

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

Original Side Appeal No.112 of 2017

&
C.M.P.No.7529 of 2017

Mr.V.S.Ekambaram
Proprietor
Sangupani Fuels
30-B, Nellukara Street
Kancheepuram- 631 502

.. Appellant

Vs.

Sri Krishna Tiles and Potteries [Madras] Pvt. Ltd.,
Flat No.A-1, Kumara Vijayam
Old No.99, New No.187
Royapettah High Road, Mylapore
Chennai - 600 004
Rep. By its Director
Thiru.A.R.Santhanakrishnan

.. Respondents

Original Side Appeal is preferred under Order XXXVI of the Original Side Rules r/w. Clause 15 of the Letters Patent against the judgment and decree dated 04.08.2016 made in O.P.No.355 of 2011, A.No.2913 of 2016 and Cont. Petition No.1997 of 2013

For Appellant : Mr.M.Sriram

M.SUNDAR, J.

JUDGMENT

This intra-court appeal before us is a statutory appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ' A and C Act ' for the sake of brevity).

2. This intra-court appeal is directed against a judgment and decree dated 04.08.2016, made by a learned single judge, on the Original Side of this Court, in a petition before him under Section 34 of the A and C Act i.e., O.P.No.355 of 2011.

3. Along with O.P.No.355 of 2011, learned single Judge had also disposed of an application, being A.No.2913 of 2016, with a prayer to receive documents and a Contempt Petition, being Contempt Petition No.1997 of 2013, for the alleged violation of orders of this Court dated 21.04.2010 made in Application No.6160 of 2009. In other words, the order of the learned single Judge called in question before us is a common order made in O.P.No.355 of 2011, A.No.2913 of 2016 and Cont.P.No.1997 of 2013.

4.While O.P.No.355 of 2011 is the parent petition, the application and the contempt petition arise out of and in the course of parent petition.

5.Bare minimum facts, which according to us are necessary for appreciating our order, are set out infra under the caption "Factual Matrix".

FACTUAL MATRIX:

5(i). Appellant before us is one V.S.Ekambaram, Proprietor of Sangupani Fuels. Sole appellant before us is the sole respondent before the Arbitral Tribunal. Respondent before us is a Private Limited Company (a juristic person), which goes by the name of Sri Krishna Tiles and Potteries [Madras] Pvt. Ltd., represented by one of its Directors. Sole respondent before us is the claimant before the Arbitral Tribunal.

5(ii) Be that as it may, for the sake of convenience and clarity, the sole appellant before us is referred to as 'E' and the sole respondent before us is referred as 'Krishna Tiles'.

5(iii) When we say Arbitral Tribunal, we refer to a sole Arbitrator being a retired District Judge, who was appointed by this Court in proceedings under Section 11 of the A and C Act, where both the E and Krishna Tiles participated.

5(iv) Admitted facts, as between E and Krishna Tiles, reveal that there was a transaction between them wherein and whereby E was paid a sum of Rs.30 lakhs by the Krishna Tiles.

5(v)The transaction between E and Krishna Tiles is reflected in a written agreement dated 30.03.2006 and it is also supported by a promissory note of even date i.e., 30.03.2006, executed by E in favour of Krishna Tiles.

5(vi) It is also seen from the records and it is not in dispute between the parties that Krishna Tiles had advanced the above said sum of Rs.30 lakhs by way of two cheques. Two cheques bear sequential Nos.697736 and 697737. Both the cheques are dated 31.03.2006 and drawn on ICICI Bank for sums of Rs.15 lakhs each.

5(vii) It is also not in dispute that both the cheques were admittedly encashed by E.

5(viii) The aforesaid agreement dated 30.03.2006 under which the aforesaid transaction of Rs.30,00,000/- took place between E and Krishna Tiles is hereinafter referred as 'said agreement' for the sake of convenience and clarity.

5(ix) Post payment of Rs.30 lakhs by Krishna Tiles to E and encashment of cheques by E as set out supra, disputes arose between E and Krishna Tiles.

5(x) There is an arbitration agreement between E and Krishna Tiles by way of a clause in the said agreement.

5(xi) Owing to the disputes that arose between E and Krishna Tiles, the arbitration clause was invoked by Krishna Tiles, which led to the aforesaid Section 11 proceedings.

5(xii) As set out supra, both E and Krishna Tiles participated in the Section 11 proceedings and a sole arbitrator was appointed by this Court. Thus, the Arbitral Tribunal was constituted and the parties went for arbitration.

