

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.11.2019

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P.No.180 of 2012

R.Sridharan

... Petitioner

vs.

1.N.S.Ramachandran

2.R.Gowri Shankar

Rep. By its Power of Attorney,
Mr.N.S.Ramachandran

3.M.Thambi Thurai (Arbitrator)

4.M.Ramachandran (Arbitrator)

5.D.K.Sivakumar (Arbitrator)

... Respondents

PRAYER: This Original petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the Arbitral Award dated 07.11.2010 on the file of the Arbitral Tribunal consisting an even number namely Respondents 3 and 4 herein in the case of the Arbitration dispute between the petitioner and the respondents 1 and 2.

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For Petitioner : M/s.T.M.Hariharan

For Respondents : Mr.M.Ganesan for R1

ORDER

This petition is filed to set aside the arbitral award dated 07.11.2019.

2.I heard the learned counsel for the petitioner Mr.T.M.Hariharan and the learned counsel for the first and second respondents Mr.M.Ganesan.

3.This dispute arises out of an agreement dated 16.03.2010 (the Agreement) as between the petitioner and the first and second respondents in respect of the partition of the family properties. The petitioner is one of the sons of the first respondent and the second respondent is the other son. As per the terms of the Agreement, these three parties unanimously agreed to the appointment of the three arbitrators who are the respondents 3 to 5 herein. The arbitral proceedings were commenced pursuant to the Agreement. During the course of such proceedings, one of the arbitrators, Mr.D.K.Sivakumar, informed the three parties that he was resigning as arbitrator and requested that the arbitral tribunal be reconstituted. He also sent an earlier letter dated 22.10.2010 to the other two arbitrators with copies to the parties but the receipt of this communication and its authenticity is disputed by the contesting respondents. After the resignation of Mr.D.K.Sivakumar, the remaining members of the Arbitral

Tribunal pronounced the arbitral award dated 07.11.2010 (the Award), which is impugned herein.

4.The learned counsel for the petitioner raised three contentions. His principal contention is that Section 10 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) mandates that there should be an odd number of arbitrators. In this case, he submits that the admitted position is that upon the resignation of Mr.D.K.Sivakumar, the remaining arbitrators constituted an even number. Consequently, the said arbitrator should have been replaced before continuing with the arbitral proceedings. His second contention was that the valuation report dated 24.09.2010 (the valuation Report), which was relied upon by the arbitral Tribunal, was not provided to the petitioner and that this constituted a violation of both Section 24(3) and Section 26(3) of the Arbitration Act. His third contention was that the properties that were required to be partitioned consisted of both immovable and movable properties whereas the Arbitral Tribunal did not deal with the movables in the Award.

5.In support of his submissions, the Judgments, which are set out below, along with context and Principle, were relied upon;

(i) ***J.Kuppuswami Chetty -vs- B.V.Anantharamier 60 LW 244***, (the Kuppuswami Chetty case) wherein, at page 246, a Division Bench of this Court, in the factual context of the withdrawal of one out of three arbitrators, held, inter alia, that "whilst the agreement provides that the decision of the majority of the arbitrators shall prevail, nevertheless, the law requires, and it is well established, that all the arbitrators must give their united consideration to all matters arising in the arbitration which has been referred to them."

(ii) ***ONGC -vs- Saw Pipes (2003) 5 SCC 705***, and in particular, paragraph 15 thereof, for the proposition that an award, which is contrary to the Arbitration Act, is patently illegal.

(iii) ***ONGC Ltd -vs- Western Geco International Ltd., (2014) 9 SCC 263*** as to the purport of the fundamental policy of Indian law.

(iv) ***Shailesh Dhairyawan -vs- Mohan Balakrishna Lulla (2016) 3 SCC 619*** and, in particular, paragraph 19 thereof regarding the requirement of replacing an arbitrator.

6.The learned counsel for the respondent made submissions in response and to the contrary. He opened his submissions by pointing out that the majority arbitrators who delivered the award are family friends of

the contesting parties and that the arbitrator who withdrew is a close relative.

