IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 07.12.2023	**Pronounced on:** 25.03.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.263 of 2023
and
Application No.3006 of 2023

VIL MAKERS,
Represented by its Proprietor B.Vijay,
S/o. Balakrishnan,
3/10-A, Sri Ragavendra Nagar,
3rd Street, Ramapuram,
Chennai – 600 089. .. Petitioner

Vs.

V.Maharaja .. Respondent

Prayer: Original Petition is filed under Section 34 2(a) & (b), 34(2A) of the Arbitration and Conciliation Act, 1996, praying to set aside the Final Award No.2 of 2019 dated 01.09.2021 passed by the learned Sole Arbitrator.

For Petitioner : Mr.S.R.Sundar

For Respondent : Mrs.Rita Chandrasekar
Senior Counsel

for M/s.R.Meenakshi

O R D E R

This petition has been filed by the Award Debtor under Section 34 2(a) & (b) (ii), 34(2-A) of the Arbitration and Conciliation Act, 1996, to set aside the award passed by the learned Arbitrator in Arbitration Case No.2 of 2019 on 01.09.2021.

2. By the impugned Award dated 01.09.2021, the learned Arbitrator has allowed the claim filed by the respondent (claimant) by awarding a sum of Rs.50,00,000/- together with interest at 12% per annum from the date of payment till the date of receipt.

3. Operative portion of the impugned Award passed by the learned Arbitrator on 01.09.2021 reads as under:-

> "49.In light of the above discussions, the issues are answered accordingly herein below:
>
> **Issue 1:**
>
> The claimant has violated the conditions of the agreement dated 10.11.2016 but however, the said agreement cannot be held to be a partnership agreement since the requisite conditions for a partnership are not satisfied and the agreement is to

> be construed as a finance / loan agreement and accordingly, the nature of relationship between the parties will have to be determined in that manner.
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> **Issue 2:**
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> The claimant cannot go beyond the terms of the agreement but however, in light of the finding in issue 1 that the agreement itself is not a partnership deed and it is only a finance or a loan agreement, both parties are governed by the conditions of the agreement by analysing it as a loan agreement since the essential intrinsic features of a partnership agreement are absent and no firm has been constituted, the claimant is within his rights to claim the return of monies given in pursuance of the agreement.
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> **Issue 3:**
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> The respondent is liable to make a payment of Rs.50,00,000/- to the claimant along with interest at the rate of 12% per annum from the date of payment till the date of receipt by the claimant of the repayment."

4. The respondent herein earlier had filed O.A.No.113 of 2018 and A.No.1098 of 2018 for the following two reliefs:-

Prayer in O.A.No.113 of 2018	**Prayer in A.No.1098 of 2018**
To pass an order Injunction restraining the respondents,* their men, agents or anybody claiming through and or on behalf of the respondents from releasing the movie title "AARUDRA" pending disposal of the Arbitration Proceedings.	To direct the respondent* to furnish security to the tune of Rs.60,00,000/- with interest of 12% from the date of payment till the present pending disposal of the Arbitration proceedings.

* petitioner herein

5.By an order dated 26.07.2018, this Court had passed the following orders in O.A.No.113 of 2018 and A.No.1098 of 2018:-

> "These Applications coming on this day before this Court for hearing in the presence of Mr.Naveenkumar Maruthi, Advocate for the applicant in both applications and Mr.K.S.Jayaganeshan, Advocate for the respondent in both applications and upon reading the judges summons and the affidavit of V.Maharaja, and the counter affidavit of B.Vijay filed in O.A.No.113 of 2018 and A.No.1098 of 2018, and this court having observed that after several rounds of deliberations, out of Rs.60,00,000/- due, **the applicant agree to receive Rs.10,00,000/- on or before 15.08.2018 and it is also stated by the learned counsel for the respondent that the date for the release of the film is not yet fixed, as the same, depends on the decision of the Producer Council, and the learned counsel for the the respondent is also confident that once the movie is released, he would discharge the entire liability and as the date of the release of the film is not yet fixed and there is an admitted liability of Rs.60,00,000/-. it is ordered as follows:-**
>
> That the respondent herein do pay a sum of Rs.10,00,000/- (Rupees ten lakhs only) directly to the applicant herein, on or before 20.08.2018.
>
> 2. That in default of paying the amount within time as mentioned in clause (1) supra, VIL Makers, the defendant herein, be and are hereby restrained by an order of injunction from releasing the film AARUDRA, if the date of the release of the film is fixed before that.
>
> 3.That the O.A.No.113 of 2018 and A.No.1098 of 2018 be posted on 21.08.2018."

