IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.01.2024

PRONOUNCED ON : 29.04.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.190 of 2021
and
A.Nos.217 & 3764 of 2021, 4967 & 2240 of 2022
and
E.P.SR.No.6411 of 2021

M/s.Nviz Entertainment (OPC) Pvt. Ltd.,
Rep. by its Director,
Mrs.Anita Udeep,
Nos.5 & 7, 6th Cross Street,
Besant Nagar, Chennai – 600 090. ... Petitioner

vs.

V.Shree Natraj ... Respondent

Prayer: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award in Arbitration, dated 28.10.2019, passed by the Sole Arbitrator herein in respect of Arbitration Proceedings between the petitioner and the respondents with cost.

For Petitioner : Mr.Madan Babu
for Mr.Kumarpal R.Chopra

For Respondent : Mr.K.V.Babu

<u>O R D E R</u>

By this common order, the above mentioned petition and applications are being disposed of.

2. Arb.O.P.No.190 of 2021 has been filed by the award debtor under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award passed by the learned Arbitrator on 28.10.2019.

3. Application No.3764 of 2021 has been filed in Arb.O.P.No.190 of 2021 to stay the operation of the impugned award.

4. E.P.SR.No.6411 of 2021 has been field by the claimant - Award Holder to enforce the above said Award against the Award Debtor (the petitioner in Arb.O.P.(Com.Div) No.190 of 2021).

5. Application No.217 of 2021 has been filed by the Award Holder / the Claimant to direct the Respondent - Award Debtor [the petitioner in Arb.O.P.No.190 of 2021] to file an affidavit stating the particulars of all the encumbrance free assets, both movable and immovable, including Bank Accounts held in the name of the Respondent - Award Debtor as provided under Order XXI Rule 41(2) of C.P.C. and in case of disobedience of the order by the Respondent - Award Debtor, this Court may be pleased to pass necessary orders as provided under Order XXI Rule 41(3) of C.P.C. *inter alia* detaining the Respondent - Award Debtor in the civil prison. The said application was also allowed on 13.08.2021 by the learned Master.

6. Since the Respondent - Award Debtor failed to comply with the above said order dated 13.08.2021 of the learned Master in Application No.217 of 2021, the Award Holder [the petitioner in E.P.SR.No.6411 of 2021 / respondent in Arb.O.P.No.190 of 2021] filed Application No.2240 of 2022 to implead the Director of the Award Debtor. Application No.2240 of 2022 came to be allowed on 08.07.2022.

7. Under these circumstances, the Respondent - Award Debtor has filed Application No.4967 of 2022 to set aside the order passed on 08.07.2022 in Application No.2240 of 2022, impleading the Director of the Respondent - Award Debtor as the second respondent in E.P.SR.No.6411 of 2021.

8. For the sake of uniformity and clarity, the parties shall be referred to as 'the Award Debtor' and 'the Award Holder' as before the Arbitral Tribunal, since there are several applications and petitions and the ranking of the parties differ in the petition and applications filed by them. Details of the parties are detailed as under:-

Rank	Arb.O.P. No.190/2021	A.No. 3764/2021 in Arb.O.P. No.190/2021	E.P.SR. No.6411/2021	Applications in E.P.SR.No.6411/2011		
				A.No. 217/2021	A.No. 2240/2022	A.No. 4967/2022
Award Debtor	Petitioner	Applicant	Respondent	Respondent	Respondent	Applicant
Award Holder	Respondent	Respondent	Applicant	Applicant	Applicant	Respondent

9. The Award Debtor (the petitioner in Arb.O.P.No.190 of 2021) is the producer of a Tamil film called 'RRITA', which was later re-named as '90ML'. In connection with the production of the above said film, the Award Debtor (the Producer) had engaged the services of the Award Holder/claimant [the petitioner in E.P.SR.No.6411 of 2021] under Ex.C.1 Agreement, dated 11.12.2017 as an Executive Producer.

10. Under the Agreement, the Award Holder was entitled to a sum of Rs.15,00,000/- as remuneration payable in various stages and a further 10% from the sale of rights of the film and production namely, RRITA, which was later re-named as 90ML.

11. It appears that after Ex.C1 Agreement dated 11.12.2017 was signed, services of the Award Holder (the claimant) was retained up to a particular point of time by the Award Debtor (the Producer). On 07.03.2018, the Award Debtor (the Producer) asked the Award Holder (the claimant) not to report to the set pending further instructions from the Award Debtor's Director Mrs.Anitha Udeep.

12. The undisputed fact is that, the movie was later released after certification by the Central Board of Film Certification on 04.02.2019. Under these circumstances, the Award Holder (the claimant) had escalated the issue before this Court by filing applications under Section 9 of the Arbitration and Conciliation Act, 1996, in A.Nos.570, 571 and 4372 of 2018].

13. The Award Debtor (the Producer) was directed to deposit Rs.8,00,000/- besides 10% of the sale of the film rights, vide common order dated 11.09.2018. The Award records that the Award Debtor (the Producer) had also complied with the order insofar as Rs.8,00,000/- pending further Arbitral Proceedings. As regards the deposit of 10% from the sale of the film rights, the Award Holder (the claimant), thus, approached the Arbitral Tribunal as per arbitration clause prescribed in the above said agreement dated 11.12.2017.

