

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2017

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.Nos.18 & 19 of 2015

O.P.No.18 of 2015

S.Baskaran ... Petitioner

Vs.

1.Mrs.B.Anubhama
2.M.V.Salai Abaranam
3.R.Kalanjiam (deceased)
4.K.Venkataraman
5.Justice Thiru.A.Raman ... Respondents

O.P.No.19 of 2015

Mrs.B.Anubhama ... Petitioner

Vs.

1.S.Baskaran
2.M.V.Salai Abaranam
3.R.Kalanjiam (deceased)
4.K.Venkataraman
5.Justice Thiru A.Raman ... Respondents

Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award dated 07.07.2014, passed by the 5th respondent directing the petitioner and his Principal/Power Agent Mrs.B.Anubhama, first respondent herein to

pay Rs.2,57,92,000.00 (Rupees Two Crores Fifty Seven Lakhs Ninety Two Thousand only) together with interest @ 12 % from 02.12.2010 till date of realisation and to pay a sum of Rs.6,04,000.00 (Rupees Six Lakhs Four Thousand only) to the Claimant towards cost of this claim; and to Award the costs of this proceedings.

For Petitioners : Mr.P.S.Ramani, Senior Counsel
(in both O.Ps.) for Mr.S.Namasivayam

For Respondents : Mr.ARL.Sundarsan for R1
(in both O.Ps.) for Mr.D.Srinivasan

Mrs.Chitra Sampath,
Senior Counsel (for R2)
for Mr.R.Baskaran

ORDER

On 19.05.2006, a memorandum of understanding has been entered into between the petitioner in Arbitration O.P.No.19 of 2015, M/s.Sameera Associates represented by the petitioner in Arbitration O.P.No.18 of 2015 and three other persons including the second respondent/claimant. As per the aforesaid agreement, it was agreed between the parties that for the sale of land identified by the petitioner in Arbitration O.P.No.19 of 2015, the second respondent along with two others all of them have been arrayed as respondents 2 to 4, would be qualified for a sum payable with respect to the extent of land. The agreement contains an arbitration Clause.

2.The second respondent is one of the three parties of the Second Part. The other two have been arrayed as respondents in the claim petition. On 19.11.2007, the second respondent/claimant issued a legal notice, *inter alia* alleging that he has not been paid his shares by the petitioners. The notice, though received, was not replied to. Thereafter, arbitral proceedings were initiated.

3.By recording of the proceedings dated 19.12.2011, the learned Arbitrator has stated that the petitioners had filed vakalat and accordingly, granted time for filing counter. It was also noted that the learned counsel undertook to file vakalat for respondents 3 & 4 therein. At the time of initiation of the arbitral proceedings, Mr.R.Kalanjiam, who was arrayed as respondent No.3 was alive, but, he died at the time when the award was passed. The fourth respondent therein, who is also a formal party of the Second Part, is none other than the son of the deceased R.Kalanjiam. Similarly, the petitioner in O.P.No.18 of 2015, being the power holder of petitioner in O.P.No.19 of 2015, is none other than her husband. On 28.02.2013, the learned Arbitrator, made the following recording:

"The Claimant and counsel for the Claimant present. The Learned Counsel for the Claimant requests two weeks time for filing proof affidavit of the Claimant and for examination of Claimant, if necessary.

Accepting the request the matter is adjourned to 14.03.2013 at 02.00 p.m. in the same venue."

4. Similarly, on the next date of hearing held on 14.10.2013, it was recorded as under:

"Claimant present and Counsel for claimant present. The counsel for claimant request time to file a detailed proof affidavit and statement showing details of extent of property sold by Respondents 1 and 2 and identified by the claimant based on encumbrance certificate. Hence the matter is adjourned to 01.04.2013 at 2.00 p.m. in the same venue."

5. Having found that the respondent did not evince any interest to appear, the learned Arbitrator passed the award with the available material. Though the claim has been made with respect to sale effected for about Rs.500 Crores, the award was made to a lesser extent, for which evidence was shown. Incidentally, the award also speaks about the amount payable to respondents 3 and 4 in the original petition, though they did not appear.

6. Before this Court, an affidavit has been filed by the fourth respondent in the arbitration petition before the learned Arbitrator

stating that his part of consideration has been received in terms of MOU. The affidavit also says the receipt of the amount by the third respondent since died before the learned Arbitrator.