6. The above mentioned applications were filed pending the release of the movie where interim orders were secured by the respondent pursuant to which, the petitioner herein has paid a sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) to the respondent as was ordered.

7. Later an order came to be passed in these two applications on 15.04.2019, whereby the immovable property of the petitioner herein was attached.

8. Later by an order dated 15.04.2019 in O.A.No.113 of 2018, the learned Arbitrator was appointed. By a subsequent order dated 16.07.2019, O.A.No.113 of 2018 & A.No.1098 of 2018 were closed. It is pursuant to the aforesaid order, the learned Arbitrator entered upon reference and has proceeded to pass the impugned award dated 01.09.2021.

9. Pursuant to the impugned award dated 01.09.2021, the respondent – Award Holder has filed E.P.No.116 of 2022 before the Additional District Court at Poonamallee, seeking to execute the award.

The petitioner – Award Debtor who has suffered an adverse award, has thus challenged the impugned award passed by the learned Arbitrator in this proceedings. The facts in brief for a fair disposal of this OP is referred to hereinafter.

10. The petitioner and the respondent entered into an unregistered Partnership Deed dated 10.11.2016 for production of a Tamil feature film titled "AARUDRA". Under the aforesaid unregistered Partnership Deed, the parties were to contribute a sum of Rs.4,00,00,000/- (Rupees Four Crores Only) towards capital for production of the film. The respondent undertook to contribute a sum of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only).

11. Pursuant to the aforesaid unregistered Partnership Deed, the Tamil film "AARUDRA" was produced. Under the aforesaid unregistered Partnership Deed, the petitioner was to act as the Banker for the unregistered Patnership between them. Clause 4 of the unregistered Partnership Deed dated 10.11.2016 reads as under:-

> *"(4) The bankers of the partnership shall be as of the VIL MAKERS. The bank account of the firm shall be operated upon by any partner OF THE FIRST PART."*

12. It was the case of the respondent before the learned Arbitrator

that the respondent had initially contributed a sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs Only) on 10.11.2016 as has been recorded in clause (2)(a) of the aforesaid unregistered Partnership Deed dated 10.11.2016.

13. On the other hand, it is the contention of the petitioner that the petitioner has received only a sum of Rs.35,00,000/- (Rupees Thirty Five Lakhs Only) in two installments from the respondent on 16.12.2016 and on 02.01.2017, out of Rs.2,50,00,000/- (Rupess Two Crores and Fifty Lakhs Only) towards the capital.

14. The challenge to the impugned award is primarily on the ground that the respondent has taken a diametrically opposite stand before this Court in O.A.No.113 of 2018 and A.No.1098 of 2018 before the learned Arbitrator after pleadings were completed.

15. It is submitted that the Arbitration Application in O.A.No.113 of 2018 and A.No.1098 of 2018 were based on the premises that there was an unregistered Partnership Agreement dated 10.11.2016 between the petitioner and the respondent, whereas, before the learned Arbitrator

after the pleadings were completed, the respondent took a stand that there was a finance arrangement between the petitioner and the respondent i.e. a borrower and lender.

16. It is the submission of the petitioner that the impugned award dated 01.09.2021 is patently illegal and therefore liable to be set aside in terms of Section 34(2A) of the Arbitration and Conciliation Act, 1996.

17. That apart it is submitted that the learned Arbitrator has failed to note that under Section 8 of the Indian Partnership Act, 1932, a person may become a partner with another person for a particular adventures or undertakings.

18. It is further submitted that the learned Arbitrator has accepted the case of the respondent after the pleading was completed contrary to the pleading and thus, the impugned award dated 01.09.2021 that has been passed is contrary to Section 19(4) of the Arbitration and Conciliation Act, 1996.