5(xiii) Before the Arbitral Tribunal, Krishna Tiles inter alia made a claim for the aforesaid sum of Rs.30 lakhs paid by Krishna Tiles to E claiming that it was a loan transaction. Krishna Tiles claimed the above said sum of Rs.30 lakhs together with interest.

5(xiv) E took a stand that the above said payment of Rs.30 lakhs by Krishna Tiles to E was not by way of loan but by way of commission paid by Krishna Tiles to E for services said to have been rendered by E for sale of a huge property worth Rs.300 crores.

5(xv) Arbitral Tribunal entered upon reference and after detailed proceedings, which included oral / documentary evidence and arguments, Arbitral Tribunal passed an award dated 01.11.2010 wherein and whereby the Arbitral Tribunal rendered a finding that the said agreement is a loan agreement, that the said transaction between E and Krishna Tiles is a loan transaction and ultimately the Arbitral Tribunal vide Award dated 01.11.2010 inter alia directed E to repay the above said sum of Rs.30 lakhs to Krishna Tiles together with interest thereon.

5(xvi) Though we are exercising powers under Section 37 of the A and C Act, considering the nature of the rival stands that were taken by E and Krishna Tiles before the Arbitral Tribunal and before the learned Single Judge, we deem it appropriate to notice some more factual aspects of the matter which come to light on a bare perusal of the award as well as other material that have been placed before us.

5(xvii) Certain clauses in the said agreement which appear to be of relevance are Clauses 3, 4 and 5. We deem it appropriate to extract the same. Clauses 3, 4 and 5 of the said agreement read as follows:

"3) THE PARTY OF THE SECOND PART specifically undertakes to repay the advance of Rs.30,00,000/- (Rupees Thirty Lakhs Only) with 6% P.A. Interest from the date of advance till repayment in full (interest calculated on a daily product basis).

4) THE PARTY OF THE SECOND PART further undertakes to repay the entire advance of Rs.30,00,000/- (Rupees Thirty Lakhs Only) with interest to THE PARTY OF THE FIRST PART on or before 30.04.2006.

5) In the event of failure by THE PARTY OF THE SECOND PART to repay the entire amount, Rs.30,00,000/- (Rupees Thirty Lakhs Only) with interest as per Para 4 above, THE PARTY OF THE SECOND PART hereby agrees to offer acceptable immovable property as security (by way of Registered Mortgage) to THE PARTY OF THE FIRST PART and further undertakes to pay interest @ 15% P.A. for the entire advance of Rs.30,00,000/- (Rupees Thirty Lakhs only) from the date of advance (i.e. 30.03.2006) to date of full and final settlement which date should not extend beyond 31.05.2006."

(To be noted in the above said extracted clauses, party of the SECOND PART is E and Party of the FIRST PART is Krishna Tiles)

5(xviii) A bare perusal of the above said extracted clauses reveal that E was required to repay the aforesaid sum of Rs. 30 lakhs along with interest at the rate of 6% per annum.

5(xix) It also comes to light that E was required to offer an acceptable immovable property as security by way of a registered mortgage in favour of Krishna Tiles and was also required to pay interest at an enhanced rate of 15% per annum on Rs.30 lakhs, if E is unable to return the aforesaid Rs.30 lakhs as provided in the extracted clauses being clauses 3 and 4. Under Clause 5, the date of final settlement has been indicated as 31.03.2006.

5(xx) Undisputed factual position also reveals that E failed repay the amount as covenanted, resulting in Krishna Tiles

issuing a notice of demand dated 17.12.2007.

5(xxi) It also emerges from admitted facts that E took further time by giving a cheque for a sum of Rs. 30 lakhs. This cheque, on the face of it, is dated 05.02.2009 and when deposited was dishonoured and returned by E's Banker with an endorsement "Insufficient Funds".

5(xxii) Owing to dishonour of the above said Negotiable Instrument, Krishna Tiles initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881. It is also seen from the records placed before us and it is not disputed in the hearing before us by the learned counsel for E that in the proceedings before the criminal Court under Section 138 of the Negotiable Instrument Act, E was convicted. On appeal, E was acquitted. Thereafter, an appeal was preferred in this Court, being Criminal Appeal in C.A.No.860 of 2012 and the same is pending adjudication.

5(xxiii) The above details pertaining to issue of cheques by E, dishonour and proceedings under Section 138 of the Negotiable Instrument Act have been set out only for completion of narration of facts. In other aspects, this Court exercising powers under Section 37 of the A and C Act and sitting in appeal over a judgment and decree made by a single Judge in exercise of powers under Section 34 of A and C Act, is not directly concerned with these factual aspects of the matter.