14. Before the Arbitral Tribunal, the Award Holder [the respondent in Arb.O.P.No.190 of 2021 / the petitioner in E.P.No.6411 of 2021] had

marked Exs.C1 to C11, which included the agreement, bank statements, correspondence and exchange between the parties and affidavits filed under Section 65-B of the Indian Evidence Act, 1872. List of exhibits marked on the side of the Award Holder (the Claimant) are detailed below:-

Sl. No.	Ex.Nos.	Date	Parties and Particulars
1	C1	11.12.2017	Agreement
2	C2	2017-2018	Bank Statements of the Award Holder
3	C3	07.03.2018	Correspondence between the Award Holder and the Award Debtor
4	C4	18.05.2018	E-Mail issued by the Award Holder
5	C5	11.09.2018	Order passed by this Court in A.No.4372/2018 in O.A.Nos.570 & 571 / 2018
6	C6	-	Correspondence between the Award Holder and the Technicians / Award Debtor
7	C7	11.12.2017	E-Mail Correspondence between the Award Holder and the Award Debtor
8	C8	29.12.2017	E-Mail Correspondence between the Award Holder and the Award Debtor
9	C9	18.04.2018	Articles published in Times Now
10	C10	14.12.2018	Acknowledgement of compliance by the Award Debtor
11	C11	16.01.2019	65-B Affidavit of the Award Holder

15. On behalf of the Award Debtor, Ex.R1 to R22 were marked. On behalf of the Award Holder-claimant, there was no oral evidence. On behalf of the Award Debtor, Mrs.Anita Udeep, the Managing Director who was impleaded in the execution proceedings vide order dated 08.07.2022 in Application No.2240 of 2022 was examined. List of Exhibits marked on the side of the Award Debtor (the respondent) are detailed below:-

Sl. No.	Ex.Nos.	Date	Parties and Particulars
1	R1	-	Award Debtor's experience and creditability found on Google, Wikipedia and in internet Move Data Base
2	R2	-	Google Page of STR
3	R3	24.09.2017	The Face Book invitation posted by the Award Debtor
4	R4	26.09.2017	WhatsApp message sent by the Award Holder to Udeep showing his anxiety to work
5	R5	11.12.2017 at 12.50 p.m.	E-Mail along with pre-filled agreement draft sent by the Award Holder and subsequently signed by the Award Debtor in the evening
6	R6	11.12.2017	The copy of the Agreement
7	R7	18.01.2018	Oviya's post while shooting the other film
8	R8	-	Cameraman / Technician working for a Malayalam Film
9	R9	21.12.2017 at 17.25 p.m.	WhatsApp conversation between the Award Holder and Udeep

10	R10	31.08.2018	Letter from the production, music lyricist evidencing that the Award Debtor handled the production and music, songs
11	R11	18.01.2018 at 12.55 p.m.	WhatsApp Group chat between the Award Holder, the Award Debtor and Mr.Udeep
12	R12	23.02.2018 at 11.11 p.m.	WhatsApp conversation between the Award Holder and the Award Debtor
13	R13	28.12.2017 at 2.01 p.m.	E-Mail conversation evidencing the Award Holder's promise to bring in the "In film branding"
14	R14	09.03.2018 at 15.18 p.m.	WhatsApp conversation between the Award Holder and Udeep
15	R15	24.04.2018 at 16.45 p.m.	Acknowledgement given by the Award Holder to the Termination Letter, dated 01.04.2018
16	R16	-	As per the Bank statement and TDS Certificate filed by the Award Holder
17	R17	01.04.2017 to 31.03.2018	The Ledger Account of the Award Holder
18	R18	-	Call sheets
19	R19	04.02.2019	Censor Certificate
20	R20	-	Affidavit under Section 65(B) of Indian Evidence Act filed by Anita
21	R21	-	Affidavit under Section 65(B) of Indian Evidence Act filed by Udeep
22	R22	11.04.2018	Copy of the letter sent by the Award Debtor to the Award Holder

16. The dispute before the Arbitral Tribunal was whether the Award Holder or the Award Debtor were guilty of breach of terms and conditions of Ex.C1 Agreement dated 11.12.2017 and whether the Award Holder was entitled to receive the balance consideration of Rs.8,00,000/- as the Award Debtor had paid a sum of Rs.7,00,000/- on various dates and whether the Award Holder was entitled to receive a further sum of Rs.95,00,000/-, being 10% from the sale of rights under Ex.C1 Agreement, dated 11.12.2017.

17. The Arbitral Tribunal had framed the following 9 issues after considering the pleadings of the parties.:-

"ISSUE No.1: Whether the Claimant had performed his part of the contract under the agreement dated 11/12/2017?

ISSUE No.2: Whether the Respondent had committed breach of the agreement dated 11/12/2017?

ISSUE No.3: Whether the Claimant is entitled to recover the balance sum of Rs.8 lakhs out of the total consideration of Rs.15 lakhs together with GST at 18% as per clause 2 of the agreement dated 11/12/2017?

ISSUE No.4: Whether the Claimant is entitled to an award of the sum of Rs.95 lakhs against the Respondent *as 10% share of the sale of the rights in the film "RRITA" as per clause 2 of the agreement dated 11/12/2017?*

ISSUE No.5: Whether the Claimant is entitled to a sum of Rs.10 lakhs as unliquidated damages from the Respondent?

ISSUE No.6: Whether the Respondent had terminated the agreement dated 11/12/2017 in terms of clause 3 of the agreement?

ISSUE No.7: Whether the Claimant had committed breach of the agreement dated 11/12/2017?

ISSUE No.8: Whether the Respondent is entitled to recover liquidated damages against the Claimant?

ISSUE No.9: To what other reliefs?"

18. The Arbitral Tribunal has concluded that the Award Holder had performed his obligation under Ex.C1 Agreement dated 11.12.2017 and has therefore, answered Issue Nos.1 and 7 in favour of the Award Holder. The Arbitral Tribunal has thus held that the Award Holder was entitled to receive the balance consideration of Rs.8,00,000/-.

