

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.12.2018

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.R.P.(PD).No.2800 of 2013

and

M.P.No.1 of 2013

M/s.Janaki Spinning Mills (P) Ltd.,
Rep.by its Managing Director R.Vijayakumar
S/o.Ramasamy Chettiar,
21, South Mullavadi Street,
Jagadeesan Kadu, Salem 636 006. ... Petitioner

Vs.

K.Ganesan, S/o.N.Krishnasamy Chettiar
Prop.Sri Angalamman Traders
17, Cotton Market Complex
Palladam Road, Tirupur. ... Respondent

Prayer :- The Civil Revision Petition has been filed under Article 227 of Constitution of India against the fair and decreetal order dated 18.02.2013 in I.A.No.1477 of 2012 in Ar.O.P.No.141 of 2010 on the file of the I Additional District Judge, Salem.

For Petitioner : Mr.D.Shivakumaran

Respondent : No appearance

ORDER

The instant revision has been filed challenging the order dated 18.02.2013 dismissing I.A.No.1477 of 2012 in Arbitration OP No.141 of 2010 on the file of the first Additional District Judge, Salem.

Brief facts leading to the filing of the revision:

2.The petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 in Arbitration OP No.141 of 2010 before the District Court at Salem, seeking for an interim injunction restraining the respondent from in any way executing the Arbitration Award if any passed against the petitioner as well as for grant of interim injunction restraining the respondent in any way registering the Arbitration Award in the Sub-Registrar's Office, Rasipuram and to make entry in the Encumbrance Register.

3.It is the case of the petitioner that the respondent was a lessee under them under a registered lease deed dated 25.03.2005 registered as Document No.891 of 2006, SRO Rasipuram. According to them, the petitioner committed default with Indian Bank in the re-payment of the loan and SARFAESI proceedings were initiated by Indian Bank against the petitioner. The respondent was also ousted from the property by Indian Bank through the SARFAESI proceedings. Thereafter, the petitioner settled the dues of Indian Bank and as on date, they are in possession of the property. On 05.10.2005, the respondent filed a suit on the file of the Sub-ordinate Judge of Namakkal and prayed for restoration of possession and the same was transferred to Sub-ordinate Judge of Rasipuram due to change in pecuniary jurisdiction and re-numbered as O.S.No.144 of 2008 and the said suit was dismissed for default on 06.07.2009 since the

matter was settled amicably between the petitioner and the respondent. Since the loan dispute between the petitioner and the Indian Bank was pending before the DRT, Coimbatore, the petitioner requested the respondent to make cancellation of lease. After taking possession of the property, the petitioner has also sold the property to a 3rd party by named Mohan and Selvamurthy under a registered sale deed dated 20.04.2009 registered as document No.1769 of 2009 at SRO, Rasipuram and handed over physical possession of the land and the unit to the purchasers. The petitioner and the purchasers requested the respondent to cancel the lease deed. But instead of cancelling the lease deed, the petitioner received a notice from a so called Arbitrator calling upon the petitioner to come for arbitration in respect of a claim made by the respondent against the petitioner. The petitioner expressed their unwillingness to go for arbitration since the matter has already been settled between the petitioner and the respondent. Thereafter, the so called Arbitral Tribunal at Coimbatore passed an Award directing the petitioner to pay the respondent a sum of Rs.47,00,000/- towards the lease amount along with interest and for mental agony and for compensation. According to the petitioner, it is a fraudulent Award passed against the petitioner. It is also the case of the petitioner that the original Arbitration Award was not served on them by the Arbitrator. The respondent in his counter in Arbitration OP No.141 of 2010, has stated that an exparte award dated 26.07.2010 has been passed against

the petitioner by the Arbitrator for a sum of Rs.46,88,000/-, which has been registered before the Sub-Registrar's Office, Rasipuram.

4.In view of the aforesaid statement made by the respondent in his counter, the petitioner filed an application under Order 23 Rule 1 CPC seeking to withdraw the Arbitration OP No.141 of 2010 with liberty to file an application under Section 34 of the Arbitration and Conciliation Act to challenge the Award dated 26.07.2010 passed against the petitioner in favour of the respondent by the Arbitrator.

