

Application No.1081 of 2021
in O.P.No. 378 of 2016

N.SATHISH KUMAR,J.

Application No.1081 of 2021 has been filed to *de hors* the evidence directed to be re-ordered vide order dated 15.12.2016 in the above original petition.

2. The main contention of the learned counsel for the applicant in this matter is that though this Court passed an order directing to record the evidence to have proper adjudication with regard to the validity and existence of the arbitration agreement, post amendment, the matter need not be adjudicated. Now, the Court has to see only the existence of the agreement and not the validity of the agreement. He has relied on the judgment of the Hon'ble Apex Court in ***Vidya Drolia and others vs. Durga Trading Corporation*** [reported in **2020 SCC Online SC 1018**] wherein it had been held that while deciding the applications under Sections 8 and 11 of the Arbitration and Conciliation Act, this Court has to see the existence of the arbitration agreement alone and not beyond that. In such view of the law laid down by the Hon'ble Apex Court, examination of the parties to have the adjudication is not required and the

validity and other pleadings with regard to the existence of the agreement can be gone into by the Arbitrator itself.

3. Hence, it is the contention of the learned counsel Mr.R.Subramanian appearing for M/s.G.Rajathi, learned counsel for the applicant that the order directing evidence to be taken before the Master is to be re-called and the matter may be referred to the Arbitrator in view of the existence of the agreement.

4. Mr.H.Karthik Seshadri, learned counsel for the respondent submitted that the series of orders passed by the Court from the year 2016 vouchsafe the fact that this is nothing but shadow litigation and in fact, the Hon'ble Chief Justice has passed an order directing to record the evidence, taking note of the seriousness involved in this matter and more particularly with regard to the non-existence of the agreement. Various orders passed from the beginning indicate that this matter is nothing but shadow litigation. Once a decision is made by the Court, the same is binding on the parties. Now under the cover of

the subsequent judgments of the Hon'ble Apex Court, the orders passed by the Court cannot be assailed indirectly.

5. Now the point that arises for consideration is as to whether the orders of the Hon'ble Chief Justice directing the parties to record the evidence for proper adjudication with regard to the existence of agreement are required to be re-called and the matter may be referred to the arbitrator directly.

6. It is relevant to note that the Original Petition No.378 of 2016 was filed for reference of certain disputes with regard to loan agreement said to have been executed on 31.07.1997 as amended on 21.08.1997.

7. However the fact remains that the original petition was filed in the year 2016 for the first time. When the original petition was filed, on 23.09.2016, the Hon'ble Chief Justice has passed the following order:

“The signatories of the petitioner to the agreement dated 31.07.1997 and the amended agreed dated 21.08.1997 (different signatories) shall remain personally present in

Court on the next date of hearing.

List on 04.11.2016.”

8. Thereafter on 04.11.2016, the following order has been passed:

“Learned counsel appearing for the applicant/petitioner states that he has filed an affidavit affirmed on 18.10.2016 to the effect that the signatories to the loan agreement on behalf of the petitioner are no more Directors at least since 2010 and thus, he is not in a position to secure their presence before the Court.

2.On being asked as to what are the documents in support of the loan agreements as the very execution and existence of those agreements is sought to be disputed, learned counsel for the petitioner states that though at present the Board resolutions in favour of the petitioner-company are not on record, he will file the same in Court along with whatever resolutions that were obtained from the respondent in respect of the execution of the loan agreements on behalf of the respondent.

3.The needful be done within two(2) weeks, as prayed for.

4.Application, accordingly, stands disposed of.”

9. Finally on 15.12.2016, the parties were directed to record the evidence. Then, again another application has been filed seeking discovery of documents in A.No.665 of 2017 in the same O.P.No.378 of 2016 and by order dated 03.02.2017, this Court has passed the following order:

“The application has been filed seeking discovery of documents from the respondent as set out in Schedule I. An exhaustive list of documents are sought in respect of functioning of the respondent company, its accounts, its loans, its transactions, while the only issue on trial is the validity and existence of the arbitration agreement as it falls within the scope of Section 11 of the Arbitration and Conciliation Act, 1996.

