



WEB COPY



O.S.A.No.32 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.04.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

O.S.A.No.32 of 2023

&

C.M.P.Nos.2420 and 2424 of 2023

in O.S.A.No.32 of 2023

Mrs.Prasanna

... Appellant

Vs.

1.Mr.Inderchand Jain

No.33, NSC Bose Road

Sowcarpet

Chennai – 600 079

2. Mr.Kumarichelvan Bosco

Advocate / Arbitrator

No.294, New Chambers

High Court

Chennai – 600 104

.. Respondents

[Second respondent deleted vide this order]

Original Side Appeal filed under Order XXXIV Rule 1 of Original Side Rules read with Clause 15 of Letters Patent to set aside the order and decretal order dated 13.06.2019 passed by this Court in O.P.No.385 of 2015.

For Appellant : Mr.P.Sesubalan Raja

For Respondents : Mr.G.Rajkumar



WEB COPY



O.S.A.No.32 of 2023

JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned 'Original Side Appeal' ['OSA' for the sake of brevity] is an intra-court appeal and the same is directed against an order dated 13.06.2019 made in O.P.No.385 of 2015 by a Hon'ble single Judge of this Court. This '13.06.2019 order' shall be referred to as 'impugned order' for the sake of convenience.

2. Short facts are that a loan agreement dated 01.08.2010 is the nucleus of a transaction between one Mr.Inderchand Jain and Ms. Prasanna{to be noted, execution of this agreement is disputed by Ms.Prasanna, who is the appellant before us and shall therefore be referred to as 'appellant' henceforth}; that Mr.Inderchand Jain is first respondent before us and therefore, he shall be referred to as 'R1'; that Clause 4 of this 01.08.2010 loan agreement is an arbitration clause and the same reads as:

'4. In case, if any dispute arises, the same shall be governed as following:

a. All the disputes, differences and / or claims arising out of this agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance



WEB COPY



O.S.A.No.32 of 2023

with the provision of the arbitration and conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Financier. The Award given by such an arbitrator shall be final and binding on all the parties to this agreement.

b. In the event of such an arbitrator to whom the matter has been referred, becoming unable to act as an arbitrator for any reasons including refusal and / or resignation or becoming incapacitated due to health problem both mental and physical or does not pass the award within a reasonable period, the financier, shall appoint a new person to act as Arbitrator. Such person shall be entitled to proceed with the reference from the stage of which it was left by his/her predecessor.

c. The venue of the arbitral proceedings will be at Chennai and the language for the arbitration proceedings shall be English. This agreement shall be constructed in accordance with the laws of India. Any or all disputes arising out of this agreement shall be subject to the exclusive jurisdiction of the Courts at Madras / Chennai.';

that, therefore, the arbitration agreement between the parties being 'arbitration agreement' within the



WEB COPY



O.S.A.No.32 of 2023

meaning of Section 2(1)(b) read with Section 7 of A and C Act is in the form of a covenant in a agreement; that this '01.08.2010 loan agreement' shall be referred to as 'said loan agreement' for the sake of convenience and clarity; that it is the case of R1 that the appellant borrowed a sum of Rs.20 lakhs under said loan agreement and executed a promissory note of even date dated 01.08.2010; that according to appellant, there was a default; that therefore, the arbitration clause was triggered appointing the second respondent in the captioned OSA [Advocate Mr.Kumarichelvan Bosco] as sole Arbitrator; that sole Arbitrator entered upon reference; that sole Arbitrator sent notice to the appellant [appellant was the lone respondent before Arbitrator, who constituted the 'Arbitral Tribunal' i.e., 'AT' for the sake of brevity]; that ultimately an arbitral award dated 17.05.2013 came to be made by AT; that a perusal of the award made by AT i.e., award dated 17.05.2013, which shall be referred to as 'said award' for the sake of convenience, brings to light that the