5(xxiv) We notice from the records that arbitration trigger notice is a notice dated 27.03.2009 issued by Krishna Tiles to E. E had taken a stand before the Arbitral Tribunal and before the learned single Judge that the said notice was not received by E. However, as E did not respond to the said trigger notice dated 27.03.2009, an application under Section 11 of the A and C Act was filed by Krishna Tiles, whereupon this Court appointed a sole arbitrator vide order dated 20.11.2009. As stated supra, E participated in the Section 11 proceedings.

5(xxv) This according to us is a pertinent fact, as it put an end to the controversy as to whether E received the trigger notice at all. To be noted, before the Arbitral Tribunal constituted by this Court, no objection to jurisdiction of the Arbitral Tribunal was raised.

5(xxvi) Ultimately, the award came to be passed, which was called in question unsuccessfully by E before the learned single Judge resulting in the present intra-court appeal.

6. We now proceed to discuss the merits of the matter under the caption "Discussion".

DISCUSSION:

6(i) This appeal, as would be evident from the memorandum of grounds of appeal, has been filed by the appellant under Order XXXVI of Original Side Rules of Madras High Court read with Clause 15 of the Letters Patent. Following the ratio of Hon'ble Supreme Court in Fuerst Day Lawson Limited Vs. Jindal Exports Limited [(2011) 8 SCC 333], we pointed out to the learned counsel for the appellant that an appeal will not lie under Order XXXVI of Original Side Rules of Madras High Court read with Clause 15 of the Letters Patent and that an appeal in cases of this nature would lie only under Section 37 of the A and C Act. Learned counsel for the appellant filed a memo and sought leave to amend the instant intra-court appeal as one under Section 37 of the A and C Act. We acceded to this request and we are treating this as an appeal under Section 37 of the A and C Act, notwithstanding the fact that Order XXXVI of Original Side Rules of Madras High Court read with Clause 15 of the Letters Patent has been invoked in the memorandum of grounds of appeal.

6(ii) Before the learned Single Judge, E while assailing the award of the Arbitral Tribunal raised grounds, which can be crystallized into four grounds. The four grounds are as follows:

a) Said agreement is not a loan transaction and that the sum of Rs.30 lakhs was given only by way of commission for services rendered by E for sale of huge property worth Rs.300 crores. Therefore, this ought to have ordinarily been reflected in the Income Tax returns, financial statements and annual returns for the Assessment Years 2006-07, 2007-08 and 2008-09 of Krishna Tiles. It was also submitted that this transaction ought to have been reflected in the minutes book of Krishna Tiles. E raised the ground that the notice to produce these documents was filed before the Arbitral Tribunal, but no orders were passed by the sole arbitrator. This is Ground No.1;

b) The second ground raised was that the loan agreement is inadmissible in law as it was allegedly not duly stamped;

c) Third ground is that the trigger notice being notice dated 27.03.2009, was never received by E; and

d) Fourth ground is, Arbitral Tribunal committed a grave error in not impleading one Sai Narayanan, even though he was a witness to the said agreement.

6(iii) Resisting and opposing the above said four grounds raised by E, before the learned single Judge, Krishna Tiles took a pivotal defence that there is no provision for re-appreciating evidence placed before an Arbitral Tribunal. Krishna Tiles also raised the plea that a suitable reply was sent to the notice to produce the documents. It was pointed by Krishna Tiles in the reply that no Income Tax returns or annual returns were filed. On a demurrer Krishna Tiles took the stand that even if it had failed to reflect the transaction in the Income Tax returns or

in the annual returns, that by itself would not establish that the amount was not advanced in view of the fact that there is a written agreement between the parties, execution of which is admitted by E. It was also pointed out that not only the execution of the said agreement, but encashment of the two cheques is also admitted by E.

6(iv) With regard to the second plea of the loan agreement being not duly stamped, it was canvassed that these are not grounds which fall under the category of misconduct under Section 34 of the A and C Act. It was also pointed out that the execution of the agreement and encashment of cheques are not disputed by E and therefore E cannot now be heard to contend by raising a hypertechnical plea that the loan agreement was not duly stamped. In other words, Krishna Tiles took a plea that even de hors the loan agreement, the transaction stood completely established (In fact, this was not disputed before the Arbitral Tribunal).