19. As far as Issue No.4 is concerned, the Arbitral Tribunal has held the records reveal that the Award Debtor had spent approximately Rs.6.5

Crores and thus, the Award Debtor must have naturally sold the rights in the film far and above the said figure of Rs.6.5 Crores and therefore, has ordered a sum of Rs.65,00,000/-, being 10% of the above said amount to be paid to the Award Holder. The Arbitral Tribunal while awarding the above said amount of Rs.65,00,000/- while answering Issue No.4, has drawn an adverse inference against the Award Debtor (the producer) on account of the failure to produce the relevant documents. Hence, has awarded the above said sum to the Award Holder.

20. The Arbitral Tribunal has rejected the counter claim of the Award Debtor (the Producer) for liquidated damages of Rs.10.07 Lakhs, being the amount paid to the Award Holder and the amounts borne in excess in connection with the work allotted to the Award Holder by the Award Debtor.

21. While answering Issue No.8, the Arbitral Tribunal has also rejected the counter claim for a sum of Rs.33.7 Lakhs of the Award Debtor (the Producer). The operative portion of the Award reads as under:-

"ISSUE No.8:-

The Respondent had not produced any document to prove the alleged damages suffered by them. R.W. I had also not spoken anything about the same. Hence, the same is rejected.*

11. *The Respondent had sought for recovery of a sum of Rs.10.07 lacs from the Claimant. At the time of framing of the issues the same had been left out even in the draft issues submitted by the Counsel for the Respondent. However, this Tribunal feels it necessary to record its findings on the Claims submitted by the Respondent. In view of the findings recorded in Issues 1, 2, 6 and 7, the Claim for Rs.10.07 is rejected. Out of this sum of Rs.10.07 lacs, only the sum of Rs.7 lacs had been paid to the Claimant and the same had been admitted by him. As regard Rs.2.37 lacs, the Respondent places reliance on a ledger extract under Ex.R17 to prove the Claim. A perusal of the same shows that the said payments are not supported by vouchers. Hence, this claim is also rejected.*
12. *The Respondent wanted the Claimant to refund the sum of Rs.33.7 lacs said to have been received by the Claimant for payment to the Music Director. But a perusal of Ex.R9 and R12 would show that the Respondent had paid the amounts directly to the music director. Moreover, in the defence statement in para 5.16 it is admitted that the money was transferred to the music director as per the instructions of the Claimant. Thus, the Claimant was not in receipt of any sum payable to the Music Director. Though the Claimant had admitted that he had received a sum of Rs.20 lacs*

in the beginning for payment to the music Director, it is not the case of the Respondent that the said sum was not paid to the music director. After the exit of the Claimant on 7/3/2018, the Respondent had continued with the same music director and their budget allocation was Rs.60 lacs as admitted by R.W.1 in answer to Q.No. 21. The Respondent had not produced any evidence to show that the said budget had exceeded and that they were forced to pay the music director all over again. Hence, the claim of the Respondent that the Claimant was holding a sum Rs.33.7 lacs payable to the music director is rejected.

13. The Respondent had come to this Tribunal with falsity is proved by the fact that in the defence statement it is alleged that the Claimant had without the authority of the Respondent had proceeded to release the first song "Marana Matta". But in Ex.R11 the message shows that the grievance was that R.W.I was not made part of the release but the song was released as a single. In regard to this R.W.1 in answer to Q.No. 108 and 110 admitted that the song was released by the music director who had the copyright for the songs proving her own statement earlier as wrong. The delay on the part of the music director to deliver the songs on time had been placed on the Claimant and pleaded as the cause for delay of the project. There is no explanation from the Respondent as to why they could not complete the film in one month from March 2018 and get all the remaining songs released. Admittedly, the Respondent had entered into an agreement with the music director and paid advance as per the answer of R.W.1 to Q.no.40. The production of the *agreement would have revealed as to the time limit agreed between them for the delivery of the four songs. No steps had been taken by the Respondent against the music director for the delay but the Claimant had been sent out of the project. Surprisingly, the music director was also not changed. This proves that the Respondent had not stated true facts before this Tribunal.*

14. The very fact that the Respondent had not raised any issues till the Claimant invoked proceedings in arbitration proves the fact that the Claimant had performed his part of the Contract. It is the Respondent who had decided to keep the Claimant away to avoid the payment of his 10% share in the sale rights.

15. Though the Respondent had made a huge counter claim for Rs.2,43,24,848/- as the loss for the project, they did not pursue it during the proceedings. In fact, even in the draft issues filed by the Counsel for the Respondent it had been omitted. R.W.I had not produced any document in support of this Claim. Neither in their written submissions the Respondent had pressed for this claim. This attitude of the Respondent needs to be condemned. Because there is no payment of court fees like a civil court, the filing of exaggerated claims before the Tribunal and not pursuing it during the proceedings is not appropriate. The parties should have realistic reliefs and have more transparency in arbitration proceedings. The very purpose of arbitration itself is to have an exclusive hearing shorn of all rigours of procedures followed by the civil courts, including Evidence Act. Arbitrators can follow their own *procedure. This was intended to decide the actual dispute between the parties without being bound by technicalities. Filing such huge Counter Claim appears to be a veiled threat to the Claimant for initiating proceedings in Arbitration. Since the Arbitrator's Fees are fixed based on the Claim and Counter Claim, such fanciful claims would only result in higher cost of Arbitral Proceedings, which is not a healthy approach. Hence, this Tribunal decides that the Respondent should bear the costs of this Arbitral Proceedings.*

16. After the conclusion of the Arbitral Proceedings, the Counsel for the Claimant had filed a Letter dated 15-10-2019, received by this Tribunal on 16-10-2019, intimating the change of address of the Claimant. The same is taken on record. The changed address for communication to the Claimant is "Old No.22, New No.40, 1st Cross Street, Trustpuram, Kodambakkam, Chennai-600 024".

