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C.R.P.No.2686 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.04.2024
PRONOUNCED ON : 21.06.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

C.R.P.No.2686 of 2023 and
C.M.P.No.16568 of 2023

M/s.Hi-Style India Private Limited,
Having Head Office at 28/1, 28/2, South Phase, 6th Street,
3rd Main Road, Ambattur Industrial Estate,
Chennai – 600058.
Having store Showroom at 1652G,
Second Avenue, Near Blue Star Bus Stop,
Anna Nagar – 600040. ... Petitioner

Vs.

M/s.Rakesh Corporation
Rep. by Manish Mulchand Jain,
No.30, Old Hanuman Galli,
1st Cross, 2nd Floor, Mumbai – 400002. ... Respondent

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the Fair order and Decreetal Order in E.A.No.1 of 2022 in E.P.No.905 of 2019 in A.R.B.No.6 of 2017-2018 dated 11.04.2023 on the file of the XXV Assistant City Civil Court, Chennai.

For Petitioner : Mr.Avinash Wadhwani MAH
assisted by Mr.Barani Bharathi.B

For Respondent : Mr.Srenik.S.Jain



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ORDER

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The respondent filed execution petition in E.P.No.905 of 2019 in A.R.B.No.6/2017-2018 before the learned XXV Assistant Judge, XXV Assistant City Civil Court, Chennai to execute the award passed in Arbitration Case No.6 of 2017-2018, dated 09.05.2018. Since no representation for the petitioner/judgment debtor and counter not filed, the learned XXV Assistant Judge passed exparte order, dated 15.11.2021. Challenging the same, the petitioner/judgment debtor representing by its Managing Director filed appeal in E.A.No.1 of 2022 in E.P.No.905 of 2019 in A.R.b.No.6/2017-2018 before the same Court and the same was dismissed by judgment and decree, dated 11.04.2023. Aggrieved over the same, the present civil revision petition has been filed.

2.The learned counsel for the petitioner submitted that the respondent/decree holder filed execution petition in E.P.No.905 of 2019 to execute the award passed in A.R.B.No.6/2017-2018, dated 09.05.2018 and sought direction to direct the petitioner/judgment debtor to pay amount of Rs.17,64,195/- failing which the order of attachment and sale of immovables



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to be ordered. He further submitted that the arbitration award is non-est in law and the Arbitrator passed the award in the absence of any valid arbitration agreement between the parties. The proceedings have been invoked solely based on the few invoices raised by the respondent. These invoices neither have any signature by the petitioner nor by its authorized person representing the Company. It is a settled position of law that arbitration clause present in invoice would not constitute as the existence of the arbitration agreement, hence, the arbitration award becomes non-executable in eye of law.

3.He further submitted that the petitioner was set exparte by the lower Court on 15.11.2021 for non filing of counter and for no representation. Thereafter, the petitioner filed appeal in E.A.No.1 of 2022 in E.P.No.905 of 2019 in A.R.B.No.6/2017-2018 to set aside the exparte order, dated 15.11.2021. In the meanwhile, the petitioner filed petition to set aside the arbitration award under Section 34 of the Arbitration and Conciliation Act, 1996 before the High Court of Bombay in Arbitration Petition (L) No.1127 of 2018 and presented on 05.10.2018. The Execution Court here dismissed



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the petitioner's set aside application on 11.04.2023 on the ground that no appeal or legal stay was pending and the averments in affidavit are false and baseless, not acceptable. The petitioner filed affidavit on the assurance given by the Counsel in Bombay to whom the case was entrusted to set aside the Arbitral award. The Counsel at Bombay informed the petitioner that the case has been filed and it is at the stage of compliance during April 2022. Later, it was informed that the Arbitration Petition (L) No.1127 of 2018 said to be rejected on 05.07.2019. This fact the petitioner came to know only after the respondent's counsel informed the same in the Execution Court here. Thereafter, the petitioner made enquiry with his Counsel at Bombay who confirmed the rejection of the petition on on technical grounds and handed over the bundle to his Junior who misplaced the papers. Then the petitioner instructed his Counsel to rectify the technical objections and restore the petition before the High Court of Bombay. Since the petitioner was not posted of later development, he made such submission which was not intentional to mislead the Execution Court here.