5.The trial Court, by its order dated 18.02.2013 in I.A.No.1477 of 2012 in Arbitration O.P.No.141 of 2010, dismissed the application filed by the petitioner under Order 23 Rule 1 CPC. Aggrieved by the dismissal of I.A.No.1477 of 2012 in Arbitration O.P.No.141 of 2010, the instant revision has been filed.

Submissions of the learned Counsel for the petitioner:

6.Heard Mr.D.Shivakumaran, learned counsel for the petitioner. Despite service of notice on the respondent and his name having been printed in the cause list today, there is no representation on his side.

7.According to the learned counsel for the petitioner, the trial Court ought not to have dismissed the application filed under Order 23 Rule 1 (3) of CPC seeking permission of the Court to withdraw the Section 9

application with liberty to file a fresh arbitration OP under Section 34 of the Arbitration and Conciliation Act to challenge the Arbitral Award passed against the petitioner. According to him, the Arbitration Award has been obtained fraudulently and is a bogus Award. He also submitted that he has not received a copy of the award from the Arbitrator. According to him, the Court below has failed to consider that the petition filed by the petitioner under Section 9 of the Arbitration and Conciliation Act is only an interim petition for injunction restraining the respondent from registering the alleged Arbitral Award before the concerned Sub Registrar's Office and on the other hand the relief under Section 34 of the Arbitration and Conciliation Act is a larger one seeking to set aside the alleged ex-parte Award. Since the Arbitral Award passed against the petitioner is a fraudulent Award obtained behind the back of the petitioner and the original Award was also not sent to the petitioner by the Arbitrator, the Trial Court ought to have allowed the application filed under Order 23 Rule 1 (3) of CPC to withdraw the petition with liberty to file a fresh petition. According to him, the fraudulent Award having been passed behind their back, the petitioner has been deprived of their statutory right to challenge the Award under Section 34 of the Arbitration and Conciliation Act as the alleged date of Award is 26.07.2010, whereas an application will have to be filed under Section 34 of the Arbitration and Conciliation Act within three months from the date of receipt of the Award. According to the learned Counsel for the petitioner, in view of the

fraudulent Arbitral Award, the petitioner has been deprived to file the application under Section 34 of the Arbitration and Conciliation Act within the stipulated time. Therefore, according to him, the Court below ought to have allowed the application filed under Order 23 Rule 1(3) CPC.

Discussion:

8. Order 23 Rule 1 CPC reads as follows:

"1. Withdrawal of suit or abandonment of part of claim.- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that

the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1) or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

9. The Arbitration and Conciliation Act is a special code by itself. Section 5 of the Arbitration and Conciliation Act also makes it clear that no judicial authority shall intervene except so provided for under the Act. Section 34 of the Arbitration and Conciliation Act enables the party against whom an Arbitral Award has been passed to challenge the said Arbitral Award before the competent Court as defined under Section 2(e)(i) of the Act. In the instant case, the issue as to whether the Arbitral Award passed against the petitioner was obtained fraudulently or not can be tested only under Section 34 of the Arbitration and Conciliation Act, which reads as follows:

"34. Application for setting aside arbitral award.—

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral

tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental

policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]”

10.As seen from Section 34 of the Arbitration and Conciliation Act,

an application for setting aside an Arbitral Award cannot be filed after

three months have elapsed from the date on which a party making that application had received the Arbitral Award, or, if a request had been made under Section 33, from the date on which that request has been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of thirty days, but not thereafter.

11. It is the case of the petitioner that he has not received the original Arbitral Award from the Arbitrator and it is also his case that the Award obtained by the respondent is a fraudulent Award. It is the further case of the petitioner that he has not been delivered with the signed copy of the Arbitral Award by the Arbitrator. Section 31(5) of the Arbitration and Conciliation Act also makes it clear that a signed copy of the Arbitral Award shall be delivered by the Arbitrator to each party.