7.Learned Senior counsel appearing for the petitioners would submit that the procedural mandate as contained in Sections 23 and 24 of the Arbitration and Conciliation Act, 1996 are not complied with. When documents were filed by the second respondent, before this Court being the claimant, they ought to have been served on the petitioners. The documents filed before this Court would show that the payment has been made as per the MOU. Therefore, these documents along with the affidavit filed by the fourth respondent before the learned Arbitrator would show that the claim has got no basis. The petitioner in O.P.No.18 of 2015, being a power holder cannot be made liable to pay any amount. Hence, the award being contrary to Section 230 of the Indian Contract Act, is liable to be set aside.

8.The learned Senior Counsel appearing for the second respondent/claimant would submit that it is case where the legal notice dated 19.11.2007, though served, was not replied. There is no clarity in the MOU with respect to the liability of the petitioner in O.P.No.18 of

2015. That is the reason why he was also arrayed as a party respondent. The documents filed were not new documents. They were already filed along with the claim statement. They have been filed separately at request made by the learned Arbitrator for convenient sake. In any case, it is the case, which involves filing of vakalat on behalf of the petitioners herein and undertaking to file vakalat on behalf of others. Therefore, there is no requirement of serving documents on the parties. Section 23 ought to be read with Section 25. Hence, no interference is required.

9. Coming to the issue of power of attorney, both the memo of understanding and the claim statement clearly mentioned that the concern of the petitioner in O.P.No.19 of 2015, is a proprietary concern. Therefore, it is not a partnership firm. This has been understood by the second respondent himself, as seen from the claim statement. Not only the averments, but also the petitioner in O.P.No.18 of 2015, has been arrayed as a power holder of the petitioner in O.P.No.19 of 2015. If one sees Section 230, it is very clear that the exception is only for the cases mentioned thereunder and not otherwise. Therefore, for any action or inaction relatable to the principal, the agent cannot be made liable. Therefore, this Court is

of the view that the rigor of Section 230 of the Indian Contract Act, will have to be applied and hence, the original petition in O.P.No.18 of 2015, deserves to be allowed.

10. In so far as other contentions raised by the learned Senior Counsel appearing for the petitioner in O.P.No.19 of 2015, are concerned, they deserve to be rejected. As rightly submitted by the learned Senior Counsel appearing for the second respondent/claimant, there was no reply to the legal notice dated 19.11.2007. The documents, which are not new, have been filed along with the claim statement. Even otherwise, having filed the vakalat, it is not open to the petitioner to contend that the documents will have to be served on her as against her counsel. Had her counsel been present, certainly the documents would have been served on him. Section 25 of the Arbitration and Conciliation Act, 1996, speaks about default of a party. When a party fails to appear, the Arbitrator is at liberty to continue proceedings. Even in the award, the arbitral proceedings have taken into consideration, the continued absence of the petitioner and rightly drew the adverse inference. On the other contention regarding the discharge, considering the scope of Section 34 of the Arbitration and Conciliation Act, 1996, this Court cannot go into the same, as the role

to be played by this Court is circumscribed by Section 34. Therefore, when the statute places a fetter on the power to be exercised, this Court cannot act contrary to the same. The award merely states about the liability. If it is one of discharge, it is for the petitioner to substantiate it before the execution Court. This Court cannot say anything beyond it. The affidavit filed by the fourth respondent before the learned Arbitrator also arrayed as the fourth respondent herein, cannot be held against the petitioner. After all, the said respondent along with the second respondent herein is a party of the Second Part.

