IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:30.07.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.835 of 2010

T.M.Muthuselvam ... Petitioner

Vs.

1.B.Ramiah

2.Mr.K.R.Veeraswami
District & Sessions Judge (Retd)
"Guru Krupa"
No.1, Old No.14
Sivakamipuram
2nd Cross Street
Thiruvanmiyur
Chennai – 600 041 ... Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 27.01.2010 passed by the second respondent.

For Petitioner : Mr.R.Ezhilarasan

For 1st Respondent : Mr.V.Lakshminarayanan
for Ms.Jayanthi Venkatesh

ORDER

This 'Original Petition' ('OP' for brevity) on hand is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity.

2.Instant OP has been presented in this Court more than a decade ago in 2010, to be precise on 01.03.2010 assailing 'an arbitral award dated 27.01.2020' (hereinafter 'impugned award' for brevity), which has been made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator, who is a former District and Sessions Judge, who has also been arrayed as second respondent in instant OP.

3. Both sides had agreed for final disposal of instant OP even in the earlier listing on 15.07.2020. Today, Mr.R.Ezhilarasan, learned counsel on record for sole petitioner and Mr.V.Lakshminarayanan, learned counsel representing Ms.Jayanthi Venkatesh, counsel on record for contesting first respondent are before me in this web-hearing on a video-conferencing platform. Adverting to aforementioned earlier proceedings dated 15.07.2020, learned counsel on both sides agreed for

final hearing of instant OP, this matter was taken up for final hearing and it was heard out in full.

4. Factual matrix in a nutshell is that the first respondent before this Court made a claim before AT *inter alia* claiming a sum of Rs.70,00,000/- from the petitioner before me on the ground that this represents various sums of money lent over a period of time and ultimately consolidated vide an 'agreement dated 11.08.2002' (hereinafter 'said agreement' for brevity). This Court shall refer to the parties by their rank before the Arbitral Tribunal for the sake of convenience.

5. According to the claimant, prior to the said agreement there was a Panchayat Muchalika dated 27.04.2001, one Mr.N.C.Vijairagavan was appointed as sole Arbitrator, he withdrew and the second respondent was thereafter appointed as sole Arbitrator. Originally, one learned counsel was representing the respondent before AT, but subsequently he withdrew and there was a change of counsel for the respondent also before AT. Before AT, the respondent had filed Statement of Defence dated 05.07.2003 as well as Supplemental Defence Statement dated 03.07.2004. AT entered upon reference, adjudicated and made the impugned award on 27.01.2010 directing respondent to pay a sum of

Rs.1,31,99,890/- with interest from dates specified therein (28.01.2010) to the date of realization besides directing respondent to pay the costs of Rs.90,000/-. The respondent, saying that he is entitled to have the impugned award set aside, has presented instant OP. It will suffice to say that going by the aforementioned Muchalika and said agreement, the case of the claimant is that monies were advanced by the claimant to the respondent, whereas the respondent has denied the transaction. Besides the arbitration proceedings, claimant has also launched criminal complaints, against the respondent. One criminal complaint is under Section 138 of The Negotiable Instruments Act, 1881 and the other criminal complaint, this Court is informed, is for cheating. This Court is also informed that both these criminal complaints are pending even as of today.

6. Having set out the factual matrix in a nutshell or in other words, short facts that are imperative for appreciating this order, this Court now proceeds to capture the rival submissions.

7. Mr.R.Ezhilarasan, learned counsel for respondent before AT (petitioner before me) notwithstanding very many grounds raised in the OP or in other words, focused his submissions on one point and that one

point is, said agreement is fabricated, it is a gotten up document and therefore, the arbitration agreement itself does not exist between the parties. Furthering his submissions on this sheet anchor sole submission, learned counsel pointed out that said agreement is dated 11.08.2002, but it has been executed in stamp paper dated 11.03.2000. It was also pointed out that in the Muchalika dated 27.04.2001, there is a reference to return of cheques, stamp papers, bond etc., and therefore, it lends credence to the submission that said agreement is a gotten up document wherein blank signed stamp paper has been used by the claimant to make the same. Learned counsel submitted that when there is no arbitration agreement between the parties, there could have been no arbitration and therefore, the impugned award , is liable to be set aside.