2. I am of the view that there is a mistaken belief as if the merits of the case will be decided here and thus, this application is not liable to be entertained.

Application is dismissed.”

10. Again the application to review the order dated 03.02.2017 in A.No.1008 of 2017 was filed, which was also dismissed by order dated 17.02.2017. Thereafter, on 29.01.2018, this Court has passed the following order:

“.....After the exhaustive submissions by

learned counsel, Mr.R.Subramaniam agrees and undertakes not to participate in the proceedings before the Master as counsel for the respondent and also not to be present either during the cross examination of PW1 or any other witness as the respondent may wish to call upon. Recording the above undertaking, and in view thereof, the proceedings before the Master may continue on 06.02.2018 or on a date proximate to the same as may be convenient to the Court as well as the parties. The Master may conclude the proceedings as expeditiously as possible, seeing as the Original Petition is of the year 2016.”

11. The above orders make it clear that the bone of contention was as to whether the counsel representing the applicant is to be present during the examination of witness before the Master or not.

12. On the basis of the undertaking given by the counsel Mr.R.Subramaniam, the Court recorded the same. The above undertaking indicates that Mr.R.Subramaniam himself agreed not to participate in the proceedings before the Master as the counsel. Again on 14.03.2019, this Court commented heavily on the conduct of the parties by fixing the specific date for

examination of P.W.1. However, the same also not been complied. Thereafter, once again, orders came to be passed on 04.04.2019 and 05.04.2019 granting the final opportunity to the applicant examine himself as P.W.1.

13. Thereafter on 22.01.2021, this matter was taken up through Video Conferencing. It is submitted by the petitioner that Application No.2105 of 2017 has been filed by the petitioner to revoke the vakalat filed by the respondent company. Thereafter, the matter was again adjourned.

14. When the matter came up before this Court on 25.06.2021, this Court posted this matter for final hearing on 07.07.2021 and in fact, an opportunity has been given to the counsel, who was said to have appeared on behalf of the counsel on record, who appeared for the petitioner in physical hearing and heard him today.

15. The orders passed by the Court as narrated above themselves speak about the conduct of the petitioner from the very inspection. No doubt, post amendment decision of the Hon'ble Apex Court makes it very clear that for

reference what is to be seen by the Courts under Sections 8 and 11 of the Act is the existence of the agreement. There is no dispute with regard to the above position of law. The facts remains in the given case is that the so called loan agreement is said to have been in existence from the year 1997. However, the petition for reference came to be filed in the year 2016. Taking note of the various allegations made in the counter, Hon'ble Chief Justice, in fact, directed the signatories of the agreement to be present in the Court. However, they have not appeared before the Court.

16. On the other hand, an affidavit explaining their absence has been filed as if they had already been retired from the company. Thereafter, this Court, as indicated above, taking note of the seriousness of the allegations, directed the parties to record the evidence for proper adjudication to find out the existence of the agreement. The above order has reached finality and no appeal whatsoever has been filed. When the parties suffered an order and the same reached finality, they cannot take advantage of the subsequent amendment and the judgment of the Apex Court to nullify the orders passed on the basis of merits of the case. If such a contention is allowed, it will lead to a situation that

the parties may assail the orders without challenging the same in the manner known to law rather relying upon some subsequent amendments and judgments.

17. The learned counsel for the petitioner has placed reliance on the judgments to show that subsequent events can be taken note of. No doubt when the matter is pending in appeal stage, the Court can take the subsequent event and accordingly mould the relief, wherein, this case, the order has been passed on merits for recording evidence which has been pending from the year 2017 onwards. Therefore, judgment cited in this regard by the learned counsel is not applicable to the fact of the case.

18. In any event, from the very inception, the conduct and attitude of the applicant are not in good taste. Despite several opportunities given by the Court, the applicant, under the pretext of seeking resolution in a speedy manner by way of arbitration, in fact, defeated the very object of the arbitration. The conduct of the applicant cannot be appreciated and if the Courts encourage such conduct or allow them to drag the matter endlessly, that will amount to

giving license to the litigant drag the matter endlessly without the litigation reaches its logical end.

