Application Nos.4027 & 4028 of 2023
in O.P.Nos.707 & 714 of 2014

R.N.MANJULA, J.

This matter is listed before this Court by way of "Being mentioned" at the instance of Mr.N.Manoharan, learned counsel for the Applicants.

2.Heard Mr.N.Manoharan learned counsel for the Applicants and Mr.R.Shunmugasundaram, learned Advocate General for Mr.C.Sathish, learned Government Advocate for the respondent.

3.This Court is convinced with the submissions made by the learned counsel for the Applicants and hence the Registry is directed to replace the following paragraphs viz., 1.4, 1.6, 7 & 20 as follows, instead of paragraph Nos.1.4, 1.6, 7 & 20 in the order passed in Application Nos.4027 & 4028 of 2023 in O.P.Nos.707 & 714 of 2014 dated 20.10.2023:

> ***"1.4*** *In fact, one of the partners to the firm by name Muraleeswaran had filed applications stating that the terms of Compromise has been executed unauthorisedly without consent. However, he did not pursue the same. Subsequently, there was difference of opinion between the partners of the firm. Arbitration Original Petitions in Arb.O.P.Nos.50 & 51 of 2017 before the learned Principal District Judge, Namakkal, have been filed to settle the dispute between the partners. However,*

the matters were settled in the mediation on 30.10.2019 and thereafter, Arb.O.P.Nos.50 and 51 of 2017 were disposed on 22.11.2019 by the learned Principal District Judge, Namakkal."

"1.6. *Further, from the information obtained through the Right to Information Act also revealed that the stamp papers on which the Memorandum of Compromise was engrossed were actually purchased subsequent to the date of the terms of compromise. In fact, the applicants / petitioners have filed Writ Petitions in W.P.Nos.16033 and 16036 of 2023, to declare Order XXIII Rule 3A of C.P.C. as unconstitutional, but were subsequently withdrawn. They also filed W.P.Nos.16044 and 16039 of 2023 seeking a direction from the respondent to proceed in accordance with law and to enter into a fresh Memorandum of Compromise in terms of the understanding arrived between the parties vide letters dated 22.02.2022 and 03.04.2023 and those writ petitions were disposed by giving liberty to the applicants to file appropriate applications in O.P.Nos.707 and 714 of 2014."*

"7. *Since there is no unity among the partners, they have filed Original Petitions before the Principal District Court, Namakkal, to settle the dispute between themselves. Subsequently, in a mediation held, the difference of opinion between the partners was settled and it was decided to challenge the earlier*

Memorandum of Compromise dated 29.12.2014 and the consequential order for setting aside the same."

"20. *Even though the Commercial Courts Act was not in existence at the time when the order was passed in O.P.Nos.707 and 714 of 2014 on 10.02.2015, once the compromise order is set aside, the O.P.Nos.707 and 714 of 2014 will get restored. In that case, Section 15(2) of the Commercial Courts Act has to be invoked and these matters which are in commercial nature and come within the ambit of commercial Arbitration ought to be transferred to the commercial Court which has the rightful jurisdiction.*

4.Registry is directed to carry out necessary amendment and issue fresh order copy.

01.11.2023

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R.N.MANJULA, J.

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Application Nos.4027 & 4028 of 2023
in O.P.Nos.707 & 714 of 2014

Dated: 01.11.2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.09.2023

PRONOUNCED ON : 20.10.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Application Nos.4027 & 4028 of 2023
in O.P.Nos.707 & 714 of 2014

M/s.Natural Food
Commercials Private Limited,
(Formerly known as Natural
Food Products],
Rep. by its Authorised Signatory
T.Gnanasekaran,
No.3/276, Kuttakadu,
Muthukalipatti, Rasipuram Taluk,
Namakkal - 637 401. ... Applicant / 1st Respondent [A.No.4027 of 2023]

M/s.Suvarnabhoomi Enterprises
Private Limited,
Represented by its Authorised Signatory
R.Logesh Kumar,
D.No.1/362(5), Kadhappalli Road,
Pappinayakkanpatti (PO),
Namakkal - 637 003. ... Applicant / 1st Respondent [A.No.4028 of 2023]

versus

The Director,

Directorate of Social Welfare and
 Women Empowerment,
2nd Floor, Panagal Maligai,
Saidapet, Chennai - 600 015. ... Respondent / Petitioner [in both Applications]

COMMON PRAYER: Applications filed under Order XIV Rule 8 of Original Side Rules read with Section 151 of the Code of Civil Procedure, praying that, in furtherance to the letter dated 03.04.2023 of the respondent, give liberty from the ambit of proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 in O.P.Nos.707 and 714 of 2014 to proceed in accordance with law including to approach the respondent to enter into a fresh Memorandum of Compromise by rejecting the disputed Memorandum of Compromise dated 29.12.2014, which culminated in the order dated 10.02.2015 made in the said O.Ps. on the file of this Court respectively.