4.It is further submitted that the petitioner's earlier petition was



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rejected under Section 986 of the Bombay High Court Original Side Rules, 1980 and that does not amount to rejection of the petition to set aside the arbitration award on merits and it is only due to procedural lapse. Hence, no execution proceedings can proceed till the finality is arrived in the arbitration award which is now pending before the High Court of Bombay. The petitioner re-presented the suit before the High Court of Bombay which is now pending at the pre-admission stage. In any event, the petitioner preferred appeal against the arbitral award. Further, the petitioner produced the order, dated 12.03.2024 in Interim Application (L) No.26740 of 2023 in Arbitration Petition (L) No.1127 of 2018 wherein the delay in filing the interim application is condoned and Arbitration Petition (L) No.1127 of 2018 is restored.

5.In support of his submissions, the learned counsel for the petitioner relied upon the following decisions.

- “*Hindustan Zinc Limited (HZL) v. Ajmet Vidyut Vitran Nigam Limited* reported in (2019) 17 SCC 82” for the point that when the award is passed with inherent lack of jurisdiction, the award is a nullity and such plea can be taken up at any stage and also in



collateral proceedings. Even acquiescence to or participation in the (non est) arbitration will not bar such a plea as such award is a nullity.

- ***“NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited*** reported in ***2015 SCC OnLine Mad 10355***” for the point that the arbitration cannot be based on unsigned document and there cannot be an arbitration clause by implication. Arbitration agreement has to be in writing and that is mandatory.
- ***“T.S.Gowrama and another v. Nithin K Chariyan and another in C.R.P.No.1603 of 2019***” for the point that if an arbitration award is illegal and on fabricated documents, the same is liable to be set aside.
- ***“Divya Shivilaks Impex v. ShanthilalJamnadas Textiles (P) Ltd.,*** reported in ***1999(2) Mh.L.J. 223***” for the point that in the absence of any other material to explain the printed clause, it cannot be concluded that the printed clause quoted amounts to an agreement to refer the dispute to the arbitration of rules of the Mumbai Piece Goods Merchants Mahajan.
- ***“Taipack Limited & Ors., v. Ram Kishore Nagar Mai*** reported in ***2007 SCC OnLine Del 804***” and ***“Parmeet Singh Chatwal and***



Others v. Ashwani Sahani reported in ***2020 SC OnLine Del 1881***” for the point that the signature in the copy of the invoice cannot tantamount to acceptance of the respondent so called offer for arbitration. The signature in such a situation were evidently an acknowledgement of receipt of the goods and nothing more. The conditions contained on the reverse of the invoice could not be inferred to be consent for arbitration.

- ***“Mikesh Corporation v. Picotee Exports and another*** reported in ***2009 (4) Mh.L.J 514***” for the point that it is not prudent to infer that invoices containing the arbitration clause were raised on a party and handed over to them merely because certain payments have been made. In fact, it would not be property to draw an inference, particularly where there has been a consistent denial by the respondents that they are not members of the Mahajan and are not subject to the rules of arbitration.
- ***“Sarwam Kumar and another v. Madan Lal Aggarwal*** reported in ***(2003) 4 SCC 147***” for the point that it was left open to the judgment-debtors to raise this ground before the appropriate forum, if available to them under law. The only forum where the judgment-debtors could raise the objection regarding the executability of the decree was in the execution proceedings which they did. Since the jurisdiction of the civil Court was barred, the decree passed by it was a nullity and the



judgment-debtors could successfully raise objection regarding the executability of such a decree. The executing Court erred in holding that the judgment-debtors could not raise the objection to the executability of the decree being a nullity having been passed by a Court lacking inherent jurisdiction to do so.

- ***“Rafique Bibi (dead) by Lrs., v. Sayed Waliuddin (Dead) by Lrs., and others*** reported in ***(2004) 1 SCC 287***” for the point that a distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down by law.

6.Making the above submissions and referring to the above decisions, the learned counsel for the petitioner prays for setting aside the impugned fair and decretal order, dated 11.04.2023.