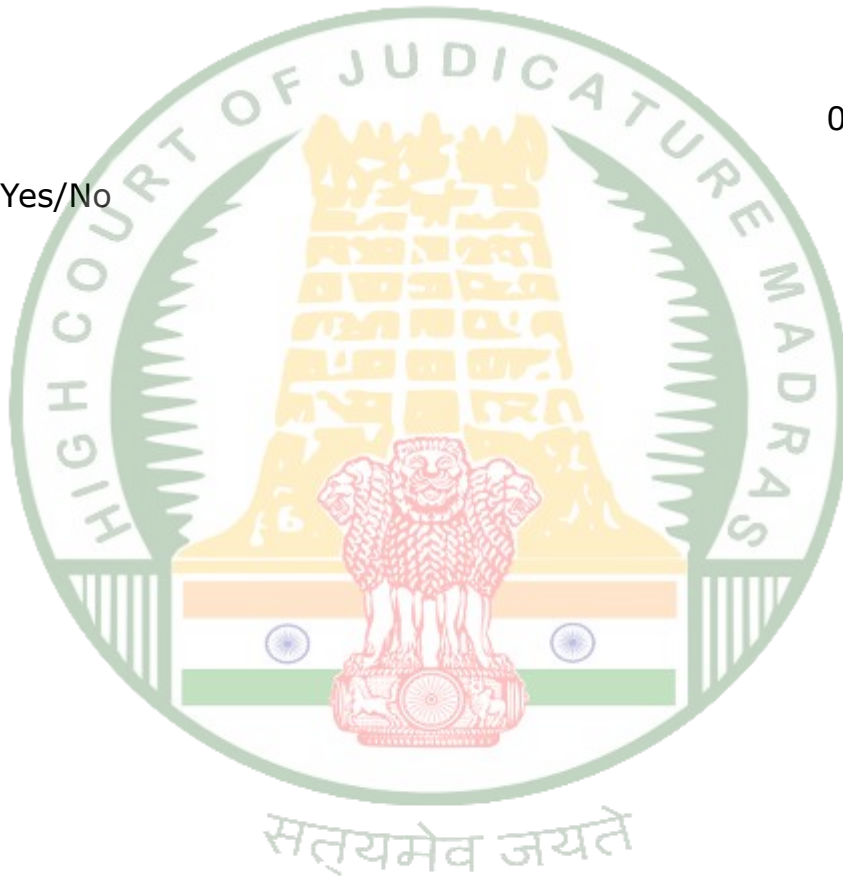
11. It is needless to state that the said respondent also been set ex-parte before the learned Arbitrator. However, this Court wants to clarify one more thing while dismissing O.P.No.19 of 2015. The claim is only with respect to the one made by the second respondent herein alone, being the claimant. Therefore, payment to be made in so far as others are concerned has got no rationale. In any case, it is only academic to the affidavit filed by the fourth respondent before this Court.

12. With the above observations, O.P.No.19 of 2015 stands dismissed. However, it is made clear that allowing O.P.No.18 of 2015,

will not stand in the way of the second respondent/claimant seeking execution of the award against the petitioner in O.P.No.19 of 2015, as the order passed will be made applicable to the petitioner in O.P.No.18 of 2015.

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Index : Yes/No

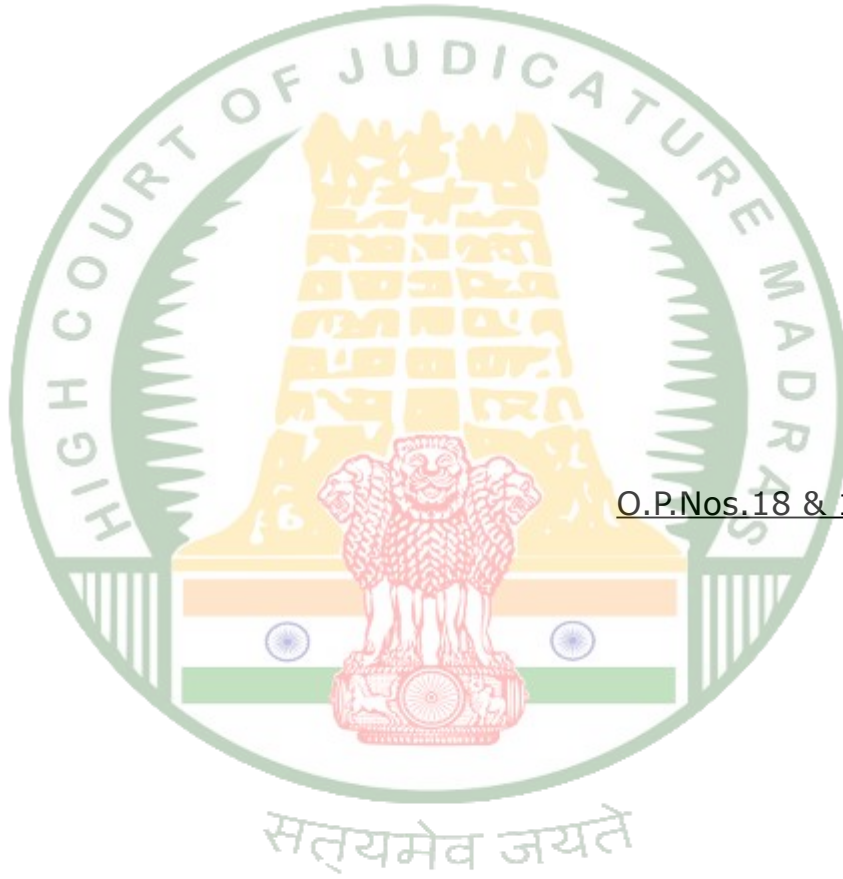
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M.M.SUNDRESH, J.

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