

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 27.08.2018
Judgment Pronounced on : 28.09.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.A.Nos.1288 & 1289 of 2018
and
CMP.No.10297 of 2018 in CMA.No.1288 of 2018

1.A.Jayakanthan
2.J.Jayanth

.... Appellants in both CMAs

Vs.

1.M/s. J.R.S.Crusher
Rep by its Partner Mrs.Ramesh
S.F.No.354/1, Hosapuram Village
Denkanikottai Taluk
Krishnagiri District.

2.M.Sathiamurthy
3.M.Santhamurthy
4.N.Ramesh

5.L.Yousuf Ali
District Judge (Retired)
Sole Arbitrator
Madras High Court
Arbitration Centre
Chennai.

... Respondents in both CMAs

Common Prayer:- Civil Miscellaneous Appeals filed against the order of the learned Sole Arbitrator, Mr.L.Yousuf Ali, District Judge (Retired) dated 06.06.2018 in M.P.Nos.8 & 9 of 2018 in O.P.No.347 of 2016.

For Appellants : Mr.T.M.Hariharan

For Respondents : Ms.Kanimozhi Mathi

COMMON JUDGMENT

The Civil Miscellaneous Appeals in CMA.No.1288 of 2018 and CMA.No.1289 of 2018 arise respectively out of two interim orders

of the learned Arbitrator passed in MP.No.8 of 2018 and MP.No.9 of 2018. Both the orders more or less can be stated as a common order, and are dated 06.6.2018.

2. The respondents before the Arbitrator, who moved these petitions (in MP.Nos.8 & 9 of 2018) unsuccessfully have preferred these appeals. The brief facts are:

- A partnership firm namely "M/s.J.R.S. Crusher" was formed in which claimants 2 to 4 and respondents 1 and 2 (both of who are now the appellants in this case) were the partners. The business of the partnership firm involved in establishing a crusher unit for manufacture of jelly stones. The first respondent/first appellant herein owned a piece of property which was leased out to the partnership firm. It is also alleged that the first appellant herein was the Managing Partner of the firm initially till he was removed Vide resolution of the firm dated 09.12.2015. The main accusation of the claimants were that the first appellant along with the supplier of stones stopped supply of boulders to enable the crusher plant to operate. Making a claim under five specific heads with residual prayer of general variety, claimants have moved the Arbitrator.
- Before the Arbitrator, appellants herein have filed MP.No.8 of 2018 wherein they sought the production of some seven documents, and in MP.No.9 of 2018, they wanted the Arbitrator to frame certain additional issues based on their defence.
- In their counter to M.P.No.8 of 2018, the claimants/respondents inter alia contended that they have produced their accounts and records in their possession, that when the first appellant was removed from the firm, he removed certain books of accounts and it is in their custody. Dealing with this petition, the Arbitrator has held that inasmuch as the first appellant did not specifically deny that he never functioned as the Managing Partner of the firm, they cannot seek the production of documents sought by them.
- So far as the additional issues raised by the appellants in MP.No.9 of 2018 is concerned, the following are the issues they so required to be raised :
 - a) Is not the O.P. To be dismissed in limine on account of the mutually destructive claims made by the petitioners?
 - b) Can the petitioners be allowed to blow hot and cold and be allowed to claim loss of profit and damages alleging breach of contract by the respondents and

at the same time seek specific performance of the very same contract?

c) Are not the petitioners in possession of the accounts and documents more fully detailed in paragraph 19 of the common statement of defence dated 28.12.2016 and are not the petitioners required to furnish the accounts and statements to the respondents?

d) Is not the alleged breach of contract and statement, the direct outcome of the illegal conduct of the petitioners and their attempt to defraud the respondents and if so are the petitioners entitled to make any claim against the respondents?

3. Relying on Order 14 CPC, the arbitrator has held that there is no need to raise these issues.

4. Mr.T.M.Hariharan, learned counsel appearing for the appellants, would argue that if the documents that the appellants have sought are denied to them, their right of effective participation in the arbitral proceedings for defending the claims against them would be robbed. Right of hearing required is not an ornamental aspect of the proceedings, nor is it an empty ritual, argued the counsel. Turning to the order passed in MP.No.9 of 2018, rejecting the appellants request for framing additional issues, the issues as suggested above are material to the appellant's case, and the Arbitrator has erred in ignoring the defence for framing the issues.

5. Responding to the same, the learned counsel for the respondents argued that whatever documents in the possession of the respondents/claimants have already been produced and in this regard, the appellants herein had filed CMA.No.1575 of 2017 and the same came to be dismissed. The present attempt of the appellants is only to delay the arbitral proceedings and to harass the claimants. So far as the other appeal is concerned, their approach to the Arbitrator to the matter is appropriate and hardly requires interference.