WEB COPY



O.S.A.No.32 of 2023

appellant Ms.Prasanna was represented by an Advocate, who filed vakalatnama before AT on 15.12.2012; that claim petition was served on the respondent on 19.01.2013 but thereafter the respondent was not represented by any one; that therefore AT took Section 25 (b) route of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] and made the said award; that assailing said award, aforementioned O.P.No.385 of 2015 was filed by the appellant; that vide paragraph 13 of the petition, it has been specifically contended by the appellant that after her counsel filed vakalatnama, he sought for copies of documents and but copies were never furnished; that there is a specific averment in paragraph 13 before Section 34 Court that on multiple hearings thereafter on 15.12.2012, 19.01.2013, 02.02.2013 and 16.03.2013, counsel for appellant [respondent before AT] requested to circulate copies but the request went in vain; that it was pointed out



WEB COPY



O.S.A.No.32 of 2023

that the said loan agreement itself has been disputed; that in an attempt to furnish proof that the appellant was unable to present her case owing to this, that therefore the appellant would fall within Section 34(2)(a)(iii) of A and C Act; that notices dated 08.08.2012 and 28.11.2012 together with reply and acknowledgment cards were filed before Section 34 Court; that Section 34 Court had proceeded on the basis that no counter has been filed by the appellant though she had entered appearance through a counsel; that on this basis, this ground was negatived by Section 34 Court; that other grounds pertaining to patent illegality and public policy were also negatived by Section 34 Court in and vide the impugned order.

3. This Court having set out the factual matrix in a nut shell and the trajectory the matter has taken thus far, heard Mr.P.Seshubalan Raja, learned counsel for appellant and Mr.G.Rajkumar, learned counsel for R1. In other words captioned OSA No.32 of 2023 was heard out.

4. Before proceeding further, applying *Vinay Heavy Equipments* principle [*Zonal General Manager, Ircon International*



Limited Vs. Vinay Heavy Equipments reported in (2015) 13 SCC 680],

the second respondent i.e., sole Arbitrator who constituted the AT is deleted from the array of parties.

5. The above means that the appellant as well as R1, who now becomes the sole respondent, were heard out.

6. After hearing both sides, this Court comes to the conclusion that the impugned order as well as the said award deserve to be interfered with on Section 34(2)(a)(iii) ground. The reasons are set out infra. To be noted, while setting out the reasons, we shall set out the points, discussion on the same and the dispositive reasoning for each point. This adumbration is as follows;

(i) It is made clear that we are interfering only under Section 34(2)(a)(iii) point but that also means that the entire impugned order and entire award have to be set aside and going by paragraph 52 of *McDermott* case law {**McDermott International Inc. Vs. Burn Standard Co. Ltd. and others** reported in (2006) 11 SCC 181}, the sequitur would be re-arbitration about which there will be discussion infra. This is mentioned to make it clear that the other aspects of the order under Section 34 Court i.e.,



WEB COPY

aspects other than Section 34(2)(a)(iii) point are not being dealt with in this order as that will be an exercise of no avail owing to re-arbitration;

(ii) As regards Section 34(2)(a) of A and C Act, the expression '*establishes on the basis of the record of the arbitral tribunal that*' kicked in only on and from 30.08.2019 when *inter alia* Section 7 of the second amending Act, namely Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019) kicked in. Prior to 30.08.2019, this expression '*establishes on the basis of the record of the arbitral tribunal that*' read as '*furnishes proof that*' and therefore it is imperative that the aforementioned paragraph 13 ground requires to be gone into;

(iii) There is no dispute that a counsel has represented the appellant before learned AT. There can also be no dispute that prior to the commencement of arbitration (commencement within the meaning of Section 21 of A and C Act) vide exchange of notices, the appellant has disputed the very execution of said loan



WEB COPY

agreement but R1 has sent a reply to the same and therefore there is contestation and counter contestation on the same. Therefore paragraph 13 of Section 34 petition saying that copies were sought for but were not given gain significance;

(iv) As a sequitur to the preceding ground, as said award is dated 17.05.2013 and as the impugned order is dated 13.06.2019 (both prior to 30.08.2019), as regards Section 34 (2)(a) ground, we have to go by the expression '*furnishes proof that*' and not by the expression '*establishes on the basis of the record of the arbitral tribunal that*'. This means that requisitioning records of AT will not arise in the case on hand;

