

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 12.06.2019	Delivered on 19.06.2019
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

Application Nos.1789 and 2330 of 2019
in CS Nos.47 and 46 of 2019

1. M/s.Escape Artists Motion Pictures
Rep. By its Sole Proprietor,
Madan Panday, No.69A, Habibullah Road,
T.Nagar, Chennai 600 017.
 2. Mr. Madan Panday
3A Trasquil Terrace,
69, Kamdar Nagar, Nungambakkam,
Chennai 600 034.
 3. M/s. Kondaduvom Entertainment,
A Partnership Firm, Rep by its Partner
Mr.Gowtham Vasudev Menon,
69-A, Habibullah Road,
T.Nagar, Chennai 600 017.
- ... Applicants in both the Petitions

Vs

1. M/s. Sun Power Solar Technick Pvt Ltd.,
Rep. By its Director,
Mrs. Radha Krishnaswamy,
102, Defence Officers Colony,
Ekkatuthangal,
Chennai - 600 032.
 2. M/s.K.Punniyamoorthy
 3. Mr. K.Prem Kumar
- ... 1st Respondent in Appl. No.1789/19
- ... Respondents 2 & 3 in both the Applications

M/s. Shraddha Entertainment,
Rep by its Partner,
Mr.Badri Kasturi,
No.2, Seaface Road, Palavakkam,
Chennai - 600 041.

1st Respondent in Appl. No.2330/19

Prayers: Applications are filed under Order XIV Rule 8 of the Original Side Rules read with Section 8 and 5 of Arbitration and Conciliation 1996, praying to refer the dispute in (i) CS No.47 of 2018 (ii) CS No.46 of 2018 respectively pending before this Hon'ble Court to Arbitration in terms of Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996.

For Applicants : Mr.Hameed
in both the Petitions for M/s.AAV Partners

For Respondents : Mr. B.Ravi
in both the Petitions for M/s. Rugan & Arya for R1

Mr. Om Prakash, Senior Counsel
for M/s.K.Moorthy for R 2 & R3

COMMON ORDER

Both these applications have been filed by the 3rd defendant in both the suits seeking to refer the dispute to the arbitration in terms of Section 8 of the Arbitration and Conciliation Act, 1996.

2. The suit in CS No.46 of 2019 has been filed by the plaintiff/1st respondent herein, seeking a declaration that the Memorandum of Understanding entered into between defendants 1 and 2 on the one hand and defendants 3 and 4 on the other hand, during March 2018 is collusively created and hence not binding on the plaintiff, in respect of the rights of the plaintiff over the film "Dhruvanatchathiram".

3. A similar prayer has been sought for by the plaintiff in CS No.47 of 2019, in respect of the agreement dated 18.03.2016 entered into between defendants 1 and 2 and defendants 3 and 4 in the said suit, with reference to the rights of the plaintiffs in the movie "Ennai Noki Paayum Thotta". A prayer for a declaration that the Memorandum of Understanding entered into between defendants 1 and 2 on the one hand and defendants 3 and 4 on the other hand in the said suit on 31.03.2018 has been collusively created and hence not binding on the plaintiff in respect of the rights of the plaintiffs in the films "Ennai Noki Paayum Thotta" and "Dhruvanatchathiram".

4. The facts leading to the present litigation between the parties in brief are as follows:

Mr.Gautham Vasudeva Menon, who is a partner of the 5th defendant in the suit, had conceived a film named "Naragasooran" and the said film was produced by M/s.Knight Nostalgia Filmotainment, represented by its Proprietor, Mr.Manikandan. The said Company was unable to raise necessary funds for completion of the said movie. Therefore, they had approached the plaintiff in CS No.46 of 2019, seeking funding for the completion of the said movie. On 15.09.2017 an agreement was entered into between the plaintiff in CS No.46 of 2019, whereby they agreed to produce and complete the movie "Naragasooran" on the terms and conditions found in the said agreement. Pursuant to the

said agreement, the plaintiff in CS No.46 of 2019 disbursed monies for the production of the movie and the said movie was completed in all respects and the Censor Certificate was also obtained. However, the said movie was not released due to various reasons.

