

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2018

CORAM :

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

C.M.A.No.710 of 2018
and C.M.P.No.6096 of 2018

M/S.Annamalai Finance Limited

A Public Limited Company

Represented by its Senior Manager-Legal

having its registered office at

252, Mettupalayam road

Coimbatore-641 043.

... Appellant/

1st

Respondent/Claimant

Vs.

1. M/S.Balamurthy Textiles (P) Limited
Represented by its Managing Director
B.Shanmugavadivel
No.43, Big bazaar street
Coimbatore-641 001.

2. B.Shanmugavadivel

3. B.Sundaramurthy

4. B.Sathiyathan

.. 1 to 4 Respondents/

Petitioners/Respondents 1,3,4

5. K.Kumaravel

.. 5th Respondent/2nd

Respondent/Sole Arbitrator

(Notice to R5 is dispensed with)

Prayer:-

Appeal filed under Section 37(2) of the Arbitration and Conciliation Act, 1996, against the fair and decretal order dated 13.07.2017 made in A.R.O.P.No.377 of 2005 on the file of the Principal District Court, Coimbatore, reversing the Award dated 30.11.2000 made in Arbitration Proceedings No.5 of 2000 passed by the Sole Arbitrator/Arbitral Tribunal, Coimbatore.

For Petitioner

: Mr.N.Manokaran

O R D E R

The Civil Miscellaneous Appeal is filed against the fair and decretal order dated 13.07.2017 made in A.R.O.P.No.377 of 2005 on the file of the Principal District Court, Coimbatore, reversing the Award dated 30.11.2000 made in Arbitration Proceedings No.5 of 2000 passed by the Sole Arbitrator/Arbitral Tribunal, Coimbatore.

2.The appellant is the claimant and the respondents 1 to 4 are the respondents in Arbitration Proceedings No.5 of 2000 on the file of the Arbitral Tribunal, Coimbatore. According to the appellant, the appellant company is the Public Limited Company, first respondent company is the Private Limited Company and the respondents 2 to 4 are its directors. The first respondent has borrowed money and the respondents 1 to 4 and one P.Balasubramaniam are guarantors. A Hire Purchase Agreement was entered into between the appellant company and first respondent company on 02.06.1995. As per the Hire Purchase Agreement, the second opposite party/ Balasubramaniam has agreed to repay the loan in 36 instalments. The third opposite party/second respondent herein has deposited his original title deeds as a collateral security. The first respondent has failed to pay the monthly instalment as agreed upon in the Hire Purchase Agreement and defaulted in payment of instalment. The first opposite party/first respondent herein has paid only a sum of Rs.7,42,950/- and even after repeated demands, first respondent has not taken any steps to regularise the amount and a sum of Rs.34,13,175/- was due and payable by the respondents 1 to 4. The respondents 1 to 4 and 2nd opposite party have also executed a demand promissory note for the loan availed by them. The respondents 1 to 4 and the appellant have entered into a supplemental agreement dated 14.10.1999, whereby it was agreed that the dispute should be resolved by Arbitration Proceedings. The appellant invoking the said arbitration clause appointed fifth respondent as Arbitrator. Before the fifth respondent/Arbitrator, the appellant has filed claim statement.

3.The respondents 1 to 4 have filed defence statement and stated that there is no arbitration clause in the Hire Purchase Agreement dated 02.06.1995 for appointment of Arbitrator. On the other hand, it was specifically agreed that the dispute should be resolved by way of civil proceedings. The supplemental agreement is not valid and the second opposite party/Balasubramaniam did not sign the said agreement. There was no Board Resolution for entering into the supplemental agreement. The appellant has got the signatures in the supplemental agreement by threat and fraud by showing N.B.W., which was issued by the learned Judicial Magistrate No.VII, Coimbatore. The second opposite party has not signed the supplemental agreement and therefore, it is not a valid

agreement. The respondents 1 to 4 signed the supplemental agreement without knowing the recitals in the agreement. The appointment of Arbitrator by the appellant is not valid, as no consent was obtained from the respondents 1 to 4 and second opposite party. The amount claimed by the appellant is not correct and the interest claimed is also exorbitant.

4.The second opposite party has filed separate defence statement and contended that the claim statement is not maintainable and there is no agreement entered into between the second opposite party with regard to the Arbitration Proceedings.

5.The fifth respondent/Arbitrator considering the pleadings and materials available on record, passed an award in favour of the appellant directing the respondents 1 to 4 and second opposite party to pay a sum of Rs.35,52,370/- together with interest jointly and severally from the date of claim statement till the date of realisation.