(v) AT itself has recorded that the appellant entered appearance through a counsel and also made a representation on a subsequent listing but did not file counter and on this basis, AT has taken Section 25(b) route;

(vi) At this distant point of time, as it is recorded in the said award itself that the counsel for



WEB COPY

appellant filed vakalatnama on 15.12.2012 and there was another hearing on 19.01.2013 when the counsel was before AT, *prima facie* proof of counsel for appellant before AT has been made out. Therefore, the further averment or ground before Section 34 Court that on multiple occasions i.e., on 15.12.2012, 19.01.2013, 02.02.2013 and 16.03.2013, the counsel requested to circulate copies but the same was not done cannot be given a complete go by but as already alluded to supra, we are not resorting to the records of the AT as the matter on hand is governed by prior to 30.08.2019 scenario qua legal landscape.

7. As we are interfering with the impugned order and the said award, as already alluded to supra, the sequitur would be re-arbitration vide paragraph 52 of **McDermott** case, which reads as follows:

'52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be



WEB COPY



O.S.A.No.32 of 2023

justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.'

8. Therefore, we are of the view that it would be appropriate to send the matter for re-arbitration so that Section 34(2)(a)(iii) ground is washed out for sure without any contestation or disputation.

9. At this juncture, on the choice of Arbitrator for re-arbitration, both learned counsel fairly consented for Mr.Amalaraj.S.Penikilapatti, Advocate, having office at No.27-R, III Floor, Pandu Klix Plaza, Door No.330, Old No.168, Thambu Chetty Street, Chennai-600 001 [Mob:98402 02279] to be Arbitrator. Learned sole Arbitrator is requested to enter upon reference qua said loan agreement, adjudicate upon arbitrable disputes that have arisen from the said loan agreement and render an Arbitral Award by holding sittings in the 'Madras High Court Arbitration Centre under the aegis of this Court' (MHCAC) as per Madras High Court Arbitration Proceedings Rules 2017 and fee of Hon'ble sole Arbitrator shall be in accordance with the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.



O.S.A.No.32 of 2023

10. We make it clear that it is open to the Arbitrator to actuate the process of settlement by resorting to Section 30 of A and C Act, though re-arbitration is by way of order of Court. In other words, learned Arbitrator will not be denuded of his powers under Section 30 of A and C Act to accelerate possible settlement i.e., learned Arbitrator will not be denuded of his powers to encourage settlement.

11. Though Fast Track arbitration under Section 29B is an option, we are not resorting to the same as the execution of the document i.e., said loan agreement [loan agreement dated 01.08.2010] itself is subjected to disputation, which means it may be necessary to let in oral evidence.

12. As we are not resorting to fast track arbitration, the usual time frame for the Arbitrator under the A and C Act now in vogue will operate and we request the learned Arbitrator to conclude the arbitration as expeditiously as possible. In this regard, Mr.P.Seshubalan Raja for the appellant and Mr.G.Rajkumar for R1 submit that they will extend every cooperation to the learned Arbitrator for such expeditious disposal.

13. Though obvious we make it clear that learned Arbitrator shall conduct the *de novo* re-arbitration untrammelled by / uninfluenced by any observation made by Hon'ble single Judge in order dated



O.S.A.No.32 of 2023

13.06.2019 in O.P.No.385 of 2015 (impugned order) as well as observations made by this Court in this order (obviously with the exception of re-arbitration and appointment of Arbitrator).

14. We drop the curtains on the captioned matter hoping that this may well be a case which falls within sub-section (2) of Section 29A for expeditious disposal if not for additional fee.

Captioned OSA disposed of in the aforesaid manner. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

(M.S.J.) (K.G.T.J.)
02.04.2024

Index: Yes/No
Neutral Citation: Yes/No
gpa



WEB COPY



O.S.A.No.32 of 2023

**M.SUNDAR.J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,
gpa**

O.S.A.No.32 of 2023

02.04.2024