

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	30.09.2019
Judgment pronounced on	18.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.753 of 2019

and

A.No.7186 of 2019

M/s.Nic Arts
Rep. by its Sole Proprietor,
Mr.S.S.Chakravarthy
No.1,Senthil Andavar Koil Street,
Vadapalani,
Chennai - 600 026.

... Petitioner

Vs.

M/s.Zee Entertainment Enterprises Ltd,
Rep. by its Managing Counsel,
Ms.Dhanya Nandakumar,
Continental Building,
No.135, Dr. Anna Besant Road,
Worli, Mumbai - 600 018.

... Respondent

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Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 19.02.2018, passed in Arbitration Case No.213 of 2017, by the Arbitrator and the certified copy issued on 20.06.2019 as illegal and not maintainable.

For Petitioner : Mr.A.Abdul Hameed
M/s.AAV Partners

For Respondents : Mr.Jose John
M/s.King and Partridge

ORDER

The Petitioner is the respondent in the Arbitration Proceedings. The dispute arises out of a Film Assignment Agreement dated 12.02.2012 (the Agreement) between the Petitioner as the assignor and the Respondent as the assignee. The Agreement was in respect of exclusive and unrestricted rights to produce, own and hold the copy right and negative rights for the feature film, "Vettaimannan". The Respondent was required to pay an aggregate consideration of Rs.6 crores for the assignment. Out of the said sum of Rs.6 crores, a sum of Rs.2 crores was required to be paid at the time of signing of the Agreement, a further sum of Rs.1 crore on completion of audio release function and the last installment of Rs.3 crores before the theatrical release of the film and subject to the receipt of the final lab confirmation letter without any conditions and the censor certificate copy of U or U/A grade. After signing the Agreement, the Respondent paid a sum of Rs.2 crores on 22.02.2012. However, it is stated by the Respondent that the Petitioner failed to release the film on or before the scheduled date of theatrical release as per the Agreement. Therefore, the Respondent demanded the

refund of a sum of Rs.2 crores from the Petitioner along with the contractual interest at the rate of 24% per annum by letter dated 11.07.2014. By reply dated 15.07.2014, the Petitioner agreed to refund the amount but requested for waiver of interest. Thereafter, there were discussions with regard to the settlement of the dispute. But, such settlement did not materialize. Eventually, on 20.04.2016, the Respondent invoked the arbitration clause and referred the dispute for Arbitration. In the Arbitration Proceedings, the Respondent prayed for refund of a sum of Rs.4,77,08,493/- comprising the principal sum of Rs.2 crores and contractual interest thereon at the rate of 24% per annum calculated from 22.02.2012 (date of receipt) to the date of claim statement(30.11.2017)and for further interest on the above aggregate sum at 24% per annum from the date of claim statement until the date of realisation thereof. The Petitioner herein did not enter appearance in the said Arbitration Proceedings and the learned Arbitrator proceeded to pronounce an exparte Award dated 19.02.2018, which is challenged herein.

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2.I heard the learned counsel appearing for the Petitioner and the learned counsel appearing for the Respondent.

3.The learned counsel appearing for the Petitioner contended that the Petitioner did not receive notices of hearing in the Arbitration Proceedings and that, therefore, he was unable to present his case before the Arbitral Tribunal. In support of this submission, the learned counsel referred to various notices of hearing. The first sitting in the Arbitration was held on 03.11.2017 pursuant to the notice dated 21.10.2017. Although the track consignment status report of the Department of posts indicated that the notice was delivered on 24.10.2017, the learned counsel for the Petitioner pointed out that the passport endorsement shows that the Petitioner departed from India on 22.10.2017 and returned on 25.10.2017. Therefore, he submitted that there is clear evidence that the Petitioner was out of the country when the notice for the first sitting was issued by the learned Arbitrator. At the first sitting, he pointed out that the learned Arbitrator directed the Respondent to file its claim statement along with supporting documents on or before 01.12.2017 after serving a copy of the same on the Petitioner. The learned counsel for the Petitioner referred to the alleged acknowledgment of the Petitioner in respect of the minutes of the first sitting held on 03.11.2017 and contended that the acknowledgment was not signed by the Petitioner. Once again, in order to substantiate this contention, he referred to the endorsement on the Petitioner's passport (at Pages 38 and 44 of the typed set of papers filed on 17.08.2019) and pointed out that

