

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 12TH DAY OF FEBRUARY 2020

THE HON'BLE MR. JUSTICE M.SUNDAR

A.NO.7747 OF 2019

IN

O.P.NO.35 OF 2019

In the matter of Arbitration
and Conciliation Act, 1996

and

In the matter of Arbitration
between M/s.Shriprop
Structures (P) Ltd., and
Mr.K.P.Vijayakumar, under the
Sale and Construction
Agreements dated 20.01.2014

Shriprop Structures Pvt. Ltd.,
rep. by its Authorized Signatory,
Lakshmi Neela Rite Chambers, 1st Floor,
New No.9, Bazullah Road,
T.Nagar, Chennai-600 017
Mr.Ravie Kumar

...Applicant/Petitioner

-Versus-

Mr.K.P.Vijayakumar,
G4, Flat No.301,
Shriram Shankari Apartments,
Thangappapuram, Perumattunallur,
Guduvanchery-603 202.

...Respondent/Respondent

Application praying that this Hon'ble Court be
pleased to appoint a substitute Arbitrator to adjudicate
all the disputes arising out of the Sale and Construction
Agreement dated 20.01.2014 between the Applicant and
Respondent.

This application coming on this day before this
court for hearing the court made the following order:

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REPORTING SETTLEMENT', both sides submit that settlement

could not be arrived at. Therefore, with consent of both sides, instant application is taken up, heard out and the same is being disposed of.

2. In the instant application on hand, there is no disputation or contestation about the existence of an arbitration agreement between the parties. Arbitration agreement, being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for brevity, is in the form of a covenant in an 'Agreement for Sale dated 20.01.2014' (hereinafter 'said agreement' for the sake of clarity). Clause 15 of said agreement is therefore the arbitration agreement (between parties to application on hand) and the same reads as follows:

'15.All disputes or differences between the Parties under or in connection with this Agreement or any breach thereof shall be amicably settled between the parties and in the event of failing to reach a settlement, the same shall submitted to arbitration of a sole Arbitrator who will be appointed mutually by both the parties. It is clarified that the Sole Arbitrator, to be appointed shall be one among the retired judges of the Madras High Court. The Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The language of the arbitration shall be English. The seat of arbitration shall be in Chennai. The expenses of the Arbitration proceedings shall be borne equally by the Parties or as may be decided by the Arbitrator. The decision by the Arbitrator shall be final and binding between both the

parties and will be capable of enforcement before the competent court having jurisdiction.'

3. In other words, Clause 15 of said agreement (extracted and reproduced supra) serves as arbitration agreement between the applicant and respondent in instant application.

4. In the aforesaid backdrop, applicant herein moved this Court under Section 11 vide O.P.No.35 of 2019, which came to be disposed of by Hon'ble predecessor Judge vide order dated 18.06.2019 wherein and whereby a former Hon'ble Judge of this Court was appointed as sole Arbitrator.

5. The Arbitrator so appointed entered upon reference. On entering upon reference, sole arbitrator issued a notice dated 29.07.2019, which reads as follows:

'1. In the above subject Honorable High Court, Madras has passed an order directing "that the proceedings shall be conducted under the aegis of the Madras High Court Arbitration Centres and in accordance with the Madras High Court Arbitration Rules".

2. The Additional Registrar (vigilance) cum-Ex office member has written a letter to the Arbitrator in this regard.

3. I therefore request you in consultation with the parties to the proceedings after ascertaining the convenient date of the arbitrator, and reserve a hall to the convenient date in advance and intimate the same to the arbitrator to proceed the matter in this regards.

4. A copy of the High Court order and a copy of the letter under above reference is sent herewith for information.'

6. Thereafter, vide a communication dated 15.07.2019 Arbitration Centre of Madras High Court communicated the order made by this Court to the Hon'ble Arbitrator and the same reads as follows:

'I am pleased to inform that your Lordship has been appointed as an Arbitrator in the above said case and a copy of the order is enclosed herewith for your Lordship's kind perusal.

Further, I request your Lordship to fix a convenient date for conducting the Arbitration proceedings at the Madras High Court Arbitration Centre, High Court Campus, Chennai and the same may be communicated to the Centre as well as to both the parties so as to enable us to make necessary arrangements at our end.

Further, I am to state that a sum of Rs.4,000/- (Rupees Four thousand only) per day is fixed as charges for utilizing the facilities of the Madras High Court Arbitration Centre.'

7. Thereafter, respondent before this Court in instant application sent a communication dated 31.07.2019 to the Hon'ble Arbitrator, which reads as follows:

'I am in receipt of your notice dated 15.07.2019 regarding the arbitration proceedings initiated by Shri Prop Structures Pvt. Ltd., calling for fixing date of hearing in the matter.

It would be appropriate to explain the happenings behind the issue referred in the notice sent by you.

(i) I have entered into Sale Agreement and Construction Agreement for construction of a

flat in the complex "Shriram Shankari" with Shri Prop Structures Pvt. Ltd. I have paid Rs.40,03,175/- as per the terms of the agreement. There was no progress for a very long period and Shri Prop Structures Pvt. Ltd., had also given a written revised commitment dated 3.11.2015 committing to hand over the subject flat by May 2016.

