IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.02.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.273 of 2017

M.Vijaya ... Petitioner

vs.

1. Dinesh Kumar
2. Nareesh Kumar
3. Mahaveer Kumar ... Respondents

Petition filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award passed by the arbitrator in arbitration proceedings No.A.C.P.No.1 of 2015 dated 16.12.2016.

For Petitioner : Mr.M.R.Umavijayan

For Respondents : No appearance

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996' (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, assailing an 'arbitral award dated 16.12.2016, bearing reference A.C.P.No.1 of 2015' (hereinafter 'impugned award' for the sake of brevity) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity).

2. The lone respondent before AT is the petitioner in captioned OP. Claimants 1, 2 and 3 before AT are Respondents 1, 2 and 3 respectively in captioned OP. From hereon, parties will be referred to by their respective ranks in captioned OP.

3. Central theme of the lis before AT is an agreement dated 18.12.2007 regarding sale of immovable property and a prayer for specific performance of the same. Mr.M.R.Umavijayan, learned counsel on record for petitioner is before me in this physical hearing. The three respondents (agreement holders) have been duly served and their names together with full/complete address as in the short and long cause titles of the captioned OP are shown in the cause list, but none appears either in the physical Court or in the virtual court. This Court is informed that no counsel has entered appearance on behalf of respondents. To be noted, the three respondents in captioned OPs (agreement holders) have been duly served and have not represented before this Court on

01.10.2020, 13.10.2020, 10.11.2020, 01.12.2020 and 18.01.2021. Therefore, it is the sixth consecutive hearing in which the respondents in captioned OP (agreement holders) are not before this Court. Learned counsel for petitioner submits that the petitioner is physically challenged, not mobile and is also now terminally ill.

4. In the aforesaid circumstances, this Court now proceeds to hear learned counsel for petitioner in captioned OP and dispose of the captioned OP on merits.

5. Suffice to say that the petitioner is one of the co-owners of a property at 'No.5, Edapalayam Street, Park Town, Chennai – 600 003, Comprised in R.S.No.8952 and O.S.No.1143 admeasuring 1032 sq.ft or thereabouts' (hereinafter 'said property' for the sake of convenience). Petitioner filed a suit in O.S.No.3366 of 2010 on the file of XVIII Assistant Judges Court, City Civil Court, Chennai for bare injunction qua said property. In this suit, an application in I.A.No.16856 of 2010 was taken out *inter alia* under Section 8 of the A and C Act and trial Court vide an order dated 24.11.2010 referred the matter to arbitration by relying on an arbitration clause in the aforementioned agreement dated 18.12.2007. This was carried in revision to this Court vide CRP (NPD) No.3812 of 2012, which was disposed of after full contest, on

04.09.2024 by order of a Hon'ble single Judge of this Court confirming the order of trial Court in Section 8.

6. Learned counsel for petitioner, notwithstanding very many averments in captioned OP and the pleas in virtual proceedings, submitted that he would focus his submission on two points and it would suffice if the captioned OP is decided on those two points. Learned counsel submitted that the first point turns on limitation and the second point is fraud is not arbitrable.

7. This Court has repeatedly held that limitation is founded on public policy and therefore, any breach of Limitation Act would attract Section 34(2)(b)(ii) of A and C Act read with Clauses (ii) and (iii) of Explanation 1.

8. To be noted, captioned OP has been presented in this Court on 28.02.2017 and therefore, applying the ***Ssangyong*** principle i.e., principle laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131,*** A and C Act obtaining post 23.10.2015 regime will apply. Be that as it may, learned counsel for petitioner draws the attention of this Court to one paragraph in the impugned award regarding limitation and that one

paragraph reads as follows:

> *'In any case the defence that specific performance ought to have been filed by the claimant does not hold any ground since this plea was never raised by respondent in the counter statement but this stand was taken belatedly for the first time during the course of argument in the written n argument filed by the respondent. The agreement is dated 18.12.2007. The time for completion is 6 months and that ends in June 2008. The other co-owners have executed the sale deed conveying their respective shares on 21.10.2009 and 25.11.2009. Letter of reference has been issued on 05.12.2012. It is seen that the claimant has been ready and willing to perform their part of the agreement. As the respondent in her cross examination has stated that the claimant come to her with the stamp paper for executing the sale deed and that Babu did not come along and that Babu and she were not in talking terms. She further adds that there was no financial disputes and that she had not registered the sale in favour of the claimant as there were internal disputes among the share holders. Thus it is apparent that the respondent has not come forward to complete the transaction. Therefore, the defence of the respondent fails on this count.'*

