

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:11.09.2020

C O R A M

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.No.1736 of 2017

Kandasamy, S/o.Ramasamy gounder,
Kottayan Thottam, Veesanam Post,
Namakkal Taluk, Namakkal District. ... Appellant/Respondent

vs

Azhagusamy, S/o.Perumal gounder,
18, Sivaniyanam Street, Ganeshpuram Post,
Namakkal Town, Namakkal District. ... Respondent/Petitioner

Prayer : Civil Miscellaneous Appeal filed under 37(2) of the Arbitration and Conciliation Act to set aside the fair and decreetal Order dated 24.02.2017 made in Arbitration O.P.No.58 of 2011 on the file of the learned Principal District Court, Namakkal confirming the Order dated 26.05.2010 made in ACP No.48 of 2009 passed by the Sole Arbitrator, Namakkal.

For Appellants : Mr.N.Manokaran
For respondents : Mr.P.Manojkumar
for Mr.P.Rajendran

J U D G M E N T

This appeal has been filed challenging the Order of the learned Principal District Judge, Namakkal dismissing the appeal filed as against the Award.

2. Though the challenge has been referred as an appeal, but the award has been challenged, on a different provision of law, under Order XLIII of CPC instead of Section 34 of Arbitration and Conciliation Act.

3. The learned District Judge having numbered the appeal as an Arbitration Original Petition, non suited the appellant herein on two grounds :

[i]. that the award has not been challenged within the period of limitation.

[ii]. that the award has not been challenged under section 34 of the Arbitration and Conciliation Act rather challenged under Order XLIII Rule 1 of CPC.

Only on technicality, the learned Principal District Judge has non suited the appellant. Challenging the same, the present appeal has been filed.

4. Brief facts leading to the filing of the appeal is as follows :

The respondent is said to have advanced a sum of Rs.3,50,000/- to the appellant on execution of a promissory note dated 10.07.2007 and the parties have agreed to refer the matter to arbitration in the event of any dispute arose between them. In pursuant to the default said to have been committed by the appellant in payment of the amount, the dispute has been referred to the sole arbitrator namely one N.S.Sukumar. Before the sole arbitrator, the appellant has took a stand that the entire amount has been discharged in respect of which a receipt has also been issued by the respondent. However, during the proceedings before the arbitrator, the appellant has all along appeared through his counsel and suddenly withdrew his counsel and appeared himself personally before the arbitrator and thereafter, he remained exparte. Therefore, the learned arbitrator has passed an award. Challenging the same, a proceedings have been taken before the learned Principal District Judge in the name of an appeal. Though the challenge has been made making allegation on the very award itself, instead of filing an application under section 34 of the Arbitration and Conciliation Act, it has been referred as it was filed under Order XLIII and Rule 1 CPC. Wrong quoting of the provision of law solely attributable only to the ignorance of the counsel appearing for the appellant before the lower Court. Mere wrong quoting of the provision of law will not take away the substantial right of the party to challenge the award as per Section 34 of the Arbitration and Conciliation Act as long as the ground of appeal made challenging the award as that of the grounds available under section 34 of the Arbitration and Conciliation Act. Mere wrong quoting of the provision of law cannot be a ground to reject the appeal. Be that as it may.

5. The learned District Judge also non suited the appellant on the ground that it is barred by limitation. It is relevant to note that the learned Principal District Judge has received additional documents as that in a civil appeal to prove the alleged factum of service of notice as to the award to reckon limitation. The learned Principal District Judge has entertained additional documents namely Ex.C.1 to Ex.C.4 and found that the challenge made for the award is barred by limitation. It is to be noted that if any additional evidence is received by the Court in Appeal stage, appropriate opportunity has to be given to the parties to rebut the documents, which has not been done so. The learned Principal District Judge also failed to appreciate Section 34 of the Arbitration and Conciliation Act and simply received the

additional documents. Having received such documents, he has failed to afford any opportunity to the parties to adduce any evidence or to prove the documents or to rebut the above documents.

6. On a perusal of Ex.C1 to Ex.C.4, on which reliance has been placed by the learned Principal District Judge, this Court is of the view that the learned Principal District Judge has not applied his mind and mechanically received the documents and accepted the documents as gospel truth, without even going to the contents of the document to reckon limitation. The documents relied upon to prove the service of award to reckon limitation indicate that these document are no way connected to the award. The postal authorities letter indicate that these documents and acknowledgements relate only to the notice dated 24.09.2009 in transaction No.931. The above notice appears to be a pre-arbitration notice which is said to have been served on 26.09.2009. Whereas, the award is said to have been passed on 26.05.2010. Therefore, the learned Principal District Judge giving an undue importance to these documents is illegal and non application of mind and the same has to be set aside.

7. Accordingly, this Civil Miscellaneous Appeal is allowed and the Order of the Principal District Judge, Namakkal in A.O.P.No.58 of 2011 dated 21.02.2017 is set aside and the matter is remanded to the Principal District Court, Namakkal to re-hear the application and though it is filed under Order XLIII, the learned Judge is required to treat it as a petition under section 34 of the Arbitration and Conciliation Act and hear the matter on merits and pass an Order within a period of six months from the date of receipt of a copy of this Order.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

vrc
To
The Principal District Judge,
Namakkal.
+1 cc to M/s.N.Manoharan, Advocate Sr.No. 29857

C.M.A.No.1736 of 2017

NMI (CO)
RMP (20/11/2020)