

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.01.2018

DATED : 08.02.2018

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

O.P.No.323 of 2011

1.R.Veeramani

2.V.Meena Devi

Both residing at First Floor,
Flat No.C, Door No.5,
Maruthai Avenue, Ranjith Lane,
Kotturpuram, Chennai-600085.

..Petitioners

Vs.

1.Naseer Khaleeli

S/o Late MAC Khaleeli,
No.3, Thendral Nagar,
Karapakkam, Chennai-600 096.

2.Mrs.Jothi Ganesan,
W/o late Mr.M.Ganesan

3.Mr.G.Srinivasakumar,
S/o Late Mr.M.Ganesan
C/o Mrs.Jothi Ganesan

... Respondents

4.Mr.G.Badrinath,
S/o Late Mr.M.Ganesan
C/o Mrs.Jothi Ganesan
Respondents 2 to 4 are residing at
Door No.25, Muthupandian Avenue,
Santhome, Chennai-600 004.

5.Mrs.R.Sivasankari,
D/o Late Mr.M.Ganesan
W/o Ram Mohan,
"Manosrovar" 4/206-A, MGR Salai,
Palavakkam, Chennai-600 041.

6.Mr.Arun Pillai,
S/o Late Dr.P.Maruthi Pillai,
77/2, Gulmohar Avenue,
Velachery Main Road,
Guindy, Chennai-600 032.

7.Sekar Alagappan,
Substitute Sole Arbitrator,
Alagappan House,
937 Poonamallee High Road,
Chennai-600 084.

.. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 17.02.2011 received by the petitioner on 22.02.2011 passed by the seventh respondent in Arbitration Reference No.1 of 2005.

For Petitioners : Mr.P.V.Balasubramaniam
for M/s BFS Legal

For Respondents : Mr.P.Tamilmani for
Mr.R.Sivakumar for R1

M/s Ganesh & Ganesh for R2 to R5

ORDER

We are dealing with a case involving an award passed by an unnamed Arbitrator appointed unilaterally against the consent of contesting parties, contrary to the arbitral agreement, seeking declaration against the parties, who were not parties to the document, which is in the nature of Agency-cum-contract and thus, not title. The award sets aside a sale deed of the year 2002 through a claim made based upon a Deed of Agency-cum-contract followed by Deeds of settlement, which according to the claimant, were forced on him. Incidentally, the award, while holding that vendors have acted bona fide in executing the sale deed, proceeds to set aside the same with liberty to the claimant to initiate civil and criminal proceedings as against the petitioners before this Court, arrayed as respondent Nos.5 and 6 being the subsequent purchasers, for appropriate relief including damages.

2. FACTUAL MATRIX:-

2.1. Narration of the facts by itself would enable the Court to give its decision. On 11.05.1994, a Deed of Agency-cum-contract was signed on behalf of the respondent No.1 and one

Ganesan (since deceased) being the agent and owner. The deceased Ganesan was represented by his power agent Maruthai Pillai. The covenants, which are of importance, are as follows.

"NOW THIS DEED WITNESSETH:-

1. That in consideration of the owner hereby appointing the Agent as his/her sole selling agent to market and identify third party purchasers in respect of 50% undivided share in the schedule 'A' lands, the Agent hereby agrees to construct for the owner 50% of the total sanctioned built up area (less Rs.9,00,000/- being the value of a portion of the owners said 50% of the sanctioned built up area) and pay to the owner a sum of Rs.9,00,000/-.

2. That the Agent has on this day paid a sum of Rs.2,25,000/- to the owner (the receipt whereof the owner doth hereby admit and acknowledge) and the agent further agrees to pay the balance sum of Rs.6,75,000/- in the manner following:-

On 16.5.94 – Rs.1,50,000/-

On 17.6.94- Rs.4,00,000/-

On 17.7.94 – Rs.1,25,000/-

That the owner shall be entitled to receive 50% of the total sanctioned built up area on the Schedule 'A' lands, less the built space valued Rs.9,00,000/- which is to be determined by mutual consent at date."