(* the petitioner in Arb.O.P.(Com.Div)No.190 of 2021)

22. It is, in this background, the Award Debtor (the producer) has challenged the impugned Award dated 28.10.2019, passed by the Arbitral Tribunal.

23. During the course of hearing before this Court, the Award Debtor (the Producer) has now filed a copy of an Assignment Agreement dated 06.02.2019 which was signed with one R.Ravindran, assigning the rights in the film 90ML, for a sum of Rs.1 Crore which is to be paid before the release of the film. This was not marked before the Arbitral Tribunal though it was produced before the Arbitral Tribunal. On the other hand, before the Arbitral Tribunal, the Award Holder (the claimant) had stated that the Award Debtor (the Producer) had assigned the right to Flamingo Entertainment. However, the copy of the agreement was not marked before the Arbitral Tribunal by the Award Holder (the claimant).

24. In support of the Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the learned counsel for the petitioner – Award Debtor (the Producer) submitted that the impugned award passed by the learned Arbitrator suffers from patent illegality and it is therefore liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

25. The learned counsel for the Award Debtor (the Producer) further submitted that the Arbitral Tribunal has ignored vital evidence produced before it and thus, had committed a grave error in awarding the above said amount in favour of the Award Holder and therefore, the impugned award is liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

26. According to the learned counsel for the Award Debtor (the Producer), the admitted and indisputable facts of the case, *inter-alia* salient for adjudication of the present application under Section 34 of the Arbitration and Conciliation Act, 1996, are as under:-

> (a) No evidence whatsoever has been adduced by the claimant in support of his case.
> (b) The issue whether the agreement dated 16/11/2017 entered into between the parties was a "Contract for Service" or "Contract of Service" raised and argued by the respondent specifically not considered.
> (c) The Claimant had not rendered all the services as required under the agreement dated 16/11/2017.
> (d) The agreement dated 06/02/2019 entered into between the Respondent assigning all right except Tamil Theatrical rights in the Cinematograph film "90 ml" for a sum of Rs.1 Crore was produced before the Arbitral Tribunal.

(e) The award in favour of the Claimant is passed:-

(i) Ignoring the Agreement dated 06/02/2019 produced and the consideration of Rs.1 Crore mentioned therein.

(ii) On assumption and presumption and surmises and without any proof.

(iii) The order passed by the Arbitrator exceeded the arbitration value and the amount claimed.

27. The learned counsel for the Award Debtor (the Producer) further submitted that the view of the Arbitral Tribunal is not even a possible view and thus the impugned award was opposed to the fundamental policy of India. It is submitted that the Award Holder (the claimant) has not adduced any evidence and that the Arbitral Tribunal has refused to decide the issue as to whether the contract was one "<u>for service</u>" or "<u>of service</u>".

28. The learned counsel for the Award Debtor (the Producer) further submitted that the Arbitral Tribunal ought to have taken note, but however failed / consciously ignored to take note that the terms of Ex.C1 Agreement dated 11.12.2017, which specifically recorded that the Award Holder was

engaged as an "Executive Producer" and that his service was being engaged under Ex.C1 Agreement, dated 11.12.2017, for "handling the production of the entire film, which included the Music/Editing/Art/Unit/Artist and was responsible to do business such as sale of Satellite/Digital/FMS/Dubbing and other Remake rights" and arrived at the indisputable conclusion that the Award Holder (the claimant) was contracted for services to do the described activities and was contracted to render such services which the Award Debtor (the claimant) may deem fit and proper.

29. The learned counsel for the Award Debtor (the Producer) further submitted that the Arbitral Tribunal ought not to have awarded any sum, much less the share of 10% of the alleged sale proceeds, when admittedly the claimant rendered no service or assistance towards any aspect of the cinematograph film in particular towards the sale of Satellite/Digital/FMS/Dubbing and other Remake rights as specifically provided for under the agreement. It is submitted that the Award Holder (the claimant) has not produced proof protesting for any breach committed by the Award Holder.

30. It is further submitted that on discarding the express terms of Ex.C.1 Agreement, dated 11.12.2017 and drawing an adverse inference against the Award Debtor for not marking Agreement dated 06.02.2019 despite, (i) Award Debtor producing the same before the Arbitral Tribunal and not marking the same as a document only on account of confidentiality and sensitivity at the relevant point of time and (ii) despite the Arbitral Tribunal dismissing the Section 17 Application filed by the Award Holder (the claimant) on 16.02.2019. It is submitted that the assumption in the impugned Award is contrary to the actual fact as evident from the statutory balance sheet for the year 2020-2021, which clearly indicates a loss rather than a profit.

31. In support of the above said submissions, the learned counsel for the Award Debtor (the Producer) relied on the following judgments of the Hon'ble Supreme Court : -

(i) **Ssangyong Engineering Vs. National Highway Authority,** (2019) 15 SCC 131.

(ii) **PSA SICAL Terminals Pvt. Ltd. Vs. Board of Trustees**, 2021 SCC Online 508.

32. It is further submitted that even otherwise the impugned Award of the Arbitral Tribunal can be segregated into parts and each part is liable to be set aside independently. It is submitted that the impugned Award has dealt with three distinct aspects *viz., (*1) the remuneration of Rs.15 lakhs payable to the claimant under Clause 2 of the Agreement dated 11.12.2017, (2) the incentive of 10% payable to the Claimant under Clause 2 of the Agreement dated 11.12.2017, (3) interest of 18% on the amounts payable to the Claimant, (4) Counter claim of the respondent, and (5) Costs.