the Petitioner was abroad between 07.11.2017 and 09.11.2017 and, therefore, he could not have received the minutes of the first meeting on 09.11.2017. As regards the minutes of the second sitting held on 05.01.2018, he, once again, contended that the minutes were not received by the Petitioner. He also contended that the claim statements and other documents were not served on the Petitioner as wrongly recorded in the minutes of the second sitting held on 05.01.2018. As regards the third sitting held on 06.02.2018, he submitted that there is no evidence that the minutes of the said meeting were despatched to the Petitioner. He also submitted that the Petitioner did not receive a copy of the Arbitral Award dated 19.02.2018. Eventually, he submitted that the Petitioner received notice in E.P.No.36 of 2018 from this Court and only upon receipt of notice in the said E.P., the Petitioner became aware about the Arbitration Proceedings and the Award dated 19.02.2018. Immediately upon coming to know about the same, he submitted that the Petitioner issued a letter dated 13.06.2019 to the learned Arbitrator and requested for a certified copy of the Award and other related documents and the same was received by the Petitioner on 20.06.2019.

4.By referring to and relying upon the above documents, the learned counsel for the Petitioner reiterated that the Petitioner did not receive any of the notices in respect of the Arbitration Proceedings or

even the Arbitration Award until 20.06.2019. Consequently, the Petitioner was unable to present his case before the Arbitral Tribunal. Therefore, it is just and necessary that the exparte Award be set aside so as to provide the Petitioner a reasonable opportunity to defend the case. In support of the above contentions, the learned counsel for the Petitioner referred to and relied upon the judgments, which are set out below along with context and principle:

(i) **Power Grid Corporation of India Ltd. vs. Electrical mfg.Co.Ltd. and others, 153 (2008) DLT 440**, wherein, at paragraph 21, the Division Bench of the Delhi High Court held that “the elementary principle of natural justice implies a duty to act fairly.” In the same judgment, at paragraph 23, the Delhi High Court held that in order to constitute a reasonable opportunity, each party must have notice that the hearing is to take place and a reasonable opportunity to be present at the hearing along with its advisers and witnesses and also requires a reasonable opportunity to present evidence, cross examine witnesses and argue the case.

(ii) **M/s.Indus Ind Bank Ltd vs. Mulchand B Jain and others, in O.S.A.No.266 of 2011, Judgment dated 13.02.2013**, wherein, at paragraph 8, the Division Bench of this Court held that unless the notice invoking Arbitration clause is received by the Respondent, the Arbitration

Proceedings do not commence and that a person who did not receive the notice invoking the arbitration clause is entitled to challenge the award under Section 34(2)(a) (iii) of the Arbitration and Conciliation Act,1996(the Arbitration Act).

(iii)**P.V.Sumesh Kumar and others vs. M/s.Kotak Mahindra Bank Ltd, in O.P.No.147 of 2015, order dated 16.07.2018,** wherein, at paragraphs 9 and 10, this Court held that in the absence of any reference to the acknowledgment cards in the Award, it may be concluded that notice was not served on the Petitioner and, therefore, the Award is liable to be set aside.

(iv)**Karansingh Narsingh Hajarq vs. M/s.Kotak Mahindra Pvt. Ltd., and others, in O.P.No.502 of 2015, Order dated 23.07.2018,** wherein, at paragraph 18 and 19, this Court held that the acknowledgment card cannot be relied upon when it was signed in Telugu language, which the Petitioner does not know.

By relying upon the said judgments, the learned counsel for the Petitioner concluded his submissions by stating that the principles of natural justice were not followed and that the Award is liable to be set aside because the Petitioner was unable to present his case before the Arbitral Tribunal.

