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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

CMA.No.204 of 2021

B. Kannan

...Appellant/ 1st Respondent

Vs

1. Jayammal

2. Reena

3. Nalinadevi

...Respondents / Petitioners

4. A. Karthikeyan,

Arbitrator,

No.9, CHB Colony, Street No.1, Vellor Road,
Namakkal District - 637 214.

...Arbitrator / 2nd Respondent

Prayer : Appeal filed under Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996 to set aside the order of the Hon'ble Principal District Judge, Namakkal passed in Ar.O.P.No.57 of 2019 dated 31.01.2020 and confirming the arbitral award passed by the sole Arbitrator in Ar.Petition.No.4 of 2017 on 19.01.2019.

For Appellant : Mr. N.K.R. Kumaresh

For Respondents : Mr. S.R. Sundar for R1 to R3

JUDGMENT

The above appeal is filed by the claimant challenging the order passed by the Principal District Judge, Namakkal in Ar.O.P.No.57 of 2019.

2. The case of the claimant was that one R.Muthusamy had borrowed a sum of Rs.1,50,000/- from him and had executed a promissory note which contains an Arbitration clause. Under the promissory note, the said Muthusamy had undertaken to repay the same together with interest at 18% per annum. Therefore, according to the claimant, Muthusamy was required to pay a sum of Rs.2,250/- towards interest every month. Since the said Muthusamy had passed away on 20.02.2017, the claimant had issued a notice of demand to the legal representatives of the said Muthusamy calling upon them to pay a sum of Rs.1,54,500/- which was the principal, together with interest. The respondents on receiving the said notice had sent a reply denying the very execution of the promissory note and also contending that the



alleged agreement cannot bind the legal representatives. In the reply notice, they had also requested for copies of the documents. However, without sending a copy of the documents, the respondent had issued another notice dated 20.05.2017, appointing an arbitrator and calling upon the respondents to pay a sum of Rs. 1,64,500/-. The respondents vide their legal notice dated 31.05.2017 had not consented to the Arbitrator appointed by the claimant/appellant, since they have disputed the very arbitration agreement. The arbitrator so appointed had recused himself vide his letter dated 21.06.2017. The applicant thereafter proceeded to appoint another arbitrator. Once again the respondent on receiving the said notice had challenged the said appointment on the ground that there was no arbitration agreement between the parties and also highlighted the fact that the documents as sought for by the respondents in their reply notice dated 09.05.2017 had not been served on them. They had also not consented for the appointment of the Arbitrator.

3. Despite the objection, it appears that the arbitrator had entered reference and issued notice to the respondents. Immediately on entering appearance, the respondent had taken out a petition under Sections 12 and 13 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') stating that the petitioner has apprehension about the impartiality of the Arbitrator and called upon him to stop further proceedings in the matter. The respondent had also questioned the unilateral appointment of the Arbitrator, particularly when the same has been done despite the respondent not having given their consent. The respondent had also contended that the mandatory disclosure as provided under the Act has not been made by the Arbitrator. However, without considering the application under Sections 12 and 13 of the Act, the Arbitrator has proceeded to pass an Award in the main claim itself.

4. Another objection that was taken by the respondent was that the Arbitrator had not issued notice to the second and third respondents and it was the first respondent alone who had been served with notice. It is also the contention of the respondent that after the application under Sections 12 and 13 was filed by her, there was no further hearing and all of a sudden, they have received the Award. Therefore, the respondent had filed the petition under Section 34 of the Arbitration and Conciliation Act to set aside the Arbitral Award before the Principal District Judge, Namakkal.

5. The learned Principal District Judge on consideration of the entire facts and the documents proceeded to set aside the Award. The learned District Judge has gone to the extent of deprecating the conduct of the second respondent and observed that the second respondent had acted like a Kangaroo court. It is challenging the said order, the appeal has been filed.



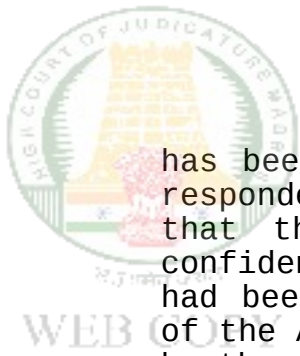
6. The grounds on which the Appeal has been filed is that the order of the District Judge is a non speaking one and the finding of the learned Judge that no notice had been served on respondents 2 and 3 was totally incorrect. The appellant would further contend that the observation of the Principal District Judge that the appellant had not followed the provisions of Section 11 of the Act was totally misconceived.