33. It is submitted that the impugned Award of the Arbitral Tribunal directing the payment of Rs. 65,00,000/- is (1) without deciding the nature of the contract and (ii) despite the Award Holder not discharging his services as provided under the Agreement. Rather, it is submitted that the Arbitral Tribunal has gravely erred in rewriting the contract as one being a species of lump sum contract by virtue of which the Award Debtor (the Producer) has been made liable to pay amounts even without the Award Holder (the claimant) actually discharging the obligation whether it be a "Contract for Service" or "Contract of Service".

34. It is submitted that the impugned Award tantamounts to penalising the Award Debtor (the Producer) for terminating the services of the Award Holder (the claimant) even without adjudicating upon whether the Award Debtor (the Producer) was justified in terminating the services of the claimant.

35. It is further submitted that the impugned Award of the Arbitral Tribunal directing the payment of Rs.65,00,000/- is wholly baseless and speculative, and based on assumptions, presumptions and surmises and ought to be necessarily set aside.

36. It is further submitted that the impugned Award has further directed payment of interest @ 18% p.a., which was neither provided for contractually nor any plausible reasoning given whatsoever. It is further submitted that In the absence of any contract between the parties for interest, and since the sum claimed by the Award Holder (the claimant) was not a debt payable by the Award Holder (the Producer), no interest

whatsoever could have been awarded by the Arbitral Tribunal and definitely not at the incomprehensible and exorbitant rate of 18% p.a. which is usurious in nature.

37. It is further submitted that the impugned Award of the Arbitral Tribunal rejecting the counter claim wholly is erroneous. The Arbitral Tribunal ought to have decided the nature of Contract between the parties, which was a *sine qua non* for determining the rights and obligations of parties, and accordingly should have directed the Award Holder (the claimant) to refund the sum of Rs.7,00,000/- received by him under the Agreement.

38. It is further submitted that the impugned Award of the Arbitral Tribunal erred in having directed the Award Debtor to bear the entire cost was wholly unjustified and arbitrary. It is submitted that the Arbitral Tribunal also failed to take note that the initiation of the Arbitration Proceedings by the Award Holder (the claimant) was itself an abuse of process inasmuch as the Award Holder (the claimant) did not even adduce

any evidence whatsoever. That apart, it is submitted that the Award Debtor's (the Producer's) conduct in giving up it's sizable counter claim was only with a view to find a quietus to the pending issue swiftly, save the time of the Arbitral Tribunal and to shorten the arbitration process, which has been misconstrued by the Arbitral Tribunal and the entire cost of Rs.15,00,000/- has been mulcted upon the Award Debtor (the Producer), which in the nature of penalising it.

39. It is therefore submitted that each portion of the impugned Award can be analysed separately and the impugned Award can be either wholly or in part set aside as this Court may deem fit and proper.

40. In support of the above submissions, the learned counsel for the petitioner–Award Debtor (the Producer) relied on the following judgments:-

> "i. **J.G. Engineers Private Limited Vs. Union of India and Another,** (2011) 5 SCC 758;
> ii.**Bawana Infra Development Private Limited Vs. Delhi State Industrial & Infrastructure Development Corporation Limited (DSIIDC),** 2023 SCC OnLine Del 1569;

iii. **National Highways Authority of India through its Project Director and Another Vs. Additional Commissioner and others,** 2022 SCC OnLine Bom 1688".

41. On the other hand, it is the submission of the Award Holder that the Award Debtor had breached the terms of Ex.C1 Agreement dated 16.11.2017 between the Award Holder and the Award Debtor. It is submitted that there were no written communications from the Award Debtor stating that the Award Holder failed to perform his duties. It is further submitted that the alleged default said to have been committed by the Award Holder was never raised by the Award Debtor at any point of time prior to the Arbitration proceedings and it is only for the first time before the learned Arbitrator these allegations were raised as defence.

42. It is stated that on 07.03.2018 the Sole Director of the Award Debtor sent a WhatsApp message and requested the Award Holder to stay away from the set till the shoot was over and not to interfere with the music process. It is submitted that even in the said message, the Award Debtor has

not stated that the Award Holder has committed any breach or failed to perform any of the obligations indicating in Ex.C1 Agreement, dated 16.11.2017.

43. On the other hand, the Award Debtor has thanked the Award Holder for the co-operation and therefore, the case of the Award Debtor that the Award Holder failed to perform his obligation is incorrect, as the Award Holder was asked to stay away from the project. That apart, it is submitted that there is nothing on record to show that the Award Debtor had at any point of time issued any notice in writing to the Award Holder for terminating Ex.C1 Agreement dated 16.11.2017 as per Clause 3 of Ex.C1 Agreement dated 16.11.2017.

44. It is further submitted that the Arbitral Tribunal has given a finding taking into account the terms of the Contract as well as the pleadings and evidence placed before it and thus, the impugned Award is strictly in accordance with Section 28(3) of the Arbitration and Conciliation Act, 1996. That apart, it is submitted that in any event, the view taken by the

Arbitral Tribunal is a possible view and therefore, does not warrant any interference.

45. That apart, it is submitted that the so-called delay in delivery of songs was not attributable to the Award Holder, but on account of the delay by the Music Director for which a separate Agreement was signed between the Award Debtor and the Music Director.