For Applicants [in both Applications]	:	Mr.N.Manoharan for Mr.K.Narayanan
For Respondent [in both Applications]	:	Mr.R.Shunmugasundaram, Advocate General Assisted by Mr.C.Sathish Government Advocate

COMMON ORDER

1. Application in Brief:-

The applicants in A.Nos.4027 and 4028 of 2023 are the first respondent in O.P.Nos.707 and 714 of 2014 respectively. M/s.Natural Food Commercials Private Limited, which was formerly a partnership firm and later converted into a Private Limited Company with a Certificate of Incorporation dated 13.07.2021. The respondent through its Department had floated a tender bearing R.O.C.No.3566/NMP/2012 dated 18.02.2013 for the purpose of procurement of Sixty Lakhs eggs per day for a period of one year under the Puratchi Thalaivar Dr.M.G.R. Nutritious Meal Programme and under Integrated Child Development Services Scheme.

1.2. The applicant in A.No.4027 of 2023 had submitted its bid and was adjudged as L-1 bidder. The applicant in A.No.4028 of 2023 had submitted its bid and was adjudged as one of the successful bidder. The agreement was entered into between the applicants and the respondent Department with regard to the price. Subsequently, a dispute arose between the applicants and the respondent and the matters were referred to arbitration and arbitral awards were passed on 15.05.2014. However, the said awards were challenged by the respondent by way of preferring Original Petitions in O.P.Nos.707 and 714 of 2014 under Section 34 of the Arbitration and Conciliation Act, 1996.

1.3. While the Original Petitions were pending, a Memorandum of Compromise dated 29.12.2014 was filed before this Court and the said Original Petitions were disposed on 10.02.2015. The terms of the above Memorandum of Compromise was to the effect of giving up rights and benefits to the applicants under the arbitral awards dated 15.05.2014.

1.4. In fact, one of the partners to the firm by name Muraleeswaran had filed applications stating that the terms of Compromise has been executed unauthorisedly without consent. However, he did not pursue the same. Subsequently, there was difference of opinion between the partners of the firm. Arbitration Original Petitions in Arb.O.P.Nos.50 & 51 of 2017 before the learned Principal District Judge, Namakkal, have been filed to appoint Arbitrators to settle the dispute between the partners. However, the matters were settled in the mediation on 30.10.2019 and thereafter, Arb.O.P.Nos.50 and 51 of 2017 were disposed on 22.11.2019 by the learned Principal District Judge, Namakkal.

1.5. The terms of Compromise was signed by a person who has acted as a liaison officer between the applicants and the Government, but who was not authorised to sign any agreement on behalf of the firms. No legal action could be taken immediately to set aside the Memorandum of Compromise dated 29.12.2014 in view of lack of understanding between the partners. After the disputes between the partners got settled, the applicants sent a letter dated 07.11.2020 and requested him to enter into a fresh Compromise Deed.

1.6. Further, from the information obtained through the Right to Information Act also revealed that the stamp papers on which the Memorandum of Compromise was engrossed were not actually purchased subsequent to the date of the terms of compromise. In fact, the applicants / petitioners have filed Writ Petitions in W.P.Nos.16033 and 16036 of 2023, to declare Order XXIII Rule 3A of C.P.C. as unconstitutional, but were subsequently withdrawn. They also filed W.P.Nos.16044 and 16039 of 2023 seeking a direction from the respondent to proceed in accordance with law and to enter into a fresh Memorandum of Compromise in terms of the understanding arrived between the parties *vide* letters dated 22.02.2022 and 03.04.2023 and those writ petitions were disposed by giving liberty to the applicants to file appropriate applications in O.P.Nos.707 and 714 of 2014.

1.7. In fact, the respondent had sent a letter dated 03.02.2022 by stating that the applicants can enter into a fresh Memorandum of Compromise, provided they do not claim compensation and get the leave of the Court. Hence, these applications have been filed seeking leave of the Court. The respondent had also sent another letter dated 03.04.2023 to the applicants about their willingness to enter a fresh Memorandum of Compromise. Hence the applications should be allowed.

2.Submission of the respondent in brief:-

The respondent has filed counter by stating that the applicants should not make any allegations against the respondent after having entered into a Memorandum of Compromise dated 29.12.2014 and the same was recorded by this Court *vide* orders dated 10.02.2015 in O.P.Nos.707 and 714 of 2014. These applications have been filed after a lapse of 6½ years. The Memorandum of Compromise dated 29.12.2014 was available with the respondent and in which the date of purchase of the stamp papers was shown as 27.12.2014. However, based on the instructions received from the Government, the respondent had sent a communication in ROC.No.12975/Nmp-2/2013, dated 03.02.2022 to the applicants to furnish the deed of partnership and other documents for verification.