"That the owner agrees to execute and register a power of attorney and thereby empower the Agent to apply for sanction, to filling and levelling the Schedule 'A' lands, to execute agreement to sell and sale deed/s with respect of 50% undivided share in the Schedule 'A' lands etc."

"12. That in the event of any dispute arising between the parties thereto from or out of this agreement then the same shall be referred to Arbitration by Mr.A.R.Karunakaran, Advocate at No.9, Valliammal Road, Madras-600 007, to the exclusion of all other forges, whose decision shall be final and binding on the parties hereto."

2.2. Thus, the title continued with the owner but the agent was permitted to sell half of the property and appropriate the

amount. The owner was made entitled to receive 50% of the sanctioned built up area after deducting the value for the amount of Rs.9 lakhs for the value paid by the agent. Thereafter, power deeds were executed by the power agent of the owner and the respondent No.1, which were subsequently cancelled. This could be seen from the averments made in the claim petition.

2.3. It was followed by two settlement deeds, by which, the first respondent was made to pay certain specified amount after effecting sale of the flat. According to the first respondent, the deeds were forced upon him. The power agent of the owner also died on 25.10.2001. The settlement deeds themselves were executed between the power agent of the legal heirs of the owner and the respondent No.1. As dispute arose between the parties, an approach was made to the Arbitral Tribunal qua the settlement deeds and accordingly, an award was passed against the respondent No.1/claimant. On a query from the Court, the learned counsel has stated that the award has not been specified. However, according to the respondent No.1, the settlement deeds recognised the title.

2.4. A sale deed was executed by the respondent No.6 before this Court, subsequently arrayed as respondent No.7 before the Tribunal, acting as the power agent of respondents 2 to 5. It was accordingly executed in favour of the petitioners. An order of attachment followed by a consent money decree was passed as against the respondent No.1 by one M.Krishnamoorthy. He made a complaint stating that the respondent No.6 before this Court has committed forgery by the creation of power of attorney. According to the respondent No.1 also, the power of attorney was forged. The criminal complaint was dismissed by the Court.

2.5. The respondent No.1 made a claim against the respondent Nos.2 to 5 and the petitioners initially being the original owners and the subsequent purchasers. Treating himself as the owner of the property, a declaration was sought to set aside the sale deed, followed by possession among other things. It appears, subsequently, the respondent No.6 herein was added as respondent No.7. The Tribunal was constituted by the named Arbitrator by name A.R.Karunakaran. Preliminary objections were

raised by the petitioners and curiously by respondent No.6 also. The respondent No.6 has raised a plea that he was nowhere concerned with the claim petition. There was no privity of contract between the parties. He cannot be made as a party being a legal heir of Dr. Marudu Pillai, who himself was the power holder. He being a delegate, cannot be proceeded against. Thus, according to the respondent No.6, he was an unnecessary party to the arbitral proceedings,

2.6. The petitioners also raised preliminary objections stating that they being not signatories to the arbitral agreements, cannot be included.

2.7. Strange things happened thereafter. The named Arbitrator received a letter from the learned counsel for the petitioners and based upon the same, informed the parties that the arbitral proceedings are closed in view of the letter of the first respondent expressing his desire to withdraw the same. The letter dated 24.11.2009 of the first respondent is placed on record herein.

"Sub: Withdrawal of Arbitration Proceedings

in Arbitration Reference Nos.1 and 2 of 2005 regarding the sale of two first floor flats belonging to me by the legal heirs of Ganesan and Muthu respectively.

This is to inform your goodself that I had initiated arbitration proceedings before you as the sole arbitrator relying on the arbitration clause No.12 under the Deed cum Agency contract dt. 11.05.94. As no significant development has taken place so far in the said proceedings, I am withdrawing the Arbitration Proceedings. You may do the needful. You are also requested to return back the documents submitted by me.

