

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.03.2017

C O R A M

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.M.A.No.997 of 2017 and

CMP.No.4913 of 2017

Vendhar Movies
represented by S.Madan
Office at Basement of Doshi Garden,
Vadapalani, Chennai. ... Appellant/Respondent

-Vs.-

1. S.Mukunchand Bothra,
S/o.Late Srichand Bothra,
rep. by its Power of Attorney
M.Gangan Bothra,
43, Veerappan Street,
Sowcarpet, Chennai-79.
2. Vedavalli Kumar,
Sole Arbitrator,
New No.3 Dr.Vasudevan Street,
Kilpauk,
Chennai-10. Respondents/Claimant & Sole Arbitrator

Civil Miscellaneous Appeal filed under Section 37(1) of the Arbitration and Conciliation Act, 1996, against the order of the 2nd respondent dated 06.03.2017 passed in I.A.No.3 of 2017 in Arbitration Case No.1 of 2016 and to set aside the same.

For Appellant ... Mr.P.H.Aravindh Pandian,
Senior Counsel for Mr.Dinesh
For 1st Respondent ... Mr.S.V.Jayaraman,
Senior Counsel
for Mr.T.Dhanasekaran

J U D G M E N T

The appellant is the respondent in Arbitration Case No.1/2016. The appeal is filed, challenging the order of the learned Arbitrator dated 06.03.2017 passed in I.A.No.3 of 2017 in Arbitration Case No.1/2016.

2. The claim was made by the 1st respondent/claimant seeking an award, directing the appellant herein to pay a sum of Rs.8,05,51,240/- with interest at 36% compounded monthly on the principal sum of Rs.7,50,00,000/-. The claim was made before the Sole Arbitrator. The said claim was made, based on an agreement of loan dated 11.01.2016 and the supporting documents to the same, namely, Promissory Notes dated 11.01.2016 for Rs.50,00,000/- each and another Promissory Note dated 04.04.2016 for a sum of Rs.6,50,00,000/-.

3. The I.A.No.2/2016 was filed by the claimant seeking an order of interim injunction from the Arbitrator, exercising his powers under Section 17 of the Arbitration and Conciliation Act, 1996, restraining the appellant from releasing the Tamil Movie titled 'Mottai Siva Ketta Siva', till the disposal of the arbitration proceedings. An order of interim injunction was granted on 08.06.2016 and was subsequently extended on 08.10.2016. Aggrieved by the said order of the Arbitrator, CMA.No.496/2017 was filed before this Court and this Court had, by virtue of the order dated 03.03.2017, disposed of the said appeal, setting aside the order passed on 08.06.2016 and the subsequent order on 08.10.2016 in I.A.No.2/2016 and remanded the matter 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. The said order as stated earlier was passed on 03.03.2017 and a copy of the same was made available only on 06.03.2017.

4. In the meanwhile, the learned Arbitrator, by letter dated 02.03.2017, issued a letter expressing her inability to conduct the case on 04.03.2017 as fixed earlier and assuring to communicate the further date of hearing later. The said notice was received by the Counsel for the appellant. As the appellant was in jail, the Counsel had made an endorsement that he would obtain suitable instructions for any further appearance.

5. While so, the 1st respondent/claimant herein had filed I.A.No.3/2017 seeking a direction to the appellant to deposit a sum of Rs.8,05,51,240/- and till such amount is deposited, praying to grant an order of interim injunction, restraining him and his men from releasing the Tamil Movie titled 'Mottai Siva Ketta Siva' and also for an attachment of the said movie in its 'Digital Encrypted Format' with a further direction to 'Real Image Media Technologies Private Limited' to implement the said order as per the directions given by this Court in CMA.No.496/2017.

6. The above said application was filed on 06.03.2017 and on the same day, even, without a notice to the respondent/appellant herein, the arbitrator proceeded to hear the same and passed an interim award, allowing all the prayers that were sought for in I.A.No.3/2017. The said order is now under challenge in the present appeal.

7. The learned Senior Counsel appearing for the appellant contended that no notice for filing such application was served on the appellant, no copies were furnished and no time was granted to them for filing any counter and also the date of hearing was not intimated to them, prior to passing of the impugned order. Hence, it is argued that the order passed by the Sole Arbitrator was against the principles of natural justice and opposed to public policy. The learned Senior Counsel for the appellant further contended that the order suffers from infirmity not only because of non-issuance of the notice to the appellant, but, the order suffers from irregularity as the Sole Arbitrator exceeded her jurisdiction while passing the impugned order.