2.1. Since it is alleged by the applicants that the Liaison Officers of the firms had acted beyond his authority, the respondent exclaimed whether the applicants had taken any criminal action against the said person. The respondent was also aware of the order passed by the Division Bench of this Court in W.P.Nos.16039 and 16044 of 2023 dated 24.05.2023 and hence appropriate orders shall be passed.

3. Heard Mr.N.Manoharan learned counsel for the applicants and Mr.R.Shunmugasundaram, learned Advocate General for Mr.C.Sathish, learned Government Advocate for the respondent and perused the materials available on record.

Discussion:-

4. The records would show that the Directorate of Social Welfare had filed O.P.Nos.707 and 714 of 2014 against the applicants by challenging the Arbitral Awards dated 15.05.2014. However, the same were disposed by stating that the parties had entered into a Memorandum of Compromise dated 29.12.2014. On the strength of the above Memorandum of Compromise the Original Petitions were disposed on 10.02.2015.

5. It is submitted by the applicants that the said Memorandum of Compromise has been executed by a person, who was not authorised by the firms and it is a kind of a fraud played upon the firms by some third party without getting the permission and approval of the Government. Despite the impugned Memorandum of Compromise was of the year 2014 and the order in Original Petitions have also been passed on 10.02.2015, no steps have been taken by the applicants immediately.

6. It is submitted by the learned counsel for the applicants that though there was dissatisfaction about the terms of Compromise, no fruitful action can be taken in view of the difference of opinion between the partners of the firms.

7. Since there is no unity among the partners, they have filed Original Petitions before the Principal District Court, Namakkal, for appointing an Arbitrator to settle the dispute between themselves. Subsequently, in a mediation held, the difference of opinion between the partners was settled and it was decided to challenge the earlier Memorandum of Compromise dated 29.12.2014 and the consequential order for setting aside the same.

8. Even though there is a delay on the part of the applicants to approach the Court to set aside the compromise, the delay cannot cure the misrepresentation or fraud committed by a third party to the disadvantage of the firms. In support of his above contention, the learned counsel for the applicants relied on the judgment of the Hon'ble Supreme Court in ***Satluj Jal Vidyut Nigam Vs. Raj Kumar Rajinder Singh*** reported in ***(2019) 14 SCC 449***. In the said judgment, it is held as under:-

*"**75.** In A.V. Papayya Sastry v. State of A.P. [(2007) 4 SCC 221], this Court as to the effect of fraud on the judgment or order observed thus: (SCC pp. 231 & 236-37, paras 21-22 & 38-39)*

"21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

'Fraud avoids all judicial acts, ecclesiastical or temporal.'

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

* * *

38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders *passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.*

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior."

Supervisory jurisdiction of the court can be exercised in case of error apparent on the face of the record, abuse of process and if the issue goes to the root of the matter."

9. When there is an element of fraud involved in getting an order from the court that would vitiate all proceedings and such proceedings are only a nullity. The cause of action for the applicants to file these applications also continues, so long as the illegality of the fraudulent act continues. Once a fraud is always a fraud and hence the cause of action continues and hence these applications are not hit by limitation.

10. The applicants have earlier filed Writ Petitions in W.P.Nos.16033 and 16036 of 2023 to declare Order XXIII Rule 3A of C.P.C. as unconstitutional by stating that a party aggrieved does not have any remedy under the said provision. Order XXIII Rule 3A of C.P.C. would state that no suit shall lie to set aside a decree on the ground that a compromise on which the decree is based was not lawful. But in the Writ Petitions in W.P.Nos.16039 and 16044 of 2023, the Division Bench and in which I was also a member, has passed an order that the applicants / petitioners can file appropriate application in the Original Petitions itself for getting the relief.

11. It is also observed in the said order that the date of purchase of the stamp papers of Memorandum of Compromise in serial Nos.1313 and 1315, have been indicated as 27.12.2014. But the Memorandum of Compromise is dated 29.12.2014. The applicants had obtained information under the Right to Information Act and through which they were able to point out the above impossibility and suspicious nature of the deed.

12. The terms of Compromise is seen to contain terms that the applicants giving up all claims. It is seen from the letter of the respondents after verification of the records that the signatory of terms of Compromise on behalf of the applicant firms is not a person authorised by the applicants' firms.

13. The above facts would substantiate that the terms of compromise has been made up and got executed by a person who was not authorised by the company. This would render the terms of compromise unlawful due to fraud and fraud in turn would vitiate the compromise proceedings. However, the applicants' firms have stated that they could not take immediate action in view of the difference of opinion between the partners themselves. They have resolved their dispute and arrived at an understanding only in the year 2020 and the said fact is proved through the order passed by the learned Principal District Judge, Namakkal, in Arb.O.P.Nos.50 and 51 of 2017 dated 22.11.2019. Subsequently, the applicants had sent a letter dated 07.11.2020 to the respondent by inviting them to enter into a fresh Memorandum of Compromise.