6(v) With regard to the 3rd plea pertaining to Arbitral trigger notice not being received by E, as stated supra under factual matrix, in the Section 11 proceedings before this Court in which the sole Arbitrator was ultimately appointed and the Arbitral Tribunal was constituted, E participated and therefore this plea is of no significance.

6(vi) With regard to Ground No.4, it was pointed out that the said Sai Narayanan is only a witness to the said agreement and not a party to the said agreement.

6(vii) Learned single Judge has perused the rival submissions and had concluded that the grounds raised by E do not perambulate within the four corners of Section 34 of A and C Act. Learned single Judge accepted the submission of Krishna Tiles.

6(viii) From a perusal of the order of the learned single Judge, we find no reason to disagree, as the learned Judge has proceeded on the well settled legal principle that in a petition under Section 34 of A and C Act, there can be no re-appreciation of evidence. Furthermore, when the transaction, issuance of Negotiable Instruments and encashment of the same have been admitted, pleas such as the said agreement not being sufficiently stamped, can not to be raised in a petition under Section 34 of A and C Act. The purported non-receipt of trigger notice does not stand a moments' scrutiny as both the parties participated in the Section 11 proceedings before this Court. Arbitral Tribunal, on appreciation of oral and documentary evidence, has concluded that the transaction is, in fact, loan transaction particularly in the light of the fact that E has issued two cheques to Krishna Tiles, which were dishonoured resulting in proceedings under Section 138 of the Negotiable

Instruments Act.

6(ix) Sitting in jurisdiction under Section 37 of the A and C Act, we have no hesitation in concurring with the conclusions that have been arrived at by the learned single Judge.

6(x) With regard to the application being A.No.2913 of 2016, which has been taken out by E, the same was negatived by the learned single Judge on the pivotal principle that there cannot be re-appreciation of evidence in a section 34 petition and the learned single Judge has clearly held that no documents, which were not before the learned Arbitrator, can be taken on record. In our considered opinion, this is not only a pivotal principle, but is indisputable too.

6(xi) However, we also notice that the three documents which have been sought to be received in the application in A.No.2913 of 2016 by E are,

- (a) Annual returns for the year 2006 of Krishna Tiles;
- (b) Judgment in C.A.No.201 of 2011 arising out of Section 138 proceedings; and
- (c) Deposition of the parties in the proceedings before the Arbitral Tribunal.

6(xii) We have no hesitation or difficulty in holding that the learned single Judge was right in negating the prayer. The principle is a petition under Section 34 of A and C Act is not a traditional appeal against an arbitral award. Law as it is obtaining today, is very clear that a petition under Section 34 of the A and C Act is only a challenge to an award (on limited grounds adumbrated in Section 34) and not an appeal, review or revision.

6(xiii) With regard to contempt petition, being Contempt Petition No.1997 of 2013 taken out by Kishna Tiles, alleging violation of orders of this Court dated 21.04.2010, made in application in A.No.6160 of 2009, learned single Judge has disposed of the same recording an undertaking given by E before him. Before we set out the undertaking given by E before the learned single Judge and expressing our views with regard to the disposal of the contempt petition, we deem it necessary to notice what transpired before the learned single Judge in Court. In Court, in the hearing, learned senior counsel appearing for E, based on instructions of the instructing counsel (counsel on record) and also E, who was present in Court, has stated that he is willing to pay the award amount with simple interest for the period indicated in the impugned award albeit at the rate of 12% per annum. There was also a further plea to permit E to pay the said amount with interest at the rate of 12% in installments considering the financial position of E. Learned counsel appearing for Krishna Tiles was

also before the Court.

6(xiv) Learned counsel for Krishna Tiles, who was before the Court, raised some dispute with regard to the rate of interest by saying that the impugned award has to be read holistically. Ultimately, learned single Judge held that it would be appropriate to give a direction that interest will be at the rate of 12%. This is articulated in Paragraphs 17 to 17.4 of the order of the learned single Judge and we consider it necessary to extract the same. Paragraph 17 and sub paragraphs therein read as under :

"17. At this stage, Mr.Venkatachalapathy, learned Senior Counsel for the petitioner, based on instructions of Mr.Sriram, as also, the petitioner, who is present in Court, says that the petitioner is willing to pay the awarded amount with simple interest for the period, indicated in the impugned award, albeit, at the rate of 12% per annum.

17.1. The learned Senior Counsel further submits that given the financial position of the petitioner, the amount will be paid in instalments.