9. Adverting to the aforesaid paragraph, learned counsel submitted that the aforementioned agreement dated 18.12.2007 for which specific performance is sought even according to the impugned award specifies 6 months as the time fixed for performance and that this six months even according to the impugned award elapsed in June of 2008. Learned

counsel drew the attention of this Court to Article 54 of Schedule to 'The Limitation Act, 1963' ('Limitation Act' for brevity). Adverting to Article 54, learned counsel submitted that three years from June of 2008 (17.06.2008 to be precise), elapsed on 17.06.2011 whereas the arbitral proceedings commenced only on 05.12.2012. This may not be correct as the letter of reference dated 05.12.2012 cannot be construed as the date of commencement of arbitral proceedings. The date of commencement of arbitral proceedings has to be decided by applying Section 21 of A and C Act. In this case, the trigger is prior to the City Civil Court's order dated 24.11.2010 when Section 8 prayer was acceded to. This is well within three years.

10. This takes us to the next point of fraud. Law is well settled that Section 8 tests acceptance of a valid arbitration agreement, but that does not preclude parties from raising arbitrability issue. In any event, Hon'ble Supreme Court in ***Lion Engineering*** case [***M/s.Lion Engineering Consultants Vs. State of M.P & Ors*** reported in ***2018 SCC Online SC 327***] has held that preliminary issues such as arbitrability can be raised at Section 34 stage even if the parties have not resorted to Section 16 before the AT. In this case, a careful perusal of the impugned award brings to light that there are allegations of serious fraud. In this

regard, Issue No.3 framed by the AT is of importance and the same reads as follows:

> *'3. Whether or not any fraud has been committed by the claimants on the Respondent herein?'*

11. The specific case of the petitioner before AT is that 18.12.2007 agreement has been brought up by playing fraud and misrepresentation and it is void under Section 23 of the Indian Contract Act, 1872. The relevant portion of the defence of the petitioner before AT reads as follows:

> *'The defence of the respondent that the agreement dated 18-12-2007 has been executed against the respondent by playing fraud and misrepresentation is void under Section 23 of the Indian Contract Act, 1872 is unsustainable. Fraud is defined under Section 17 of Indian Contract Act, 1872.'*

12. Therefore, this is a case of serious fraud. This question of serious fraud, which is Issue No.3, has been glossed over by AT by saying that no credence can be given to this allegation of fraud regarding the sale agreement as she has not made any effort to bring any evidence regarding action in a criminal court. For this purpose, AT has placed reliance on Paragraph 5 of the order of the trial Court (City Civil Court, Chennai) i.e., XVIII Assistant Judges Court, made in the Section 8

application. Aforementioned Issue No.3 framed by the AT has been answered in the following manner:

> *'3. As regards third issue, as to the allegation that the claimants have committed fraud, as pointed by the Honourable City Civil Judge, Chennai, the respondent herein have not made out any specific case and they have not initiated any action in any criminal court. The observation made by the by the learned judge in I.A.No.16856 of 2010 in O.S.No.3366 of 2010 on the file of XVIII City Civil Court, Chennai in paragraph 5 of the order that the respondent has not made effort to bring on evidence as to any action is taken before the Criminal Court. Therefore, no credence can be given to the said allegation of fraud committed by the claimants against the Respondent herein. The respondent herein has been a party to the sale agreement and she has agreed to all the terms and agreement. The Respondent was fully aware of the transaction and there has never been any misrepresentation to her about the sale of the property. Therefore, she is bound by the agreement.'*

13. Thereafter, after referring to another aspects, AT has concluded in the following manner in the impugned award:

> *'From the evidence of RW1 it is clear that there where internal dispute between shareholders but the dispute never related to financial matters. If that be so how respondent can allege fraud and misrepresentation against the claimants herein, if at all the respondent was serious enough she could have filed a criminal case against the claimant and others in a criminal court as pointed out*

by the learned judge in his order, paragraph number 5 in I.A.No.163856 of 2010 in O.S.No.3366 of 2010 before the City Civil Court, Chennai. The defence raised by the respondent is belated one and is only to confuse and to escape the liability to honour the sale agreement dated 18-12-2007.'

14. Hon'ble Supreme Court has ultimately made distinction between fraud and serious fraud. The relevant case law is ***A.Ayyasamy Vs.A.Paramasivam*** reported in ***(2016) 10 SCC 386*** and the relevant paragraph is paragraph 25, which reads as follows:

'25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in

the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non- arbitrable. Such categories of non-arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected'.