8. At this juncture, it is relevant to consider the order passed by this Court in CMA.No.496/2017, dated 03.03.2017. This Court, while passing orders, had considered that there was a variance in signature found on the agreement dated 11.01.2016. Besides the stamp paper for the same was purchased on 24.03.2014 whereas the agreement was written on it on 11.01.2016 after two years. The amount advanced, which was a huge sum of Rs.7,50,00,000/-, was also said to have been paid only by cash which was not readily believed by the Court, thereby drawing an inference that the agreement is not likely to be a genuine one. In the said order, this Court has already held that the claimant had not made out a prima facie case for grant of interim injunction as the agreement based on which injunction was sought for itself was under dispute on the ground that the agreement is a forged one. Even at the first time, when the injunction was granted by the Arbitrator, the appellant/respondent was not heard. As neither a prima facie nor balance of convenience was in favour of the claimant, this Court had come to the conclusion that the claimant was not entitled to an order of injunction. As the issue related to the release of the Feature Film, involving the rights of several third parties, this Court vacated the interim injunction granted earlier by the Arbitrator by setting aside the order.

9. So far as the security to be furnished by the claimant was concerned, this Court had categorically held that the same was not necessary as the very agreement was disbelieved. Thus, while vacating the order of injunction granted by the Sole

Arbitrator, the matter was remitted back to the Arbitrator with liberty to the parties to raise all those issues that were raised before this Court and proceed with the Arbitration. However, instead of doing so, by moving the application in I.A.No.3/2017, the respondent had invited the order now impugned in the present appeal.

10. The learned Senior Counsel appearing for the appellant contended that though the order was passed on 03.03.2017, the same was made available to the parties only on 06.03.2017 and the Sole Arbitrator, possibly, could not have issued notice to any of the parties to proceed with the matter urgently on 06.03.2017 and passed the impugned order. It is pertinent to note that the very same Arbitrator had issued a letter expressing her inconvenience to proceed with the matter on 04.03.2017 due to some personal inconvenience assuring to inform the further date of hearing. While so, the appellant cannot be expected to have hearing on 06.03.2017 in the absence of any notice to him. Even though the appellant may be inside the prison, as his Counsel has been representing, the Arbitrator could have issued notice to the Counsel for the appellant.

11. It is pointed out by the learned Senior Counsel for the appellant that after the orders were passed on 03.03.2017 by this Court, the Movie titled 'Mottai Siva Ketta Siva' was released. However, by virtue of the order passed by the Arbitrator on 06.03.2017, the appellant was enjoined from releasing the movie. Therefore, the appellant had rushed to this Court and obtained an order of Status-quo on 15.03.2017 and the movie is allowed to be screened on Theaters.

12. The learned Senior Counsel for the appellant contended that the order of the learned Sole Arbitrator was unjust inasmuch as stating that the High Court had failed to place reliance on the pro-notes that were executed by the respondent in favour of the claimant. The Arbitrator also believed the version of the claimant by stating that he was not given an audience before passing of an order and permitted him to engage a Counsel on his behalf.

13. In fact, in the order dated 03.03.2017, it is specifically recorded in paragraphs 2 and 3 as follows:

'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 is 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 the 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.

14. The Arbitrator ought to have read the order passed by this Court which had recorded that the son of the claimant appeared as party-in-person and he was allowed to address the Court. Secondly, with respect to furnishing of security, this Court had specifically held in para 13 that "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."

15. While this Court had specifically not wanted to order furnishing of security or a condition to deposit the money, the Arbitrator had misinterpreted the same by reading only the first line and conveniently omitted the second line.

16. It is also pointed out by the learned Senior Counsel for the appellant that the order passed in I.A.No.2/2016 was sought to be enforced in E.P.No.141/2016, even before the expiry of the statutory appeal period. The above conduct would show that the claimant/1st respondent was only desperate in harassing the appellant in the process of recovering the money before adjudication of the issue on merits.

17. On the other hand, the learned Senior Counsel appearing for the 1st respondent contended that when the orders were passed in CMA.No.496/2017, the claimant was not at all heard and he was kept in dark about the orders being passed. But the said contention cannot mean as the very order has categorically mentioned about the opportunity having been given to the son of the claimant, who was present in the Court, despite the fact that he had not even obtained permission from the court to appear on behalf of his father. Secondly, in order to seek a direction to the appellant to deposit a sum of Rs.8,05,51,240/-, there should be a prima facie element existing to show that there was a money transaction. In fact, this Court had earlier stated that the payment of huge sum of Rs.7,50,00,000/-, being paid in cash, the said fact could be accepted only with a pinch of salt. So far as the agreements, promissory notes were concerned, there is only a mere denial of the same as forged by the appellant. Till today, the written statement has not been filed in the Arbitration Proceedings and it is exclusively

within the jurisdiction of the arbitrator to go into the merits of the case and pass an award. Hence, this Court is not inclined to go into the validity or genuineness of the agreement.

