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CRP No.676 of 2013



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.01.2023

PRONOUNCED ON : 03.02.2023

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P. No.676 of 2013

and

M.P.No.1 of 2013

V.K.John

.... Petitioner

Vs

1. S.Mukanchand Bothra & HUF (died)

Represented by Mukanchand Bothra

2. A.Philip

3. M.Karishma Bothra

4. M.Gagen Bothra

5. Sandeep Bothra

(Respondents 3 to 5 brought on records as

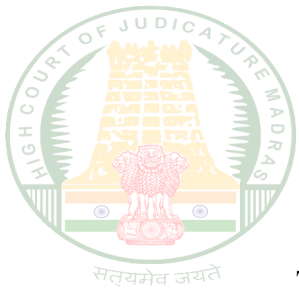
LRs of the deceased R1-S.Mukanchand Bothra

vide Court order dated 20.09.2021 made in

CMP No.15308 of 2019 in CRP No.676 of 2013) Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure to set aside the final Award dated 21.02.2011 passed by the “Arbitral Tribunal Consisting of sole Arbitrator Vedavalli Kumar” in Arbitration No.1 of 2011 between respondents 1 and 2.

For Petitioner : Mr.Abraham Markos
for M/s.King and Partridge
For R1 : Died
For R2 : No appearance
For R3 to R5 : Mr.M.Gagen Bothra
Party-in-person

**ORDER**

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This Civil Revision Petition has been filed to set aside the final Award dated 21.02.2011 passed by the “Arbitral Tribunal Consisting of sole Arbitrator Vedavalli Kumar” in Arbitration No.1 of 2011 between respondents 1 and 2.

2. The learned counsel appearing for the petitioner would submit that the petitioner is the third party to the Arbitration Award passed by the Arbitral Tribunal consisting of sole Arbitrator Vedavalli Kumar, in Arbitration Award No.1 of 2011 between the respondents 1 and 2. It was obtained by fraud and collusion by the respondents. The first respondent initiated the arbitration proceeding as against the second respondent claiming to be a person by name A.Philip and styled as the legal representatives of the petitioner's uncle one Appu John. The said Appu John had never appointed any legal representative by name A.Philip. The sale agreement and the pronotes produced in the arbitration proceedings also have been fraudulently created by the first respondent by forging the signature of the late Appu John. The first respondent never paid any amount to late Appu John.

<https://www.mhc.tn.gov.in/judis> 3. He further submitted that the said Appu John is the petitioner's



father's brother. He died on 28.07.2007. He was unmarried and had no issues. The petitioner is the only surviving legal heir of the said Appu

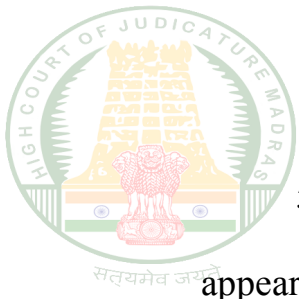
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John. The said Appu John had never appointed any legal representative by name A.Philip, who is the second respondent herein. The arbitration proceeding was initiated by the first respondent, in pursuant to the agreement for sale dated 20.04.2007 said to have been executed by late Appu John in favour of the first respondent, thereby agreeing to sell Nungambakkam property admeasuring 8 grounds and 2338 sq.ft. for a very meager sum of Rs.3,20,00,000/-. In fact, the said property never belonged to late Appu John. It belonged to the grandmother of the petitioner and she passed away in the year 1984. The petitioner's father was her eldest son, who died in the year 1995. The petitioner had filed a suit in C.S.No.423 of 1995 before this Court as against the said Appu John and his aunt, for partition of the suit property. This Court had passed an order of injunction, by an order dated 22.07.1996, in respect of those properties. In the meanwhile, the said Appu John died on 28.07.2007. Therefore, the said Appu John had no title over the property in order to execute any agreement for sale as claimed by the first respondent herein. The petitioner had absolutely no knowledge about the arbitration proceeding and only from the execution proceeding, when an attempt was made to execute the Arbitration Award, the petitioner



came to know about it through the counsel on record. The petitioner, being third party to the arbitration proceeding, can very well challenge the Arbitration Award under Article 227 of Constitution of India, since, he is not a party to the arbitration proceeding, as a non-party is not entitled to file application under Section 34 of the Arbitration and Conciliation Act, 1996.

4. He also submitted that under Section 34 of the Arbitration and Conciliation Act, 1996 provides for filing of an application to set aside the Arbitral Award. Section 34(2)(a)(iii) provides that an arbitral award may be set aside by the Court if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings. Section 34(2)(b)(ii) provides that an arbitral award may be set aside by the Court if the Court finds that the arbitral award is in conflict with the public policy of India. The explanation goes on to clarify that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or it is in conflict with the most basic notions of morality or justice. The present impugned award has been obtained by collusion and fraud, that too, without notice to the petitioner and without adding the petitioner as a party. Therefore, it is liable to be set aside.