5. In response and to the contrary, the learned counsel for the Respondent submitted that notices were duly served on the Petitioner but the Petitioner failed to appear before the Arbitral Tribunal. In this regard, he first referred to Section 3 of the Arbitration Act, which stipulates that notices are required to be given to the address specified in the agreement between the parties and that if notices are despatched to the said address, it shall be deemed to be served. He also referred to Article 13 of the Agreement, wherein the Petitioner's address for service of notice is provided. By referring to the said Article 13, he pointed out that all the notices were sent to the address specified in Article 13. He, thereafter, referred to the Award, wherein the learned Arbitrator has set out the procedural history relating to the case at Paragraphs 6 to 13 of the Award, wherein details of issuance and service of notices is recorded. In addition to the contention that all the notices relating to the Arbitration Proceedings and minutes thereof were received by the Petitioner, the learned counsel for the Respondent also pointed out that the Award was received by the Petitioner in February 2018. In order to substantiate this submission, he referred to the letter dated 19.02.2018 from the learned Arbitrator to the parties (Page No.21 of the typed set of papers) and pointed out that the said Award was received by the Petitioner some time in February 2018, as evidenced by the acknowledgment card at page 98 of the typed set of papers. Consequently, he submitted that the Petition,

which was presented on 20.08.2019, is barred by limitation. In response to the submission that the power of attorney was submitted after the conclusion of the Arbitration Proceedings, the learned counsel for the Respondent relied upon the judgment of this Court in **S.Suresh vs. M/s.Sembcorp Logistics (India) Pvt. Ltd., (2010) 1 C.L.T. 460**, wherein, at paragraph 11, this Court held that the Deputy General Manager is an Officer of the Company and, therefore, is authorised to make submissions on behalf of the company. By relying on the said judgment, the learned counsel submitted that Ms.Dhanya Nandhakumar was employed as the Deputy General Manager and Managing Counsel of the Respondent and, therefore, was authorised to represent the company even without the power of attorney. For all these reasons, the learned counsel for the Respondent submitted that the Award is not liable to be interfered with under Section 34 of the Arbitration Act. Accordingly, he concluded his submissions by submitting that the Petition is liable to be rejected.

6.By way of rejoinder submissions, the learned counsel for the Petitioner contended that the claim for refund is not sustainable on merits because the Agreement was not terminated by the Respondent. He further submitted that the Respondent provided a copy of the Power of Attorney in favour of Ms.Dhanya Nandhakumar, the authorised

representative of the Respondent, only on 06.02.2018, which is the date of the last hearing in the Arbitration Proceedings. In effect, he submitted that the proceedings were prosecuted by the said Ms.Dhanya Nandakumar without providing a copy of the power of attorney. Consequently, the proceedings was unauthorised and the Award is liable to be set aside on this ground also.

7.The records were examined and the oral submissions of both sides were considered carefully. The main question that arises for consideration in this case is as to whether the Petitioner received notices in respect of the Arbitration Proceedings or the Award dated 19.02.2018. It is clear from the track consignment status report of the Department of Posts, Ministry of Communications, Government of India, that the notice dated 21.10.2017 in respect of the first hearing of the Arbitral Tribunal was received by the Petitioner on 24.10.2017. Although the acknowledgment card does not appear to contain the signature of the Petitioner, there is no reason to doubt the track consignment status report issued by the Department of Posts in this regard. As regards the receipt of the minutes of the first meeting, there is an acknowledgment card evidencing receipt by or on behalf of the addressee (Page 10 of the typed set of papers dated 17.08.2019). With regard to the second sitting of the Arbitral Tribunal also, the track consignment status report shows that the

said minutes of meeting was received on behalf of the addressee on 06.01.2018(page No.18 of the typed set of papers). As regards the Arbitral Award also, it appears that it was received on behalf of the addressee some time in February 2018. Although the relevant date stamp does not show the exact date clearly, the month is visible. This document also bears a signature on behalf of the addressee and the said signature is similar to the signature at Page No.10, although some differences are noticeable. Therefore, it appears that the Arbitral Award was received at the address of Nic Arts, the Petitioner/Proprietary concern, some time in February 2018.