19. It is submitted that although the Arbitral Tribunal is not bound by the provisions of CPC, 1908 and Indian Evidence Act, 1872, nevertheless, a party cannot take a different stand contrary to the claim statement filed before the Arbitral Tribunal and therefore, the impugned award passed by the learned Arbitrator suffers from patent illegality and is therefore liable to be set aside on account of the grounds stated in Section 34(2)(v) of the Arbitration and Conciliation Act, 1996.

20. It is submitted that the procedure adopted by the learned Arbitrator in the Arbitral proceeding was not in accordance with Part-I of Arbitration and Conciliation Act, 1996.

21. That apart, it is submitted that the award is liable to be set aside on the ground specified in Section 34 (2)(a) (iv) of the Arbitration and Conciliation Act, 1996 as the award was passed beyond the scope of the reference in the Arbitral proceeding.

22. The learned counsel for the petitioner further submits that the impugned award dated 01.09.2021 also suffers from patent illegality on account of the failure of the learned Arbitrator to consider Section 28(3)

of the Arbitration and Conciliation Act, 1996.

23. Specifically, it is submitted that the learned Arbitrator has ignored the express terms of the contract between the parties in the unregistered Partnership Deed entered into between them on 10.11.2016.

24. It is submitted that there is no scope for invoking Section 6 of the Indian Partnership Act, 1932 as the contract was reduced in writing and therefore, indeed there was partnership relationship as defined in Section 4 of the Indian Evidence Act, 1872.

25. The petitioner in the written submissions has stated that the petitioner is also a Producer and an Actor and was producing films in the own banner viz. VIL Makers which is also known to the Respondent. The petitioner and respondents were well acquainted with each other and when the petitioner informed the respondent that he intended to take the movie and therefore the respondent approached the petitioner after getting convinced with the story and agreed to invest capital for the production of the film titled AARUDRA.

26. It is submitted that **Clause 2(a)** of the unregistered partnership deed dated 1011.2016 indicates that the Respondent had paid only a sum of Rs.25 lakhs. However, no such payment was made to the petitioner due to Demonetisation announced on 08.11.2016.

27. It is submitted that the Respondent had only transferred Rs.25 lakhs on 16/12/2016 through RTGS and paid another sum of Rs. 10 lakhs on 02/01/2017 in terms of the agreed partnership clause by way of bank transfer as against the total capital investment of Rs.2.5 crores. Except the said payment of Rs. 35 lakhs, the Respondent has not contributed any capital for the production of the aforesaid film.

28. It is submitted that the Respondent failed to contribute the capital as agreed, and despite the financial difficulties and non-co-operation on the part of the Respondent, the Petitioner produced the film and also fixed the date of releasing the film.

29. This being so, the Respondent with a malafide intention had filed an **Application No. 1098/2018 in OA 113/2018** on the file of this Hon’ble Court to direct the Petitioner to furnish a security for Rs.60 lakhs

with interest @ 12% p.a. from the date of payment alleging that he had paid Rs. 25 lakhs under the partnership deed dated 10.11.2016 and remaining payments of Rs.25 lakhs and Rs.10 lakhs through bank RTGS on 16.12.2016 and 2.1.2017 respectively.

30. It is submitted that the Hon'ble Court granted an interim injunction order restraining the Petitioner from releasing the film, thereafter the Petitioner entered appearance and filed counter statement. The Court was pleased to modify the interim order on 26.7.2018 subject to the condition that the petitioner paying a sum of Rs. 10 lakhs directly to the respondent on or before **20.8.2018** and the same was complied by **drawing a DD No.000707 dated 18.08.2018** infavour of the respondent.

31. It is submitted that the film was released on **31-8-2018.** It howver and it did not perform well in the box office. While this being so, **in OA 113/2018 came up for hearing**, the Respondent had insisted the payment of disputed dues by filing memo dated 21.3.2018. This Hon'ble Court was thus pleased to pass an order dated 15.4.2019 and thereby attached the property. Subsequently the matter was referred to sole Arbitration and the Learned Arbitrator was appointed to resolve the

dispute.

