

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2017

CORAM

THE HONOURABLE Dr. JUSTICE. S.VIMALA

C.M.A.No.496 of 2017
and C.M.P.No.3216 of 2017
and C.M.P.No.4079 of 2017

Vendhar Movies,
Rep. By S.Madan,
Office at Basement of Doshi Garden,
Vadapalani, Chennai.

.... Appellant

Versus

S.Mukundchand Bothra
Son of Late Srichand Botha,
Rep. By its Power of Attorney,
M.Gangan Bothra.

... Respondent

Appeal filed under Section 37(1) of the Arbitration and Conciliation Act, 1996, seeking to set aside the Arbitration Interim Award dated 08.10.2016 passed by the Sole Arbitrator in I.A.No.2 of 2016 in Arbitration Case No.1 of 2016.

For Appellant	: Mr.M.K.Kabir, Senior Counsel for M/s.Dinesh
For respondent	: Mr.M.Gangan Botha, (Party-in-person)

JUDGMENT

Exercising powers under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), the learned Arbitrator granted interim injunction in I.A.No.2 of 2016 in Arbitration case No.1 of 2016, restraining the respondent/appellant in C.M.A., from releasing the Tami Movie title "Mottai Siva Ketta Siva", till the disposal of

the arbitration proceedings.

1.1. Originally, there was an interim order on 08.06.2016 and later on, it was extended till the disposal of the arbitration proceedings on 08.10.2016.

1.2. Execution proceedings have already been taken in E.P.No.141 of 2016 pending before the Original Side of the High Court, Madras.

2. One of the creditor, namely, M/s.Futhra Finance has filed C.M.P.No.4079 of 2017, praying to implead them as respondent in C.M.A.No.496 of 2017.

2.1. Learned counsel for the Creditor vehemently contended that the claimant/respondent herein cannot be permitted to argue the matter, when he has neither obtained power of attorney from his father, nor has obtained permission of this Court to represent his father before this Court. In support of this contention, he relied upon the decision reported in AIR 1978 Supreme Court 1019 (**Harishankar Rastogi vs. Girdhari Sharma and another**), wherein, it has been held as follows:

“It is absolutely clear that anyone who is not an advocate, cannot, as of right, force himself into this Court and claim to plead for another. **Permission may however be**

granted by this Court, taking the justice of the situation and several other factors into consideration for such ***non-professional representation.***"

2.2. The second decision is one reported in AIR 2005 SC 48(1) (Jimmy Jahangir Madan vs. Bolly Cariyappa Hindley (deceased by L.Rs.)), wherein, it has been held as follows:

"An agent with a power of attorney to appear and conduct judicial proceedings, but, who has not been so authorised by the High Court, has no right of audience on behalf of the principal, either in the appellate or original side of the High Court..... There is no warrant whatever for putting a power of attorney given to a recognized agent to conduct proceedings in Court in the same category as a vakalat given to a legal practitioner, though latter may be described as a power of attorney (which) is confined only to pleaders, i.e. those who have to right to pleading the Court.

2.3. When the Court wanted to know the status, the claimant's son who appeared before the Court would submit that he has obtained such a permission from the First Court and not from this Court. Therefore, the non-filing of permission petition is not out of ignorance. Still, when it was stated that his father a heart patient and therefore, as his son, the party-

in-person is appearing, this Court heard the argument in the interest of justice. Moreover, as the objection was raised only belatedly and considering his competency and suitability, the arguments were heard. However, it is made clear that without filing such a permission petition, no audience in future will be given.

3. The claimant/respondent has initiated arbitration proceedings, based on the agreement dated 11.01.2016, but, the appellant has disputed the genuineness of agreement, claiming the same as forgery.

3.1. A mere perusal of the signature in all the three papers would go to show that the signature in all the three papers did not appear to be by one and the same person, as there is substantial and critical variation, (which cannot be said to be usual and normal variation) in the signature. The same is more visible by comparison of signature with microscope.

3.2. During the course of argument, when this Court wanted the claimant's son, who represented the claimant, to disclose the mode of payment, he has stated that the mode of payment was cash. This statement also has to be accepted with a pinch of salt, when the amount stated to be due is Rs.7,50,00,000/-.

3.3. Moreover, stamp papers have been purchased on 24.03.2014, whereas, the agreement is dated 11.01.2016, driving the Court to the

probable conclusion that agreement is not likely to be genuine one.

4. The learned counsel for the appellant submitted that the order passed by an Arbitrator is a nullity, having been obtained by the claimant by suppression of material facts and also by playing fraud on the Tribunal and therefore, the order has to be set aside. It is also pointed out that there is neither prima facie case nor balance of convenience in favour of the claimant and hence, the Arbitrator ought not to have granted an order of injunction in favour of the claimant.