7. With regard to the principal contention, namely, the resignation of Mr.D.K.Sivakumar, he contended that the three arbitrators had heard the submissions in detail and were required to meet only for the purposes of pronouncing the award. In support of his submissions, he referred to the minutes of the arbitral proceedings dated 17.10.2010 at page 145 of the typed set wherein it is recorded that Mr.D.K.Sivakumar was informed over phone to meet the other arbitrators on 24.10.2010 at 10.00 AM for pronouncing the award. On that basis, he submitted that the resignation of the arbitrator was not bona fide and was done so as to scuttle the proceedings in collusion with the petitioner. He also pointed out that the letter dated 22.10.2010, which is purportedly addressed to the other arbitrators with a copy to the parties, was not received by the first and second respondents or by the arbitrators and appeared to have been handed over only to the petitioner. He also pointed out that the majority arbitrators issued a notice to the petitioner calling upon the petitioner to attend the proceedings for purposes of pronouncing the award, but the said notice was refused to be received by the petitioner, as evidenced by the proceedings dated 28.10.2010 at page 148 of the typed set of the papers.

8. In these facts and circumstances, he contended that the petitioner waived the requirement under Section 10 of the Arbitration Act with regard to the requirement of an odd number of arbitrators. In specific, it is the contention that inspite of being aware about the resignation of Mr.D.K.Sivakumar, the petitioner did not take steps for the replacement of the said arbitrator and for the re-constitution of the Arbitral Tribunal and that such inaction amounts to a waiver. In this connection, he referred to and relied upon a judgment of the Hon'ble Supreme Court in **Narayan Prasad Lohia -vs- Nikunj Kumar Lohia and others on 20th February 2002**, (the Narayan Prasad Lohia case) wherein, at page 7, the Hon'ble Supreme Court held that Section 10 of the Arbitration Act is a derogable provision and that it should be read along with Section 16 thereof. By relying upon the said decision, the learned counsel for the respondent emphasized that, in this case, the petitioner waived the right to object on the basis of Section 10 of the Arbitration Act. He also relied upon the judgment of the **Delhi High Court in Cimmco Ltd. -vs- Union of India**, (the Cimmco case) judgment dated 09.10.2018, wherein the Delhi High Court, at paragraphs 22 to 24.3, held that the remaining Arbitrators could proceed with the arbitral proceedings and pronounce a valid award in the factual context of the withdrawal of one arbitrator at the fag end of proceedings, after a draft

award had been prepared in the matter. He also relied upon a judgment of the Delhi High Court in ***Government of India, Bharat -vs- Acome and others 2007(2) Arbitration Law Reports 90 Delhi***, wherein, at paragraph 32, it was held that one arbitrator cannot frustrate the arbitration proceedings by refusing to sign the majority award.

9.The learned counsel for the first and second respondents also submitted that the movable assets were partitioned even prior to the arbitral proceedings on 25.04.2010 and that, therefore, the non-partitioning of movable assets cannot be cited as an infirmity in the award. His last submission was that the arbitral award is well reasoned and that the petitioner has not cited any legitimate grievance with regard to the Award on merits.

10.The records were examined and the oral submissions of both sides were considered. The principal issue that is required to be determined in this case is whether the arbitral award is liable to be set aside because of the withdrawal of one of the arbitrators, namely, Mr.D.K.Sivakumar. It is the admitted position in this case that the Agreement provided for a three member Arbitral Tribunal and, in fact, all three contesting parties unanimously selected specific persons as arbitrators under the Agreement.

It is also the admitted position that Mr.D.K.Sivakumar resigned as an arbitrator by issuing a communication dated 24.10.2010 to the three contesting parties. In these facts and circumstances, the question that arises for consideration is whether it could be concluded that the petitioner waived his rights under Section 10 of the Arbitration Act. In this case, it is clear from the record that no hearings took place subsequent to the withdrawal of Mr.D.K.Sivakumar at which the petitioner participated. In fact, the petitioner did not participate even at the hearing when the arbitral award was pronounced by the majority arbitrators. From the above facts, it is clear that there is no evidence of waiver by conduct or implied waiver. Consequently, notwithstanding the judgment of the Hon'ble Supreme Court in the Narayan Prasad Lohia case that Section 10 may be derogated from, on facts, it cannot be said that the petitioner waived his right under Section 10.

