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A.O.P.No.37



Arb.O.P.No.37 of 2022 &

Apl.No.4866 of 2022

**Reserved on
30.03.2023**

**Delivered on
05.06.2023**

K.KUMARESH BABU., J

The instant Original Petition has been filed seeking to terminate the mandate given to the second respondent, pending arbitration proceedings and be substituted by the independent and sole Arbitrator to be appointed by this Court to enter reference afresh to adjudicate upon more than disputes, defences that had arisen between the parties, pursuant to the Memorandum of Understanding (MoU) entered between the petitioner and the first respondent dated 08.11.2021.

2. Heard the learned counsel appearing for the parties.

3.The learned counsel appearing for the petitioner would submit that the petitioner is the owner of the land and building namely 'M/s.Shri Ayappa Industries'. The first respondent is the sole proprietor of M/s.Shri Ayappa Industries. The petitioner is also one of the Directors in M/s.Hipcon Valves (P) Ltd. The first respondent's son Mr.Raghavan, Managing Director of M/s.Hipcon Valves (P) Ltd has been involving in various irregularities and maladministration of the company. He had also deputed employees of the company to the firm of his father to improve its production capacity, which is against the interest of the company. The petitioner and



the first respondent had jointly purchased several properties wherein the petitioner provided for 50% of sale consideration and therefore, he has 50% right in each of the properties that have been jointly purchased. As various disputes arose, the petitioner and the first respondent had entered into a MoU providing for various clauses. It was jointly agreed upon to appoint one Mr.Thirumalai, as an Arbitrator for resolving the dispute, if any that arises under the MoU. However, the first respondent has invoked the arbitration clause seeking for modifications of the MoU, dated 08.11.2021. He would submit that there was no dispute arose out of the MoU, but for the reasons best known to him, he had invoked aforesaid clause seeking to modify such MoU, which is not within the purview of the arbitration. A reading of the arbitration clause would suggest that only if a dispute arises between the parties under the MoU, only then such a dispute could be referred to the Arbitrator namely the second respondent herein. However, the first respondent had made a claim to the Arbitrator seeking to modify the MoU, but such power has not been vested with the Arbitrator. The petitioner had also filed statement of claim before the Arbitrator. The petitioner had also filed a counter before the Arbitrator wherein he had specifically contended that the Arbitrator cannot entertain the claim petition seeking for a direction to enter into a revised MoU with terms and conditions. But however without dealing with the preliminary objections raised by the petitioner, the Arbitrator had continued to conduct proceedings in the arbitration claims made by the first respondent as well as the petitioner. The various minutes of meetings recorded by the Arbitrator created a doubt on the bonafides of the



second respondent Arbitrator. During such enquiry, it came to the knowledge of the petitioner that there has been financial transactions between the first respondent and the second respondent thereby, the second respondent is statutorily barred from being an Arbitrator to resolve between the petitioner and the first respondent or in any arbitration proceedings, where the first respondent is a party. He would submit that the financial transactions between the first and the second respondent were not in the knowledge of the petitioner when he had entered into the MoU agreeing to have the second respondent as an Arbitrator to adjudicate the dispute between the petitioner and the first respondent. Hence he would seek this Court to entertain the Original Petition and order as prayed for.

4.The learned counsel appearing for the first respondent would submit that the petition filed is an after thought and the various claims made by the petitioner as regards the obligations and liabilities between the petitioner and the first respondent were all denied. He would submit that he was coerced to enter upon into a MoU by the petitioner and only thereafter, he had taken out this claim petition seeking for an intervention of the Arbitrator to direct a fresh MoU on the terms and conditions to be decided by the Arbitrator to be entered upon between the petitioner and the first respondent. He would further submit that the Arbitrator is an known person to both the petitioner and the first respondent and only at the instances of the first respondent, the Arbitrator was agreed upon between the petitioner and the first respondent. He



would further submit that all the disputes raised by the petitioner in the present

Original Petition could be taken out as grounds of appeal if the petitioner is aggrieved against the award. The petitioner has been trying to delay the arbitration proceedings inspite of the various opportunities given to the petitioner he had neither put forth his oral or written arguments and at the fake end of the proceedings, he had filed the Original Petition. Therefore, the learned counsel prays this Court to dismiss the petition as being without merits.

5. The learned counsel appearing for the second respondent Arbitrator had also filed a detailed counter affidavit wherein he has denied the allegations of bias. He would submit that after due deliberations with the parties namely the petitioner and the first respondent, minutes of each meeting had been meticulously drawn out and agreed by the respective parties. The petitioner has been repeatedly seeking time and hence the Arbitrator left with no other option had imposed a cost upon the petitioner to be paid to the first respondent. He would further submit that bias is not a ground to appoint another Arbitrator and that can be a ground for the petitioner to challenge the award under Section 34 of Arbitration and Conciliation Act. He had specifically made that a statement neither of the parties nor personally or officially related to him and he has not committed any act detrimental in the interest of both the parties. He has performed the duties assigned to him till date in clear and transparent manner and therefore, he would seek this Court to dismiss the Original Petition as devoid of



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6. I have heard the rival submissions made on either side and perused the materials placed on record.

