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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.10.2021

PRONOUNCED ON : 20.10.2021

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

C.M.A.No. 1456 of 2021

and

C.M.P. No.7610 of 2021

A. Jayakanthan ... Appellant

Vs.

1. J.R.S. Crusher
2. M. Sathiamurthy
3. M. Santhamurthy
4. N. Ramesh
5. J. Jayanth

...Respondents

Civil Miscellaneous Appeals filed under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 against the order of the Learned Sole Arbitrator Thiru. L. Yousuf Ali, District Judge (Retired) dated 12.04.2021 in M.P.No.20 of 2020 in O.P. No.347/2016.

For Appellant : Mr. T.M.Hariharan
for Mr.K. Siva Subramanian

For Respondents :M/s.Kanimozhi Mathi

JUDGMENT

This appeal has been filed under Section 37 of the Arbitration and Conciliation Act, challenging the order dated 12.04.2021 passed by the Arbitral Tribunal in M.P. No.20 of 2020 under Section 13 (3) of the Arbitration and Conciliation Act dismissing the application filed by the Appellant requesting the Arbitrator to withdraw from the Arbitral proceedings.

2. The Appellant and the respondents 2 to 5 are the Partners of a Partnership Firm by name M/s.JRS Crusher. There arose disputes between the Partners under the Partnership Deed dated 27.07.2013 and the dispute was referred to Arbitration at the instance of respondents Nos.2 to 4 and the Arbitral Tribunal was constituted as per the Arbitration clause contained in the



Partnership Deed. The Arbitral Tribunal accepted the Arbitration reference and issued notice to the Appellant, who is the first respondent in the Arbitration. After entering appearance through a counsel in the Arbitration, the Appellant filed M.P. No.20 of 2020 before the Arbitral Tribunal under Section 13(2) read with 12 (3) (a) of the Arbitration and Conciliation Act, 1996 requesting the Arbitral Tribunal to withdraw from the Arbitration proceedings. In application M.P. No.20 of 2020, the reasons given by the Appellant for requesting the Arbitrator to withdraw from the Arbitral proceedings are as follows :-

a) Proceedings were to be heard on 26.02.2020 at 3.00 p.m. Mr.T.M. Hariharan, the Learned Counsel, who is leading Mr.K.Sivasubramanian, my Learned Counsel on record in the O.P. was present in the venue till 3.45 P.M. that day and had to leave thereafter to make arrangements for his mother's ceremony the following day.

b) The Learned Arbitrator arrived in the venue at 4.00 P.M. Along with the Claimants in the Car of the Claimants;

c) It was brought to the notice of the Learned Arbitrator by my Counsel on record that the Learned Counsel leading him waited till 3.45 P.M. and had to leave on account of his personal commitments. Even thereafter the Learned Arbitrator Ordered M.P. No.10 of 2018 and impleaded the 3rd Respondent herein as Party Respondent to the O.P. even without considering the objections raised in my Counter Affidavit. In fact, on 22.11.2018, M.P. Nos. 10 to 14 of 2018 were by consent posted to be heard with the main O.P. Subsequently, on 26.02.2020, the Claimants unilaterally sought disposal of pending Mps;

d) Again on 28.02.2020 as well, I saw that the Learned Arbitrator arrived in the venue along with the claimants in their Innova Car;

e) Taken together with the events that had happened on 26.02.2020, the circumstances give rise to justifiable doubt as to the independence and impartiality of the Learned Arbitrator as will be seen from the following :-

i. The Learned Arbitrator travelling in the car of one of the parties to the Arbitration on more than one occasion;

ii. The Learned Arbitrator travelling along with the Claimants in their car;

iii. The Learned Arbitrator coming to the venue of the Arbitration along with the



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Claimants in their Car;

iv. Order passed after 4.00 P.M. on 26.02.2020 in the circumstances stated supra;

f. On an earlier occasion on 08.01.2019, a request for adjournment was sought on the ground that the father of the learned Counsel who is leading my Counsel on record had passed away and ceremonies were under way. On that day M.P. No.4 of 2018 was Ordered. It is relevant to note that as early as on 01.02.2018, it was consented that M.P. No.4 of 2017 and M.P. No.5 of 2018 will be heard along with the main case. Though at that time I was under the bonafide impression that the earlier Order dated 01.02.2018 was not noticed on and from 28.02.2020, I entertain justifiable doubts on the independence and impartiality of the Learned Arbitrator as regards the happenings on 08.01.2019 as well. My Applications in M.P. Nos.16 & 19 of 2019 are kept pending till date.