11.This leads to the contention based on the judgment of the Delhi High Court in the Cimmco case. The said judgment was pronounced in the factual context of the arbitrators completing deliberations in the matter and preparing the draft award, as is evident from paragraph 22.4 of the said judgment. By contrast, in this case, the record does not disclose that the three arbitrators deliberated on the case and prepared a draft award

pursuant to such deliberations. Consequently, it cannot be said that the withdrawal of Mr.D.K.Sivakumar was after such deliberations or after preparing the draft award. The Judgment of the Division Bench of this Court in the Kuppuswamy Chetty case to the effect that all the arbitrators should give their united consideration to all matters would be squarely applicable. The learned counsel for the respondent, no doubt, contended that such deliberations may be implied from the fact that the majority arbitrators requested Mr.D.K.Sivakumar to attend the hearing for purposes of pronouncing the award. However, drawing such an inference from the evidence on record would be purely speculative and, therefore, the said contention cannot be countenanced.

12.For the forgoing reasons, I am of the view that a case is made out of violation of Section 34 (2)(a)(v) of the Arbitration Act in so far as the composition of the Arbitral Tribunal that pronounced the Award was not in accordance with the Agreement. Therefore, the Award is liable to be set aside. In view of the above conclusion, it is not necessary to deal with the other contentions of the learned counsel for the petitioner.

13.Consequently, the award dated 07.11.2010 is hereby set aside. Notwithstanding this conclusion, it is just and necessary that the dispute

between the parties with regard to the partitioning of the family properties is required to be decided on merits. Therefore, both parties are granted leave to initiate de-novo legal proceedings, including arbitration proceedings, in this regard. If such legal or arbitral proceedings are initiated, all the contesting parties are entitled to the benefit of Section 14 of the Limitation Act, 1963 in respect of time taken in this arbitration and proceedings before this Court. In view of the lapse of considerable time in the arbitration and in this proceeding, all the contesting parties are directed to initiate the dispute resolution process expeditiously so as to ensure quick resolution of the dispute.

14.The learned counsel for the respondent submits that the first and second respondents are in possession of the rear portion of the property in Chennai and were using the passage leading to the said property throughout the period of this dispute. The statement of the learned counsel is recorded with regard to the status-quo as on date. The learned counsel for the petitioner submits that there is an interim injunction in a Section 9 Application with regard to the maintenance of the said status-quo and therefore, there is no risk of it being disturbed pending de-novo dispute resolution. The said statement is also recorded.