(ii) However, they have miserably failed to complete the construction of the flat even after several months of their commitment. Frustrated by the lethargic and reckless attitude of Shri Prop Structures Pvt. Ltd., in completing the construction and handing over the flat, I have issued a legal notice dated 19.12.2017 calling upon them to immediately commence the construction activities in the subject property and to complete and handover flat to me at the earliest and further to pay the compensation and damages. Despite receipt of the said notice, Shri Prop Structures Pvt. Ltd., has not cared to comply with the same and continued their acts of default in abiding by their commitments.

(iii) Therefore, I have filed a complaint before the State Consumer Commission, Chennai seeking the reliefs as claimed by me in the said legal notice dated 19.12.2017. The said complaint was numbered as C.C.No.62 of 2018 and notice was served on Shri Prop Structures Pvt. Ltd., before the first hearing of the said CC i.e., 07.05.2018 and the next hearing was posted to 06.06.2018. It was after receipt of notice in the said complaint the Shri Prop Structures Pvt. Ltd., proceeded to initiate arbitration proceedings.

I have already sent a detailed reply to Shri Prop Structures Pvt. Ltd., explaining all the facts and clearly affirming that there is no dispute to be referred to arbitration. There are clear acts of deficiency in service by Shri Prop Structures Pvt. Ltd., for which I have already initiated legal proceedings before the Hon'ble State Consumer Commission, Chennai and the same is pending.

I hereby communicate through this letter that there is no arbitrable dispute exist based on the agreement as referred by Shri Prop Structures Pvt. Ltd.'

8. Based on the aforesaid communication, the sole Arbitrator has passed an order dated 07.08.2019 (though captioned 'REPORT OF THE ARBITRATOR') and this 07.08.2019 order of the Arbitrator reads as follows:

'REPORT OF THE ARBITRATOR

1. As directed Arbitrator has written letter to the parties concern to arbitrate the issues in this regard. Both parties have received the letter and sent acknowledgement there of.

2. By the reply dated 31.07.2019 Mr.K.P.Vijayakumar the respondent herein has stated that he has already set the law into motion seeking the reliefs under the above subject before the state consumer commission, Chennai and the same was numbered as CCNO 62/2018 and the 1st hereing came up on 07.05.2018 and the next hearing was posted to 06.06.2018.

3. Only after receipt of the notice of the complaint referred above the petitioner Shri Prop.Structures Pvt. Ltd have proceeded to initiate arbitration proceeding.

4. Therefore the respondent has submitted that there is no arbitrable dispute exist based on the agreement as referred by Shri Prop.Structures Pvt. Ltd.

5. Arbitrator has gone through the reply of the respondent in detail. The reply is self explanatory. A copy of the reply is submitted herewith for information in this regard.

6.As the state consumer forum has taken cognizance of settle the issues in this regard, the arbitrator is of the view that no purpose would serve to arbitrate the matter.

7. It is for the parties concern to get appropriate orders before the competent forum to proceed further in this regard.

8.In such view of the fact the arbitrator has closed the Arbitral proceedings and submitting this report for passing further directions for the above subject.

Dated at Chennai this the 7th day of August 2019.'

9. Thereafter, instant application has been moved under Sections 14 and 15 of A and C Act with a prayer to substitute the aforementioned Arbitrator (obviously with another Arbitrator) to adjudicate the arbitrable disputes that are said to have arisen between the parties qua said agreement.

10. Learned counsel for applicant pressed into service two case laws. One is order of Hon'ble Supreme Court dated 04.03.2014 in **Lalitkumar V.Sanghavi's** case and

the other is an order made by a Hon'ble single Judge of Bombay High Court dated 12.02.2019 made in **Neeta Lalitkumar Sanghavi & Anr. Vs. Bakulaben Dhamadas Sanghavi & Ors** case. Learned counsel drew the attention of this Court to Paragraphs 11 to 14 of Lalitkumar case and Paragraph 21 of Neeta Lalitkumar case, which read as follows:

' Lalitkumar V.Sanghavi's case

'11. Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court to decide on the termination of the mandate.

12. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings.

13. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof.

14. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e.

the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the

termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court as provided under Section 14(2).'

'Neeta Lalitkumar case

'21. Looking at the opening words "the mandate of an arbitrator shall terminate" appearing in Section 32 (3) and the use of the exact words in the opening part of Section 14(1) would also indicate that in a situation where such as the one contemplated under Section 32(2)(c) would be covered by Section 14(1) and therefore an application under Section 14(2) would be maintainable. I find considerable force in the argument arbp-626-17.doc canvassed on behalf of the petitioners that an order which is not an award, but at the same time puts an end to the mandate of the Tribunal as well as termination of the arbitral proceedings, would fall within Section 32(2) and would have to be considered under Section 14(2).'

11. Adverting to aforesaid case laws, learned counsel submitted that Section 14 has to be read in tandem with Section 32 of A and C Act. Saying so, learned counsel advanced a proposition that in the instant case there is termination of mandate within the meaning of Section 32(2) of A and C Act and therefore, instant application under Sections 14 and 15 have to be considered in that context.