8. With regard to the acknowledgments and the track consignment status reports, the main contention of the learned counsel for the Petitioner is that the Sole Proprietor of the Petitioner, namely, Mr.S.S.Chakravarthy, was out of the country during the relevant period and that the signature on the acknowledgment card is not his signature. Therefore, I put a question to the learned counsel for the Petitioner as to whether the address of the Petitioner changed at any point of time and as to the address at which the notice in the Execution Petition was received. In response, the learned counsel for the Petitioner admitted that notice was served at the same address in the Execution Petition. The learned counsel for the Respondent filed an affidavit dated 01.10.2019 enclosing a

copy of the acknowledgment in the Execution Petition. From the said acknowledgment, it is clear that notice was received at the same address as the address used in the Arbitration Proceedings. It also appears from the signature that the same person who received the notices in the Arbitration Proceedings received the notice in the Execution Petition. From the above, it appears that the Petitioner employed persons who received notices in the Arbitration Proceedings and in the Execution Petition on behalf of the Petitioner. In spite of receiving such notices, the Petitioner did not attend the Arbitration Proceedings. More importantly, it is evident from the acknowledgment card at page 98 of the typed set of papers that the Petitioner received the Arbitral Award some time in February 2018. Therefore, the Petition under Section 34 of the Arbitration Act should have been filed within three months from the date of receipt of the Award. The said three months period would have ended some time in May 2018. Even after taking into consideration the summer vacation of the Court, the Petition should have been filed on the re-opening date in June 2018. Instead, it is evident from the record that the Petition was presented on 20.08.2019, which is much beyond the 30 day period in which an application to condone delay may be considered. Therefore, the Petition is clearly barred by limitation. In this regard, it is relevant to state that Section 5 of the Limitation Act is not applicable to a Petition under Section 34 of the Arbitration Act as held by the Hon'ble Supreme Court in several

judgments, including **Union of India vs. Popular Construction Co. (2001) 8 SCC 470.**

9.The contention of the learned counsel for the Petitioner that the person who represented the Respondent in the Arbitration Proceedings was unauthorised is untenable for the following reasons. First, the Power of Attorney Deed dated 12.05.2016 records that it is with effect from 01.10.2015. The first sitting of the Arbitration Proceeding was on 03.07.2017. Therefore, the authorised representative of the Respondent was authorised to act on behalf of the Respondent from the inception of the Arbitration Proceedings. In addition, as submitted by the learned counsel for the Respondent, the said authorised representative is/was the Deputy Manager and Managing Counsel of the Respondent. Therefore, the said officer is entitled to represent the company as held by this Court in **S.Suresh vs. M/s.Sembcorp Logistics (India) Pvt. Ltd. (2010) 1 C.L.T. 460.**

10.As stated earlier, in addition to the conclusion that the Petition is barred by limitation, there is sufficient evidence that the Petitioner received notices in respect of each of the hearings before the Arbitral Tribunal and in spite of receipt of such notices, the Petitioner failed to attend the Arbitration Proceedings. In these facts and

circumstances, it cannot be said that the Petitioner was not provided a reasonable opportunity to present his case before the Arbitral Tribunal. Consequently, none of the judgments that were relied upon by the learned counsel for the Petitioner apply to the facts of this case because the Petitioner received notices for the hearings and had a reasonable opportunity to present his case before Arbitral Tribunal but chose not to appear. Therefore, the Award is not liable to be set aside under Section 34(2)(a)(iii) of the Arbitration Act and the challenge on this basis fails. Moreover, on examining the Award, it is evident that the Arbitral Tribunal examined the evidence adduced by the Respondent and reached the conclusion that the Respondent is entitled to refund of a sum of Rs.2 crores with contractual interest thereon after appraising the evidence in a reasonable manner and by interpreting the Agreement in a reasonable manner. Thus, the Petitioner has not made out a case to interfere with the Award.

11.In the result, the Petition to set aside the Arbitral Award is dismissed. Consequently, the connected Application is closed.

18.10.2019

Speaking order
Index: Yes
Internet: Yes
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SENTHILKUMAR RAMAMOORTHY, J.
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