18. It was only contended by the learned Senior Counsel for the 1st respondent that if the Movie was released and the sale proceeds are taken away, there would not be any security for his claim. Hence, he had moved the Arbitrator in an emergent situation and fairly admitted that no notice was issued to the other side.

19. The learned Senior Counsel appearing for the appellant also put forth the contention that the application filed in I.A.No.3/2017 would operate as res judicata even for interim orders. When this Court had specifically vacated the injunction granted earlier, refused to pass an order to furnish security and directed the parties to go before the Arbitrator to resolve the disputes on merits, the order passed by the Arbitrator for the second time on the same issue would definitely operate as res judicata.

20. The learned Senior Counsel for the appellant places reliance on a decision of the Hon'ble Supreme Court in Iftikhar Ahmed and others vs. Syed Meharban Ali and others reported in (1974) 2 Supreme Court Cases 151 in which paragraphs 15 and 16 read as follows:

"15. We see no reason why a previous decision should not operate as resjudicata between co-plaintiffs if all these conditions are mutatis mutandis satisfied. In considering any question of resjudicata we have to bear in mind the statement of the Board in Sheoparsn Singh v. Ramnandan Prasad Narayan Singh that the rule of res judicata "while founded on ancient precedent is dictated by a wisdom which is for all time" and that the application of the rule by the Courts "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

The raison d'etre of the rule is to confer finality on decisions arrived at by competent courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule (see Ram Bhaj v. Ahmad Said Akhtar Khan)

16. In the award, the arbitrator has stated th at the judgment of the High Court in the second appeal would not operate as res judicata as regards the title

to the properties but was only a piece of evidence. The arbitrator came to the conclusion that the respondents were in joint possession of the properties and, therefore, there was no ouster. If the judgment operated as res judicata, the respondents had no title to the properties. There was no finding by the arbitrator that by adverse possession they had acquired title to the properties at any point of time. The question which was referred to the arbitrator was the dispute between the parties as regards the title to the properties. If the judgment of the High Court operated in law as res judicata, it would be an error of law apparent on the face of the award if it were to say that the judgment would not operate as res judicata. The District Judge, was, therefore, right in holding that the award was vitiated by an error of law apparent on its face in that it was based on the proposition that the judgment of the High Court would not operate as res judicata on the question of title to the properties. If an award sets forth a proposition of law which is erroneous, then, the award is liable to be set aside under Section 30 of the Arbitration Act. This Court has held that the provisions of the Arbitration Act will apply to proceedings by an arbitrator under the Act (see Charan Singh v. Babulal)''

21. The learned Senior Counsel also places reliance on yet another decision of the High Court of Delhi in Value Advisory Services vs. ZTE Corporation and others reported in MANU/DE/1032/2009 in which it is relevant to extract paragraph 21 hereunder:

''21. Thus, in the present case, where as yet there is no decree or award in favour of petitioner and when the claims of the petitioner are being disputed by respondents No.1 and 2, and when the interest of the petitioner is sufficiently protected by order in the earlier petition, it is not deemed appropriate to direct the respondent No.3 to deposit the monies owed by it to respondents No.1 and 2, in this Court. The reason of respondent No.3 using the said monies for its own purpose also does not sway me to direct so, for the reasons of Section 22 of SICA, 1985, though ordinarily the possibility of such third party/garnishee dissipating the monies may be a reason for directing deposit in court. I do not find the respondent No.3 to be in the position of a trustee. Also, there is considerable force in the contention of counsel for respondent No.3 that the petitioner had sought the said relief in the earlier petition also and it was not so

granted. There is no change in position since then. The principles of res judicata apply to interim orders also and the petitioner cannot relitigate.'

Thus, the orders passed by the Arbitrator in the case on hand is also barred by the principles of res judicata.

22. In the light of the above discussion, the orders passed by the Sole Arbitrator is set aside and the Arbitrator is directed to complete the proceedings as expeditiously as possible.

23. With the above direction, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

Mrs.Vedavalli Kumar,
Sole Arbitrator,
New No.3 Dr.Vasudevan Street,
Kilpauk, Chennai-10.

+2cc to Mr.T.Dhanasekaran, Advocate SR.18606
+2cc to M/S.Dinesh, Advocate Sr.18874
+1cc to Mr.Gaurav Chattrjee, Advocate Sr.18948

CMA No.997 of 2017

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