46. It is submitted that the copies of this Agreement were not filed and that the Award Holder was responsible to handle the production of the entire film, which includes music/editing/unit/artist and that the role of the Award Holder in the production of the film is not to produce the music, but only to handle the production of music, which would mean to follow up with the Music Director for production of the film.

47. It is submitted that the Award Holder had faithfully performed his duties as per Clause 27 of the Agreement dated 11.12.2017. It is further submitted that no dispute was raised at any point of time with the Music Director, even though the actual production and delivery of the songs was

the obligation of the Music Director and that the Contract was only with the Music Director and Ex.C1 Agreement dated 11.12.2017 was never terminated on account of the delay in delivery of songs and music.

48. It is further submitted that the view taken in Page No.17 (i) of the impugned Award was a possible view. It is further submitted that there was no valid termination of the Contract by the Award Debtor and that the Letter of Termination was issued vide Ex.R22, dated 11.04.2018, by the Award Debtor.

49. It is further submitted that as far as the rights sold to Flamingco Entertainment for Rs.1 Crore is concerned, the rights were sold during the pendency of the Arbitral Proceeding and therefore, the Award Holder [the claimant] filed an application in A.No.1 of 2019 under Section 17 of the Arbitration and Conciliation Act, 1996, to direct the Award Debtor to furnish documents along with other Applications in A.Nos.2 to 5 of 2019 and that an order came to be passed by the Arbitral Tribunal on 16.02.2019.

50. It is further submitted that the Arbitral Tribunal in A.Nos.2 to 5 of 2019 held that non-production of the documents by the Award Debtor can be decided only at the conclusion of the Arbitral Proceedings. Since the Award Debtor was complying with the orders of this Court, which has provided sufficient safeguards with regard to the rights of the Award Holder under Agreement with the Award Debtor dated 11.12.2017 and therefore, A.Nos.2 to 5 of 2019 were dismissed.

51. It is submitted that the Arbitral Tribunal has rightly fixed the sale price as Rs.6.5 Crores on the basis of the production cost and that the sale made for Rs.1 Crore under Agreement with Flamingo Entertainment was not proved by the Award Debtor and no Bank Statements were filed to substantiate the case and no evidence was produced to prove the contrary.

52. The learned counsel for the respondent has relied on the following decisions in support of the case:-

(i) **Ion Exchange India Ltd. vs. Angenpalayam Common Effluent Treatment Plant Ltd.**, MANU/TN/9915/2019

(ii) **Peepul Capital LLC vs. Vimura Investments LLP** MANU/TN/5433/2021
(iii) **Secretary, Irrigation and Power Department, Govt. of Orissa and Ors. Vs. Niranjan Swain**, MANU/SC/1325/1998
(iv) **Silor Associates SA Vs. Bharat Heavy Electrical Ltd.,** MANU/DE/1467/2014

53. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent. Scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, is very limited.

54. Court under Section 34 of the Arbitration and Conciliation Act, 1996can neither sit as a Court of appeal or re-appreciate the evidence placed before the Arbitral Tribunal or substitute the finding of the Arbitral Tribunal with its own conclusion on facts or evidence. The Honourable Supreme Court in **The Project Director, NHAI V. M. Hakim,** (2021) 9 SCC 1, has held that the power to set aside an Arbitral Award under Section 34 of the Arbitration And Conciliation Act, 1996, does not include the authority to modify the award. It further held that an award can be 'set aside' only on limited grounds as specified in Section 34 of the Act and it is not an

appellate provision. It further held that an application under Section 34 for setting aside an award does not entail any challenge on merits to an award.

55. The Honourable Supreme Court in **Ssangyong Engineering and Construction Co Ltd vs. National Highway Authority of India,** (2019) 15 SCC 131, has held that an Award can be set aside on the ground of "patent illegality" under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996, only where the illegality in the Award goes to the root of the matter. It further held that **erroneous application of law** by an Arbitral Tribunal or the reappreciation of evidence by the Court under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996, is not available.

56**.** The Court further held that the above ground is available only where the view taken by the Arbitral Tribunal is "**an impossible view**" while construing the contract between the parties or where the Award of the Arbitral Tribunal lacks any reasons. The Court further held that an Award can be set aside only if an Arbitrator/Arbitral Tribunal decide(s) the question beyond the contract or beyond the terms of reference or if the finding arrived by the Arbitral Tribunal is based on no evidence or ignoring vital evidence or is based on documents taken as evidence without notice to the parties.

57**.** The Honourable Supreme Court in **Patel Engineering Ltd vs**. **NEEPC**O, (2020) 7 SCC 167, held that patent illegality as a ground for setting aside an Award is available only if the decision of the Arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same or the construction of the contract is such that no fair or reasonable person would take or that the view of the Arbitrator is not even a possible view.

58**.** The Honourable Supreme Court in **McDermott International Inc. vs. Burn Standard Co. Ltd,** (2006) 11 SCC 181, held that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is well within the Arbitrator's jurisdiction to consider the same.

59. The Honourable Supreme Court in **Sutlej Construction Ltd. vs. UT of Chandigarh,** (2018) 1 SCC 718, held that when the Award is a reasoned one and the view taken is a plausible, re-appreciation of evidence is not allowed while dealing with the challenge to an Award under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside an Award. It further held that the proceedings challenging the Award cannot be treated as a first appellate Court against a decree passed by a trial Court.

60. This Court in **Sheladia Associates Inc. vs. TN Road Sector Project II, Represented by its Project Director,** 2019 SCC OnLine Mad 17883, reminded itself of the Hodgkinson principle which has been explained by the Honourable Supreme Court in the oft-quoted and celebrated Associate Builders Case in **Associate Builders V. Delhi Development Authority**, (2015) 3 SCC 49. It held that Hodgkinson principle in simple terms means that the Arbitral Tribunal is the best Judge with regard to quality and quantity of evidence before it. It further held that if there is no infraction of Section 28(3) of the Arbitration and Conciliation

Act, 1996, the question of challenge on the grounds of public policy does not arise.