15. Therefore, this Court is convinced that this is not a case of serious fraud which vitiates the impugned award in terms of arbitrability as trial Court order has been sustained by a Hon'ble single Judge of this Court and this follows as matter of judicial discipline. Be that as it may. a further perusal of the impugned award reveals that the petitioner has

specifically pleaded that her signature has been obtained by misrepresentation and she has also given evidence. Regarding fraud it ought to have been dealt with in greater detail and the basis upon which the award is made should have been set out and therefore, there is an infarct of Section 31(3) of A and C Act. The lead case in this regard is ***Dyna Technologies*** case [***Dyna Technology v. Crompton Greaves*** reported in ***2019 SCConline SC 1656***] and relevant paragraph is Paragraph 35. Of the three facets culled out by Hon'ble Supreme Court regarding 31(3) plea, the plea of adequacy comes into play in this case. Hon'ble Supreme Court has clearly held that regarding adequacy as a facet of Section 31(3), a Court while exercising jurisdiction under Section 34 has to adjudicate the validity of the impugned award based on degree of particularities of reasoning required having regard to the nature of the issues falling for consideration. Hon'ble Supreme Court has clearly held that degree of particularities cannot be stated in a precise manner as the same would depend on the complexity of the issue. In this case, considering the complexity of the issue and considering the complexity of the plea raised by the petitioner, the reasons are clearly inadequate.

16. This Court has already extracted and reproduced two

paragraphs from the impugned award which dealt with Issue No.3 as this Court was proceeding on the inadequacy facet considering the seriousness of the issue and considering the particularities required in a case of fraud, deems it appropriate to extract entire portion of the award dealing with /touching upon Issue No.3 including the aforementioned paragraph 3 and the same is as follows:

> *'3. As regards third issue, as to the allegation that the claimants have committed fraud, as pointed by the Honourable City Civil Judge, Chennai, the respondent herein have not made out any specific case and they have not initiated any action in any criminal court. The observation made by the by the learned judge in I.A.No.16856 of 2010 in O.S.No.3366 of 2010 on the file of XVIII City Civil Court, Chennai in paragraph 5 of the order that the respondent has not made effort to bring on evidence as to any action is taken before the Criminal Court. Therefore, no credence can be given to the said allegation of fraud committed by the claimants against the Respondent herein. The respondent herein has been a party to the sale agreement and she has agreed to all the terms and agreement. The Respondent was fully aware of the transaction and there has never been any misrepresentation to her about the sale of the property. Therefore, she is bound by the agreement.*
>
> *There is no denying of the fact that the disputed property belonged to Kosala Govindammal and after demise on 21-08-1973 the property passed on to her two sons Mr.Annamalai Naidu and*

Mr.Venugopal Naidu. The legal heirs of Venugopal Naidu executed the sale deed which is marked as Exhibit A-3 in this claim petition for a sale consideration of Rs.17,50000 (Rupees Seventeen lakhs fifty thousand only) being their respective share. However, as regards the legal heirs of Mr.Annamalai Naidu, all the other legal heirs except the Respondent herein have executed the sale deed marked as Exhibit A-4, herein for a sale consideration of Rs.11,66,700/- (Rupees eleven lakhs sixty six thousand and seven hundred only) towards their share. From the sale agreement it is seen that the proportionate sale consideration payable by the claimant to the respondent is Rs.5,83,333.33. The claimants have paid Rs.2,16,666.67 (Rupees Two lakhs Sixteen Thousand Six Hundred and Sixty Six and paise sixty seven only) by way of advance, receipt of which the respondent has acknowledged in the sale agreement.

As per the sale agreement dated 18.12.2007 the sale was to be executed within a period of six months and time was the essence of the contract. The claimants have been ready and willing to pay the balance sum of Rs.3,66,666.66 (Rupees Three Lakhs Sixty Six Thousand Six Hundred and Sixty Six and paise sixty six only).

The counsel for claimant relied on Biswanath Ghosh v. Gobindha Ghosh (2014) 11 Supreme Court Cases 605. Where it was held that for complaince with sec.16(c) of the specific relief Act 1963 it is not necessary for the plaintiff to aver in the same words used in the section that is ready and willingness to perform the contract. Absence of specific words in the plaint would not result in dismissal of the suit if sufficient facts and evidence are brought on record to satisfy the core the readiness and willingness to *perform his part of the contract. The very fact that the claimant has purchased Non-judicial stamp paper (marked as exhibit No.A-7, for execution of the sale deed amply proves that the claimant was ready and willing to perform his part of contract. The argument of the respondent that above citation has no relevance to the case is hereby rejected.*

The defence of the respondent that the agreement dated 18-12-2007 has been executed against the respondent by playing fraud and misrepresentation is void under Section 23 of Indian contract Ac,1872 is unsustainable. Fraud is defined under Section 17 of Indian contract Act, 1872.

