IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.06.2023

Coram

The Honourable Mr.Justice KRISHNAN RAMASAMY

Arb.O.P.(Comm.Div.)No.62 of 2023

M/s.Dhanabakkiam Enterprises
Represented by Partner,
No.5E, Mookambika Complex,
No.4, Lady Desika Road,
Mylapore, Chennai – 600 004.

...Petitioner

Versus

1.M/s.Eshan Productions
Represented by its Partners Mr.R.G.Dusshyanth
& Mrs.Abirami Dusshyanth
Having place of business at:
No.6, 1st Floor, Shanmugam Street, Gopalapuram,
Chennai – 600 104.
Also having office at:
Old No.16, New No.37,
Chevaliar Shivaji Ganesan Road,
T-Nagar, Chennai – 600 017.

2.Mr.R.G.Dusshyanth

3.Mrs.Abirami Dusshyanth

4.Mr.Ramkumar Ganesan

...Respondents

Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 for the following reliefs:

(i) To appoint an Arbitrator to adjudicate the disputes between the petitioner firm and the respondents and

(ii) To award costs of the petition.

For Petitioner	:	Mr.P.Mohankumar
For Respondents	:	Mr.S.Raman

ORDER

The present petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act') praying to appoint an Arbitrator, for adjudicating the disputes that have arisen between the petitioner and the respondents under the Finance Agreement dated 22.12.2017.

2. The learned counsel for the petitioner submitted that the petitioner is a firm engaged in the business of financing for production of feature films. The 1st respondent is a partnership firm. The 2nd respondent is the Managing Partner of the 1st respondent firm and the 3rd respondent is a

partner of the 1st respondent firm. The 4th respondent is the father of the second respondent. The 1st respondent has approached the petitioner for the purpose of financing the production of Tamil feature film viz., "Jagajala Killadi" starring Vishnu Vishal, Nivetha Pethuraj, Mottai Rajendran, Yogi Babu & Others, directed by Ezhil and the music was composed by D.Imman. Initially, the petitioner firm was not willing to finance the 1st respondent, however, thereafter, the 4th respondent had personally requested the petitioner firm to help the 1st respondent firm. Hence, the petitioner firm inclined to finance the 1st respondent, pursuant to which, the petitioner and the 1st respondent were entered into a Finance Agreement dated 22.12.2017. Under the said agreement, the petitioner agreed to disburse a sum of Rs.4,00,00,000/- as loan to the 1st respondent.

2.1. Some of the terms and conditions agreed by the petitioner and the 1st respondent under the aforesaid Finance Agreement are as follows:

(i) In the event of the schedule of shooting works being cancelled or postponed, there would not be any financial disbursement and in the event of the shooting works cancelled after receiving the disbursement then the 1st respondent/producer shall have to return such unused funds to the petitioner/financier immediately.

(ii) The 1st respondent/producer shall utilize the loan amount only for the progress of the feature film and shall not make use of it for any other purposes.

(iii) The 1st respondent/producer shall execute separate promissory notes for the loan amount and shall pay interest at 30% per annum.

(iv) The 1st respondent/producer has agreed to repay the loan amount together with interest at the rate of 30% per annum.

(v) In the event of any default, the petitioner shall be entitled to attach the remuneration of the 2nd respondent as an actor and director.

2.2. In furtherance of the aforesaid Agreement, for producing the said feature film, the petitioner has paid a sum of Rs.3,74,75,000/- as loan to the 1st respondent after deducting beforehand interest to the tune of Rs.49,50,000/- in advance in respect of the said loan. The petitioner firm has paid the loan amounts by way of Bank Transactions from its various group concerns viz., (i) M/s.Akshay Sarin HUF (ii) M/s.Akshay Communications Pvt. Ltd., and (iii) Vansheeka Sarin Beneficiary Trust.

2.3. The 1st respondent consented to repay the loan amount, within six months from the date of the said Agreement or seven days before the release of the said film, whichever is earlier. It was represented to the Managing Parter of the petitioner firm that the aforesaid feature film would be completed before October 2018. However, even after completing the production of aforesaid feature film, the respondents had deliberately delayed the release of film. The respondents are wantonly prolonging the distribution of the said film. All the cheques issued by the 1st respondent provided for payment of interest were dishonoured.

2.4. When the petitioner was about to issue a paper publication about lien in the said film, the 1st respondent had entered into a Memorandum of Understanding (MOU) dated 04.10.2020 with the petitioner firm. Under the said MOU, the 1st respondent had agreed to repay a sum of Rs.6,44,00,000/- which is inclusive of principal and interest till 07.06.2020 and for future interest till the repayment of entire dues without any delay. Pursuant to the said MOU, the 1st respondent paid a sum of Rs.25,00,000/- through Cheque dated 01.10.2020 to the petitioner firm and also, promised to repay the balance amount before 25.11.2020. However, thereafter, the 1st respondent had deliberately defaulted to adhere their commitments in the said MOU. Hence, the petitioner firm vide Notice dated 13.08.2022, demanded the respondents to pay a sum of Rs.3,74,75,000/- together with interest at 30% per annum amounting to Rs.4,50,06,500/- calculated from the date of lending till 31.07.2022, within a period of 15 days from the date of receipt of that notice. After the receipt of said notice, the respondents vide Reply Notice dated 31.08.2022, called upon the petitioner firm to recall the Notice dated 13.08.2022 forthwith since the Finance Agreement dated 22.12.2017 is novated pursuant to the MOU dated 04.10.2020. Thereafter, the petitioner sent a Rejoinder Notice dated 08.09.2022 to the respondents, wherein, it has been stated that the MOU was only a conditional arrangement to settle the dispute of non-performance of the Finance Agreement by the respondents and the terms of the MOU is very clear that Finance Agreement was to be read in part and parcel of the MOU and hence, the allegation of novation is misconceived and against the agreed terms.