3. According to the Appellant, the aforementioned reasons raise justifiable doubts as to the independence and impartiality of the Arbitral Tribunal.

4. A counter affidavit was filed by the respondents Nos.1 to 4, who are the claimants in M.P. No.20 of 2020 denying the allegations of the Appellant.

5. By order dated 12.04.2021, the Arbitral Tribunal dismissed the application filed by the Appellant in M.P. No.20 of 2020 and has also imposed costs of Rs.50,000/- (Rupees fifty thousand only) on the appellant to be paid to the Legal Aid Centre, Chennai on or before 12.05.2021.

6. The impugned order dated 12.04.2021 reads as follows :

Counter filed by the Respondents 1 to 4 in M.P. No.20 of 2020 on 12.04.2021, this Application came to be filed by Petitioner / 1st Respondent seeking withdrawal of the Arbitrator from his office in O.P. No.347/2016. I went through the entire Affidavit of Mr.A. Jayakanthan but I cannot find any sustainable reason to entertain this Petition, as the contents are very much far from the truth. I can come to a conclusion without any hesitation that this application is also filed with a sole intention of protracting the main proceedings pending in O.P. No.347/2016 i.e. to say pending for more than four years, further despite of going through the Affidavit of Mr.A. Jayakanthan, Petitioner / Respondent I am of the firm view that this is also a tactics resorted by the Respondent to



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procrastinate the proceedings endlessly. Despite of going through the entire Petition filed by Mr.K.Sivasubramanian counsel for Petitioner / 1st Respondent, this Application is also yet another ruse to protract the proceedings without allowing this forum to pass orders in the main case and to adjudicate. I have no option but to dismiss this Application with exemplary cost of Rs.50,000/- to be paid to the Legal Aid Centre, Chennai by the Petitioner / 1st Respondent on or before 12.05.2021.

Dates of next hearing is fixed continuously on 22nd, 23rd & 24th of April 2021 at 3.00P.M., at the residence of Arbitrator, notice to Mr.T.Jaganadhan 3rd Respondent.

7. Aggrieved by the aforesaid order dated 12.04.2021 passed by the Arbitral Tribunal, this appeal has been filed under Section 37 of the Arbitration and Conciliation.

8. Heard Mr. T.M.Hariharan, learned counsel for the Appellant and M/s.Kanimozhi, learned counsel for the respondents.

9. The learned counsel for the Appellant would submit that the respondents 2 to 5 are the major shareholders of the Partnership Firm holding 80% and the remaining 20% is held by the Appellant and the 5th respondent. According to the learned counsel for the Appellant, the respondents 2 to 4 have colluded together and have unlawfully initiated Arbitration claim against the Appellant as if the Appellant has committed default and is liable to pay damages. According to the learned counsel for the Appellant, the Appellant and his son, the 5th respondent herein have been completely excluded from the Partnership business by the respondents 2 to 4 who have colluded together in making a false claim against the Appellant. The reasons given for the requests made by the Appellant for withdrawal of the Arbitral Tribunal are justifiable reasons, which the Arbitral Tribunal ought to have taken note of and allowed the application.

10. The learned counsel for the Appellant would submit that there is no falsity in the reasons as he was a witness to the same. The learned counsel for the Appellant would further submit that the conduct of the Arbitrator raises justifiable doubts on his independence and impartiality.

11. Further, it is contended by the learned counsel for the Appellant that the venue of the Arbitration was shifted by the Arbitrator without obtaining the consent of the Appellant who wanted the Arbitration to be held in the Madras High Court Arbitration Centre, as per its rules.



12. It is also contended by the learned counsel for the Appellant that the Arbitral Tribunal has also violated Section 18 of the Arbitration and Conciliation Act by not treating both the parties to the dispute equally and by not affording both the parties to the dispute with equal opportunity to present their respective claims.

13. The learned counsel for the Appellant would further submit that it is a cardinal principle of law that Justice must not only be done but also seen to be done. According to him, the Arbitral Tribunal has acted in a biased manner towards the Appellant and therefore, the Arbitral Tribunal cannot adjudicate the dispute between the Appellant and the respondents.

14. The learned counsel for the Appellant has also sought for liberty to exercise the Appellant's statutory right under Section 14(1) (a) of the Arbitration and Conciliation Act, for termination of the Arbitral proceedings due to the alleged misconduct of the Arbitrator.