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Misrepresentation is defined under 18 of Indian Contract Act, 872. "Misrepresentation" as follows:

"Misrepresentation" means and includes-

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true,

> *though he believes it to be true;*
>
> *(2) any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;*
>
> *(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.*

Therefore under Indian Contract Act, 1872 where if any party plays fraud or misrepresentation the agreement becomes only voidable and not void. At no point of time the respondent has treated voidable at her option and the respondent has never rejected the agreement as voidable at her option. But now the respondent submits that it is void for fraud and misrepresentation. The respondent has failed to prove fraud or misrepresentation.

Section 23 of Indian Contract Act, 1872 deals with agreement which are unlawful. What consideration and objects are lawful, and what not is defined as follows:

The consideration or object of an agreement is lawful, unless -

It is forbidden by law; or

is of such nature that, if permitted it would defeat the provision of any law or is fraudulent; or

involves or implies, injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

From the above provision of law, it is clear that when the respondent pleads fraud and misrepresentation he cannot take recourse to void under section 23 of Indian Contract Act, 1872. At no point of time the respondent has claimed that the agreement is executed for unlawful object and consideration under section 23 of Indian Contract Act. Therefore, the contention of the respondent that the agreement dated 18.12.2007 void is misconceived Right from the beginning, the only contention of the respondent is fraud and misrepresentation. The Respondent has never raised the question of unlawful object. In such a situation when the respondent raised the contention of fraud and misrepresentation she could have treated contract as voidable which she has not done therefore her defence fails on this count. Another ground for raising fraud and misrepresentation is that the respondent is illiterate and she is suffering from disability up to 67% vide disability certificate filed as exhibit B4. When this arbitrator visited the residence of the respondent for recording for cross examination, he found that the respondent was mentally alert except for disability in leg. When the counsel for claimant put a question to her she has stated that she is mentally fit and her disability relates only to her leg. There are 20 executants of execution of sale agreement and sale deed filed and none of them ever raised any question of fraud or misrepresentation and they have executed the sale deed as per the terms of sale agreement dated 18.12.2007. It is, therefore, surprising to note that only the *respondent seem to have the difficulty in honouring the agreement. The plea by the respondent that she was made to sign the agreement under the impression that bank loan was to be obtained for which she has signed the agreement but in her evidence in cross examination she did not make any specific allegation against Mr.Srinivasulu or Mr.Babu. She only gave the suggestion that there where internal dispute among the shareholders.*

From the evidence of RW1 it is clear that there where internal dispute between shareholders but the dispute never related to financial matters. If that be so how respondent can allege fraud and misrepresentation against the claimants herein. If at all the respondent was serious enough she could have filed a criminal case against the claimant and others in a criminal court as pointed out by the learned judge in his order, paragraph number 5 in I.A.No.163856 of 2010 in O.S.No.3366 OF 2010 before the City Civil Court, Chennai. The defence raised by the respondent is belated one and is only to confuse and to escape the liability to honour the sale agreement dated 18.12.2007.

The respondent should have given a notice to the claimant stating that fraud was played. Therefore, she is avoiding the contract and that she treats the entire agreement as voidable. She could have taken action pursuant to a notice given to the claimant herein. Therefore, the contention of respondenet fails.

During the course of evidence of Mr.Naresh CW1 has stated that one Mr.Annamalai offered to sell their property. But their counsel for respondent pointed out that Annamalai was deed long before the respondent was born. In the course of cross examination the respondent counsel also put several questions to CW1 *regarding the relationship of 20 family members as to the relationship of agnates and cognates wherein the respondent counsel tried to create an impression that CW1 is not well versed with the relationships of other co-owners. But this proceedings does not relate to suit for partition suit relating to family members. CW1 is a total stranger and the claimants are only concerned with the sale of the property in question in the present proceedings. Therefore, it is not expected of CW1 to know the entire details of family structure of respondent and other co-owners.*

As regards the fourth and fifth issues.........'

17. This Court has carefully examined the impugned award, (without supplementing, supplanting or adding any reasons) the manner in which Issue No.3 turning on fraud has been answered. This leaves this Court with the considered view that it is vitiated by inadequacy facet of Section 31(3) of A and C Act as explained in ***Dyna Technologies*** as fraud plea on the basis of core document cannot be answered broadly in this manner and it requires particularities with specificity.

Owing to the narrative thus far, discussion and dispositive reasoning the impugned award is liable to be set aside. Captioned OP is allowed. This Court refrains itself from imposing costs.

23.02.2021

Speaking order: Yes/No
Index: Yes/No
gpa

M.SUNDAR.J.,

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