2.5. Further, the learned counsel submitted that as per Clause 8 of the Finance Agreement dated 22.12.2017 entered into between the petitioner and 1st respondent, any disputes arising between the parties in relation to the terms of the said agreement shall be referred to Arbitration. For better appreciation, Clause 8 of the said agreement is extracted hereunder:

> *"8. In the event of a dispute arising from and out of this Agreement the same shall be referred to arbitration under a sole arbitrator to be mutually appointed under the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be at Chennai, India. This Agreement shall be governed by the laws of India and the Courts at Chennai shall have the exclusive jurisdiction in connection with any dispute arising out of or in connection with this Agreement."*

Hence, the petitioner firm sent a Notice dated 24.12.2022 to the respondents, calling upon them to nominate an individual to act as an independent arbitrator and intimate the same, within 30 days from the date of receipt of that notice. Even after receiving the said notice, the respondents have not sent any reply to it. Therefore, left with no other alternative, the petitioner has filed the present petition before this Court.

2.6. The learned counsel also submitted that contrary to the terms and conditions of the Finance Agreement, the 1st respondent has defaulted in payment of loan availed from the petitioner firm. As on date, the respondents are liable to pay a sum of Rs.3,74,75,000/- together with interest at 30% per annum amounting to Rs.4,50,06,500/- calculated from the date of lending till 31.07.2022. Therefore, the learned counsel prayed this Court to appoint an Arbitrator, for adjudicating the dispute between the parties.

3. The learned counsel appearing for the respondents contended that the petitioner has advanced only a sum of Rs.1,82,25,000/- to the 1st respondent and the remaining sum of Rs.1,92,50,000/- has been paid by various concerns viz., (i) M/s.Akshay Sarin HUF (ii) M/s.Akshay Communications Pvt. Ltd., and (iii) Vansheeka Sarin Beneficiary Trust. The said concerns did not find any place in the Finance Agreement entered between the 1st respondent and the petitioner. That apart, none of the respondents have signed any agreement for dispute resolution through mediation with the said concerns. So, the petitioner cannot initiate arbitration proceedings in respect of amounts lent by other concerns. He further contended that the 4th respondent is not a partner of the 1st respondent partnership firm and he has been unnecessarily arrayed as an party in this petition That apart, the 4th respondent is not a party in the

Finance Agreement and he has been referred to as a guarantor only in MOU which does not contain any Arbitration Clause.

4. The learned counsel for the petitioner refuted that the aforesaid concerns are also the group concerns of the petitioner firm. He further submitted that the 4th respondent had executed the Finance Agreement in his capacity as a personal guarantor. As one of the personal guarantors, the 4th respondent had guaranteed the amount financed by the petitioner to the 1st respondent. Further, the said Finance Agreement was a part and parcel of the MOU. Hence, the 4th respondent is a necessary party in this case.

5. Heard the learned counsel on either side and perused materials placed before this Court.

6. The parties have raised the following issues:

(i) Whether the petitioner can initiate arbitration proceedings against the respondents, in respect of the amounts lent by other concerns?

(ii) Whether the 4th respondent is a necessary party to the proceedings?

(iii) Whether the Finance Agreement 22.12.2017 entered into between the parties is a part and parcel of the Memorandum of Understanding dated 04.10.2020?

7. Upon perusing the materials and hearing the submissions made by the learned counsel on either side, it is crystal clear that the dispute involved herein is arbitrable as per Clause 8 of the Finance Agreement dated 22.12.2017 entered into between the petitioner and the 1st respondent. With regard to the above issues raised by the parties, this Court feels that it is not appropriate to decide those issues at this stage since the same has to be decided by way of evidence to be let in by the parties. Hence, this Court is inclined to appoint an Arbitrator to adjudicate the dispute between the parties herein. It is left open to the parties to raise all the issues before the learned Arbitrator and the learned Arbitrator shall adjudicate the same, based on the pleadings and the evidence without being influenced by any observations made by this Court in this order. Accordingly, this Court is inclined to pass the following order:

(i) **The Hon'ble Mr.Justice T.Ravindran (Retired Judge of this Court), New No.27, Old No.12, IIIrd Avenue, Indira Nagar, Adyar,**

Chennai – 600 020, Mobile No.9941350926 is appointed as Arbitrator to enter upon reference and adjudicate the dispute *inter se* the parties.

(ii) The learned Arbitrator shall pass award within a period of six months from the date of receipt of a copy of this order, only after issuing notice to the parties and hearing them.

(iii) The parties shall pay fees and other incidental charges to the learned Arbitrator fixed by him, equally.

(iv) In the event of non-appearance of the respondents before the learned Arbitrator, petitioner shall pay the entire remuneration and other expenses at first instance and thereafter, petitioner can recover the same directly from the respondents.

8. Accordingly, this petition is ordered. The parties shall bear their own costs. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under the provisions of Arbitration and Conciliation Act 1996, before the Arbitrator.

08.06.2023

mrr
Index : Yes/No
Speaking Order (or) Non Speaking Order
Note to Registry: Issue order copy on 11.07.2023

KRISHNAN RAMASAMY, J.

mrr

Arb.O.P.(Comm.Div.)No.62 of 2023

08.06.2023