15. Per contra, the learned counsel for the respondents Nos.1 to 4 would submit that the present appeal is not maintainable in view of the bar under Section 13(4) of the Arbitration and Conciliation Act. She would also submit that the impugned order passed under Section 13 of the Act is also not an appealable order under Section 37 of the Act. According to her, once an application filed by any party questioning the independence of the Arbitrator has been dismissed, the said party will have to wait for the Arbitral Award to be passed and only thereafter under Section 34 of the Arbitration and Conciliation Act, a challenge can be made to the said Arbitral Award.

Discussion :

16. Section 37 of the Arbitration and Conciliation, under which this appeal has been filed reads as follows :

37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or



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(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

20. The allegations raised by the Appellant against the Arbitrator having been rejected by the Arbitral Tribunal, the only recourse for the Appellant is to challenge the same before the competent Court once an Arbitral Award comes to be passed against him by the very same Arbitrator under Section 34 of the Arbitration and Conciliation Act. The impugned order is not an Appealable order under Section 37 of the Act and therefore the present Appeal is not maintainable. There should be minimal intervention by the Courts insofar as arbitral proceedings are concerned. Arbitration is meant for expeditious disposal of disputes between the parties. Only with the aforesaid salutary objective, the Legislature thought it fit to introduce Section 13(4) of the Act. The learned counsel for the Appellant has referred to Section 18 of Arbitration and Conciliation Act which directs the Arbitral Tribunal to provide equal treatment for all the parties to the dispute. The said contention cannot be raised in this appeal as the Arbitral Tribunal has rejected the application filed by the Appellant questioning its independence and impartiality and in view of the statutory bar under Section 13(4) to file any appeal, if at all the Appellant is aggrieved, he can raise all the objections with regard to the conduct of the Arbitrator under Section 34 of the Arbitration and Conciliation Act in case in the near future an Arbitral Award comes to be passed against him by the Arbitral Tribunal.

21. After referring to various decisions of the Hon'ble Supreme Court, this Court while deciding an appeal under Section 37 of the Arbitration and Conciliation Act arising out of the dismissal of an application filed under Section 16 (5) of the Arbitration & Conciliation Act questioning the jurisdiction of the Arbitral Tribunal which is on the same lines as that of Section 13(4) held by its judgment dated 13.09.2021 in CRP (NPD) No.1441 of 2021 that the only recourse available to a party is to challenge the Arbitral Award under Section 34 of the Arbitration and Conciliation Act as no appeal is maintainable under Section 37 of the Act. The relevant paragraphs of the aforementioned judgment are as follows:

14. Section 16 of the Arbitration and Conciliation Act, 1996, is based on the doctrine of kompetenz - kompetenz which indicates that an Arbitral Tribunal is empowered and has the



competence to rule on its own jurisdiction, including determining all jurisdiction issues, and the existence or validity of an arbitration agreement. The underlying object of this doctrine is to minimize judicial intervention in order to ensure that the arbitral process is not thwarted at the very threshold, merely because a preliminary objection is raised by one of the parties.

15. Section 37 of the Arbitration and Conciliation Act, 1996 which deals with appealable orders also does not permit any appeal rejecting an application filed under section 16 of the Arbitration and Conciliation Act, questioning the jurisdiction of the Arbitral Tribunal. The remedy for an aggrieved party is only to challenge the arbitral award, in case it is passed against him or her in the near future, as seen from section 16 (6) of the Arbitration and Conciliation Act, 1996.

16. Under section 16(6) of the Arbitration and Conciliation Act, 1996, it is made clear that a party aggrieved by the rejection of application filed under section 16 of the Arbitration and Conciliation Act questioning the jurisdiction of the Arbitral Tribunal can only challenge the award which may be passed against him or her in the near future under Section 34 of the Arbitration and Conciliation Act.

22. The Principles applicable to Section 16 (5) and Section 13 (4) are similar in nature. Both Section 16 (5) and Section 13 (4) form part of the Statute only to prevent any unnecessary interference by Courts pending Arbitration which may result in delaying the outcome of the Arbitration thereby defeating the salutary objects of Arbitration.

23. For the foregoing reasons, this Court is of the considered view that there is no merit in this appeal and accordingly, this Civil Miscellaneous Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar



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and
C.M.P. No.7610 of 2021

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srg 10/11/2021