12. The scope for interference of an Arbitral Award is laid down in Section 34 of the Arbitration and Conciliation Act. The Arbitration and Conciliation Act, 1996 is a self contained code and carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and Acts or things not mentioned therein are not permissible to be done. In other words, the Act being a special Act, the

applicability of the Civil Procedure Code is excluded when the Arbitration and Conciliation Act, 1996 provides for a procedure to challenge the Arbitral Award. The grounds raised by the petitioner in the Section 9 application ought to have been raised by the petitioner only by way of an application under Section 34 of the Arbitration and Conciliation Act seeking to set aside the Arbitral Award. Till date, the petitioner has not filed any application to set aside the Arbitral Award before any competent Court. Order 23 Rule 1 CPC deals only with suits and not with an application filed under provisions of the Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation Act, 1996 is a special code by itself which is a self contained code. It is settled law that special law will prevail over the general law when the special law provides for a remedy. The Arbitration and Conciliation Act provides for a remedy under Section 34 to challenge the Arbitral Award and therefore, without approaching the competent Court under Section 34, the petitioner has filed an application under Order 23 Rule 1(3) CPC seeking permission of the Court to withdraw Arbitration OP No.141 of 2010 filed under Section 9 of the Arbitration and Conciliation Act with liberty to file a fresh petition under Section 34 of the Arbitration and Conciliation Act to challenge the Arbitral Award. Order 23 Rule 1(3) CPC is not applicable to applications under the Arbitration and Conciliation Act as the said provision applies only to suits. If a party has not received proper notice of the appointment of the arbitrator or the Arbitral Award was obtained fraudulently, the only

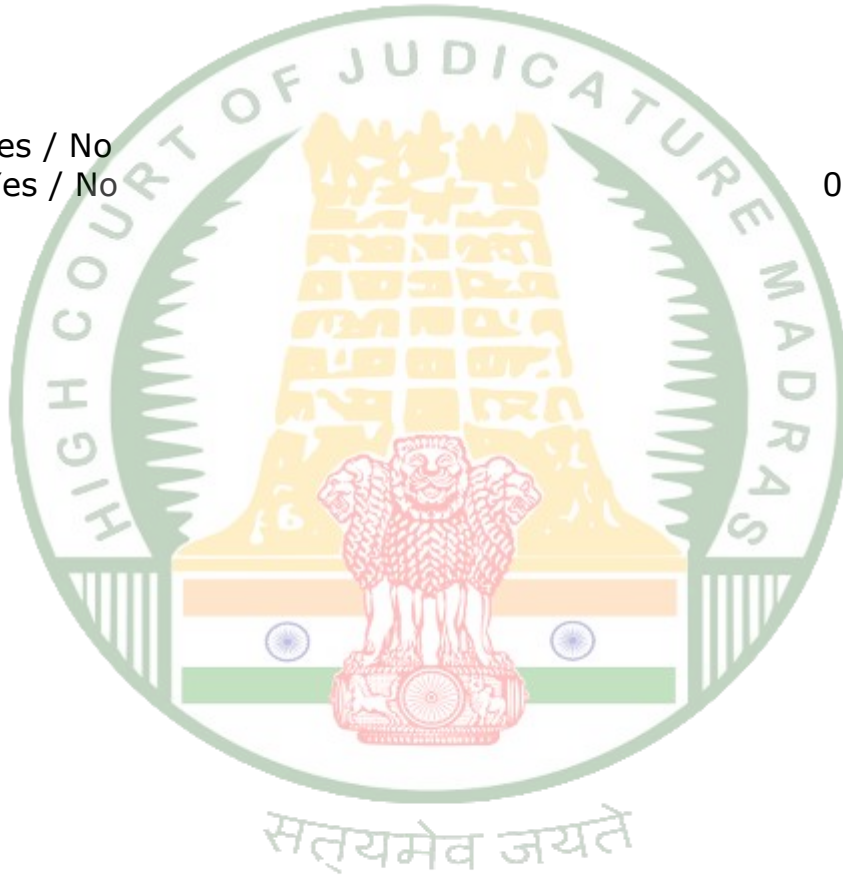
recourse available to the aggrieved party is to file an application under Section 34 of the Arbitration and Conciliation Act. Since the Arbitration and Conciliation Act is a special law, this Court is of the considered view that Order 23 Rule 1 CPC will not apply for an application under Section 9 of the Arbitration and Conciliation Act, even though the findings of the trial Court regarding the maintainability of an application under Order 23 Rule 1 CPC is erroneous. The Trial Court has erroneously misconstrued the judgment of a Division Bench of this Court reported in **2006 2 LW 118 (Om Sakthi Renergies Limited v. Megatech Control Limited and Another)**. A Division Bench of this Court in that judgment was dealing with Section 21 of the Civil Procedure Code which provision is not specifically made applicable to the proceedings arising under the Arbitration and Conciliation Act, 1996. But in the case on hand, there is a specific provision under the Arbitration and Conciliation Act for challenging the Arbitral Award. Therefore, the judgment reported in **2006 2 LW 118** referred to supra is not applicable to the facts of the instant case. But the trial Court has erroneously applied the same even though it has ultimately dismissed the application filed by the petitioner in I.A.No.1477 of 2012 in Arbitration OP No.141 of 2010. Even though, the Court below has misconstrued and misapplied the judgment reported in **2006 2 LW 118**, the conclusion of the Court below dismissing I.A.No.1477 of 2012 in Arbitration OP No.141 of 2010 is a correct order and does not call for any interference by this Court.