7. The present Original Petition has been filed seeking to terminate the mandate given to the second respondent and to appoint an Arbitrator by this Court. In such circumstances, I do not propose to venture upon the various allegations made by the respective counsels as regards to the reasons for entering upon the MoU and disputes that had arisen in the MoU. The petitioner in his affidavit had pleaded that it was at the instance of the first respondent, the second respondent was named as Arbitrator in the MoU entered between the petitioner and the first respondent. The first respondent in his counter had averred that the MoU entered between the parties is invalid and has been entered only upon to grab the property from the first respondent and also that the MoU itself is not enforceable and termed it to be invalid and non-est in law and for better appreciation, the relevant paragraph is extracted hereunder:-

5. I deny the averments made in para 4 that my son Raghavan who is the managing director of Hipcon valves wantonly, deliberately decreasing the profit of Hipcon and hence the dispute arose and decided to separate/partition of the companies/ properties in order to avoid further dispute, joined together and discussed various points, mutually decided and subsequently executed MoU without compulsion in the presence of the auditor. It is admitted that my daughter and son witnessed but the invalid MoU which was entered under coercion. I further deny that petitioner/respondent is well aware that Hipcon Valves is drowning with debts and hence in order to



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get away with his responsibility to be a part in clearing the debt of the company, intending to grab the property from the respondent kept intimidating him and eventually got the forcible MoU signed by the respondent, his daughter and son. It is explicit that no prudent man would consent to get into a MoU when the plant and the machineries are under hypothecation with the bank. It is evident that in such a circumstance when the MoU itself is not enforceable it is to be termed as invalid and non est in law. The petitioner is willing to obey the terms and conditions of MoU which is invalid in the eyes of law. The respondent filed petition before the Arbitrator seeking revised MoU by the parties in order to have the same effective. The averments of para 4 are denied accordingly.

8. A reading of the aforesaid paragraph of the counter would suggest that for the first respondent seeks to term the MoU as invalid. However, it is not clear as to how the so called alleged invalid MoU was sought to be invoked for appointment of an Arbitrator. Hence, the first respondent cannot be heard to say that the arbitration proceedings should be proceeded with on the basis of a MoU, which he himself claims to be illegal, invalid and *non est* in law. Even though the counter has disputed the various allegations made in this original petition except for a bald denial that there is no relationship between the first respondent and the second respondent of any financial transaction and only at the instance of the petitioner, the second respondent has been named as Arbitrator, no materials have been provided to substantiate the same much in the light of the statement of accounts of the first respondent which has been produced by the petitioner to substantiate his claim of financial transactions between the first respondent and the second respondent.



9. Further a reading of the counter affidavit filed by the second respondent would show that the second respondent is personally or officially related to the first respondent and that he has not committed any act detrimental to interest of both the parties. The minute of the first meeting held on 13.06.2022, explicitly shows that the Arbitrator is aware of the law relating to arbitration proceedings, as he has specifically made a declaration as to his interest in the dispute. What is surprisingly even the Arbitrator, the second respondent had not disclosed his pecuniary advantage with the first respondent much less he has not explained the bank statement produced by the petitioner to support his allegations.

10. Further when the petitioner had raised a preliminary objection in his counter affidavit which had been filed as early as in June 2022, without dealing with a preliminary objection as to the claim petition filed by the first respondent, the Arbitrator without deciding such a claim as to whether any dispute had arisen out of the MoU, had proceeded to continue the arbitration proceedings which in my view is without following the mandate of Section 16(5) of the Arbitration and Conciliation Act, 1996. Subsections (2 & 3) of Section 16 deals with the jurisdiction and scope of the authority of the Arbitrator. When such a claim is made as regards the jurisdiction and scope of authority of Arbitral Tribunal, then under Sub section 5 should first decide such plea and after taking a decision on such plea should thereafter proceed to continue with the Arbitral proceedings. This procedure has not been followed in the



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present case. As I have already given a finding that neither the first respondent or the second respondent had not specifically disputed the bank statement produced by the petitioner coupled with the reasons of findings of violation of Section 16(5) of the Arbitration and Conciliation Act by the Arbitrator, the second respondent, I am of the view that the petitioner has made out a case for termination of the mandate given to the second respondent and to appoint an Arbitrator by this Court.

11. In fine the Original Petition is allowed and the mandate given to the Arbitrator is terminated and Mr.V.Anand, Advocate, No.20/15, Avvai Shanmugam First Line, Royapettai, Chennai – 14 (9841173125/9894359830) is appointed as Arbitrator who shall on the basis of the pleadings filed by the petitioner and the first respondent, shall issue notices to them and decide the claim petition filed by both the petitioner and the first respondent. Before proceedings with he shall also decide the claim of the petitioner under Sub-sections 2 and 3 of Section 16 of the Arbitration Act. Further, the newly appointed Arbitrator is entitled to fix the fees as provided under the schedule to the Arbitration Act. Consequently A.No.4866 of 2022 is closed.

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