7.The learned counsel for the respondent/decree holder submitted that the petition filed by the respondent is not maintainable and liable to be dismissed in *limine*. The petitioner filed this petition only to prolong the case and he is attempting to cheat the respondent. The sole Arbitrator was



appointed only as per the arbitration clause of Mumbai Textile Merchant's Mahajan morefully described in invoices raised and the said tax invoices are not denied or objected by the petitioner. Such being the position, the petitioner cannot now deny the constitution of the lawful arbitration proceedings. The finding of the Arbitrator is binding and award passed therein can be executed by the Execution Court. Without challenging the award, the execution appeal is not maintainable which the lower Court rightly considered. He further submitted that from the search conducted based on the status report of the appeal in Commercial Arbitration Petition (L) No.1127 of 2018, it was found that the appeal was filed on 05.10.2018 which is beyond the period of limitation and time barred. The appeal was rejected on 05.07.2019 by the High Court of Bombay and the execution petition was presented by the respondent on 27.04.2022 after the appeal was rejected in the year 2019. The allegation raised by the petitioner that an appeal is pending as on date of filing the execution petition is totally false which amounts to Contempt of Court. There is no appeal pending and no stay granted by the High Court of Bombay. The petitioner failed to produce any document to substantiate his contentions.



8.He further submitted that the exparte order was passed against the petitioner as early as on 15.11.2021 due to non filing of the counter on the side of the petitioner despite sufficient chances given to him. The exparte setting aside petition in E.A.No.1 of 2022 in E.P.No.905 of 2019 was not filed immediately and was only filed on 28.04.2022 eventhough the exparte order was passed on 15.11.2021. The petitioner's contention that the sole arbitrator has no jurisdiction to adjudicate the dispute between the petitioner and thus the award passed by the sole arbitrator is non est in law and null and void, not sustainable. The petitioner's contention that the signature of the petitioner or his authorized person are not available in the invoices and there is no arbitration clause between parties, hence, the arbitration proceedings is vitiated, not sustainable. The petitioner has not taken such objections before the Arbitrator or proper forum before passing the award. The Execution Court had considered all these aspects finding that it has got no jurisdiction to testify the validity of the decree and the averments of the petitioner are irrelevant, dismissed the appeal. In support of his submissions, the learned counsel for the respondent relied on the following decisions:



(i)Placed reliance on the decision of this Court in “***Sahayaraj v. M/s.Shriam Transport Finance Company Limited and another in C.R.P(MD)No.576 of 2024***” wherein this Court had held that without challenging the arbitration award, Executing Court cannot go behind the Award and decide the issue afresh. Such courses are not available to the executing Court and dismissed the revision.

(ii)Further placed reliance on the judgment of the High Court of Tripura in “***State of Tripura and another v. Shri Ashes Deb, Contractor in C.R.P.No.85 of 2022***” and submitted that a challenge against an arbitral award can be made by taking recourse to Section 34 of the Arbitration Act within the time prescribed for filing such applications. The award holder can approach the appropriate Court under Section 36 for enforcement of the arbitral award. In this case, the objections under 47 C.P.C is not maintainable. Further, Section 5 of the Arbitration Act is an non obstante clause wherein it is clearly stated that “*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this*



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part”. Implying that the aggrieved party against whom the arbitral award is passed to approach the appropriate forum. In this case, such approach has not been made within the time prescribed. The objection raised by the petitioner under Section 47 C.P.C despite specific remedy available under Section 34 of the Act, cannot be entertained.

9.Considering the submissions and on perusal of the materials, it is seen that the petitioner suffered arbitral award in A.R.B.No.6/2017-2018, dated 09.07.2018 whereby the petitioner/judgment debtor was directed to pay an amount of Rs.17,64,195/- to the respondent. The respondent after exhausting of appeal period filed execution petition in E.P.No.905 of 2019 in A.R.B.No.6/2017-2018 in which the petitioner was set exparte on 15.11.2021. Challenging the same, the petitioner preferred setting aside petition in E.A.No.1 of 2022 in E.P.No.905 of 2019 only on 27.04.2022 which was rejected on 11.04.2023. Against which, the present revision is filed.



10.The contention of the petitioner gains consideration that the petitioner filed appeal in Arbitration Petition (L) No.1127 of 2018 before the High Court of Bombay. As contented by the learned counsel for the petitioner, there was miscommunication between the petitioner and his counsel at Bombay High Court. The petitioner's appeal returned and thereafter, re-presented. It would be beneficial to extract the order passed by the High Court of Bombay, dated 12.03.2024 in Interim Application (L) No.26740 of 2023 in Arbitration Petition (L) No.1127 of 2018:

“1. By this Interim Application, the Applicant/Petitioner is seeking recall of order dated 13th June 2019 passed by the Prothonotary & Senior Master of this Court and for restoration of Arbitration Petition (L) No. 1127 of 2018 to the file of this Court.