6.Pending Arbitration Proceedings before the fifth respondent, the second opposite party, who is the father of the respondents 2 to 4, died.

7.Aggrieved by the said award dated 30.11.2000 made in Arbitration Proceedings No.5 of 2000, the respondents 1 to 4 filed A.R.O.P.No.377 of 2005 on the file of the Principal District Court, Coimbatore, against the appellant and fifth respondent/Arbitrator.

8.Before the learned Judge, the appellant filed counter and contended that the respondents 1 to 4 have not raised any valid ground for setting aside the award and prayed for dismissal of the said A.R.O.P.

9.The learned Judge considering the materials available on record, allowed A.R.O.P. holding that the appointment of Arbitrator by the appellant is not in accordance with law as the appellant did not get any consent from the respondents 1 to 4. As per the provisions of Section 11 and 34(2)(iii) of the Arbitration and Conciliation Act, 1996, the award passed by the fifth respondent/Arbitrator is liable to be set aside.

10.Against the said order dated 13.07.2017 made in A.R.O.P.No.377 of 2005, reversing the award dated 30.11.2000 made in Arbitration Proceedings No.5 of 2000, the present Civil Miscellaneous Appeal is filed by the appellant.

11.The learned counsel for the appellant contended that the learned Judge erred in allowing the A.R.O.P. by setting aside the award dated 30.11.2000. The appellant has appointed the

Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996. The grounds raised by the respondents 1 to 4 for setting aside the Arbitration award are not valid. The respondents 1 to 4 have filed counter and they have not participated in the enquiry before the fifth respondent/Arbitrator. The respondents 1 to 4 have not raised any objection contemplated under Section 34 of the Arbitration and Conciliation Act, 1996 and hence, they are not entitled to challenge the award. The learned Judge has not properly exercised his power and jurisdiction conferred under Section 34 of the Arbitration and Conciliation Act, 1996 and erroneously set aside the award.

12. In support of his contention, the learned counsel for the appellant has relied upon the following judgment reported in 2015 (3) SCC 49 (Associate Builders v. Delhi Development Authority):

"15. This Section in conjunction with Section 5 makes it clear that an arbitration award that is governed by part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:

"5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

.. ..

17. It will be seen that none of the grounds contained in Sub-Section 2 (a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

.. ..

19. ... The result would be - award could be set aside, if it is contrary to:

- (a) Fundamental policy of Indian law; or
- (b) The interest of India; or
- (c) Justice or morality, or
- (d) in addition, if it is patently illegal.

.. ..

74. In the result, it is held that:

(1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

.. ..

.. ..

(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

.. ..

22. ... Apart from the three grounds stated in Renusagar [1994 Supp (1) SCC 644], added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

.....

.....

25. J.G.Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758, held:

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that a Court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court, as then it would be opposed to public policy."

13. Heard the learned counsel for the appellant and perused the materials available on record and the judgment relied upon by the learned counsel for the appellant.

14. From the materials available on record, it is seen that in the Hire Purchase Agreement dated 02.06.1995, there was no

arbitration clause that it was specifically agreed between the parties that the dispute would be resolved in the civil forum. Only in the supplemental agreement dated 14.10.1999 entered into between the appellant and respondents 1 to 4, an arbitration clause was introduced. The second opposite party did not sign the said supplemental agreement. The respondents 1 to 4 have claimed that the appellant has got their signatures by threat and fraud by showing N.B.W. that was issued by the learned Judicial Magistrate No.VII, Coimbatore, against them and therefore, they signed the supplemental agreement.

15.Arbitration clause in the supplemental agreement reads as follows:

"1.The existing Clause 24 is completely deleted and in its place, the following Clause is substituted as Clause 24.

2.It has been agreed between the parties that any disputes, difference and/or claims arising out of the Principal Agreement, whether during its subsistence or thereafter, shall be settled by ARBITRATION in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole Arbitration of the Arbitrator nominated by the Managing Director of the party the first part. The Arbitrator so appointed shall not be an Employee or Officer of the first part and it is the discretion of the Managing Director of the party of the first part to appoint a retired Judicial Officer. The award given by such an arbitrator shall be final and binding on all the parties."

16.As per the supplemental agreement dated 14.10.1999, the Managing Director of the appellant has to appoint arbitrator. An Arbitrator can be appointed by complying with the provisions of Sections 11(2) and (5) of the Arbitration and Conciliation Act, 1996, which are extracted hereunder:

"11.Appointment of Arbitrators:

(1) ...