61. There are several discrepancies, that was noticed during scrutiny of documents after the case was reserved for orders. This was not properly addressed either by the learned counsel for the petitioner or by the learned counsel for the respondent.

62. It was incumbent on the part of the learned counsels to assist the Court regarding the discrepancies in the documents filed as Typed Set of Papers, since it is taken for granted that the documents that are filed before the Court are the documents which were marked before the Arbitral Tribunal.

63. Date of Ex.C1 Agreement signed between the petitioner and the respondent is dated as 11.12.2017 in the impugned award.

64. The above petition was filed on 30.01.2020 long before the Country went under lockdown during 4th week of March 2020. The Court fee was paid on 31.01.2020 for filing of the above O.P. on 30.01.2020. Perhaps there were defects at the time of presentation of the above O.P. on 30.01.2020. Thereafter, the O.P. was re- presented along with typeset on 30.04.2021.

65. Three Typed Sets of documents were filed as Volume-I,II &III. These typed Sets bear the seal of Court as 30.04.2021.

66**.** In the index to the Typed Set of documents in Volume-III filed on 30.04.202, there are twenty nine documents starting from page 1 to 112. In Volume-I of the Typed Set of documents there are 6 documents . Document No.2 is dated 11.12.2017 which is Ex.C1 Agreement signed between the petitioner and the respondent.

67. However, in at Page No.1 of Volume-III of the Typed Set of Documents, Ex.C1 is dated **16.11.2017** and not **11.12.2017**.

68**.** The impugned Award of the Tribunal also discusses about the Ex.C1 Agreement as **11.12.2017** and not as **16.11.2017**. However, both the documents are one and the same. In Page No.01 of Volume-III of the Typed Set of Documents which is dated 16.11.2017, the first page is not signed. It is also not drawn on a Non Judicial stamp paper. However, text of both these documents are same. Whichever way one look at, the fact remains that the petitioner was appointed as an Executive Producer for the film that was being produced by the Award Debtor [the petitioner in Arb.O.P.No.190 of 2021].

69**.** Whether Ex.C1 Agreement was dated **11.12.2017** or **16.11.2017**, the fact remains that vide Ex.C3 E-Mail dated 07.03.2018 the Award Holder was asked not to report to the set till the shoot was over. This is 3 months from signing of Ex.C1 dated **11.12.2017**/ **16.11.2017** respectively.

70**.** The fact also indicate that the film was ready for theatrical release only some time in the beginning of 2019 as Ex.C16 Central Board of Film Certification [CBFC] is dated 04.02.2019 for the subject film "90 ML".

Prior to Ex.C3 dated 07.03.2018, there was a delay in leading Actress giving dates for acting in the film. It was the responsibility of the Award Holder to get the dates.

71. There are also indications that the Music Director employed for production of the film had delayed the music considerably and it is the Award Holder, who was liaisoning with the Music Director as the Executive Producer under Ex.C1 dated 11.12.2017/ 16.11.2017 although the petitioner is said to have signed a separate agreement with The Music Director. There were also issues regarding over charging of amounts by the Music Director and therefore, the Award Debtor, represented by Mr.Udeep, the husband of Mrs.Anita Udeep, the Director of Award Debtor was upset with the manner in which the film production was being handled by the Award Holder and therefore, Mrs.Anitha Udeep by a SMS on 07.03.2018 requested the Award Holder to not to come to the set and not to interfere with the music production till the shoot was over.

72. The Award Holder by Ex.R14, E-Mail dated 09.03.2018 offered to exit from the film production to save the personal relationship with the Promoters of the Award Debtors namely, Mr.Udeep & Mrs.Anitha Udeep. Relevant portion of the WhatsApp message reads as under:-

> *"Hi udeep m trying to reach u for past two to three days post Anita's msg. Her msg didn't seem appropriate as it was too blunt with no reasons. Inspite of doing good for the project I don't deserve such response. Am tired of all these politics and don't want to interfere in any of this anymore..u know I have worked a lot to set this project n bringing n simbu and Oviya on to this end for the benefit of the project m keeping quite inspite of all the nonsence politics people r playing between us.* ***I rather exit than spoiling our personal relationship due to mere one movie. Would appreciate if you make the remaining full and final payment. Am still happy to assist and help."***

73. Thus, the Award Holder as of 09.03.2018 was happy if the balance of the remaining amount was paid in full and final payment. The Clause in Ex.C1 Agreement dated 16.11.2017 or 11.12.2017also states that consolidated remuneration shall be inclusive of all other taxes and surcharges and levies. Relevant Clause from Ex.C1Agreement dated 16.11.2017/11.12.21017 reads as under:-

"2.Producer hereby engages V Shree Natraj to render services in as the (Executive Producer). As full compensation for the services of Executive Producer to be rendered pursuant hereto in and for Executive Producer's undertakings herein specified, the Producer shall, provided the Executive Producer faithfully perform his duties and obligations hereunder, pay the Technician a sum of Rs.15,00,000/- (Rupees Fifteen Lakh only) exclusive of GST paid in installments and frequencies mutually agreed between both parties hereto for his services in the motion Picture in Tamil Language for shooting the said film. The above consolidated remuneration shall be inclusive of all other taxes and surcharges and levies. The GST shall be paid over and above the agreed compensation by the producer at the prevailing tax rate during the time of payments.

a. This sum shall be payable to Executive Producer in multiple installments and mutually agreed frequencies based on the progress of the film and recordation of the role:

b.An amount of Rs.1,00,000/-(Rupees One Lakh Only) is paid as advance by the Producer through her proprietary concem N-Viz Entertainment to the Technician on the date of this agreement vide cheque number 000077 dated 6-11-2017 drawn on HDFC Bank, Chennai. The above consideration of Film is Net after deduction of all taxes.