7. During arguments, the learned counsel for the appellant has also advanced arguments on the above lines.

8. The learned counsel for the respondent has submitted a typed set of papers containing all the documents and he would contend that the entire arbitration proceedings smacks of fraud and violation of all the provisions of the Act. Though the respondent had taken out an application under Sections 12 and 13 of the Act, the Arbitrator has not passed any orders on the said application. He has proceeded to pass an Award despite the respondent objecting to the arbitrator. The unilateral action of the appellant in appointing the Arbitrator despite the objection of the respondent and without recourse to this Court under Section 11 of the Arbitration and Conciliation Act is perse illegal and the constitution of the Tribunal is totally against the Provisions of the Act. That apart, the Arbitrator has not submitted the mandatory disclosure as contemplated under Section 12 (5) of the Act. He would therefore submit that the order of the learned Principal District Judge, Namakkal should be suspended.

9. Heard the learned counsel and perused the papers.

10. The preliminary notice which is the basis on which the claim has been made is dated 08.10.2014. The promissory note alleged to be executed by the deceased Muthusamy is the cause of action for the entire proceedings. The promissory note contains a clause that parties had resolved their disputes through the alternative method of arbitration. Another document styled as an Agreement to refer disputes to Arbitration is also put forward by the appellant. The contention of the claimant even in his original notice dated 03.05.2017 was that the loan was repayable within a period of one year from the date of borrowal. Since the said Muthuswamy had died on 20.02.2017, the claimant has issued a notice on 03.05.2017, calling upon the respondents to repay the loan. The respondents had denied the very loan and called upon the appellant claimant to supply the documents in question. This does not appear to have been furnished by the appellant to the respondents. It is also seen that the first notice issued under Section 21 of the Act, appointing one Bharanidaran as an arbitrator, dated 20.05.2017, had been objected to by the respondents and the said Bharanidran had also recused from the proceedings. Thereafter, the Arbitrator who has passed the Award



has been appointed by notice dated 22.07.2017. Once again, the respondents had objected to the said appointment by contending that there was no Arbitration Clause and that they had no confidence in the Arbitrator. On entering appearance, a petition had been filed by the first respondent under Sections 12 and 13 of the Act. However the said application has not been considered by the Arbitrator.

11. The noting of the Arbitrator which has been filed as the 3rd document would also indicate that notice has been served only on the first respondent. However there is an interpolation in the note sheet that respondents 1 and 2 were called absent and set ex parte, when vakalat has been filed by the first respondent.

12. The learned Principal Judge has rightly set aside the Award on the ground that without the consent of the respondents, the Arbitrator had been unilaterally appointed by the appellant, which is contrary to the provisions of the Act. The learned District Judge has also observed from the records that after receiving the petition filed under Sections 12 and 13, and adjourning the matter for the filing of the counter, to 21.03.2018, no further intimation has been sent to the respondents, and an Arbitral Award has been passed, that too when a letter dated 12.10.2018 had been issued by the learned counsel for the respondent to the Arbitrator calling upon him to intimate the next date of hearing. Without intimating the same, the Arbitrator has proceeded to examine the witness on the claimant's side on 24.11.2018 and pass the Award on 19.01.2019. The Award would clearly show that no opportunity had been given to the respondents to submit their case and further the application filed by them under Sections 12 and 13 had not been disposed of and the Arbitrator had proceeded to pass the Award. Section 11 of the Arbitration and Conciliation Act states that where there is no agreement between the parties regarding the appointment of an Arbitrator the remedy available to the other side is only to file an application under Section 11 for appointing an Arbitrator. In the instant case, the appellant has brushed aside the objection of the respondent and unilaterally proceeded to appoint the Arbitrator.

13. Under these circumstances, I do not find any infirmity in the order passed by the learned Principal Judge in Ar.O.P.No. 57 of 2019 and the appeal therefore stand dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar



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To

WEB COPY

1. The Hon'ble Principal District Judge,
Namakkal.

2. The Director, Arbitration
and Conciliation Centre,
High Court, Madras.

+1cc to M/s.K.Moorthy, Advocate, S.R.No.20213

+1cc to M/s.T.S.Arthanareeswaran, Advocate, S.R.No.21647

CMA.No.204 of 2021

SSN(CO)
SB(07/09/2021)