4.1. With regard to maintainability of the appeal under Section 37 of the Arbitration and Conciliation Act, the decision reported in **AIR 2010 Rajasthan 80 (Mohan Das (deceased by Lrs.) vs. Additional District Judge No.3, Jodhpur and others** is relied upon, where under, it has been held that the interim order passed by the learned Arbitrator is subject to appeal under Section 37 of the Act. Therefore, maintainability of the appeal is not an issue.

4.2. The contention on legal aspect is that the commencement of arbitration proceedings is incumbent on the receipt of Notice to be sent under Section 21 of the Act and if no notice is received by the respondent/appellant, then, there is no commencement of arbitral proceedings and therefore, the interim order passed is non-est in the eye of law. The decision reported in **M/s.Indus Ind Bank Ltd. vs. Mulchand**

B Jain is relied upon, where under, it has been held 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 and if no notice is received, then, there is no commencement of arbitration proceedings. In this case, no contention has been raised by the respondent/claimant that notice was issued under Section 21 of the Arbitration and Conciliation Act and therefore, the conclusion is that there is no commencement of arbitration proceedings.

4.3. The next contention is that the learned Arbitrator did not comply with the minimum requirements of a proper hearing and therefore, the arbitral proceedings are not valid. In support of the same, the following three decisions are relied upon.

(i) AIR 2005 Karnataka 313 (Rudramuni Devaru vs. Shrimad Maharaj Niranjana Jagadguru and others), where under, it has been held as follows:

“The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have the opportunity to be present throughout the hearing; (iv) each party must have the reasonable opportunity to present statements, documents, evidence and arguments in support of

his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date for hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagement of himself elsewhere, etc. However, it is true that a party has no absolute right to insist of his convenience being consulted in every respect. The matter is very much within the discretion of the arbitral tribunal and the Court may intervene only in the cases of, positive abuse. Since each party has a right to remain present throughout the hearing, the arbitral tribunal is not to exclude either party even from a portion of hearing without the consent of such party. The arbitral tribunal is expected to give opportunity to both the parties to present their respective cases and evidence in support thereof before it. Each of the parties is required to be apprised with statements, documents and evidence adduced by his opponent which are adverse to his case. Each party is also entitled to know any statements, documents, evidence or informations collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the

parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under Section 24 of the Act. "

(ii) AIR 1998 Calcutta 174 (Lohia Jute Press (P) Ltd. and others vs. The New India Assurance Co. Ltd. and others), where under, it has been held as follows:

"The principles governing the Arbitrator's right to proceed ex parte : --

(1) If a party to an arbitration agreement had failed to appear at one of the sittings, the arbitrator could not or, at least ought not to, proceed ex parte against him in that sitting.

(2) Where non-appearance was accidental or casual, the arbitration should ordinarily proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party.

(3) If, on the other hand, it appears that the defaulting party had absented himself for defeating the object of the reference, the arbitrator should issue a notice that he intended at specified time and place to proceed with the reference and that if the party concerned did not attend he would proceed in his absence.

(4) But if after making such peremptory appointment issuing such a notice the arbitrator did not in fact proceed ex parte on the date fixed, but fixed another subsequent date, he could not proceed ex parte on such subsequent date, unless he issued a similar notice in respect of that date as well.

(5) If he issued a similar notice and the party concerned did not appear, an award made ex parte would be in order. But, if he did not issue such notice on the second occasion but nevertheless proceeded ex parte, the award would be liable to be set aside in spite of a notice of peremptory hearing having been given in respect of the earlier date, subject however to the condition that prejudice was caused to the party against whom the ex parte order was made.

(iii) AIR 1983 Del 413 (1) (M/s.Lovely Benefit Chit Fund and Finance Pvt. Ltd. vs. Puran Dutt Sood and others), where under, it has been held as follows:

"11. From these authorities, it is apparent that an arbitrator ought not to proceed ex parte against a party if he has failed to appear at one of the sittings. The arbitrator should fix another date for hearing and give notice to the defaulting party, of his intention to proceed ex pane on a specified date time and place. Even after notice if the defaulting party does not take part'in the proceedings the arbitrator may proceed in his absence. "

5. The respondent would submit that the learned Arbitrator has done everything legally possible/permissible to get the notice served on the respondent and therefore, it must be construed that notice has been served on the respondent. Under normal circumstances, when the learned Arbitrator/any Court follow legally available procedure to get the notice served, then, there is a presumption of deemed service and then, the Court can conclude that the notice has been served, but, in this case, it is pointed out by the learned counsel for the appellant that the appellant was missing from 29.05.2016 and during that time, when Habeas Corpus proceedings were pending, the claimant took out an application to implead himself as a party in C.M.P.No.9209 of 2016 on 30.08.2016, and therefore, it was within the knowledge of the claimant that the appellant was not available and this should have been brought to the knowledge of the

Arbitrator and in that event, the learned Arbitrator would have granted some more time for appearance or issued a direction to the Family members to take steps to trace out the appellant for hearing. Under such circumstances, the contention that there is no notice and there is no proper proceedings by the Arbitrator must be accepted.