32. It is submitted that an order was earlier passed on 26.7.2018 based on a concession was given by the erstwhile counsel for the Petitioner admitting liability of Rs. 60 lakhs payable to the Respondent. It is submitted that such a concerness is not binding on the petitioner. It is also brought to the attention of the Court that the amount of Rs. 60 lakhs recorded in the order is not correct which is also evident by the statement of accounts as the Respondent has paid only the capital of Rs.35 lakhs towards the partnership firm.

33. It is submitted that the respondent had invoked the arbitration clause and sent a notice on 13.8.2019 for appointing the Learned Arbitrator to resolve the dispute between the parties in terms of the partnership deed. The Petitioner has filed a reply statement dated 18.12.2019, and it is the case of the Petitioner that the payment of Rs. 25 lakhs in terms of Clause 2(a) is denied and since the demonetisation came into effect on 8.11.2016 and it is no way possible to pay such a huge amount in cash on 10.11.2016.

34. It is submitted that the learned Arbitrator without drawing any procedure contemplated under section 19 for conduct of the Arbitral proceedings passed the impugned award on 1.9.2021 by directing the Petitioner to pay a sum of Rs. 50 lakhs along with interest of 12% p.a.

35. It is submitted that the learned Arbitrator **has held that the relationship between the parties under the partnership deed was in the nature of loan transaction** and that the nomenclature of the partnership of the agreement would not suffice to reach the conclusion that there was a partnership arrangement between them thereby rewriting the contract between the parties.

36. It is submitted that the Arbitral Tribunal failed to appreciate that the Respondent had not pleaded a case of loan transaction in the claim statement or in the rejoinder to the reply, and failed to take into consideration the terms of the Contract.

37. It is submitted that the learned Arbitrator had been carried away by the submission of the respondent-claimant that the Partnership Agreement dated 10.11.2016 was a loan agreement without either

sufficient pleading and/or evidence and hence the impugned award is patently illegal on the face of it and thereby attracts sting under Section 34(2-A) of the Arbitration and Conciliation Act, 1996.

38. It is submitted that the learned Arbitrator had neither considered the claim statement nor the rejoinder filed by the Respondent / Claimant. Without considering the claim statement and rejoinder, the learned Arbitrator had passed the impugned award only considering the argument contrary to the claim statement and rejoinder and therefore the impugned Award warrants interference of this Court under Section 34 (2)(a)(iv) & 34(2)(b)(ii) & (iii)of the Arbitration and Conciliation Act, 1996.

39. It is submitted that the Tribunal also failed to consider and appreciate **Sec. 11 of the Partnership Act, 1932** which discusses about the rights and duties of partners by contract between the partners. It is submitted that as per the above provision, the terms of the Partnership Deed dt. 10.11.2016 was perfectly valid. It is submitted that Section 6 of the Partnership Act, 1932 will arise only if the respondent-claimant had pleaded the case and proved the same with adequate oral or documentary

evidence, hence, the Award is contrary to Section 28(3) of the Act as well as section 34(2)(iv) & 34(2)(b) (ii) read with Explanation I (ii) of the Arbitration and Conciliation Act, 1996.

40. It is submitted that the learned Arbitrator failed to appreciate that when there is an agreement amongst the parties and intention to carry on the business and sharing the profits and when these three essential elements are present it attracts the existence of partnership deed in terms of Sec. 4 of the Partnership Act and that there is no law prohibiting single venture partnership deed which the learned arbitrator failed to appreciate.

41. It is submitted that in the impugned award at para 42 has given a finding that there is no constitution of the firm and there is no establishment of separate bank a/c or there is nothing such as partnership. This finding of the Tribunal according to the petitioner is contrary to the provisions of Sec. 8 of the Partnership Act, because there is no need for opening of a joint bank account, if the two parties involved constitute a firm for a particular partnership which squarely falls under Sec. 8 of the Partnership Act. It is further submitted that the Arbitral

Tribunal's finding that the non-opening of a separate bank account is not fatal to the present case and such a finding is contrary to the established practice and the provisions of the Partnership Act and hence it is submitted that the award is liable to be interfered under section 34(2)(b)(ii) and 34(2)(b) Explanation I (ii) of the Arbitration and Conciliation Act , 1996.