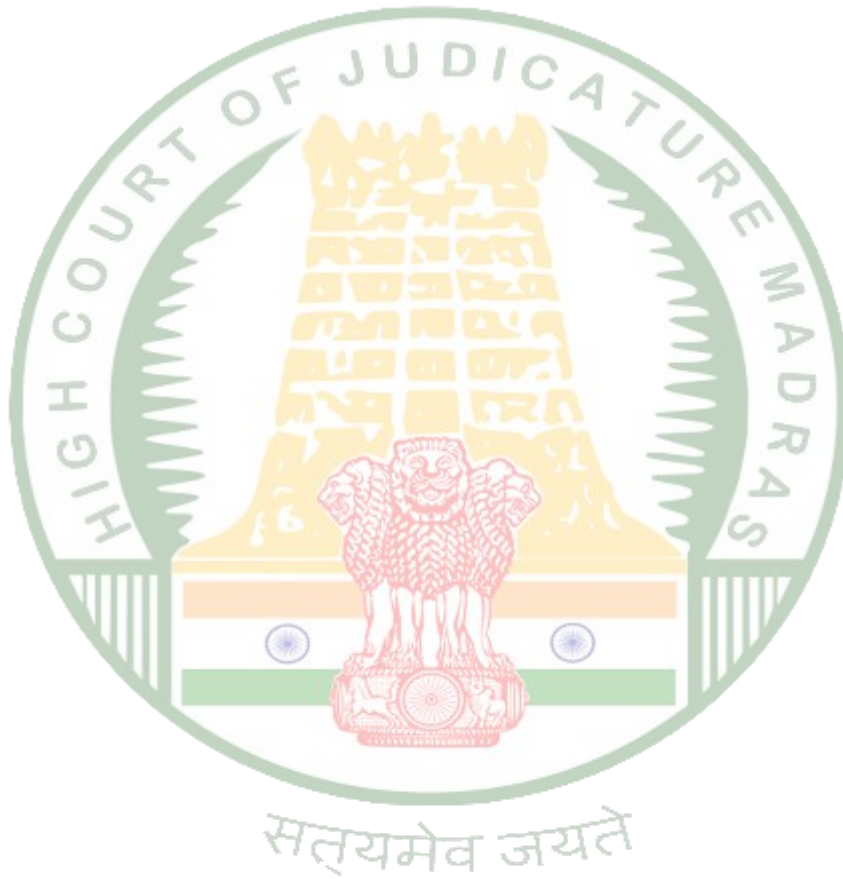
15.With the above observations, this Original Petition is disposed of.

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Index : Yes / No

Internet : Yes / No

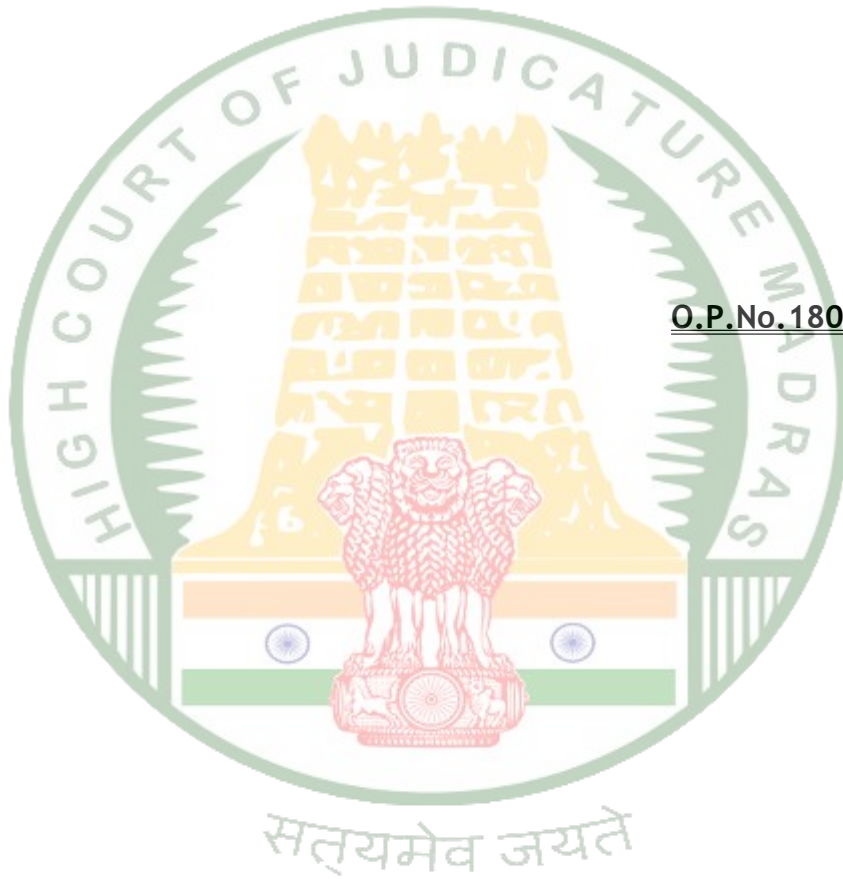
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SENTHILKUMAR RAMAMOORTHY,J

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