5. It is also stated that this Court had in an application filed under Section 9 of the Arbitration and Conciliation Act, 1996 filed by the 1st defendant in CS No.47 of 2019 had granted an injunction restraining the release of the movie "Naragasooran" on 31.10.2017. Similarly by another order dated 31.10.2017, at the instance of the 1st defendant in CS No.47 of 2019, the producer namely M/s.Photon Kathaas Production Pvt Ltd., was restrained by an order of injunction from releasing the movie "Dhruvanatchathiram". The 5th defendant which is a partnership firm, wherein the proprietor of M/s. Ondraga Entertainment, Mr.Gautham Vasudeva Menon, is a partner had confirmed that the producers of the movie "Naragasooran" namely, M/s. Ondraga Entertainment, had received a sum of Rs.4,20,00,000/- from third parties by assigning various rights in the movie "Naragasooran" in their favour.

6. When the plaintiff in CS No.46 of 2019 took over the production and completion of the said movie "Naragasooran", the 5th defendant had agreed to pay the said sum of Rs.4,20,00,000/- to the plaintiff in CS No.46 of 2019 with interest before the release of the movie "Dhruvanatchathiram". The said agreement was entered on

28.02.2018. The plaintiff in CS No.46 of 2019 also filed an application in Application No.2152 of 2018 seeking to implead itself in OA No.1070 of 2017 filed by the 1st defendant in CS No.47 of 2019 against M/s.Ondraga Entertainment and two others. During the pendency of the said application, a Memorandum of Understanding was entered into between defendants 1 and 2 and the 3rd defendant, whereby the 3rd defendant had agreed to make a payment of Rs.8,50,00,000/- to the defendants 1 and 2, ten days before the release of the movie "Ennai Noki Paayum Thotta" and for the remaining amount, the 3rd defendant had assigned 50% of the rights in the movie "Dhruvanatchathiram" to the 1st defendant. Upon the said agreement being reached, the 1st defendant withdrew OA No.1070 of 2017.

7. Thereafter, on 26.05.2018, another agreement was entered into between the plaintiff in CS No.46 of 2019 and the 5th defendant therein, in and by which, the 5th defendant acknowledged its liability to the tune of Rs.4,20,00,000/- to the plaintiff and confirmed that they will not release the movie "Dhruvanatchathiram" till the said sum is paid.

Finding that the alienation of the rights in the movie "Dhruvanatchathiram" by the 5th defendant in favour of defendants 1 and 2 would substantially affect its chances of recovery of the sum of Rs.4,20,00,000/-, the plaintiff in CS

No.46 of 2019 had come forward to the present suit seeking the prayer for declaration as aforesaid.

8. As regards the plaintiff in CS No.47 of 2019 is concerned on 01.10.2016 the plaintiff and the 3rd defendant entered into an agreement for financing the movie "Ennai Noki Paayum Thotta", the same was preceded by proforma dated 25.08.2016 and letter dated 28.10.2016 the plaintiff had paid a sum of 3,00,000 US Dollars for overseas rights to the said movie and 3,95,000 US Dollars for the music rights. Though originally the picture was to be produced by M/s.Ondraga Entertainment, eventually the picture was produced by the 3rd defendant M/s.Escape Artists Motion Pictures Pvt Ltd., on 30.11.2016 a Finance Agreement entered into between the plaintiff and the 5th defendant M/s.Kondaduvom Entertainment, for a sum of Rs.6,78,03,260/- the same was followed by the another Finance Agreement on 07.10.2017 for a sum of Rs.1,51,71,250/-. Since the monies were not paid, proceedings under Section 9 and Section 11 of the Arbitration and Conciliation Act, were initiated. Arbitrator has been appointed and the Arbitration proceedings are on between the plaintiffs and defendants 3 and 4. While so, defendants 3 and 4 had entered into a Memorandum of Understanding with defendants 1 and 2, with reference to certain rights in the movie "Ennai Noki Paayum Thotta" as well as "Dhruvanatchathiram".

9. Apprehending that the Memorandum of Understanding entered into between defendants 3 and 4 on the one side and defendants 1 and 2 on the other would affect the rights of

the plaintiff in respect of the movies "Ennai Noki Paayum Thotta" and "Dhruvanatchathiram", the plaintiffs have come forward with the present suit seeking a declaration and those Memorandum of Understanding entered into between defendants 1 and 2 on the one hand and defendants 3 and 4 on the other, have been done collusively in order to defeat the rights of the plaintiffs and the declaration is sought for to the effect that the Memorandum of Understanding dated 31.03.2018 will not affect the rights of the plaintiffs over the said movies.