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12. Per contra, learned counsel for respondent

adverting to sub-clauses (a) to (c) of sub-section(2) of Section 32 submits that instant case does not fall under any of those three clauses, as Hon'ble Arbitrator appointed by this Court has returned a finding on 07.08.2019.

13. This Court has carefully considered the rival submissions. It makes it necessary to peruse the fact scenarios in **Lalitkumar** case rendered by Hon'ble Supreme Court and **Neeta Lalitkumar** case rendered by Bombay High Court. The facts scenario in **Lalitkumar** case is captured in Paragraph 4 of said order, which reads as follows:

'4. The undisputed facts are that the parties herein are carrying on some business in the name and style of a partnership firm constituted under a partnership deed dated 20th October 1962. The partnership deed provided for the resolution of the disputes arising between the partners touching the affairs of the partnership by means of an arbitration. In view of certain disputes between the partners (details of which are not necessary for the present purpose) the original applicant filed arbitration application No.263/2002 under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, for short) before the Chief Justice of the Bombay High Court which was disposed of by an order dated 21st February, 2003 by a learned Judge of the Bombay High Court, who was the nominee of the Chief Justice under the Act. The relevant portion of the order reads as follows:

Considering that applicant respondent No.1 have appointed two arbitrators, Justice H. Suresh, Retired Judge of this Court is appointed as presiding arbitrator. The

arbitral tribunal so constituted to decide all disputes including claims and counter claims of the parties arising from the controversy. In case respondents do not cooperate with the matter of appointment of third arbitrator, applicant initially to bear the made part of final award in the position, application disposed of accordingly.'

17. The factual matrix in **Neeta Lalitkumar** case has been captured in Paragraph 3 of that order, which reads as follows:

'3. To understand the controversy, it would be necessary to set out some basic facts. It is not in dispute that the subject arbp-626-17.doc matter of the arbitration proceedings are disputes relating to the Partnership Firm known as "Sanghavi Brothers" (for short "the Firm"). Since disputes arose between the partners of the said Firm, the original claimant (i.e. the father of the petitioners) approached this Court under Section 11 of the Act for constitution of an Arbitral Tribunal for the purpose of adjudicating the disputes relating to the said Firm. This application was allowed by this Court by an order dated 21st February, 2004 and the Arbitral Tribunal was constituted comprising of (i) Justice H. Suresh (Retd), (ii) Justice I. G. Shah (Retd) and (iii) Mr. Suresh Payak (for short "the three-Member Tribunal") for adjudicating the disputes in relation to the said Firm. Once the Arbitral Tribunal was constituted, the original claimant (the father of the petitioners) filed his statement of claim before the three-Member Tribunal. The respondents also filed their statement of defence. It is the case of the petitioners that several hurdles were created by the respondents and/or their predecessors in the

progress of the arbitration proceedings. In view of the delays and due to the non-cooperation on the part of the respondents and/or their predecessors, the three-Member Tribunal passed an order dated 29th October, 2007 stating that the Arbitration Proceedings stand terminated.'

18. A perusal of facts scenarios in the aforesaid two case laws brings to light that both were cases where the arbitration proceedings were terminated as the Arbitral Tribunal in those cases were of the view that it is impossible to proceed with the arbitration, but the facts scenario in instant case is completely different. A perusal of 07.08.2019 order of Hon'ble Arbitrator makes it clear that the Arbitrator has virtually returned a finding by holding that the consumer forum, which is in cognisance of all the disputes, should only decide the matter.

19. Thereafter, Hon'ble Arbitrator no doubt has said that no purpose would be served by arbitrating the matter, but the fact remains that learned Arbitrator has returned a finding on 07.08.2019. Therefore, this Court is left with the considered view that the finding returned by learned Arbitrator on 07.08.2019 has to be assailed in a manner known to law and a decision has to be taken one way or the other of the correctness or otherwise of the findings (vide order dated 07.08.2019) returned by the learned Arbitrator. In other words, it is not a case of termination of arbitral proceedings simplicitor on the ground that there is a delay and there is a situation which has made it impossible to continue the arbitral proceedings. It is not a case of termination simplicitor and it is a case of a verdict being returned and a finding being given. In this view of the matter, this Court is left with the considered view that aforesaid two case laws do not come to the aid of the applicant qua prayer in the instant case. It is made clear that this Court has not expressed any opinion whatsoever on

the merits of the order dated 07.08.2019 of learned Arbitrator. Suffice to dispose of this application leaving it open to the applicant herein to assail the proceedings of the arbitrator dated 07.08.2019 in a manner known to law.

In the light of the narrative thus far, instant application is dismissed albeit preserving the rights of the applicant in the aforesaid manner i.e., to assail the proceedings of the learned Arbitrator dated 07.08.2019 in a manner known to law.

Sd/.M.S.J.

12.02.2020

//Certified to be a true copy//

Dated this the day of 2020.

SU.18.02.2020

COURT OFFICER

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