8. In response to the above submission, Mr.V.Lakshminarayanan, learned counsel representing the counsel on record for contesting first respondent submitted that burden of song of the respondent before AT is denial of transaction. Learned counsel also pointed out that stamp paper on which said agreement has been executed has been purchased by the respondent (petitioner before me) and not by the claimant. On this basis it was submitted that the plea of creating a document using blank signed

stamp paper does not hold water. It was also submitted that the respondent before AT had adequate opportunity to cross-examine the claimant and demonstrate that said agreement is gotten up with a blank signed stamp paper, but the same was not done.

9. From the rival submissions set out supra, it is clear that the sole point that falls for consideration (based on the submissions made before this Court) for testing the impugned award is whether said agreement dated 11.08.2002 has been fraudulently gotten up using blank signed stamp paper by the claimant or is it a valid document.

10. Having set out the rival submissions and having narrowed down the sole point that falls for consideration in instant OP, this Court now embarks upon the exercise of discussing the same, giving dispositive reasoning for arriving at a conclusion.

11. This Court carefully perused the impugned award. AT, after setting out the rival pleadings, has framed as many as 10 issues. The issue that pertains to the point that is now urged before this Court is Issue No.2, which reads '*whether the Agreement dated 11.08.2002 is true and valid?*'. This issue has been dealt by AT in the impugned award along

with Issue No.1, which reads *'Whether the Agreement dated 27.04.2001 (Muchalika) is true and valid?'* and AT has returned findings on both issues together. In other words, Issues 1 and 2 have been dealt with and findings have been returned by AT in Paragraphs 20 to 29 of the impugned award, which has been placed before me. To be noted, AT has returned a finding that Muchalika dated 27.04.2001 and said agreement dated 11.08.2002 are true, valid, that the respondent has executed said agreement freely/ voluntarily admitting that he is due and liable to pay Rs.70,00,000/- to the claimant besides agreeing and undertaking to pay within 30 days from 11.08.2002.

12. A careful perusal of Paragraphs 20 to 29 of the impugned award reveals that AT has proceeded on the basis of evidence available before it. To be noted, said agreement has been marked as Ex.A60 before the AT. Also to be noted, as many as 32 exhibits were marked before the AT.

13. This now takes us to proceedings before the AT. Proceedings before AT are captured in Paragraphs 18 and 19 of the impugned award, which read as follows:

> *'18.Proceedings of the above case were held on 10.10.2006, 07.11.2006, 05.12.2006, 09.01.2007, 30.01.2007, 13.02.2007,*

27.02.2007, 27.03.2007, 24.04.2007, 05.06.2007, 21.08.2007, 09.10.2007, 06.11.2007, 18.12.2007 &29.01.2008.

19. Copy of claim statement was furnished to the counsel for the Respondent. Similarly copies of statement of defence and supplementary statement of defence filed by the Respondent were furnished to the Counsel for the Claimant. Sufficient opportunity was given to both parties to produce documents in support of their case. No documents were produced by the Respondent. Documents 1 to 32 were produced by the Claimant. Copies of documents 1 to 32 produced by the Claimant were served on the Counsel for the Respondent. The Respondent was not contacting his counsel Mr.S.Subbiah and hence Mr.S.Subbiah had terminated the Vakkalath and informed the Respondent. The letter of Mr.S.Subbiah, Advocate was also communicated to the Respondent by this Tribunal. Then one Mr.Elizharasan, Advocate, appeared and under took to file V akkalath. But no Vakkalath was filed and even after ex parte notice was given neither the Respondent no Mr.Elizharasan appeared. Thus a fair and full opportunity was given to the Respondent to present his case.'

14. Besides capturing dates of proceedings and what transpired thereat, the trajectory of the hearing has also been captured by AT in paragraphs 8 to 16, which read as follows:

'8.During the pendency of these arbitral proceedings a memo contending that in the absence of any agreed procedure for filling up the vacancy in the office of the Arbitrator, the appointment made by the Claimant unilaterally is against the provisions of Section 11 of

the Arbitration and Conciliation Act, 1996 and that the alleged right of appointment of an Arbitrator having been extinguished with the appointment of Mr.N.C.Vijairagavan as Arbitrator the Claimant cannot unilaterally appoint another Arbitrator, was filed by M/s.S.Subbiah, A.V.Arun, P.Raja and P.Kannan, Advocates for the Respondent. Copy of the memo was served on the learned counsel for the Claimant. A detailed reply to the memo was filed by the learned counsel for the Claimant. On a careful consideration of the contentions raised in the memo and the reply, the Memo was dismissed by this Tribunal by a detailed order dated 07.01.2009.