10. It is not in dispute that the agreements entered into between the parties namely, between the plaintiffs in both the suits and defendants 3, 4 and 5 contain an Arbitration Clause. Similarly the Agreements entered into between defendants 1 and 2 and defendants 3 and 4 also contain an Arbitration Clause. It is also not in dispute that invoking the said Arbitration Clause, the parties have initiated proceedings under Section 9 as well as Section 11 of the Arbitration and Conciliation Act and Arbitrators have been appointed by this Court. The Arbitration proceedings are also going on before two different Arbitrators appointed by this court.

11. Pending the above suits, the plaintiffs also sought for injunction restraining the respondents from releasing the said pictures namely "Ennai Noki Paayum Thotta" and "Dhruvanatchathiram", interim injunction was granted. Defendants 3 to 5 in both the suits have come

forward with the present applications seeking to refer the parties to Arbitration. According to defendants 3 to 5, since both the agreements i.e., the agreements between the plaintiffs on the one side and defendants 3 to 5 on the other side and the agreements between the defendants 1 and 2 on the one side and the defendants 3 to 5 on the other side contained Arbitration Clause and Arbitration proceedings were pending. The present dispute relating to Memorandum of understanding entered into *inter se* the defendants should also be referred to Arbitration.

12. This prayer is stoutly opposed by both the plaintiffs as well as defendants 1 and 2. According to defendants 1 and 2, the Memorandum of Understanding entered into between them and defendants 3 to 5 confers certain independent rights on defendants 1 and 2 and therefore, the dispute as to whether the said Memorandum of Understanding has been brought about by collusion and as to whether the same will affect the rights of the plaintiffs in the two movies, which is the subject matter of the application namely "Ennai Noki Paayum Thotta" and "Dhruvanathiram", cannot be made subject matter of an Arbitration, since there is no agreement between defendants 1 and 2 and the plaintiffs regarding Arbitration.

13. I have heard Mr.Hameed, learned counsel appearing for M/s.AAV Partners for the applicant in both the petitions, Mr.K.Ravi, learned counsel appearing for

M/s.Rugan & Arya for the 1st respondent/plaintiff in both the

petitions and Mr.Om Prakash, learned Senior Counsel appearing for Mr.K.Moorthi for respondents 2 and 3 in both the petitions.

14. Mr.Hameed, learned counsel appearing for the applicants would submit that when there is an Arbitration Clause in the agreements between the defendants *inter se* as well as in the agreements between the plaintiffs and defendants 3 to 5. The Court is obliged to refer the present dispute also to Arbitration. He would also invite my attention to the judgment of the Division Bench of this Court in **MMTC Ltd. V. Shiv Sahai & Sons and Another**, reported in **2015 (3) R.A.J. 676 (Mad)**, wherein a Division Bench had held that reference to Arbitration can be resorted to *dehors* the fact that one of the parties to the suit is not a party to the Arbitration. He would also rely upon the judgment of the Hon'ble Supreme Court in **Ameet Lalchand Shah and Others v. Rishabh Enterprises and Another**, reported in **2018 (15) SCC 678**, wherein the Hon'ble Supreme Court concluded that existence of the Arbitration Clause in the mother agreement would take in the supplementary agreements also. The Hon'ble Supreme Court also concluded that non incorporation of the Arbitration Clause in ancillary/interconnected agreements shall not prevent the Court from the referring the dispute to Arbitration under Section 8 of the Act.

<https://hcservices.ecourts.gov.in/hcservices> 15. Contending contra, both Mr.K.Ravi, learned counsel appearing for the 1st respondent and Mr.Om Prakash, learned

Senior Counsel appearing for the respondents 2 and 3 would contend that the Arbitration Clause in the agreements between the defendants *inter se* or between the plaintiff and defendants 3 to 5 are confined to the disputes that arise under the said agreement and they cannot include within their sweep dispute which are foreign to the said agreement. It is also pointed out by the learned counsel that while the plaintiffs in both the suits are not parties in the agreements *inter se* the defendants, defendants 1 and 2 are not parties to the agreement between the plaintiffs and defendants 3 to 5. Therefore, according to them, the present dispute which involves the rights of defendants 1 and 2, under the agreements entered into between them and defendants 3 to 5 vis-à-vis, the rights of the plaintiffs under the agreements entered into between them and defendants 3 to 5 cannot be made subject matter of Arbitration for there is no agreement between the plaintiffs and defendants 1 and 2 for referring the dispute to Arbitration.