42. It is submitted that the Tribunal failed to appreciate that a partner stands in a fiduciary relationship as against the other partner and towards the firm. A partner cannot become a lender to the firm at any cost. Hence, admittedly the firm constitute of two partners, one the Claimant and the Respondent when the Claimant / Respondent had brought an investment to the firm certainly the partner cannot be termed as creditor to the firm.

43. It is submitted that the respondent / claimant had initiated the above Arbitration proceedings in his individual capacity as against the petitioner/ respondent and admittedly the Firm is a not a party, in such circumstances the claim itself is not legally maintainable and there is no cause of action to sustain the claim.

44. The learned counsel for the petitioner has drawn attention to the following cases:-

(i) **K.D.Kamath & Co.** Vs. **C.I.T., Bangalore** in (1971) 2 SCC 873.
(ii) **Indian Oil Corporation Limited and another** Vs. **Shriji Enterprises Erandol and others**, 2014 SCC Online Bom. 175.
(iii)**Hage Tera** Vs. **Hage Appo and another**, 2014 SCC Online Gau 366.

45. In addition to the above, the learned counsel for the petitioner has drawn attention to the following decisions : -

(i)**Ram Rikkhi Dei Chhabra Vs. Sita Ram Gupta and others**, 1979 SCC Online All 363;
(ii)**Steel Brothers & Co. Ltd., Vs. Commissioner of Income Tax**, AIR 1958 SC 315;
(iii)**Y.Venkanna Chowdry Vs. G.Lakshmidevamma & 20 ors.**, 1994-1-L.W. 112;
(iv)**K.D.Kamath & company Vs. Commissioner of Income Tax**, 1971 (2) SCC 873;
(v)**M.P.Davis Vs. Commissioner of Agricultural Income Tax**, AIR 1959 SC 719;
(vi)**Himalayan Cooperative Group Housing Society Vs. Balwan Singh & Ors.**, (2015) 7 SCC 373;
(vii)**SREI Infrastructure Finance Ltd., Vs. TUFF Drilling (P) Ltd.**, (2018) 11 SCC 470;
(viii)**Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri & Ors.**, (1987) 3 SCC 538;
(ix)**Nabha Power Ltd., Vs. Punjab State Power Corporation Ltd., & Anr.**, (2018) 11 SCC 508 and
(x)**Adani Power (Mundra) Ltd., VS. Gujarat ERC**, (2019) 19 SCC 9.

46. The learned counsel for the petitioner would submit that the

Arbitral Tribunal has failed to note Sections 4, 6, 8, 11(1) and 13(b) of the Indian Partnership Act, 1932 and therefore, the Award passed by the learned Arbitrator has resulted in patent illegality. It is further submitted that once there is an Agreement, there is no scope for invocation of Section 6 of the Indian Partnership Act, 1932.

47. Defending the impugned award, the learned counsel for the respondent defended the Award passed by the learned Arbitrator. It is submitted that the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 was limited. A specific reference was made to paragraph no.41 from the decision of the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)**, (2019) 15 SCC 131 and the decision of the Hon'ble Supreme Court in **The Project Director, National Highways No.45 E and 220, National Highways Authority of India Vs. M.Hakeem & Anr.** in SLP.(Civil).No.13020 of 2020.

48. The learned counsel for the respondent would submit that the scope for interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited and has drawn attention to the decision of the Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority**, (2015) 3 SCC 49.

49. The learned counsel for the respondent submitted that it is the petitioner who approached the respondent, when the petitioner was in the process of taking a film titled “AARUDRA” which was admitted by the petitioner in all the statements before the OA. No.113 of 2018. The petitioner was in need of funds for the production of the movie AARUDRA and therefore partnership deed dated 10.11.2016 was signed so as to ensure that the interests of the respondent was protected as the respondent was lending a huge amount of money to the petitioner.

50. It is submitted that the petitioner has sought to paint a picture as through the respondent could not have given a sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) to the petitioner on 10.11.2016 as demonetization was announced on 08.11.2016. It is submitted that however, the petitioner has conveniently glossed over the fact that even

post demonetization, the demonetized currencies were accepted as valid legal tender until 30.12.2016. Hence. attempt of the petitioner to use demonetization was an excuse to deny having received Rs.25,00,000/- from the respondent is not a tenable excuse.