6. Under the stated circumstances, the party-in-person representing the respondent would contend that the appeal is barred by limitation and therefore, the maintainability of the appeal in the light of limitation should be considered by this Court under Section 5 of the Limitation Act and when there is no application to condone the delay, the appeal should be dismissed. In support of this contention, the decision of this Court in the case of **Shoba Viswanathan vs. D.P.Kingsley**, is relied upon. The relevant observation reads as under:

“3. In [Krishnasami Panikondar v. S.R.M.A.R. Ramasami Chetty and Ors.](#) (34 MLJ 63), the Privy Council held that the question of limitation should not be left open till the hearing of the appeal, although it was till then the usage in India. The Privy Council categorically ruled that the Courts in this Country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal. It is pointed out that the admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour and where such an order is made ex parte, it is open to reconsideration at the respondent's instance.”

7. The learned counsel for the appellant responded to the contention by pointing out that the appeal is not barred by limitation, when the date of receipt of the order is taken into account. It is further submitted that when there is no opportunity given to the appellant to participate in the proceedings, it is not the date of order, but, it is a date of receipt of the order, that should be the starting point for limitation. This contention is acceptable as the appellant had no opportunity to participate in the proceedings as he was found missing during the relevant time.

8. The next contention of the respondent is that the issues raised by the appellant in this forum are the issues which ought to have been raised before the Arbitrator and in support of the same, the decision of this Court in the case of **M/s. Vign Developers Pvt. Ltd. Vs Vanjulavalli**, is relied upon. The relevant observation reads as under:

“4. On perusal of the pleadings and on hearing the learned counsel for the parties, I am of the view that insofar as the first issue is concerned, that is the matter of interpretation of the agreement of sale and the parties having conferred the jurisdiction on the Arbitrator qua all disputes, that could be something for the Arbitrator to examine. The second issue raised is no more res integra in view of the judgment of the Honourable Supreme Court in [Swiss Timing Limited vs. Organising Committee, Commonwealth Games 2010](#), reported in AIR 2014 SC 3723, holding that such matters can be decided by the Arbitrator. ”

8.1. So far as this proposition is concerned, this Court is of the view that the issue regarding the jurisdiction of the Arbitrator, has to be decided only by the Arbitrator and not by this Court.

9. Under section 16 of the Arbitration and Conciliation Act, the Arbitrator could rule on his own jurisdiction including ruling on any objection with respect to existence or the validity of the arbitration agreement.

10. Coming to the merits of granting injunction, the Arbitrator is expected to consider the prima facie case and balance of convenience in granting injunction and the irreparable loss, which would occasion if the injunction is not granted.

11. So far as this case is concerned, the existence of the agreement based on which the claimant is asking for injunction, itself, is under dispute on the ground that the agreement is a forged one. The available evidence, intrinsic in the agreement itself, did not prima facie lie in favour of genuineness. No doubt, when the injunction was granted, the appellant was not available before the Arbitrator to say that the agreement was a forged one. However, a mere perusal of the agreement itself would have given sufficient indication that the document is not free from doubt and that it requires establishment by adducing evidence. Neither prima facie case is established nor balance of convenience is in

favour of the claimant. Therefore, it is not a fit case for grant of injunction.

12. In a film release not only the interest of film maker and the financier is involved, but it involves the right of third parties, like, distributors, licencees, employees, the artists, the other creditors and others. When the rights of third parties are also involved, it would be harmful, if the court passes orders stopping the release of the film. Unless the court is satisfied that there is no other way of granting justice to the parties except by a preventive injunction, the Court/Arbitrator is not justified in granting the injunction. It cannot be said that except by stopping the release of the film, the claimant will not be able to get justice. Therefore, the impugned award passed by the Arbitrator is hereby set aside.

13. Under normal circumstances, this Court would have ordered security to be furnished or deposit of the money claimed. However, in this case, no such order is passed, considering the nature of documents produced and the facts and circumstances of this case.

14. In the result, the Civil Miscellaneous Appeal is disposed off and the impugned order dated 08.10.2016 passed by the sole arbitrator in I.A.No.2 of 2016 in Arbitration case No.1 of 2016 and the order dated 08.06.2016 are hereby set aside. I.A.No.2 of 2016 is dismissed. The

matter is remitted back to the Arbitrator with liberty to the parties to raise those issues, which were raised before this Court to be raised before the Arbitrator. As the main C.M.A is disposed of, the impleading petition is closed. No costs. Consequently, connected miscellaneous petition is closed.

03.03.2017

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Note : Issue order copy by today itself

Dr.S.VIMALA, J.

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C.M.A.No.496 of 2017

03.03.2017