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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2021

PRONOUNCED ON : 31.03.2021

CORAM

THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

C.M.A.NO.1334 OF 2011

P.Subramani

... Appellant/1st Respondent

Vs.

1. P.Rajagopal

... 1st Respondent/Petitioner

2. A.C.Raja

3. S.P.Arunachala Asari

4. M.Muthu

5. P.M.N.M.Krishnan Asari

6. M.Venkatesan

7. P.C.Jaganathan Asari

8. P.Prakash Asari

9. P.Ramaswami Asari ... Respondents 2 to 9/ Respondents 2 to 9

Prayer :- Civil Miscellaneous Appeal is filed under Section 37 of Arbitration and Conciliation Act 1996, to set aside the common and decreetal order dated 31.08.2010 made in Ar.OP.NO.170 of 1997 on the file of the learned I Additional District Judge, Salem.

For Appellant	: Mr.S.Devanathan
For Respondents	
For R1	: Ms.J.Prithivi
For R2 & R4	: No Appearance
For R3, R5 to R8	: No Appearance
For R9	: Mr.S.Saravana Kumar

JUDGMENT

This Civil Miscellaneous Appeal is directed as against the fair and decreetal order dated 31.08.2010, passed by the learned I Additional District Judge, Salem, in Ar.OP.NO.170 of 1997, thereby setting aside the award dated 09.05.1996 passed by the Arbitrators.

2. The appellant is the first respondent in Ar.O.P.No.170 of 1997 and the first respondent herein is the petitioner, who challenged the award passed by the arbitrators dated 09.05.1996. The Court below allowed the petition and thereby setting aside



the award passed by the arbitrators dated 09.05.1996. Aggrieved by the same the present appeal.

3. The learned counsel appearing for the appellant would submit that the respondents 2 to 9 herein were the arbitrators and they passed an award dated 09.05.1996, determining and allocating the immovable properties between the appellant and the first respondent herein. Both are brothers and the subject properties were purchased from their own joint income and earning in the year 1975 jointly. They were carpenters by profession and earned money from their profession and they also had constructed building out of their joint income from their professional earning.

3.1. He further submitted that the Court below, while setting aside the award, applied both the Arbitration and Conciliation Act 1940 (herein after called as "old Act") and the Arbitration and Conciliation Act, 1996 (herein after called as "new Act"). Originally, the arbitration proceedings commenced after the enactment of the new Act and the award was passed after enactment of the new Act and after came into force of the new Act. The petition to set aside the award was filed under Section 34 of the new Act. The new Act was came into force on 22.08.1996 and it is continuation of ordinance dated 25.01.1996. Therefore, the ordinance came into force as early as on 25.01.1996 itself. When the first ordinance came into light, the old Act was repealed from 25.01.1996. Therefore, the Court below wrongly invoked the old Act and found infirmities to set aside the award passed by the Arbitrators. The Court below is being the Additional District Judge has no jurisdiction to entertain the arbitration original petition, since the new Act specifically provides that the Principal District Court in the District has only jurisdiction to decide the question forming the subject matter of arbitration.

3.2. Under Section 34(2)(v) of the new Act says that the award can be set aside if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement is in conflict with the provision on the part from while the parties cannot derogate on, failing such agreement is not in accordance with part. Therefore, the Court below wrongly concluded that the matter was heard by even number of arbitrators but they did not appoint an umpire as contemplated under clause 2 of the first schedule to the old Act. As per the muchilaka dated 31.01.1996, the appellant and the first respondent agreed to appoint nine persons as Arbitrators to settle the issue between them. The ninth arbitrator did not participate and eight arbitrators only acted as arbitrators, in which one of the arbitrators did not participate as an arbitrator and he withdrew from the office of



the arbitrators from conducting enquiry. Therefore, he did not signed the award. Therefore no need to appoint an umpire as pointed by the Court below, when the arbitrators are in the even numbers.

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3.3. He further submitted that Section 10 of the new Act has to be read along with Section 16 of the new Act and it is derogable provision, assuming without conceding the parties agreed to upon an even number of arbitrators and objection as to composition of arbitral tribunal was not taken within the stipulated period as provided under Section 16(2) of the new Act, there would be a deemed waiver of objection regarding the composition of tribunal under Section 4 and as such, the award cannot be set aside. In support of his contention, he relied upon the following reported judgments:-

(i) AIR 2001 SC 2293 -M/s. Fuerst Day Lawson Ltd., Vs. Jindal Exports Ltd.,

(ii) AIR 2003 SC 2523 - Delhi Transport Corporation Ltd., Vs. Rose Advertising.

(iii) AIR 2002 SC 1139 - Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and ors.

4. Per contra, the learned counsel appearing for the first respondent submitted that the first respondent never executed any panchayat muchilaka dated 31.01.1996, thereby appointing the respondents 2 to 9 herein as arbitrators to decide the dispute between the petitioner and the first respondent herein. The panchayat muchilaka itself created by the petitioner herein in view of extract money from the first respondent herein and also prevent him from demanding the loan amount borrowed by the petitioner. Further the first respondent was never enquired by any one of the respondents 2 to 9 herein and no one was contacted him and they themselves fabricated the documents and served with respondents as award.

4.1. She further submitted that Section 2(i)(e) of the new Act is very clear that Court means that the civil Court of original jurisdiction and it does not include any civil Court of a grade inferior to the principal civil Court or any Court of small causes. Therefore, the Court below is not inferior to the principal civil Court since Additional District Court is also having the same power of Principal District Court. Therefore, the Court below got jurisdiction to pass the orders under Section 37 of the new Act.