Mode & Stage of Payments:

Advance Payment along with Agreement signing	:	*Rs.1,00,000/-*
On Day 1 of Schedule I shooting	:	*Rs.3,00,000/-*
On Day 1 of Schedule II shooting	:	*Rs.3,00,000/-*

On Day 1 of Schedule III shooting : Rs.3,00,000/-

Balance before release : Rs.5,00,000/-"

74. Thus, the amount of Rs.15,00,000/- was towards full compensation for the services of Executive Producer to be rendered and as Executive Producer the Award Holder was to perform his duties and obligations in installments and frequencies mutually agreed between both parties. Only Rs.7,00,000/- was paid before Ex.C3 E-mail dated 07.03.2018.

75**.** As far as profit sharing equation under the Ex.C1 Agreement dated 16.11.2017/ 11.12.2017 is concerned, it reads as under:-

> *"In addition to the above mentioned remuneration the Producer agrees to share 10% from sale of all rights for the film "RRITA" such as (All Language Satellite rights, all Language Digital Rights, all Language Dubbing rights, all language Remake Rights) Executive Producer will not take any share from Tamil Language Theatrical release of the film. "RRITA" and It's up to the Producer wish to pay whatever he/she wishes if the film is a success and if it makes profit post the release."*

76. As far as the default by the Award Holder is concerned, relevant Clause under the above said Ex.C1 Agreement dated 16.11.2017/ 11.12.2017 filed along with the Typed Sets, read as under:-

> *"If the EP fails or refuses to perform or comply with any of the terms or conditions of this Agreement other than by reason of Technician's Incapacity, then the Producer shall notify the EP, and the EP shall have twenty four(24) hours, if during principal photography and seventy two (72) hours at all other times, from receipt of notice, to cure such default. If the EP fails to cure such default within that period, apart from enforcing specific performance and other remedies available to the Producer under applicable Laws including claim of liquidated damages, the Producer shall be entitled to recover amounts already paid to the EP under this Agreement and also to terminate this Agreement upon written notice to the EP."*

77. The method adopted by the Award Debtor was admittedly inconsonance with Clause 3 read above. As mentioned above, the scope of interference with the Award is limited. However, if an Award shocks the conscience of the Court, it can be set aside as per Explanation 1 (ii) to Section 34(2)(b) of the Arbitration and Conciliation Act, 1996.

78. The Clauses, which have been reproduced above indicates as an Executive Producer, the Award Holder was entitled to receive a sum of Rs.15 Lakhs, which was to be paid in installments. Admittedly, a sum of Rs.7 Lakhs had been paid till the Award Holder was asked not to come to the set vide Ex.C3 WhatsApp Message dated 07.03.2018. The film has been produced thereafter.

79. The Award Holder's labour and effort is confined to a period of three to four months from the respective dates as mentioned above. The payments do not match the time lines. At best the payment could be confined to Day 1 of Schedule III shooting. Therefore, the amount awarded by the Arbitral Tribunal to the Award Holder [the claimant] appears to be in breach of express terms of Agreement dated 16.11.2017 [referred to Ex.C1 dated 11.12.2017 in the Award]. Since the Award Holder had no role to play in the production of the film after 07.03.2018, the question of the Award Holder getting 10% from the sale of rights in the film except from the Tamil language theatrical release of the film cannot be countenanced. Thus, awarding of Rs.65,00,000/- to Award Holder cannot be countenanced.

80. There are indications that the Agreements were signed by the Award Debtor with Flamingo Entertainment and with R.Ravindran before the Arbitral Tribunal. Before the disposal of A.Nos.1 to 5 of 2019 on 16.02.2019, they were produced before the Arbitral Tribunal but were not marked. In any event, these documents they ought to have been summoned if they were not produced by the Award Debtor during Trial in the Arbitral proceedings. Thus, the impugned Award insofar as it awards a sum of Rs.65 Lakhs being 10% of the expenses incurred by the Award Debtor is without any basis. It is impossible of being awarded as there are no indications that the Award Holder had any role to play after Ex.C3 E-mail dated 07.03.2018 was sent as the subject film was released only after 04.02.2019. Therefore, the Award passed by the learned Arbitrator cannot be said to satisfy the requirements of the Act. It is susceptible to a valid challenge under Section 34 of the Arbitration and Conciliation Act, 1996. Awarding of Rs.65,00,000/- being 10% of the expenses incurred clearly shocks the conscience of the Court.

81. The impugned Award suffers from patent illegality in so far as Rs.65,00,000/- is concerned as the conclusions arrived in the impugned

Award are impossible of being arrived in view of the facts discussed above. The impugned Award seeking to award a sum of Rs.65 Lakhs is liable to be set aside. Therefore, the impugned award to that extent it is liable to be interfered with.

82. In the result, this Arbitration Original Petition is allowed to that extent, leaving the parties to bear their own costs. Consequently, connected Applications and E.P.SR. are closed with liberty to file fresh Execution Petition to enforce award for Rs.8,00,000/- together with interest.

29.04.2024

Index : Yes/No
Internet : Yes/No
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C.SARAVANAN, J.

smn2/kkd

Pre-delivery Order in
Arb.O.P.(Com.Div.)No.190 of 2021

29.04.2024