

Reserved on :06.06.2019

Pronounced on :18.06.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

**Original Petition No.292 of 2018 &
Application Nos.2790 & 6220 of 2018**

Ozone Projects Private Ltd.
New No.63, G.N. Chetty Road,
T.Nagar, Chennai – 600 017.

... Petitioner

Vs

Chennaiyin FC Sports Private Ltd.,
64, Free Press House, Free Press Journal Marg,
Mumbai – 400 021.

... Respondent

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the Award passed by the Arbitrator on 19.02.2018.

For Petitioner

: Mr.A.R.L.Sundaresan, Senior Counsel
for Mr.P.V.Balasubramaniam
BFS Legal

For Respondent

: Mr.Triyambak J.Kannan

ORDER

Challenge has been made against the impugned Award passed by the Sole Arbitrator appointed by the parties dated 19.02.2018.

2. Brief facts leading to filing of this Original Petition is as follows :

The claimant is a company incorporated under the Companies Act 2013 and owner of franchisee Chennaiin F.C., herein after called as CFC. The respondent is engaged in the business of real estate development. The claimant has the sole and absolute right to grant sponsorship rights of CFC on the terms as may be deemed fit by them. The claimant signed a Letter of Intent with the respondent on 07.10.2014. According to which, the respondent was designated as Principal Sponsor for CFC for the period from 01.09.2015 to 31.08.2017 or commencement of the second season, whichever is earlier and the Sponsorship Fee payable by the respondent was fixed at Rs.6,00,00,000/-. Subsequently, on 05.09.2015 a Sponsorship Agreement was executed between the Claimant and the Respondent. As per the said Sponsorship Agreement, the term of the sponsorship was fixed from 01.09.2015 to 31.08.2017 and the amount was fixed at Rs.17,00,00,000/- payable by the respondent to the claimant as set out in Schedule 2 of the agreement. Though the claimant complied with the obligations under the agreement, the respondent failed and neglected to comply with its

obligations under the Letter of Intent and the Agreement. The respondent had failed in making payments to the claimant towards the Sponsorship Fee and also towards the fee for the Grass Root Development Plan. As the respondent neither made the payment nor confirmed the renewal of the Sponsorship Agreement for 2016-17 season i.e., ISL Season 3, the Claimant made requests to the Respondent regarding the same by sending E-mails. In the E-mail dated 26.08.2016, it is stated that they were willing to renew the sponsorship for the ISL Season 3 on a lesser consideration. They sought time to clear the outstanding dues payable to the Claimant. As there was no co-operation from the respondent, the Claimant issued a notice dated 07.04.2016 demanding the outstanding amount. Thereafter, the claimant issued notice dated 30.09.2016, terminating Agreement and invoked the Arbitration Clause in the Agreement. The respondent vide letter dated 12.10.2016, had also agreed to appoint sole Arbitrator. On the basis of the above, Claimant made the following claims :

1. Rs.3,58,43,447/- towards the outstanding sponsorship fee
2. Rs.63,13,110/- towards Grass Roots Development Plan
3. Rs.2,00,000/- towards early termination of the Agreement
4. Interest at 18% from the date the payment become due till Realization.
5. Compensation for the Claimant for loss of Business Opportunities to the Claimant
6. Costs.

3. It is the case of the respondent that the claimant has failed to perform its obligations as per the terms of the Agreement and caused loss and hardship to the respondent. As the Claimant Club was owned and backed by reputed and well known personalities from the Sports and Entertainment fields, the respondent entered into negotiations with the Claimant regarding Sponsorship of the Claimant Club with a view to get maximum publicity and promotion for the Sports as well as maximum exposure for the respondent's brand in the market. After numerous representations and assurances made by the Claimant, the letter of intent dated 07.10.2014 was issued by the respondent. But the Claimant did not honor the assurances and the representations, after the letter of intent. The main reason to agree to part with huge money under the Agreement was due to the assurance that the team owners Mr.M.S.Dhoni and Mr.Abishek Bachan would be available for "meet and greet" atleast twice in every season. But even after completion of two seasons, the 'meet and greet' events failed to materialize. The failure on the part of the Claimant constitutes non-performance of its obligations under the Agreement and the agreed terms of the Letter of Intent between the parties. As per Clause 9 of the Schedule 3 to the Agreement, collateral assets in the form of 25 autographed Foot Balls and 50 autographed shirts signed by all the players of the Club, which were intended to be used by the Respondent as part of its advertising and publicity campaign, to be launched by the respondent were not provided by the Claimant in Season 2 of the ISL. Consequently, the respondent ended up with losses. Though agreed, the team

did not participate in the Online Marketing campaigns started by the respondent to enhance the Brand Value of the respondent and thereby the respondent suffered huge loss. Further, as per the agreement, the Claimant was obligated to create a Website in the name of the Claimant Club which was mandatorily required to feature a Hyperlink directing the visitors to the Respondent's Website as well as to provide a space to the respondent for the promotion of its activities and marketing purposes. But no such Website has been created. The respondent owes no liability to the Claimant. They have also denied their liability in their reply notice dated 26.09.2016. Besides they have also claimed a counter claim of Rs.20 crores for damages under various heads.

4. The learned arbitrator after analysing the entire materials and evidence has found that the claimant has not discharged his obligations as contemplated in Clause 8(2) of the agreement. However, considering the admission by the respondent in the Email dated 21.08.2016, that they are liable to pay a sum of Rs3,50,00,000/- and agreed to issue post dated cheques to the claimant, passed an Award for the said amount with interest at the rate of 12% per annum and finally passed the Award for a sum of Rs.3,50,00,000/- with interest at the rate of 12% per annum till the date of payment.