51. It is submitted that the as regards proof of payment questioned by the petitioner that it has been clearly set out in clause 2 (a) of the partnership deed dated 10.11.2016 that "Second party agrees to pay a sum of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs) advance payment paid on date 10.11.2016, sum of Rs.25,00,000/- (Twenty five lakhs)". It is stated the said partnership deed contains the signatures of both the petitioner and respondent which serves as an ample proof of the petitioner having received a sum of Rs.25,00,000/- (Twenty five lakhs)" from the respondent. Hence it is evident that the petitioner has received the money and has also sought to escape liability by painting a picture as if he had never received any monies from the respondent in cash. It is settled principle that once a document is signed and the same has been accepted, unless it is tested by due process of law, the validity of the document is binding on the persons who have signed the same. Here the signature of both parties are not in question in the agreement and both of

them were accepted the signature.

52. It is submitted that at no point of time the respondent intended to go out of the partnership, and as such there was no need to given notice of any sort to the petitioner. As such, it is submitted that the respondent has not breached the terms of the partnership deed dated 10.11.2016.

53. It is submitted that even though the petitioner had invited the respondent to his office, the petitioner was evasive in his replies whenever the respondent sought to bring up the subject regarding finances and accounts surrounding the movie. It is submitted that the respondent was completely kept in dark once he had transferred a significant amount of funds to the petitioner for financing the movie. The respondent submits that each time the respondent sought to discuss the finances, the petitioner would hurriedly state that finances could only be settled after the movie was released, thereby raising suspicion in the mind of the respondent regarding the utilization of funds.

54. It is submitted that the order of Hon'ble High court in OA. No. 1098 of 2018 dated 26.07.2018 was not challenged till date by the way of appeal by the petitioner. Since 10 Lakhs Rupees has already been paid in pursuance of the order of the High Court. The petitioner himself agreed to comply with the order of the Court and therefore complied the order. Therefore, the petitioner himself accepted that the agreement is mere a finance agreement not a partnership deed.

55. It is submitted that clause (7) of the partnership deed,

(7) Each partner shall-

> ***(i) Be just and faithful to other partners in the transactions relating to partnership business;***
>
> ***(ii)Pay his separate debts and indemnify the other all partners and assets of the firm against the same and all other proceeding, cost claims or demands in respect thereof;***
>
> ***(iii) Give full information and truthful explanations of all matter relating to the affairs of the partnership to all the partners at all times.***

56. It is submitted that the above said clause was never implemented and the respondent was kept in dark throughout thereby

preventing the claimant from participating in the process and also accessing the accounts. The agreement itself a unilateral one and it can not be called as partnership and the real intention behind the agreement is to misappropriate the money of the respondent and defraud the respondent.

57. It is submitted that the petitioner insisted the respondent to act as a role of inspector of Police in the movie hardly 16 seconds and the same was removed from the movie when it was released. Now the petitioner takes a ground that the respondent was acted in the movie. The above act clearly shows the intention of the petitioner to defraud the Respondent.

58. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

59. The award passed by the learned Arbitrator treats the unregistered Partnership Deed dated 10.11.2016 as that of finance / loan agreement contrary to the basis on which the proceedings before the Court under Section 9 were predicated and contrary to the pleadings

before the Arbitrator. The impugned award thus suffers from patent illegality.

60. The impugned Award is clearly contrary to Section 28(3) of the Arbitration and Conciliation Act, 1996. While passing an Award, the Arbitral Tribunal in all cases has to take into account of the terms of the contract and the trade usage applicable to the transactions. There is no evidence to suggest that in the Film Industry it is the trade practice and usage to sign such unregistered agreements as a partnership arrangement and were indeed it was intended to treat the relationship between the petitioner and the respondent as that of a lenderer and borrower.

61. The reliance placed on the decision of the Hon'ble Supreme Court in **Ramanlal Motilal Vs. Ghanchi Chimanlal Keshavlal**, 1993 Supp (1) SCC 295, dealing with the dispute between the parties under a mortgage deed has been wrongly relied to the facts of the case. Thus, there is a patent illegality.

62. Once an arrangement between the parties are reduced in writing, there is no scope for altering the terms of the contract. Unless

there was a novation of the agreement between the parties under Section 62 of the Contracts Act, 1872. Thus, the award alters the contract between the parties and is therefore liable to be set aside as per the terms of the decision of the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)**, (2019) 15 SCC 131.

