



O.P. No.586 of 2012
and
O.A. No.202 of 2013

... Petitioner

V5

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 30.04.2012 passed by the 2nd respondent/Arbitrator Mr.P.S.Krishnamurthy in this matter.



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For Petitioner : Mr.B.K.Sreenivasan
R4 : Mr.M.Gagan Bothra
(Party in Person)

ORDER

An Arbitral award dated 30.04.2012, passed by sole Arbitrator, directing the petitioner herein to implement so called lease agreement dated 05.12.2000 and to vacate the tenants from the suit schedule property, is under challenge in the present Original Petition.

2.Brief facts of the case would run thus :

2.1.It is the case of the 1st respondent that, one Ayya Subramania Mudaliar was a Trustee of "Sri Prasanna Vinayagar Temple". As a Trustee of the temple, he borrowed various amounts from the 1st respondent from 1995 till 1999, to a tune of Rs.10,00,000/- (Rupees ten lakhs only). At the time of borrowal, the said Ayya Subramania Mudaliar assured and undertook to vacate the tenants and hand over possession of the temple premises to the 1st respondent. An agreement of lease in this regard came to be executed on 05.12.2000 between the 1st respondent and the said Ayya Subramania Mudaliar. Since, Ayya Subramania Mudaliar had died and the tenants of the temple premises were not vacated as per the terms of the agreement, the 1st respondent referred the matter for Arbitration with a claim to enforce the agreement.

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4. Contending that the other two legal heirs namely Ms.M.Karishma Bothra and Mr.M.Sandeep Bothra were not heard, application for setting aside the said order was made along with a 'Condonation of Delay' ['COD'] application. COD application is Application No.1325 of 2021 and the same was allowed by this Court on terms in and by order dated 23.06.2022. The terms have been complied [costs paid] and there is no dispute before this Court that this order has attained finality. Pursuant to the COD prayer being acceded to, captioned application is before this Court.

5. Mr.A.E.Ravichandran, learned counsel for applicants submits that aforementioned portion of the said order which marks the appearance itself will demonstrate that only Mr.M.Gagan Bothra was heard and his two siblings were not before the Court and therefore (obviously) were not heard.

6. In response to the above, Mr.B.K.Sreenivasan, learned counsel for the petitioner in main OP submits that said order is not an ex-parte order. Learned counsel placed reliance on Order IX Rule 13 of 'The Code of Civil Procedure, 1908 (Act No. 5 of 1908)' [hereinafter 'CPC' for the sake of brevity].

7. Learned counsel also pointed out that Mr.M.Gagan Bothra has accepted notice in the set aside abatement and bring on record LR applications [A.Nos.5543 and 5544 of 2019] on behalf of other respondents also.



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8. Let me now proceed to deal with the rival contentions. The first point is pertaining whether the said order is an ex-parte order. That portion of the said order which has been scanned and reproduced supra makes it clear that only the fourth respondent was heard. This means that the other respondents namely the two applicants in the captioned application were not heard. There is nothing in the case file to demonstrate that the two applicants in the captioned application were put on notice in main OP qua said order. The question as to whether Mr.M.Gagan Bothra could have filed the aforementioned Memo dated 04.07.2019 itself remains unanswered as there is nothing on record to show that he was representing his Late father as a power agent. There is a Hon'ble Committee which has to clear requests for party-in-person appearance and there is nothing to demonstrate that Mr.M.Gagan Bothra was permitted to represent his Late father in the case on hand. To be noted, Mr.M.Gagan Bothra, party-in-person who is before this Court as one of the respondents submits that he is not a law graduate (therefore not a lawyer) as averred in contesting respondent's counter affidavit. Equally, there is no material to demonstrate that he has the authority to represent his two siblings. Therefore, the Memo or on a demurrer, even if he has accepted notice on behalf of the siblings [though there is no material to demonstrate this] is of no value. As regards the order irrespective of



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whether it is on merits or not, it is imperative that the two other legal heirs are given an opportunity to defend the award.

9. In any event, it is to be noticed that CPC cannot be applied to proceedings under A and C Act. As regards A and C Act and proceedings before Court under A and C Act, the same are governed by Rules to be made by High Court under Section 82. On the date of said order i.e., 27.08.2019, no Rules had been made by this High Court as Rules made under Section 82 of A and C Act being 'The Madras High Court (Arbitration) Rules, 2020' [hereinafter 'MHC Arb Rules' for the sake of convenience and clarity] kicked in only on and from 17.03.2021. Therefore, the simple principle is an award holder died pending challenge to the arbitral award leaving behind three legal heirs and the award has been set aside after hearing only one of the three legal heirs. The two legal heirs who were not before the Section 34 Court have now come up with captioned application. Therefore, it is only appropriate that the other two legal heirs are also given an opportunity, more so, as there has been judicial intervention qua the award. It is nobody's case that the two other legal heirs [applicants in captioned application] were heard. The only contention is that Mr.M.Gagan Bothra represented them but that pales into insignificance as the said order makes it clear that only fourth respondent was before the Court.



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10. As neither CPC nor MHC Arb Rules were available on the date of said order, one may have to look at Section 40 of A and C Act. Section 40 of A and C Act makes it clear that an arbitration agreement will not stand discharged by death of a party and that it is enforceable by or against the legal representative of the deceased. Therefore if Section 40 of A and C Act is applied, it is clear as daylight that there can be no award absent arbitration agreement and if the arbitration agreement is to be construed to be not discharged, all the legal heirs have a say.

11. There is another way of looking at this matter. A Section 34 legal drill is only a summary procedure *inter alia* owing to ratio laid down by Hon'ble Supreme Court in **Fiza Developers** case law being **Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited** reported in (2009) 17 SCC 796 which was subsequently reiterated in **Emkay Global Financial Services Ltd., v. Girdhar Sondhi** reported in (2018) 9 SCC 49 as a step in the right direction. Drawing inspiration from such ratio, this Court, as part of MHC Arb Rules vide Clause 8.5 has held that proceedings under Section 34 of A and C Act would be summary procedure. There is a mandate vide sub-section (6) of Section 34 of of A and C Act that in proceedings under Section 34, every endeavour shall be made to dispose of the same within one year from the date of



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service of notice under sub-section (5) of Section 34 of A and C Act. In and by ***Bhumi Vikas*** case law being ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in (2018) 9 SCC 472, Hon'ble Supreme Court held that notice under sub-section (5) of Section 34 is only directory and not mandatory. Therefore, the reckoning date for computing one year time frame for a Section 34 legal drill has now been held to be the date of presentation of Section 34 petition. In this view of the matter also, there is going to be no elaborate or protracted trial and it would be fair if the two other legal heirs are given an opportunity to have their say. In this regard, Mr.A.E.Ravichandran, learned counsel for applicants, on instructions submits that two applicants would extend all cooperation for expeditious disposal of main OP. In other words, learned counsel submits that the two applicants would be ready to have the main OP heard out on merits without unduly delaying the matter.

12. Owing to the narrative discussion and dispositive reasoning thus far, captioned application is allowed/ordered as prayed for. There shall be no order as to costs.

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M.SUNDAR, J

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