14. The respondent Government has sent a reply dated 03.02.2022 and the contents of the said letter is extracted as under:-

> *"In your representation dated 07.11.2020 you have raised the issue that the Memorandum of Compromise was obtained under duress force, coercion, fraud and without proper*

authorization and knowledge. After considering the same, the Government vide reference 2nd cited directed to take appropriate action. Accordingly the following directions are hereby issued.

i) You are requested to furnish the deed of partnership/articles of Association, as appropriate, along with due authorization letter/power of Attorney to conduct due verification of the same by this office.

ii) After furnishing the aforesaid information/documents and after due verification you will be called to enter into fresh Memorandum of Compromise (Compromise deed) without paying and compensation. After the above said Memorandum of Compromise the same will be filed in O.P.No.707 of 2014 by the Department after obtaining the leave of Hon'ble High Court."

15. In response to that, the applicants had submitted all the required documents along with the letters dated 22.02.2022 containing the specimen signatures of the authorised person of the applicants company. Subsequent to that, the applicants had filed W.P.Nos.16039 and 16044 of 2023, seeking a direction from the respondent to proceed in accordance with law and to enter into a fresh Memorandum of Compromise in terms of the understanding arrived between the parties *vide* letters dated 22.02.2022 and 03.04.2023. In the order passed in the said Writ Petitions, the contents of the letter of the respondent dated 03.04.2023 has been reiterated as under:-

> *"In view of the above details and as per Government letter 7th cited hereby informed that, the question of compensation can only be considered by the appropriate Government authority when approached through the proper channel. In any case if you do not agree to enter into fresh Memorandum of Compromise without compensation and reiterate your claim for consideration then instead of Government approaching the Hon'ble High Court as per your letter dated 22.02.2022* ***you are at liberty to approach the High Court to obtain leave of the court in line with your said letter for considering your request and to enter into fresh Memorandum of Compromise with appropriate authorisation****."*

16. The above communication of the respondent would reveal that the respondent is open to deal the matter afresh for the purpose of entering into a fresh Memorandum of Compromise, however, subject to the leave granted by this Court. Even though there is a bar under Order XXIII Rule 3A of C.P.C. to institute a fresh suit to set aside the decree on the ground that the Compromise is not lawful, the applicants are at liberty to file an application in the same Court for seeking appropriate relief.

17. Though there may not be any fraudulent intention on the part of the respondent, a third party could have misled the respondent to enter into a Memorandum of Compromise by making the respondent to believe that he is the authorised person to enter into terms of Compromise with the respondent. The respondent ought to have verified whether the signatory to the terms of Compromise, on behalf of the applicants firms, is a rightful authority or whether he had been authenticated by the firms to sign on their behalf.

18. In fact the respondent apprehended of any criminal action against the unauthorised signatory or any proceedings against the government itself for recovery of any compensation and it had been stated so in its letter. But the applicants have expressed that their intention is to get fresh deal by taking into consideration of their long term business relationship with the respondent and that they are not going to make any other claim. Then the respondent has also fairly conceded to take up the matter afresh and to allow the parties to go for a fresh deal and enter into a fresh terms of compromise. Hence the earlier terms of compromise tainted with misrepresentation should be recalled.

19. The learned counsel for the applicants submitted that as on date when the earlier terms of Compromise dated 29.12.2014 was entered and the consequential order was passed on 10.02.2015, the Commercial Courts Act, 2015 was not in force. As per Section 15 of the Commercial Courts Act, all suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court.

20. Even though the Commercial Courts Act was not in existence at the time when the order was passed in O.P.Nos.707 and 714 of 2014 on 10.02.2015, once the compromise order is set aside, the Arb.O.P.Nos.50 and 51 of 2017 will get restored. In that case, Section 15(2) of the Commercial Courts Act has to be invoked and these matters which are in commercial nature and come within the ambit of commercial Arbitration ought to be transferred to the commercial Court which has the rightful jurisdiction.

In view of the above stated reasons, the applications are allowed and the orders dated 10.02.2015 made on the basis of terms of compromise filed in O.P.Nos.707 and 714 of 2014 are recalled and O.P.Nos.707 and 714 of 2014 are ordered to be restored and once restored, they are ordered to be transferred to the Commercial Court.

20.10.2023

Speaking order
Index : Yes / No
Neutral Citation : Yes / No

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R.N.MANJULA, J.

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**Pre-Delivery Common Order made in
Application Nos.4027 & 4028 of 2023
in O.P.Nos.707 & 714 of 2014**

20.10.2023