9. During the proceedings held on 31.01.2009 both the Counsel for the Claimant and the Counsel for the Respondent were present and they were required to serve the copies of the documents on the other side before 28.02.2009 and file the documents before this Tribunal on 28.02.2009. On 28.02.2009 counsel for the Respondent was present. Counsel for the Claimant was present and produced some documents and requested time to produce the remaining documents. Copies of the documents produced by the Claimant were communicated to the learned counsel for the Respondent and served.

10. On 28.03.2009 the Counsel for the Claimant produced documents numbering 32 in a bound volume. Counsel for the Respondent was not present. The counsel for the Claimant was directed to serve copies of the Documents 1 to 32 on the Counsel for the Respondent.

11. Memo was filed by the Counsel for the Claimant that copies of the documents 1 to 32 was served on the counsel for the Respondent.

12.As the Respondent and his counsel were not regular in appearing before this Tribunal notice was sent to the counsel for the Respondent that the Respondent will be set ex parte, if he fails to attend the hearing and produce documents on his side.

13. On 23.05.2009 letter was received from Mr.S.Subbiah, Advocate, Counsel for the Respondent that the Respondent had not been contacting him and that hence he would not make any arrangements either for his appearance or any of other Advocates on record and that hence he has sent a letter by courier to the Respondent terminating his Vakkalath and that any communications may be taken directly to the Respondent.

14. Minutes of the Proceedings and the copy of the letter were communicated to the Respondent to his addresses by RPAD and was served.

15. On 27.06.2009, Mr.Ezhilarasan, Advocate was present and he under took to file Vakkalath for the Respondent. Copy of written arguments submitted by the Claimants was furnished to the learned counsel. The proceedings were adjourned to 18.07.2009.

16. On 18.07.2009 Mr.Ezhilarasan, Advocate was absent. There was no representation. Vakkalath was not filed on the side of *the Respondent and notice was ordered. Exparte notice was sent to the Respondent. Again on 01.08.2009 both the Respondent and his counsel were absent. There was no representation. Respondent was set ex parte. Oral arguments of the Claimant were heard. Proceedings were closed. Award was reserved.'*

15. A careful perusal of the of impugned award (extracted and reproduced supra) paragraphs reveal that the respondent before AT, after filing statement of defence and Supplemental Defence Statement, has not chosen to go before the AT and cross-examine the claimant, the only reason that is being advanced for this is that the respondent's son was hospitalized with dengue and he ultimately died leaving the family of the respondent bereaved. It may not be necessary to dilate further on this aspect of the matter as the aforesaid extracted paragraphs of the AT reveal that adequate opportunities have been given to the respondent to go before the AT and cross-examine the claimant, but not availed by respondent. Therefore, inevitably AT has proceeded to make the impugned award on the basis of available documentary evidence and other available materials before it.

16. The respondent has raised this plea of making up said agreement which contains arbitration clause albeit in pleadings, two issues have been framed, the same have been dealt with and a finding has been rendered by the AT. It is to be borne in mind that this is a case where the respondent, after filing the statement of defence/supplemental statement of defence i.e., after completing pleadings, did not choose to go before AT and cross-examine the claimant. There is nothing to demonstrate that there was any incapacity or impediment for the respondent in doing this except pleading bereavement. This is hardly an explanation much less a convincing explanation as the trajectory and the dates of proceedings which have already been set out supra reveal that it was not one solitary hearing but several hearings over a period of time. In this regard, it was argued by learned counsel for contesting first respondent that when a party has not been cross-examined, that too, on a critical issue as the one on hand, going by the principles underlying law of Evidence, it follows as a sequitur that the assertion is correct. In other words, the party, who has not chosen to cross-examine the adversary, cannot later turn around and make a post decision plea to the same effect, as not cross-examining the adversary will leave the assertion of the

adversary conclusively proved. ***Leelavathi*** principle ***[Leelavathi Alias Leelamma v. Chandra Mouli*** reported in ***ILR (Kar) – 2007-0-2338]*** was pressed into service to buttress this submission.

17. This Court deems it appropriate to consider one other aspect of the matter viz., whether it would be a case which is not arbitrable, as it was argued that said agreement being gotten up with blank signed stamp paper tantamounts to fraud. In this regard, the judgments of Hon'ble Supreme Court reported in ***A.Ayyasamy Vs.A.Paramasivam*** reported in ***(2016) 10 SCC 386*** and ***Ameet Lalchand Shah*** v ***Rishabh Enterprises*** reported in ***(2018) 15 SCC 678*** become relevant. A careful reading of the principles underlying ***Ayyasamy*** and ***Rishabh Enterprises*** cases are to the effect that fraud by itself is not completely excluded from arbitration. If it is serious fraud, it may have to be sent to Civil Court is the obtaining legal position. In this regard, a broad test regarding fraud or serious fraud, is that the allegation of fraud should be such that an offence is made out. At the end of the day, whether it is fraud or serious fraud, is a matter which has to be decided based on factual matrix of each case.