6.1 An arbitral proceedings which is expected not to adopt the complexion of a formal civil proceedings in a civil court, now appears to be dragged to be made into one. The appellants seek certain documents to establish their defence and the claimants would contend they possibly might be in the possession of the

first appellant himself. However, at the end of the day, what is important while passing the award is that, the arbitrator would be considering if the claimants have travelled the entire distance to prove their claim and if in the process, if they have discharged the burden of proof. One doctrine that can tilt the balance in the matter of discharging the burden of proof is one in drawing adverse inference against the party who withholds the best evidence. Therefore, all is not lost to the appellants, and if they are successful in establishing that the documents sought are critical for a just decision by the Arbitrator, that the claimants are in possession of the said documents, and that they withhold the best evidence, then necessarily the arbitrator would consider drawing adverse inference against the claimants. Secondly, the claimants/respondents contend that the documents that the appellants now seek possibly in the possession of the first appellant himself. This itself is an aspect that requires some factual or evidentiary material for the arbitrator to appreciate. In these circumstances, this court cannot hold that the arbitrator was in error when he dismissed M.P.8 of 2018. Therefore, nothing survives in this appeal and CMA. No.1288 of 2018 is liable to be dismissed.

6.2 So far as the issues required to be raised are concerned, even in a civil suit where initial burden is cast generally on the plaintiffs, issue must be so framed as to fix the burden of proof and the party who pleads the affirmation. What the appellants now attempt is to frame issues in negative form founded on mere denial. Therefore, this Court finds the approach of the Arbitrator is in order.

7. It shall not be forgotten that an Arbitral proceedings has larger elasticity than civil proceedings, and hence the court has to weigh the controversy raised herein on that plane.

8. In result, both the appeals are dismissed and the order dated 06.06.2018 passed by the Arbitrator in M.P.No.8 of 2018 and M.P.No.9 of 2018 in O.P.No.347 of 2016, is hereby confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

WEB COPY

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.L.Yousuf Ali
District Judge (Retired)
Sole Arbitrator
Madras High Court
Arbitration Centre
Chennai.

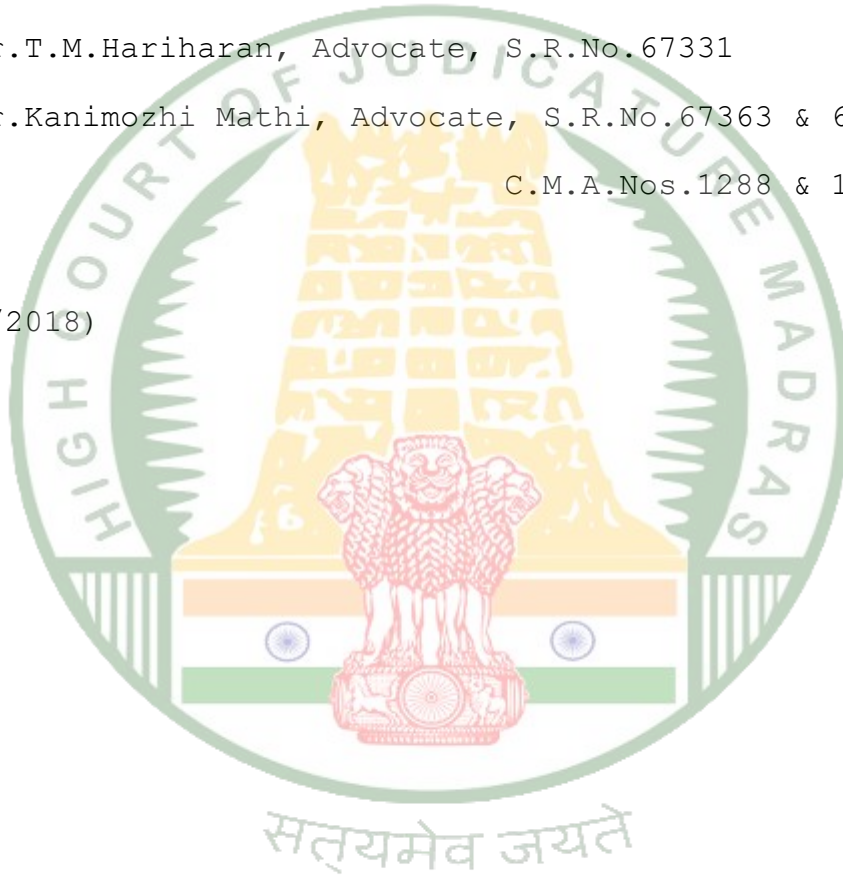
2.The Section Officer,
VR Section, High Court, Madras

+2cc to Mr.T.M.Hariharan, Advocate, S.R.No.67331

+2cc to Mr.Kanimozhi Mathi, Advocate, S.R.No.67363 & 67364

C.M.A.Nos.1288 & 1289 of 2018

JP (CO)
GSP (25/10/2018)



WEB COPY