

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.04.2017
Delivered on : 19.12.2017

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE M.SUNDAR

O.S.A.No.173 of 2014

S.A.Fasludeen
(1st Appellant has been removed
as per Court order dated 5.4.2017)

S.A.Sharffudin .. Appellants

Vs.

1. Siyauddin

2. Hazeena

3. Basheera

4. S.A.Mohideen

5. Hon'ble Mr.Justice S.A.Kader
Former Judge, High Court of Madras
Presiding Arbitrator
H-33, Parvathy Street
Kalakshetra Colony
Besant Nagar, Chennai - 600 090.

6. K.Ganesan
Arbitrator - Advocate
West Car Street
Ambasamudram
Tirunelveli District.

7. Dr.E.M.Abdul Razack
Formerly Professor of Dermatology
Stanley Medical College
Arbitrator, No.6, Subadral Street
Triplicane, Chennai - 600 005.

.. Respondents

PRAYER: Appeal under Order XXXVI Rule 1 of the Original
Side Rules read with Section 37 of the Arbitration and
Conciliation Act against the order dated 7.11.2013 passed
in O.P.No.59 of 2012.

O.P.No.59 of 2012:

Petition filed under Section 34 of the Arbitration and Conciliation Act 1996 praying to set aside the award dated 11.10.2011 passed by the Respondents 5 to 7.

For Appellants : Mr.Vijay Narayan,
Sr. Counsel
for M/s.S.Y.Masood
for Appellant

For Respondents : Mr.M.S.Krishnan,
Sr.Counsel
for Mr.R.Dasaratha Rao
for respondents 1 to 3

Mr.V.Selvaraj
for 4th respondent

JUDGMENT

The Hon'ble Chief Justice

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") is against a judgment and order dated 7.11.2013 passed by the learned Single Judge dismissing the Original Petition No.59 of 2012 filed by the appellants under Section 34 of the 1996 Act for setting aside an award dated 11.10.2011 made and published by the Arbitral Tribunal in an arbitration between the parties thereto.

2. The appellants and the respondent Nos.1 to 4 are the sons and daughters of S.M.Abdul Majid, who died on 15.2.2009. The appellants are the brothers of respondents 1 to 4 herein.

3. During the lifetime of S.M.Abdul Majid, two of his sons, i.e., the Appellant No.2 and the Respondent No.4, filed a civil suit, being O.S.No.4910 of 2008, in the City Civil Court at Chennai praying for a decree of declaration that any document created by their father S.M.Abdul Majid in favour of his two daughters, being the respondents 2 and 3, or any document created in favour of any one son, i.e., the Appellant No.1, after 2004 was null and void.

4. The Appellant No.2 and Respondent No.4 also sought a permanent injunction restraining the defendants in the suit from interfering with the possession of the plaintiffs in the suit, i.e., the Appellant No.2 and the Respondent No.4 herein, of a

property at Adyar in Chennai. It is stated that S.M.Abdul Majid was not impleaded as defendant in the said suit.

5. Later, two sons of the second appellant herein and a son of the appellant No.1 filed another suit, being O.S.No.6456 of 2008 against their grandfather S.M.Abdul Majid and his two daughters, being the respondent Nos.2 and 3 herein, and sought a permanent injunction restraining the defendants from interfering with their possession and enjoyment of the property at Adyar.

6. The above two suits were compromised by the parties thereto who entered into an agreement, whereby the parties decided to have their disputes referred to arbitration by a panel of three arbitrators. Under Clause (2) of the agreement, which is dated 16.11.2008, the parties agreed to treat the award passed by the Arbitral Tribunal final and binding on them and they also agreed to have the two suits withdrawn.

7. Some of the relevant clauses of the arbitration agreement are set out herein below for convenience:

"Clause (4)

We, the signatories herein have absolute confidence in the fairness of the above Arbitrators and we solemnly agree to be bound by the decision of the Tribunal. The parties herein agree that no reasons need be given by the Tribunal for its decision.

Clause (6)

The agreement hereby made shall not be revoked either by the death or incapacity or any act of any one or more of the parties hereto and the said Arbitral Tribunal shall proceed as if no such act or event had occurred.

Clause (9)

As the disputes are among the members of the family, the Tribunal is requested to decide the questions involved not strictly in accordance with the law but on the principles of justice, equity and good conscience, in order to ensure ever lasting peace and amity in the family during and after the life time of the propositus Haji S.M. Abdul Majid, No.(1) of us."

8. The parties thereto filed their respective pleadings before the Arbitral Tribunal. The appellants filed their statement of claim on 15.1.2009 on their own behalf and on behalf of respondent No.4. It was the contention of the appellants and the respondent No.4 that their father S.M.Abdul Majid was acting as a puppet in the hands of his daughters and sons-in-law and that the daughters should not be granted any

part of the properties.

9. The Respondent No.1, who had been a resident of the United States, filed a claim statement on 19.1.2009, a major portion of which focused on the philosophy of human life and in the end of the statement, he pleaded for a fair and correct division of the properties in accordance with the Islamic Shariat Law.