Conclusion:

13. In the result, there is no merit in the instant Civil Revision Petition. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Index : Yes / No
Internet : Yes / No
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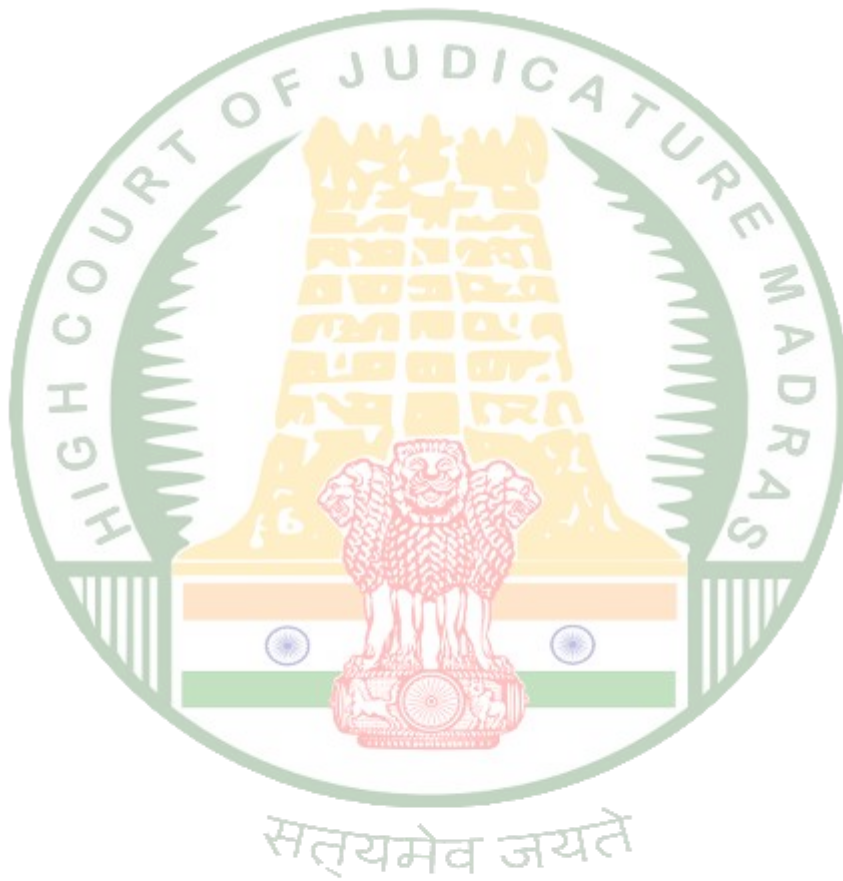
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To

The I Additional District Judge, Salem.



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