19. Accordingly, this Court is of the view that this application is nothing but frivolous and not maintainable and liable to be dismissed. Taking note of the time wasted in the Court and that the original petition is pending from the year 2016 and despite the direction of this Court to record evidence, the applicant has not cooperated to record evidence.

20. ***A.No.1081 of 2021 is dismissed with cost of Rs.25,000/- and the same shall be paid within period of two(2) weeks. The cost shall be paid towards the Chief Justice Relief Fund.***

21. Since the learned counsel himself gave undertaking before this Court not to present while recording evidence since he may be also be summoned as witness, he has to ponder over himself as to whether to continue to appear for applicant to avoid conflict of interest if any. This Court hope that better sense will prevail on the counsel to take wise decision.

22. In view of this, this Court direct the matter is posted for recording evidence finally before the Master.

23. From the records it appears that P.W1 was cross examined two years back. But, no further evidence is recorded.

24. Mr.R.Subramanian, learned counsel has submitted that he requires to recall P.W.1 evidence just to clarify certain documents.

25. Based on such request, only one chance will be given and if the P.W.1 is recalled, he should be examined on the same day itself. Failure to examine the P.W.1 on that day applicant will forfeit his right to recall the P.W.1 and no further chance will be given to examine any other witnesses.

26. Post the matter on 23.07.2021 for compliance of the payment of costs.

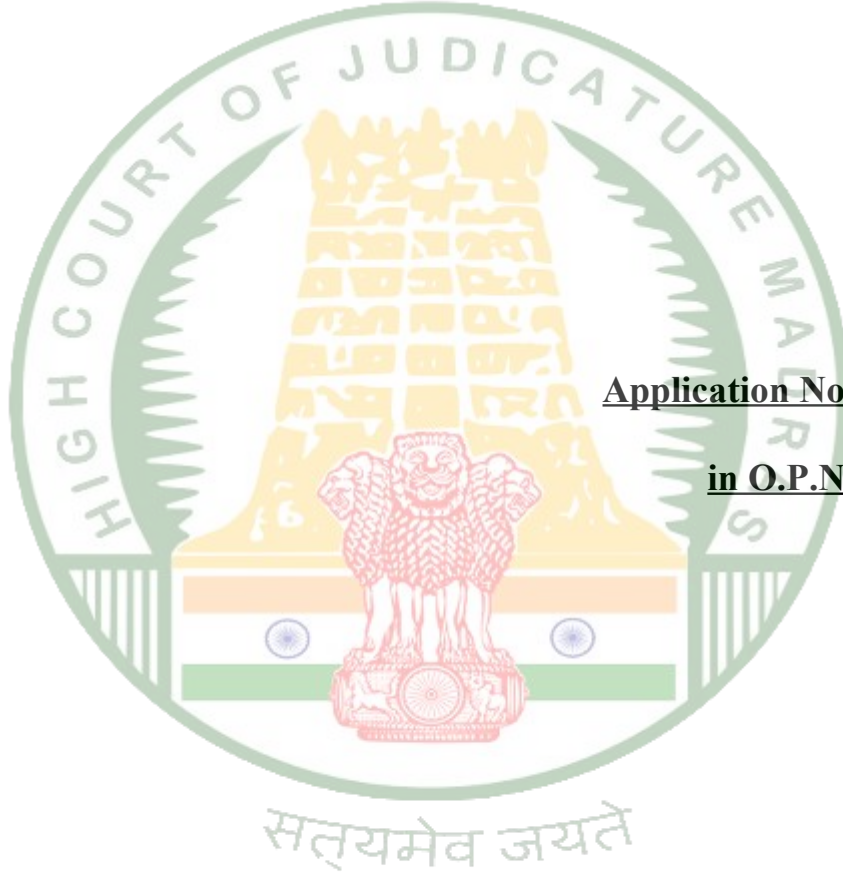
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