5. The learned Senior Counsel appearing for the petitioner would contend that the arbitrator has found that the respective promises have not been

complied and hence, awarding a sum of Rs.3,50,00,000/- with interest is against substantive law of the land. Admission has been explained in later reply, the admission is not a conclusive proof and when the admission has been explained, the learned Arbitrator ought to have been rejected the claim of the claimant since they failed to perform their obligations as set out in their agreement. Hence, it is the contention of the learned Senior Counsel that the Award is not based on the settled position of law following fundamental policy of India. Further, it is the contention of the learned Senior Counsel that the Award is against the provisions of Sections 51 and 52 of the Contract Act. Hence, the Award is liable to be interfered.

6. Whereas, the learned counsel appearing for the respondent would submit that the signing of Letter of Intent dated 07.04.2016 followed by Sponsorship Agreement dated 05.09.2015 is not in dispute. The Sponsorship Agreement dated 05.09.2015 makes it clear that the contract is entered and a sum of Rs.17 crores towards Sponsorship Fee is payable by the petitioner. The payment of Sponsorship Fee is one of the material of contract entered between the parties. Further, the contract is for a period of two years which would expire only on 21.08.2017. One of the material condition of the contract is that without prejudice to the other provisions of this agreement, the petitioner is not entitled to terminate the agreement subject to the condition that a written notice is given by

the petitioner 45 days prior to the termination and the petitioner paying 50% of the Sponsorship Fee, i.e., a sum of Rs.8,58,0000/-, prior to the termination of the agreement pursuant to the clause 10(3). Further, if the payment has not been made, either party may terminate the agreement immediately upon written notice to the other party in the letter of intent. It is his contention that the payment has not been made in terms of the agreement and written notice has been issued by the respondent to the petitioner, wherein the petitioner has categorically admitted the due of Rs.3,50,00,000/- and agreed to clear the same before October 20th, 2016. The same admission makes it clear that prior to the termination of the contract, the petitioner is liable to pay a sum of Rs.3,50,00,000/- as per the terms of the contract. Once his admission is clear and unambiguous, it is binding on the parties. The learned Arbitrator has taken note of the fact and passed the Award. Hence, prayed for dismissal of this petition.

7. Heard the learned Senior Counsel for the petitioner and the learned counsel for the respondent and perused the entire Award and materials available on record.

8. Admittedly, the Letter of Intent dated 07.04.2014 and the Sponsorship Agreement dated 05.09.2015 is not in dispute. A sum of Rs.17 crores is payable by the petitioner as per the agreement is also not in dispute. During currency of

the agreement, dispute arose between the parties for which the respondent has sent a notice stating that the petitioner agreed to pay Rs.3,50,00,000/- outstanding due before the ISL Season 3, by way of post dated cheques, by September 2016. A reply has been sent by way of email contending that he is entitled to continue the contract as well as requesting the instalment of payment and time also for continuing the Sponsorship for the next year. There was a clear admission made by the petitioner with regard to the Sponsorship due of Rs.3,50,00,000/- and agreed to clear the above amount before 15th October, 2016. When the agreement is not in dispute and the correspondence between the parties also indicate clear and unambiguous admission, such admission is certainly binding on the parties. The learned Arbitrator though found that the claimant has not performed his obligation as per the terms of the contract, the parties were effectively discussing the disputes through email correspondence. In the above correspondence, though certain conditions have not been fully complied, the petitioner has categorically admitted that a sum of Rs.3.5 crores is payable to the claimant. Therefore, subsequent explanation in the legal notice at a later point of time, taking advantage of certain non compliance by one of the parties to the contract, such admission which is clear, unambiguous and cannot be erased from the record. The learned Arbitrator has rightly found that the admission is binding the parties. When the Arbitrator has considered the entire dispute on merits and factually analysed, such Award cannot be interfered by re-

appreciating the entire facts as a first appeal. It is well settled that the Award can be interfered only in the circumstances as enumerated under section 34 of the Arbitration and Conciliation Act

9. In a judgment in **McDermott International Tnc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]** when the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

10. A Division Bench of this Court in **Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

11. In **Swan Gold Mining Ltd., v. Hindustan Copper Ltd reported in**

2015(5) SCC 739 the Honourable Apex Court has held as follows:

"12. **Section 34** of the Arbitration and Conciliation Act, 1996 corresponds to **Section 30** of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of **Section 34** of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of

India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in [Section 23](#) of the Contract Act and also [Section 34 \(2\)\(b\)\(ii\)](#) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

12. The learned Senior Counsel further submitted that Section 51 and 52

of the Contract Act has not been followed. Section 51 deals with reciprocal promises simultaneously performed. When the entire contract is seen, they had not agreed to perform reciprocal promises simultaneously. It has not been agreed to perform reciprocal promises simultaneously. Similarly when the terms are to be performed, expressly fixed by the contract, those promises shall be performed in the Order and when the Order has not been expressly fixed by the contract, they shall be performed in that Order which the nature of the contract requires. Looking at the contract, in the Sponsorship Agreement though certain obligations cast on either parties, there is no indication that the promises to be performed in such an Order or simultaneously, i.e., one, appearance of M.S.Doni for the purpose of 'meet and greet' and two, appearance of Abishek Bachan for the season. Though one of the condition mentioned, there is no indication that those promises have to be performed simultaneously or in that Order to contend that the petitioner did not perform his promise. Therefore, the contention of the learned Senior Counsel that the Award is vitiated and in violation of Sections 51 and 52 of the Contract cannot be sustained.

13. Accordingly, this Original Petition is dismissed. Consequently, the connected applications are closed. No cost.

18.06.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

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To

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N.SATHISH KUMAR, J.

VRC



Order in
Original Petition No.292 of 2018

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