10. After the claim statements were filed, S.M.Abdul Majid died on 15.2.2009. The Arbitrators, therefore, did not proceed further. One of the Arbitrators, i.e., the Respondent No.7, made an attempt to convince the appellants to resolve the issues amicably.

11. The Respondent Nos.1 to 3 filed a suit being C.S.No.766 of 2010 in this Court against the appellants and the Respondent No.4 for partition and separate possession of the suit premises and for rendition of accounts. The Respondent Nos.1 to 3 filed an application, being O.A.No.1055 of 2010, in the said suit for an interim injunction against the second appellant herein from proceeding with the construction in one of the properties being the subject matter of the suit. The Respondent Nos.1 to 3 also took out another application, being O.A.No.1056 of 2010, for appointment of an Advocate Receiver.

12. Orders were from time to time passed in the suit and Advocate Commissioner was appointed and an order was also passed injuncting the Appellant No.2 from proceeding with the construction. Thereafter, the appellants filed an application, being A.No.7065 of 2010, for revocation of the leave granted under Clause 12 of the Letters Patent. While the applications were pending, the Respondent Nos.1 to 3 filed two applications - one being A.No.53 of 2011 and another being A.No.54 of 2011 under Section 8 of the 1996 Act.

13. By an order dated 30.8.2011, all the aforesaid applications were disposed of by directing the parties to agitate their disputes before the Arbitral Tribunal. Soon thereafter, on 13.9.2011, the Arbitral Tribunal issued notices to the parties to appear on 3.10.2011.

14. However, the Appellant No.1 sent a letter dated 15.9.2011 to the Presiding Arbitrator claiming that after the death of S.M.Abdul Majid, the arbitration agreement had become meaningless and that all the parties had lost faith in arbitration.

15. The Presiding Arbitrator, however, wrote a letter dated 21.9.2011 rejecting the contentions of the Appellant No.1. Immediately thereafter, the Appellant No.2 sent a letter dated

30.9.2011 to the Presiding Arbitrator asking for an adjournment on the ground that the appeals filed in O.S.A.Nos.320 and 321 of 2011 against the orders passed on 30.8.2011 were to be listed for hearing shortly.

16. It, however, appears that the letter was received only at 3 P.M. on the afternoon of 3.10.2011, being the date on which the arbitral proceedings took place as scheduled. The arbitral proceedings appear to have commenced at 11 A.M. and were concluded at 1 P.M. The Arbitrators rejected the request as made in the letter.

17. In the hearing held on 3.10.2011, the three claimants were present. The Respondent No.3 before the Arbitral Tribunal was also present. A counter affidavit was filed by the Respondent No.3 before the Arbitral Tribunal.

18. The Arbitral Tribunal framed five issues for adjudication in the arbitral proceedings. The issues, inter alia, were: (i) the share to which each of the parties was entitled in the properties being the subject matter of the arbitration agreement dated 16.11.2008; (ii) the division of the properties amongst the parties; (iii) what amount each of the claimants and the respondents would be entitled towards share of income from the Kadayanallur lands and building managed by Respondent No.1; (iii) to what amount each of the claimants and the third respondent before the Arbitral Tribunal was entitled towards their share of income from the multi-storied residential complex managed by the respondents; and (iv) the costs to which the parties were entitled.

19. Since the parties indicated that there was no evidence over and above what was already on record, the arbitral proceedings were concluded on 3.10.2011 and an arbitral award was passed on 11.10.2011. The footnote of the award indicates that the award was prepared on 7.10.2011. However, unfortunately, on 8.10.2011, three days before the pronouncement of the award, one of the Arbitrators, namely K.Ganesan, was killed in a road accident. Accordingly, the award was signed by the two remaining Arbitrators.

20. Co-incidentally, on the day on which the award was passed, i.e., on 11.10.2011, the appeals filed against the order dated 30.8.2011 dismissing the applications in the suit were dismissed.

21. Assailing the award passed by the Arbitral Tribunal, the appellants herein filed an application under Section 34 of the 1995 Act being O.P.No.59 of 2012 before this Court and the learned Single Judge dismissed the same.

22. The learned Senior Counsel appearing on behalf of the second appellant attacked the award mainly on the following grounds:

- (i) Notice of the arbitral proceedings had not been issued to the appellants;
- (ii) The claimants had filed an additional claim statement on the first date of hearing and on the same day issues were framed without opportunity to the appellants;
- (iii) In the absence of notice and or opportunity, the appellants had been denied natural justice;
- (iv) Since the award was passed after a considerable period of time from the date when the proceedings were set ex parte, the appellants ought to have been given further opportunity of hearing;
- (v) Parties had not been put to notice of the death of one of the Arbitrators.
- (vi) The mandate of the Arbitral Tribunal terminated with the death of one of the Arbitrators in view of Section 15(2) read with Section 14(1) (a) of the 1996 Act.

23. The learned Senior Counsel appearing on behalf of respondents 1 to 3 argued that the conduct of the appellant No.2 disentitled him to notice. Initially, notice had been served, but the Appellant No.2 chose not to appear. Furthermore, the appellant had written a letter dated 15.9.2011, a copy whereof is on record, whereby the said appellant had expressed his intention to rescind the agreement and made it clear that he had no interest in participating in the arbitration proceedings. It was, thus, assumed that notice to the said appellant would be an exercise in futility.