"If I don't receive communication from your goodself regarding the order terminating the abovesaid arbitration proceedings within one week from the receipt of this letter. I shall take it that the said arbitration proceedings stand terminated with effect from the date of receipt of this letter by your goodself."

2.8. Thereafter, the Arbitrator wrote a letter to the respondent No.1 dated 26.11.2009 stating that he was about to pass final orders, at the time, he received the letter and thus,

informed the parties on the decision made by the claimant/ respondent No.1 to withdraw the claim. The apposite part of the letter is as follows:-

"This has reference to your letter dated 24.11.2009. As you are aware, the Arbitration Proceedings lacked the cooperation of the parties involved and there was much delay in taking the matter forward. I have sent notices of hearing on several occasion, but the parties and counsels have failed to appear on several occasions.

As such, I was about to pass final orders when I received your said letter. I am informing all the parties to the Arbitration Proceedings about your decision to withdraw your claim.

The papers can be collected from my Office on any working day after fixing a prior appointment by telephone."

2.9. The respondent No.1 once again wrote a letter dated 14.12.2009 to the named Arbitrator stating that he was only withdrawing the proceedings, but not the claims. The statement made in the letter is as follows:

"Sir,

I had withdrawn the arbitration proceedings from your good self as per my letter dated 24.11.09. But I had not withdrawn my claims against the opposite parties in this regard as stated by you in your letter dt.26.11.09. This is to confirm and clarify that your mandate as sole arbitrator stands terminated w.e.f. 26.11.2009. As stated by you, kindly hand over all the papers to Mr.R.Arvind Advocate."

2.10. Thus, it is clear that the respondent No.1/claimant withdrew the arbitration proceedings rightly presided over by the named Arbitrator. This was done at the time of passing the final award. The mandate was terminated unilaterally by the respondent No.1.

2.11. Rather, very strangely the proceedings were restored once again unilaterally through an appointment of another Arbitrator. Notice for consent was sent only to the respondent No.6 and thus, not to the petitioners and respondents 2 to 5.

The respondent No.6 also agreed immediately with the so called

hope of settling at the earliest. It was also stated by the respondent No.6 that the Arbitrator was known to both sides.

2.12. Now, let us see the proceedings before the Tribunal. The application filed under Section 16 of Arbitration and Conciliation Act, 1996, by the petitioners was rejected. On the complaint made by the petitioners, it was restored. On the same day, in which, the application was heard and decided. Award was also passed i.e., 17.02.2011. The respondent No.7 curiously gave up his stand taken earlier and started accusing the petitioners. Perhaps, this may be, by way of a reply to the memo filed by the petitioners, though the fact remains that there is a complete departure. He also accepted the appointment of the Arbitrator as against the earlier stand of being added as a party though no individual right or liabilities are involved.

2.13. In the award passed, the written arguments of the respondent No.1 find part of the annexure. Documents have not been marked. Ultimately, the Tribunal is pleased to hold that there is no need to get the concurrence of the petitioners and notwithstanding the fact that they are not parties to the arbitral

agreements, an award can be passed against them. Resultantly, while holding the act of the other respondents in executing the sale deed was bona fide, it was accordingly set aside with a further liberty to proceed against the petitioners.

3. The learned counsel appearing for the petitioners would submit that the deed of Agency dated 11.05.1994 did not create any title against the respondent No.1. The arbitration clause only speaks about the named Arbitrator. The petitioners were not party to the arbitration clause. They were not heard before the appointment of a new Arbitrator. The Arbitrator was not an impartial person as recorded by him in the award itself as he was a well wisher of both sides and familiar with the family affairs of late Dr.P.Maruthai Pillai. This does not include the petitioners. No opportunity was given to contest the matter on merits as the Award was passed on the same day without affording chance to file reply statement. No evidence was recorded along with exhibits marked. The petitioners seek to resurrect a stale claim. There cannot be a declaration to set aside the sale deed. The findings are mutually contrary and destructive qua the respondent No.6. before the Tribunal. Thus, the award has to be

set aside.