2. Further condonation of delay of 2 years and 20 days in filing the Interim Application has been sought.

3. The Applicant has stated that the above Arbitration Petition had been listed on the board of the Prothonotary & Senior Master of this Court on 13th June 2019. The erstwhile Advocate, who was appearing for the Petitioner, could not remain present before the Prothonotary & Senior Master of this Court on that date. Accordingly, conditional order dated



13th June 2019 was passed by the Prothonotary & Senior Master of this Court to remove office objections on or before 4th July 2019 and get the Petition numbered, failing which the Petition shall stand rejected under 986 of O.S. Rules for non-compliance of office objections.

4. The Applicant has stated that the earlier advocate was unaware of the impugned order passed in the matter and hence, office objections were not complied with within the stipulated time. Thereafter, there was Covid-19 lock-down from the month of March 2020 and the earlier Advocate looking after the matter permanently shifted to his native place. The Applicant has stated that his Advocate completely lost track of the matter.

5. The Applicant further states that in the month of July 2023, the Applicant received notice of execution of the arbitral award and upon enquiry about the status of the Arbitration Petition, the Applicant learnt that the Arbitration Petition had been rejected long back for non compliance of the office objections.

6. The Applicant states that the Application was to be filed on 3rd August 2019, considering that the conditional order was passed on 13th June 2019 and came into effect on 4th July 2019. However, due to the Applicant being unaware about the conditional order, Interim Application could not be



filed within stipulated time.

7. Reliance has been placed on the order of the Supreme Court in *Suo Motu Writ Petition No. 3 of 2020* extending the period of limitation from 15th March 2020 to 20th February 2022. It is stated that there is a delay of 2 years and 20 days in filing the Interim Application.

8. Having considered the averments in the Interim Application, it appears that the earlier Advocate is in default in not following up the matter and/or making appearance before the Prothonotary & Senior Master of this Court. Had the earlier Advocate been diligent, it should have come to his knowledge that the conditional order dated 13th June 2019 had been passed. The Applicant was relying on its earlier advocate. Although the averments in the Interim Application on the delay in filing the Interim Application and/or non removal of office objections are not entirely satisfactory, in the interest of justice, by imposing costs of Rs. 30,000/- on the Applicant, the relief sought for in the Interim Application is required to be granted. Hence, the following order is passed.:-

(i) Conditional order dated 13th June 2019 insofar as it applies to the above Arbitration Petition is recalled.

(ii) Delay of 2 years and 20 days in filing the Interim Application is condoned.



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(iii) Arbitration Petition (L) No. 1127 of 2018 is restored to file, subject to payment of costs of Rs. 30,000/- (Rupees Thirty Thousand only) to be paid to Deeds for Needs Foundation, Row No. C/4, Clover Highlands, Kondhwa, SN. 25/1 to 4, NIBM Road, Pune – 411048 by way of Pay Order within a period of two weeks from the date of this order.

(iv) Interim Application is accordingly disposed of.”

11.From the order extracted above, it is seen that the Arbitration Petition (L) No.1127 of 2018 restored holding that the contention of the petitioner and the respondent to be decided in the appeal. The primary contention of the learned counsel for the petitioner gains significance and consideration since the Arbitrator is Mahajan. The petitioner's contention that the petitioner is not a member of Mahajan and further the arbitration proceedings proceeded based on the invoices. Mere arbitration clause in the invoice will not be sufficient as contented by the petitioner and as per the judgment of the Hon'ble Apex Court as referred above. Now, the appeal has been taken on file and it would be appropriate to await the outcome of the appeal. Depending upon the outcome of the appeal, further recourse can be taken. The objections are primarily on the inherent lack of jurisdiction and



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the same can be taken at any stage including the collateral proceedings.

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12.In view of the above, the impugned fair and decreetal order, dated 11.04.2023 in E.A.No.1 of 2022 in E.P.No.905 of 2019 in A.R.B.No.6/2017-2018 passed by the learned XXV Assistant Judge, XXV Assistant City Civil Court, Chennai is set aside and further the proceedings in E.P.No.905 of 2019 in A.R.B.No.6/2017-2018, dated 15.11.2021 is terminated.

13.In the result, this civil revision petition stands allowed. Consequently, connected civil miscellaneous petition is closed. No costs.

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Speaking Order/Non Speaking Order
Index : Yes/No
Internet : Yes

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To

The XXV Assistant Judge,
XXV Assistant City Civil Court,
Chennai.

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M.NIRMAL KUMAR, J.

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PRE-DELIVERY ORDER IN
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