17.2. I have put this aspect to Mr.Kuberan, learned counsel for the respondent. He contends otherwise.

17.3. However, upon a bare perusal of the award, he cannot, but submit that, in the operative directions issued by the learned Arbitrator, he has erred in not indicating the rate of interest. Though, the learned counsel for the respondent, has sought to argue that if, the impugned award is read holistically, the rate of interest, impliedly, would be 15% per annum, in my view, there is not much scope for debate on this issue.

17.4. Therefore, while sustaining the award in respect of the principal sum awarded, i.e., Rs.43,64,250/-, I am inclined to direct that in addition, simple interest will be paid to the respondent, which will run at the rate of 12% per annum (simple interest), albeit, on the sum of Rs.30,00,000/-, with effect from 01.12.2009 till the date of realisation. "

6(xv) Coming back to the Contempt petition, in addition to the above said submission, E also undertook to provide adequate security in the form of immovable property with the Registry of this Court to ensure that he pays the entire award amount in 9 equal monthly installments of Rs.7,52,028/- each. Recording this, learned single Judge disposed of the contempt petition by crystallizing and setting out the agreed mode of settlement / satisfaction of the award amount with specificity. This is contained in Paragraph 21 of the judgment of the learned single Judge and we deem it appropriate to extract the same. Paragraph 21 and sub paragraphs therein read as follows :

" 21. The captioned contempt petition is, accordingly, disposed of, on the following undertaking given by the petitioner, who is present in the Court :

i) That the petitioner will pay a monthly installment of Rs.7,52,028/- commencing from 10.09.2016. The remaining eight installments will be paid on or before 10th day of each Calender month.

ii) That the original title deeds, which are presented in Court today, will remain in the custody of the Registrar General of this Court, in a sealed cover, till such time, the entire debt equivalent to a sum Rs.67,68,250/- is paid by the petitioner.

iii) Upon failure / default by the petitioner in the payment of any one installment, the respondent would have liberty to approach this Court for bringing the property to sale.

iv) That the petitioner, who is present in Court, has indicated in no uncertain terms that the aforementioned title deeds submitted are free of encumbrances.

v) The petitioner also undertakes not to create any third party interest in the aforementioned property without the leave of the Court till such time, the entire amount, as indicated above, is paid to the respondent. "

6(xvi) All that have been stated supra would clearly show that E has categorically submitted himself to the decree (award). Thereafter, an appeal, more so under Section 37 of the A & C Act, in our opinion does not deserve any lengthy consideration.

6(xvii) We put this to Mr.Sriram, learned counsel appearing for the appellant. However, the learned counsel insisted that the learned single judge should have acceded to his prayer in A.No.2913 of 2016 and called for the documents though they were not before the Arbitral Tribunal. We are unable to agree or even entertain this plea as this militates against the fundamental legal principle of proceedings under Section 34 and 37 of the A and C Act. However, as the learned counsel insisted on the matter being argued, we have taken up the appeal, heard it and returned our views on the various points that were canvassed in this appeal.

6(xviii) One other most intriguing and interesting feature is that we were informed by the learned counsel for appellant that E had produced / furnished immovable property as security as undertaken before the learned single Judge, paid all 9 Equated monthly installments of Rs.7,52,028/- to Krishna Tiles without any delay or default and also taken back the original

title deeds of the immovable property that was furnished as security. We wonder what remains in the matter. However, as the learned counsel for the appellant insisted in arguing the appeal we had considered the appeal on merits and returned our considered views / opinions uninfluenced by the fact that E has paid the entire money as agreed before the learned single Judge.

7. CONCLUSION:

7(i) Owing to all that have been stated supra, we find no reason or ground whatsoever, particularly in an intra-court appeal under Section 37 of the A and C Act, to interfere with the considered judgment and decree of the learned single Judge, which has been called in question before us. In the light of all that we have set out supra under the captions "Factual Matrix", "Discussion" and "Conclusion", this intra-court appeal, being O.S.A.No.112 of 2017, is bereft of merits and deserves to be dismissed.

8. DECISION :

8(i) This appeal is dismissed. Consequently, the connected miscellaneous petition is closed.

8(ii) As we have not issued notice and as we are dismissing the appeal at the admission stage, we are not examining the costs aspect.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gpa
To
The Sub-Assistant Registrar
Original Side
HighCourt, Madras

+2 ccs to Mr.M.Sriram Advocate sr 54799

Original Side Appeal No.112 of 2017 &
C.M.P.No.7529 of 2017

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