4. The learned counsel appearing for respondent Nos.2 to 5 would submit that respondent Nos.2 to 5 were never informed either about the appointment of the new Arbitrator or the subsequent proceedings. An affidavit was also filed by the respondent No.2 to that effect. It is also submitted that no authorisation was given to respondent No.6 to act on behalf of respondent Nos.2 to 5.

5. The learned counsel appearing for the respondent No.1 would vehemently contend that sufficient power is available to the Tribunal to add necessary parties. There is no need to put the petitioners on notice. The Tribunal has considered the entire materials available on record. Reliance was also made on Section 45 of the Arbitration and Conciliation Act, 1996, with specific emphasis on the words "any party claiming through or under him". To buttress his submission, the learned counsel has furnished the following decisions.

1.CHLORO CONTROLS INDIA PRIVATE
LIMITED V. SEVERN TRENT WATER

PURIFICATION iINC ((2013) 1 Supreme Court Cases 641);

2.SBP & CO., PATEL ENGINEERING LTD., AND ANOTHER ((2005) 8 Supreme Court Cases 618); and

3. A.AYYASAMY V. A PARAMASIVAM AND OTHERS ((2016) 10 Supreme Court Cases 386).

6. As stated already, nothing more is required to be done on the facts of the case to set aside the award. The deed of agency cum contract dated 11.05.1994 did not convey any title in favour of the respondent No.1. It merely enabled the respondent No.1 to sell off a part of the property after completion of the construction. The power deed executed by the power holder of the owner-Ganesan was also cancelled. Both the owner and the power holder also died. The arbitration clause mentions only a named Arbitrator. He has stated in clear terms that he had almost completed the award when request to terminate the proceeding was made. Admittedly, the petitioners were not parties. For the reasons known, the respondent No.1 terminated the proceedings of the named Arbitrator and went to

an unnamed one. A consent was obtained from the respondent No.6, who took a stand till that time that he was not a necessary party. There is nothing to indicate that he could represent the other respondents viz., respondents 2 to 5, who appeared on the earlier occasion and filed vakalath and contested the case on engaging a lawyer. Similarly no notice was given to them during the proceedings. The petitioners were also not heard before the appointment of the Arbitrator. Both the order under Section 16 of the Arbitration and Conciliation Act, 1996, and the award were passed on the same date. There is nothing to indicate that they were heard after completion of the argument in the application filed under Section 16 of the Arbitration and Conciliation Act, 1996.

7. Even according to the first respondent, the settlement deeds were brought forth by coercion. Based upon these deeds, an Award was passed earlier but strangely not given effect to. Even these settlement deeds were not documents of title. Even according to the respondent No.1 the power deed was forged and hence, it is not known as to how the respondent No.6 before this Court was arrayed as respondent No.7 in the

arbitral proceedings subsequently and in which capacity. We are dealing with a case where the respondent No.1 seeks certain right based upon a deed of the year 1994 and subsequent settlement deeds of the year 2000. Claiming title through these deeds, which appeared to be unregistered ones, a declaration to set aside the sale deed was sought for by treating the Tribunal as a Civil Court against third parties. An award was passed as against the basic principle of law by setting aside the sale deed with the finding that there was nothing wrong in its execution by respondent Nos.2 to 6.

8. When the proceedings were terminated, it is not known as to how they could be continued thereafter by a unilateral change of the arbitrator specifically named. Perhaps, the respondent No.1 was not comfortable with the expected result from the named Arbitrator as against the unilaterally nominated one viz., the respondent No.7. Absolutely, no effort was made to request the named Arbitrator to continue thereafter, when the letter of the respondent No.1 dated 14.12.2009, clearly indicates the intention. There cannot be any unilateral termination of a named Arbitrator by one of the party and thereafter, preferred

some other person. The named Arbitrator specifically informed respondent No.1 that the other parties were being informed on the withdrawal of the claim. If the subsequent Arbitrator was known to some of the parties, he ought to have recused himself as he is not known to the petitioners.