16. The sum and substance of the submissions of the learned counsel appearing for the respondents is that in the absence of an agreement between the plaintiffs and the defendants 1 and 2 to refer the matter for Arbitration, the Court cannot thrust Arbitration on them.

17. I have considered the rival submissions.

18. No doubt Section 8 of the Arbitration and Conciliation Act, imposes an obligation on the Court to refer disputes to Arbitration and in view of the amendment the scope of Section 8 has also been enlarged to certain extent where the parties or their representatives or persons claiming under the parties can also seek reference to Arbitration.

19. In **Ameet Lalchand Shah's** case the Hon'ble Supreme Court was concerned with the performance of agreements which are interconnected. The Hon'ble Supreme Court found that the four agreements that were the subject matter of the said litigation were interconnected and they dependent on each other for performance. While dealing with such chain of agreements, the Hon'ble Supreme Court taking into consideration, the scope of the words "a matter" in Section 8 concluded that if the entire matter or dispute could be said to be referable to Arbitration. The Court has power to refer the parties to Arbitration *dehors* the fact that some of the parties may not be actually parties to the Arbitration Clause. The Hon'ble Supreme Court also took note of the fact that amendment of Section 8 which includes parties or persons claiming through or under.

20. In **MMTC Ltd. V. Shiv Sahai & Sons and Another**, a Division Bench of this Court in fact found that the appellant Corporation had actually agreed for an Arbitration at the initial stages, but took a U-turn at a subsequent stage. The Bench found the conduct of the Corporation

surprising. Therefore, on the facts available the Division Bench concluded that even if there are allegations of fraud, the matter can be referred to Arbitration.

21. I find the facts on hand are quite different from the facts involved in both the above precedents. The plaintiffs in both the suits claim certain rights over the two movies namely "Ennai Noki Paayum Thotta" and "Dhruvanatchathiram", defendants 1 and 2 on the other hand would also claim certain rights over the said movies, pursuant to the Memorandum of Understanding entered into between them and defendants 3 to 5. According to the plaintiffs, the rights conferred on them under the Agreements between them and defendants 3 to 5, would get diluted or will be in conflict with the rights that are sought to be conferred on defendants 1 and 2 under the Memorandum of Understanding dated 31.03.2018. The essential question that involved in the suit is as to whether the rights of the plaintiff would be superseded or affected by Memorandum of Understanding dated 31.03.2018.

22. While defendants 1 and 2 would stake their claim under the Memorandum of Understanding dated 31.03.2018, the plaintiffs would contend that the said Memorandum of Understanding would not bind them and their rights will not be curtailed or altered by the said Memorandum of Understanding. This question is essentially foreign to the scope of the Arbitration Clause found in the agreements between the defendants *inter se* and between the plaintiffs

and defendants 3 to 5. As rightly pointed by learned counsel appearing for the respondents, since there is no agreement for Arbitration between the plaintiffs and the defendants 1 and 2, there cannot be a reference to Arbitration.

23. As already stated the essential question that is to be decided is the extent of the right of the defendants 3 to 5 to enter into the Memorandum of Understanding, dealing with certain rights over the two movies and the extent to which, the said action of defendants 3 to 5 would affect the rights of the plaintiffs. The said questions, in my considered opinion, will not fall within a scope of the Arbitration Clauses found in the agreements between the defendants 1 and 2 on one side and the defendants 3 to 5 on the other or the agreements between the plaintiffs on one side and the defendants 3 to 5 on the other. I do not see any interconnectivity between the agreements, the performance of the agreements also do not depend on the performance of the other and therefore, I am of the considered opinion that defendants 3 to 5 cannot seek a reference to Arbitration under Section 8 of the Arbitration and Conciliation Act. May be that the issues can be resolved in a more comprehensive manner, by referring the parties to an Arbitration by a single Arbitrator, but I do not think the Court can thrust upon Arbitration, when the parties do not agree for resorting to that remedy.

24. The learned Senior Counsel appearing for defendants 1 and 2/respondents 2 and 3 has made it clear that they are not ready to go for Arbitration of the dispute between the plaintiffs and defendants 1 and 2.

25. I therefore, see no merit in the applications and the applications accordingly dismissed. However there will be no order as to costs.

Sd/.R.S.M.J
19.06.2019

//Certified to be a true copy//
Dated this the day of 2019.

R.s/21.06.2019

COURT OFFICER

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