63. In **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)**, (2019) 15 SCC 131, the Hon'ble Supreme Court held as far as patent illegality and fundamental policy as follows:-

> *"26.While referring to the 246th Report of the Law Commission of India, the Supreme Court observed that under the formulation of the Commission, an award can be set aside on public policy grounds only if it is opposed to the 'fundamental policy of Indian law' or it is in conflict with the 'most basic notions of morality or justice'.*
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> *30.The Supreme Court referred to para 40 of ONGC v. Western Geco International Ltd., (2014) 9 SCC 263: (2014) 5 SCC (Civ) 12 which is reproduced below:*
> *"It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the*

> *context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."*
>
> *37."Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within 'the fundamental policy of Indian law', namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality."*

64. That apart, a reading of provisions of the Partnership Act, 1932 indicates that as per the definition in Section 4 of the Partnership Act, 1932, there has to be an agreement to share the profit and loss and there is a mutual agency.

65. Once the arrangement is reduced in writing and such arrangement satisfies the definition Partnership, partner and firm in Section 4 of the Partnership Act, 1932, there is hardly any scope for

invoking Section 6 of the Indian Partnership Act, 1932 for determining whether a group of persons is or is not a firm and whether a person is or is not a partner of the firm.

66. This issue has been decided by the Hon'ble Supreme Court in **K.D.Kamath & Co.** Vs. **C.I.T., Bangalore** in (1971) 2 SCC 873. There, the High Court had earlier held that the management as well as the control of business was entirely left in the hands of the first partner and that the other partners were on to serve under his directions and further they had no authority to accept any business except with the consent of the first partner nor could they raise any loan or pledge the firm's interest. On this reasoning the High Court came to the conclusion that there was no relationship of partners created under the partnership deed and as the essential element of agency was lacking and therefore the appellant was not eligible to be granted registration under Section 26A of the Indian Partnership Act, 1932.

67. In appeal before the Hon'ble Supreme Court, the Hon'ble Supreme Court held as follows:-

"The mere nomenclature given to a document is by itself not sufficient to hold that the document in question is one of partnership.

Two essential conditions to be satisfied are

(1)that there should be an agreement to share profits as well as. the losses of the business and

(2) the business must he carried on by all or any of them acting for all within the meaning of the definition of partnership under Section 4 of the partnership Act."

68. The Hon'ble Supreme Court held that the fact that the exclusive power to control by agreement of the parties is vested in one partner or the further circumstance that only one partner can operate the bank account or borrow on behalf of the firm are not destructive of the theory of partnership provided the two essential conditions mentioned earlier are satisfied. The Arbitral Tribunal there should have examined whether under the Partnership Deed dated 10.11.2016 the above two conditions were not satisfied.

68. That apart, Section 59 of the Indian Evidence Act, 1872 provides that all facts except the contents of documents or electronic records may be proved by oral evidence. There is no scope for re-writing

the contract by tendering secondary evidence contrary to the agreement between the parties reduced in writing. The Arbitral Tribunal ought to have examined the issue from the prism of the well settled principles of law particularly in **K.D.Kamath & Co.** Vs. **C.I.T., Bangalore** in (1971) 2 SCC 873 and decided the issue as to whether there was any scope for drawing the inference with the arrangement between the parties under the partnership agreement dated 10.11.2016 was indeed that of a partnership arrangement or that of a lenderer borrower.

70. In view of the above discussions, I am of the view that the Award not only suffers from patent illegality, but also is in conflict with the public policy of India as in contravention of fundamental policy of Indian Law as in Explanation 2 to Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

71. Under these circumstances, the Impugned Award is set aside leaving the parties to approach the Arbitral Tribunal to pass a fresh Award taking note of the specific clauses in the partnership agreement dated 10.11.2016 in the light of the decision of the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited**

Vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131.

72. In the result, this Original Petition stands allowed. Consequently, the connected Application is closed. No costs.

25.03.2024

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Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No

C.SARAVANAN, J.

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Arb.O.P.(Com.Div.)No.263 of 2023
and Application No.3006 of 2023

25.03.2024