18. In this case, as already mentioned supra, respondent has not chosen to cross-examine the claimant and therefore, it cannot be gainsaid that the respondent has made out a case of serious fraud. It follows as a sequitur that the plea of serious fraud and the case being not arbitrable does not come to the aid of the contesting first respondent in this case owing to the factual aspects and trajectory before AT, all of which have been delineated and alluded to supra.

19. With regard to the plea of the stamp paper in which said agreement being executed being of the year 2000, whereas said agreement is of the year 2002, as the stamp paper has been purchased by the respondent himself and as the signature has not been disputed, I find for the claimant.

20. This takes us to the impugned award in its entirety. A careful perusal of the impugned award in its entirety reveals that as many as 32 documents have been marked on the side of the claimant without objection, 10 issues have been framed based on the rival pleadings and all the issues have been answered based on the evidence and pleadings

before the AT. There is no finding in the impugned award, which is so implausible that no reasonable person would come to such a conclusion. In other words, there is no finding which shocks the conscience of this Court. This being an OP under Section 34 of A and C Act, this Court would not interfere as long as it is not demonstrated that the view taken by AT is implausible and is a view, which no reasonable person would take. The reason is, section 34 is neither an appeal nor a revision. Section 34 not being either an appeal or a revision is not even a full-fledged judicial review. It is a mere challenge to an arbitral award within the contours and confines of Section 34. Furthermore, one of the sublime philosophies and salutary principles underlying the scheme of A and C Act is minimum judicial intervention. After all Section 34 of A and C Act is a delicate balance between sanctity of finality of awards ingrained in Section 35 of A and C Act and the sacrosanct character of judicial review. The sole and sheet anchor point on which this OP was predicated and posited by the protagonist of OP on hand can at best be relatable to Section 34(2)(b)(ii). This Section 34(2)(b)(ii) in this case would again turn on the validity of said agreement dated 11.08.2002.

21. This Court has already discussed and given its dispositive reasoning regarding the validity of said agreement dated 11.08.2002 and the conclusion that the findings returned by the AT vide the impugned award in this regard do not deserve to be interfered with, as they are not implausible views which no reasonable person would take. Therefore, the sole plea which at best can gravitate towards 34(2)(b)(ii) also does not help the case of the petitioner in the instant case.

22. Before concluding, it is made clear that this Court has reminded itself of the principle laid down by Hon'ble Supreme Court in ***Fiza Developers*** case [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796***]. This ***Fiza Developers*** principle is to the effect that Section 34 proceedings are summary proceedings and the same was reiterated by Hon'ble Supreme Court in ***Emkay Global*** case being ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49.*** In ***Emkay Global*** case, Hon'ble Supreme Court held that ***Fiza Developers*** is a step in the right direction qua objectives of A and C Act. In other words, a step in the direction towards expeditious disposal and minimum judicial

interference principles underlying Alternate Dispute Resolution (ADR) Mechanism. Further, this ***Emkay Global*** principle was also recently reiterated by Hon'ble Supreme Court in ***Canara Nidhi Limited*** case [***M/S. Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244***]. Besides the Fiza Developers principles as reiterated recently in ***Canara Nidhi Limited*** case, this Court also deems it appropriate to refer to the ***Bhumi Vikas Bank*** case being ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***(2018) 9 SCC 472.*** Bhumi Vikas Bank judgment is an authority for the broad proposition that sub-section (5) of Section 34 is not mandatory and it is merely directory, but there is an observation in ***Bhumi Vikas Bank*** case which emphasizes and reiterates the importance of the one year time line set out in sub-section (6) of Section 34. In the instant case, as already mentioned supra, instant OP was presented in this Court on 01.03.2010, which is more than a decade ago.

23. The ***Fiza Developers*** and B***humi Vikas Bank*** principles have been set out only to make it clear that this Court has reminded itself about the nature of proceedings qua a petition under Section 34 and the time line.

Owing to all that have been set out supra, it follows as a inevitable sequitur that the petitioner's plea fails and therefore, the OP is dismissed. There shall be no order as to costs.

30.07.2020

Speaking Order: Yes/No
Index: Yes/No
gpa

M.SUNDAR, J.

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