



O.S.A.(CAD) No.11 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2023

CORAM :

THE HON'BLE MR.T.RAJA, ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

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1.Enhance Aesthetic and Cosmetic
Studio Private Limited,
No.C 131, 1st Floor, SEC 2, Noida,
Uttar Pradesh-201 301,
rep. by its Managing Director, Manoj Khanna.

2.Manoj Khanna

.. Appellants

Vs

1.M/s.Fullerton India Credit Co. Ltd.,
Having its registered office at
MEGH TOWERS, 3rd Floor,
Old No.307, New No.165,
Poonamallee High Road,
Madhuravoyal, Chennai-600 095.

2.Sanjeev Mahajan

.. Respondents

Prayer: Appeal filed under Section 13 of the Commercial Courts Act,
2015 read with Section 37 of the Arbitration and Conciliation Act, 1996



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against the order dated 22.07.2022 passed in Arb. O.P. (Comm. Div.)
No.320 of 2022.

For the Appellants : Mr.Anirudh Krishnan

JUDGMENT

(Delivered by the Hon'ble Acting Chief Justice)

This appeal is directed against the impugned order dated 22.7.2022 passed by the learned Single Judge in Arb. O.P. (Comm.Div.) No.320 of 2022, whereby recording the statement of the learned counsel appearing for the appellants that despite receipt of two hearing notices the appellants failed to enter appearance before the Arbitrator, the petition was dismissed.

2. Mr.Anirudh Krishnan, learned counsel appearing on behalf of the appellants, argued that the first appellant is a company registered under the provisions of the Companies Act having its registered office at No.E84, Ground Floor, Greater Kailash, Part-1, New Delhi South, Delhi – 110 048 and the second appellant is the majority shareholder and Managing Director of the first appellant



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company. It is further submitted that the second respondent, who was appointed as an Additional Director of the first appellant company on 5.1.2013 and was managing the affairs of the first appellant company, caused manipulation and falsification of the records resulting in financial loss to the first appellant company, which came to light only on receipt of notices from the lenders who alleged default in repayment of loans advanced by them. It is pleaded that one of such notices was received from the first respondent company and the second respondent assured to repay the said amount. However, the said notice issued by the first respondent culminated into passing of an ex parte arbitration award, despite the fact that the Arbitrator was appointed unilaterally by the first respondent.

3. Learned counsel for the appellants would further submit that when the Arbitrator admitted in her declaration submitted under Section 12(1) of the Arbitration and Conciliation Act, 1996 that she is ineligible to be appointed as Arbitrator as she was appointed in more than three occasions by the first respondent in



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the last three years, she ought not to have proceeded further and passed the ex parte award.

4. Learned counsel for the appellants fairly submitted that even though the appellants received notices for two hearings, they have not appeared before the learned Arbitrator. Nonetheless, it is pleaded that the learned Single Judge ought not to have dismissed the petition in the light of the principles laid down by the Apex Court in the case of *Lion Engineering Consultants v. State of Madhya Pradesh and others*, (2018) 16 SCC 758, to the effect that the party is not precluded from raising an objection at a later stage, although not taken before the Arbitrator. In the case on hand, it is pleaded that the second respondent committed fraud and availed loan by forging the signature of the second appellant without any authorisation by the first appellant and in this regard the appellants have already lodged a criminal complaint and the same is pending. Therefore, the learned Single Judge ought not to have dismissed the petition filed under Section 34 of the Act. In support of his submission, learned counsel for the appellants pressed into service



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yet another judgment of the Supreme Court in the case of *Rashid Raza v. Sadaf Akhtar*, (2019) 8 SCC 710, wherein it has been held that when serious allegations of fraud are raised, the dispute is not arbitrable. He, therefore, pleaded that the learned Single ought to have set aside the arbitral award and entertained the plea raised by the appellants.

5. We are unable to find any merit or justification in the plea raised by learned counsel appearing on behalf of the appellants.

6. Firstly, when learned counsel appearing for the appellants pleads before us that the alleged loan agreement dated 31.7.2020 is sham and nominal and was created by the second respondent in cahoots with the first respondent, for which criminal proceeds were initiated against the second respondent which culminated in registration of FIR No.0085/2022 on 3.6.2022 and is pending investigation, the appellants ought to have raised their objection to the jurisdiction of the learned Arbitrator to entertain the disputes relating to rights and liabilities which arise out of criminal offences.



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It is beyond any cavil that the appellants did not appear before the learned Arbitrator despite receipt of two notices. The appellants having failed to utilize the opportunity to raise objections before the learned Arbitrator, cannot now plead that the dispute is not arbitrable and, therefore, the learned Arbitrator does not have jurisdiction. Such objections must be taken at the stage of submission of statement of defence and must be dealt with under Section 16 of the Act. However, if one of the parties contends that the subject-matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt with under Section 34 of the Act. Accordingly, such plea was considered by the learned Single Judge.

7. In the case on hand, the learned Single Judge, after referring to the FIR dated 3.6.2022, had observed that the complaint is not pivoted on the primary contract, but it is a complaint pertaining to siphoning off Rs.9.68 crore, of which the loan amount advanced by the first respondent under the agreement is only Rs.7,19,500/-. In any event, the learned Single Judge made it clear that the criminal law will take its course and the Court under



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Section 34 of the Act has nothing to say on the same. We find no earthly reason to interfere with the such finding rendered by the learned Single Judge.

In the result, the appeal is dismissed. There will be no order as to costs. Consequently, C.M.P.No.2980 of 2023 is closed.

(T.R., ACJ.) (D.B.C., J.)
14.02.2023

Index : No
Neutral Citation : No
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T.RAJA, ACJ.
AND
D.BHARATHA CHAKRAVARTHY, J.

(sasi)

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