9. The Tribunal has committed a serious error in passing the Award. The settlement deeds will not confer title. These deeds merely provided the respondent No.1 to sell of the property and then make the payment, after clearing the LIC loan. There is no material to hold that the respondent Nos.2 to 5 were also heard either at the time of appointing the subsequent Arbitrator or during the proceedings before the Tribunal. There was no finding on the authorisation given by them in favour of the respondent No.7 to represent them. In fact, they were already on record but not issued with notices, after the termination of the earlier proceedings.

10. The decisions relied upon by the learned counsel appearing for the respondent No.1 have no application to the case on hand. We are not dealing with a case involving Sections 8, 11 and 45 of the Arbitration and Conciliation Act, 1996. Even

assuming the respondent No.1 was entitled to bring the petitioners into the arbitral agreement, the right guaranteed to them in choosing the Arbitrator after issuing notice to them cannot be taken away.

11. In the result, the award is liable to be set aside as it is a case where this Court satisfied on the ground mentioned in/under Section 34 of the of the Arbitration and Conciliation Act, 1996. Accordingly, the Award stands set aside and the original petition is allowed. No costs.

08.02.2018

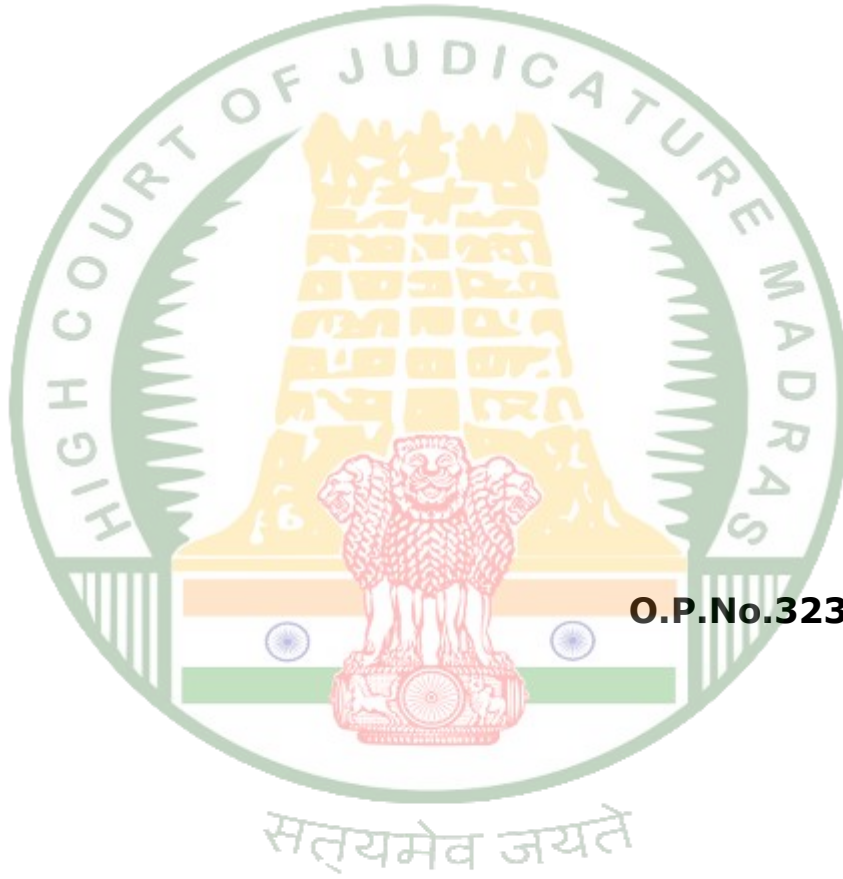
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O.P.No.323 of 2011

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