have the impression that bringing the legal representative of the deceased respondent on record in an appeal by a co-appellant will enure for the benefit of or be sufficient for purposes of the cross-appeal. An abandonment of a technical plea of abatement and the consequential dismissal of appeal, is therefore a matter at the discretion of the legal representative of the deceased respondent and there is no

justification for the argument to the contrary. It is equally futile to argue that an appellate court is denude of its jurisdiction to hear an appeal in which one of the respondents has died and the right to sue does not survive against the surviving defendant or defendants alone merely because no application has been made to bring his legal representative on record when no objection to that effect is raised by anyone.

6. The award was passed against Sh. S.P. Sampath Kumar and Sh. Tanmay Kumar, son of Sh. S.P. Sampath Kumar, he was the guarantor of the loan agreement.

7. Considering all the facts and circumstances of the case I am of the considered view that the Award passed against late Shri S.P. Sampath Kumar is a nullity and the same is set aside 8. With regard to Tanmay Kumar is concerned against whom also the Award is passed, the respondent is at liberty to proceed against him in accordance with law. It appears from record that Tanmay Kumar has not challenged the award.

9. This petition is accordingly disposed of. (MANMOHAN SINGH) JUDGE APRIL25 2014

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