24. It is true that the Court is generally slow to interfere with the award of an Arbitral Tribunal constituted in accordance with the agreement of the parties. This Court also does not sit in appeal over the merits of an award of an Arbitral Tribunal that is duly constituted in accordance with the arbitration agreement. In this case, however, the appellants have not called upon this Court to sit in appeal over the merits of the award, nor has this Court been called upon to analyse the evidence to assess whether evidence has correctly been appreciated by the Arbitral Tribunal. Nor is this Court required to assess the adequacy of the evidence.

25. The short question before us is whether the award is liable to be set aside on the ground that notices were not issued intimating the appellants of future dates of hearing after the appellants failed to appear at the first hearing?

26. The award of an Arbitral Tribunal might be set aside by recourse to a Court under Section 34 of the 1996 Act. Section 34(2) (iii) of the 1996 Act provides that an arbitral award may be set aside by the Court on the ground that the applicant for setting aside had not been given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

27. The language of Section 34(2)(iii) of the 1996 Act makes it amply clear that the Arbitral Tribunal is not only obliged to give notice of the appointment of the Arbitral Tribunal, but also give the parties notice of the dates of arbitral proceedings to enable the parties to appear and make their submissions.

28. In our view, the learned Single Judge patently erred in proceeding on the basis that once notice of constitution of the arbitral proceedings and the first date of hearing had been given, there was no obligation on the part of the Arbitral Tribunal to give any further notice to the appellant.

29. The Arbitral Tribunal is duty bound to arrive at its decision in substantial compliance of the principles of natural justice. A party can be said to have been given reasonable opportunity to appear and make submissions not only by service of notice of constitution of the Arbitral Tribunal, but also by notice of the proceedings and or in other words notice of the dates on which the proceedings are scheduled to be held.

30. The arbitral proceedings, which are informal in nature, heard and adjudicated before a Tribunal constituted by the respective parties by agreement cannot be equated with proceedings before a Court of Law, where the daily/weekly/monthly cause lists serve as notice of the hearing dates.

31. May be, as contended by the learned Senior Counsel appearing on behalf of respondents 1 to 3, the conduct of the appellants evinced an intention not to participate. However, that was inconsequential. Notice of the dates of the proceedings are mandatory, unless of course the next date is fixed in course of proceedings duly attended by all the parties. Moreover, the appellants are right in their submission that once an additional affidavit/claim was allowed to be filed, the pleadings should have been supplied to the appellants.

32. In any event, upon the death of one of the Arbitrators, it became impossible for the Arbitral Tribunal to function, since it had expressly been agreed that the Arbitral Tribunal would be constituted of three Arbitrators.

33. Section 15 of the 1996 Act provides as follows:

"Section 15. Termination of mandate and substitution of arbitrator.—

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

34. When the mandate of the Tribunal terminates, it is incumbent that an Arbitral Tribunal be reconstituted in accordance with law as per the applicable rules of appointment of the Arbitral Tribunal. In the absence of any express provision in this regard in the arbitration agreement, the 1996 Act would prevail.

35. In no circumstances could an Arbitral Tribunal of two Arbitrators proceed to make and pronounce an award upon the death of the third Arbitrator. The mandate of the Arbitral Tribunal came to an end by reason of the event of the death of the third Arbitrator and the Arbitral Tribunal became functus officio. The award made after the death of the third Arbitrator is, thus, null and void, even though the draft may have been prepared while the third Arbitrator was alive.

36. The impugned award is, thus, set aside. The Arbitral Tribunal may be re-constituted by agreement of the parties and/or alternatively if there is no consensus, in accordance with Section 11 of the 1996 Act. The arbitral proceedings may be continued and concluded by the Tribunal so constituted. The records of the proceedings may be transmitted to the Arbitral Tribunal so constituted. It would be open to the Arbitral

Tribunal to decide the issue in accordance with law on the basis of the materials and evidence on record or to take further and fresh evidence.

The appeal is allowed. The order under appeal is set aside. No costs. Consequently, M.P.No.1 of 2014 and C.M.P.No.14328 of 2016 are closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

sasi

To:
To

1. The Hon'ble Mr. Justice S.A. Kader
Farmer Judge, High Court of Madras
Presiding Arbitrator, H 33, Parvathy Street
Kalakshethra Colony, Besant Nagar
Chennai 90.
2. Mr.K. Ganesan
Arbitrator, Advocate West car street
Ambasamudram, Tirunelveli District.
3. Dr.E.M. Abdul Razack, Formerly Professor of Dermatology
Stanley Medical College
Arbitrator, No 6, Subadhal Street, Triplicane
Chennai 600 005.

+1 CC to Ms.R. Dasaratharao, Advocate sr 90654.
+1 CC to Mr.S.Y. Massod, advocate sr 90648.
+1 CC to Mr.V. Selvaraj, advocate sr 90907

WEB COPY

O.S.A.No.173 of 2014

SAI(CO)
SP(21/12/2017)