4.2. Even assuming that the punchayat muchalika and the award are genuine one, there should be nine arbitrators. Admittedly eight arbitrators only participated in the arbitration and seven arbitrators were only signed in the



arbitration award. Therefore it directly hits under Section 34 (2)(v) of the new Act. The Court below rightly set aside the arbitration award and it doesn't warrant any interference from this Court. Therefore, she prayed for dismissal of this appeal.

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5. Heard Mr.S.Devanathan, learned counsel appearing for the appellant, Ms.J.Prithivi, learned counsel appearing for the first respondent and Mr.S.Saravana Kumar, learned counsel appearing for the ninth respondent.

6. The petitioner and the first respondent are brothers. According to the petitioner, they entered into a panchayat muchilaka dated 31.01.1996, thereby appointed nine persons as arbitrators to settle the issues between them in respect of the suit properties earned by them jointly in the carpenter profession. Accordingly, the arbitrators conducted enquiry in which, eight arbitrators were participated and by an award dated 09.05.1996, they allotted respective shares to the petitioner as well as the first respondent herein. It was challenged by the first respondent under Section 34 of the Arbitration and Conciliation Act 1996.

7. Initially, the petition was filed before the Sub Court, Salem under the old act viz., the Arbitration and Conciliation Act 1940, to set aside the award. The said petition was returned with an endorsement, the same to be filed before the appropriate Court under the new Act, since new Act came into force. Accordingly, the first respondent filed petition to set aside the arbitrary award in Ar.O.P.No.170 of 1997 before the I Additional District Judge, Salem. The learned Judge allowed the petition and set aside the award passed by the Arbitrators, as against which the present appeal.

8. The first ground raised by the learned counsel appearing for the petitioner is that the Court below has no jurisdiction to enquire the petition under Section 34 of the Arbitration and Conciliation Act, 1996. It is relevant to extract the provision under Section 2(i)(e) of the new Act as follows :-

"2(1)(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior



to such principal Civil Court, or any Court of Small Causes;"

Under the old Act, Section 2(c) defines the Courts as follows:-

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"2(c) " Court" means a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;"

9. Initially under the old Act, the first respondent filed petition to set aside the award before the Sub Court, Salem and it was returned for the reason that the new Act came into force. Further the Sub Court, Salem returned the petition for the reason that the new Act only applied to challenge the award. As rightly pointed out by the learned counsel appearing for the first respondent, under the new Act, the Court does not include any civil Court of a grade inferior to such Principal District Court or any Court of small cause. The Court below is the Additional District Court and it has equal powers as Principal District Court and does not inferior to the Principal Civil Court. Therefore, the Court below has jurisdiction to enquire the petition under Section 34 of the new Act.

10. After the panchayat muchalika entered between the petitioner and the first respondent on 31.01.1996, they referred to the nine arbitrators for arbitration. Though nine arbitrators were appointed, out of nine arbitrators, eight arbitrators were conducted enquiry and passed award on 09.05.1996. The new Act came into force on 22.08.1996 and as such, the arbitration award has to be tested under the old Act, which was in force at the time of passing the award. Therefore the Court below applied the old Act to consider the petition to set aside the award. The first schedule of the old Act enumerates implied provisions under the arbitration agreement, in which unless otherwise expressly provided the reference shall be to a sole arbitrator and if the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

11. As per muchalika dated 31.01.1996, the petitioner and the first respondent were referred the dispute to the nine arbitrators in which one arbitrator did not participate in the arbitration. Though eight arbitrators arbitrated the dispute in which, one of them did not sign in the award. As pointed out by the Court below the matter was arbitrated by even number of



arbitrators, even then they failed to appoint an umpire as contemplated under clause 2 of the first schedule of the old Act. Admittedly, the ninth arbitrator did not participate in the arbitration and one of the arbitrators who participated in the arbitration proceedings did not sign the award. Section 14(1) of the old Act, reads as follows :-

"14. Award to be signed and filed. (1)
When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award."

Therefore, the arbitration award is not valid one, since one of the arbitrators who arbitrated the arbitration did not sign the award.

12. That apart, under Section 30 of the old Act and under Section 34 of the new Act, the grounds for set aside the award as follows :-
Section 30 of the old Act :-

"30. Grounds for setting aside award.
An award shall not be set aside except on one or more of the following grounds, namely:-

(a) that an arbitrator or umpire has misconducted himself or the proceedings

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid."

Section 34(2)(v) of the new Act :-

"34

(2)..... (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;"



As per under Section 30(c) of the old Act, the award has been set aside if the arbitration improperly procured or is otherwise invalid. Under Section 34(2)(v) of the new Act, normally that award can be set aside the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part.

13. Therefore, the Court below applied both the provisions under the old Act as well as the new Act and concluded that the award fails to satisfy the procedure laid down under the Acts. Therefore the judgments cited by the learned counsel appearing for the appellant are not helpful to the case on hand. This Court finds no infirmity or illegality in the order passed by the Court below.

14. Accordingly, this Civil Miscellaneous Appeal stands dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

rts Sub Assistant Registrar

To

The I Additional District Judge,
Salem.

Copy To

The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1cc to Mr.S.Devanathan, Advocate, S.R.No.21155
+1cc to Mr.S.Kaithamalaikumarm, Advocate, S.R.No.21235
+1cc to Mr.I.Abrar MD Abdullah, Advocate, S.R.No.21250

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BR(CO)
PM/04/10/2021