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

.. ..

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party for the other party to so agree the appointment shall be made, upon request

of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court."

17.As per Section 11(5) of the Arbitration and Conciliation Act, 1996, the appellant must inform the respondents 1 to 4 about the Arbitrator appointed by him. If the respondents 1 to 4 failed to agree for appointment of Arbitrator, then the appellant has to approach the Court for appointment of Arbitrator. In the present case, there is nothing on record to show that the appellant has informed the respondents 1 to 4 about the appointment of fifth respondent as Arbitrator and that the appellant called upon the respondents 1 to 4 to give their consent. When there is no consent by the respondents 1 to 4 for appointment of fifth respondent as Arbitrator., the appellant ought to have approached the Court under Section 11(5) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.

18.Section 34(2) (iii) of the Act reads as follows:

Section 34(2) (iii):

"(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; "

As per this Section, if Arbitrator is not appointed as per Section 11 of the Act, the Award can be set aside. The learned Judge set aside the Award as the appellant failed to follow the procedure contemplated under Section 11 of the Act.

19.Considering the above facts in entirety, the appellant has not followed the procedure for appointment of Arbitrator as per Section 11 of the Act and the learned Judge has rightly set aside the award as per the provisions of Section 34(2) (iii) of the Act. The judgment relied on by the learned counsel for the petitioner is not applicable to the facts of the present case. In addition to that, the learned Judge has held that execution of the supplemental agreement itself is in suspicious circumstance and it is not genuine one and the second opposite party has not signed the supplemental agreement. There is no irregularity or illegality warranting interference by this Court with the order of the learned Judge dated 13.07.2017 in setting aside the award dated 30.11.2000.

20.In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kj

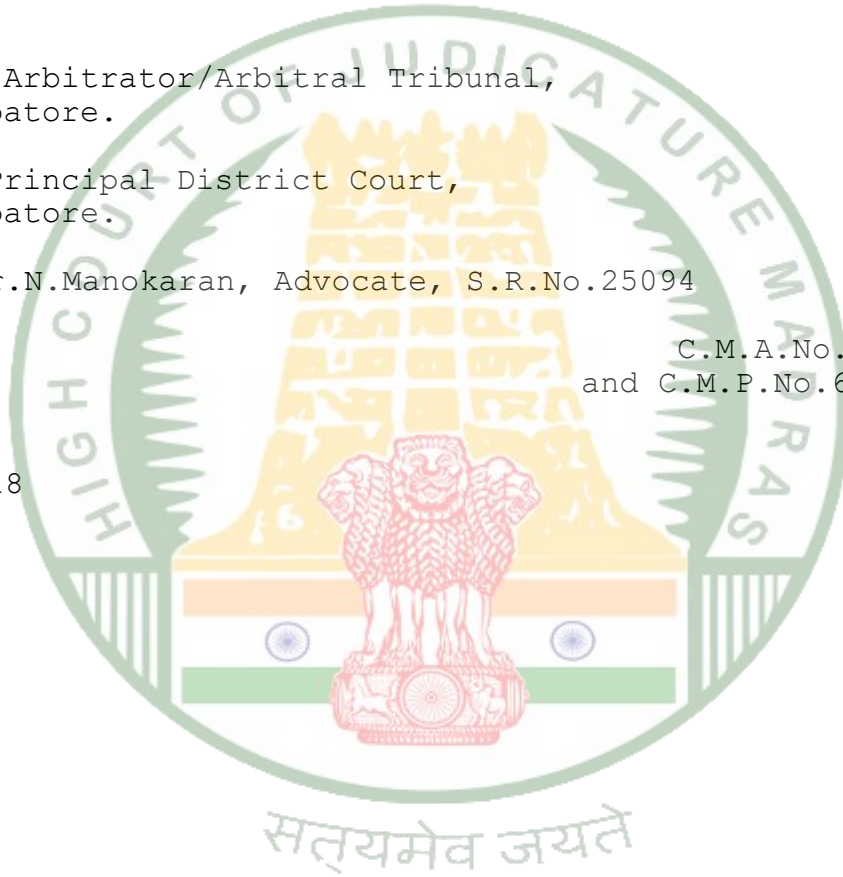
To

1. Sole Arbitrator/Arbitral Tribunal,
Coimbatore.
2. The Principal District Court,
Coimbatore.

+lcc to Mr.N.Manokaran, Advocate, S.R.No.25094

C.M.A.No.710 of 2018
and C.M.P.No.6096 of 2018

ssi(co)
cs/30/05/18



WEB COPY