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5. Per contra, the fourth respondent Mr.M.Gagen Bothra, appearing as party-in-person, on behalf of the respondents 3 & 5 herein submitted that the Civil Revision Petition itself is not maintainable by challenging an Arbitration Award on the ground that he is the legal representative of the party with whom an agreement of sale was entered by the deceased first respondent. There is a statutory right of appeal available under Section 34 of Arbitration and Conciliation Act. As per definition of 'party' under the said Act, it means a party to an 'arbitration agreement'. The Arbitration Award is challenged only on the ground that the said Appu John died and the petitioner is the sole surviving legal heir. Therefore, the petitioner ought to have challenged the Arbitration Award in the manner known to law and not under Article 227 of Constitution of India. The Arbitration Award was passed on 21.02.2011, whereas the present petition was filed in the year 2013, without any condone delay petition. Only to escape from the delay, the petitioner filed Civil Revision Petition under Article 227 of Constitution of India. Where a statutory right to file an appeal has been provided for, it is not open to entertain a petition under Article 227 of the Constitution of India.

<https://www.mhc.tn.gov.in/judis> 6. In support of his contention, he relied upon the following



Judgements :

(i) **2021 (1) CTC 450** in the case of Bhaven Construction through Authorised Signatory Premjibhai K.Shah Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd & Another

(ii) **Appeal (Civil) No. 557 of 2003** in the case of Sadhana Lodh Vs. National Insurance Company Ltd.,

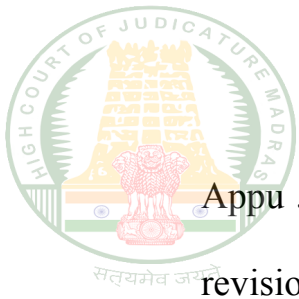
(iii) **Appeal (Civil) 1526 of 2007** in the case of Ravi Prakash Goel Vs. Chandra Prakash Goel and another.

(iv) **CRP (NPD) No.316 of 2016** in the case of Venkatachalam Vs. Supparayan

(v) **CRP (PD) No.1734 of 2021** in the case of V.C.Sethu Vs. Inderchand Kochar.

7. Heard, Mr.Abraham Markos, learned counsel appearing for the petitioner, Mr.M.Gagen Bothra, Party-in-person/4th respondent/ appearing for respondents 3 and 5 and perused the materials available on record.

8. Admittedly, the petitioner is not a party to the arbitration agreement dated 20.04.2007. It was executed by one Appu John. According to the petitioner herein, the said Appu John died as unmarried and he had no issues. The petitioner is the brother's son of the said



Appu John and he is the only legal heir of the said Appu John. In this

revision petition filed, challenging the arbitration award, under Article

227 of the Constitution of India, the two grounds emerged to decide that

are

(i) Whether the legal heir of a party to the agreement can challenge the award as a third party under Article 227 of the Constitution of India ? and

(ii) Whether the Arbitration Award can be challenged under Article 227 of the Constitution of India when there is statutory right as contemplated under Section 34 of Arbitration and Conciliation Act, 1996?

The petitioner challenged the Arbitration Award dated 21.02.2011 as legal heir of the party with whom an agreement of sale was entered into by the first respondent herein. The Arbitration award can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996. The Arbitration Award can be set aside if it is filed by a 'party' making the application to set aside the Arbitration Award. The 'party' means a party to an 'arbitration agreement'. The petitioner challenged the Arbitration Award as he is the sole surviving legal heir of the said Appu John. It is relevant to extract the definition of the legal representative as per Section 2(g) read with Section 40 of the Arbitration and Conciliation Act, which



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is as follows :

Sections 2 : definitions

(g) “legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting ;

Section 40 :

Arbitration agreement not to be discharged by death of party thereto.

40 (1). *An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.*

(2) *The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.*

(3) *Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.*

9. Thus, it is clear that an arbitration agreement shall not be discharged by death of any party and it shall not be terminated by death of any party. It is also clear that the agreement can be enforceable by or



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against the legal representatives of the deceased. A person, who has the right to represent the estate of deceased person occupies the status of a legal person. Section 35 of the Arbitration and Conciliation Act, 1996 which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the parties and persons claiming under them. Persons claiming under the rights of a deceased person are the personal representative of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives. The legal representatives of the deceased, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting, can very well challenge the award under the provision of the Arbitration and Conciliation Act, 1996. Admittedly, the petitioner claims to be the legal representative of the said Appu John. Therefore, he can very well, as a legal representative of the said Appu John, challenge the Arbitration Award in the manner known to law.

10. The Arbitration Award passed by the sole Arbitrator has been now challenged under Article 227 of the Constitution of India. It is not maintainable when there is statutory remedy available under Section 34



of the Arbitration and Conciliation Act, 1996. It is relevant to extract

the provision under Section 5 of the Arbitration and Conciliation Act,

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1996, which is as follows :

Section 5 : Extent of judicial intervention :-

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 Part.

The non-obstacle clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration and Conciliation Act, 1996. Therefore, the petitioner cannot maintain this Civil Revision Petition, under Article 227 of the Constitution of India, challenging the Arbitration Award,

11. That apart, where a statutory right to file an appeal has been provided for, it is not open to the petitioner to challenge the Arbitration Award under Article 227 of the Constitution of India. That apart, the Arbitration Award was passed on 21.02.2011. The present Civil Revision Petition had been filed on 04.10.2012. The petitioner ought to have challenge the Award within a period of three months from the date



of Award. Therefore, in order to escape from the delay, the petitioner

challenged the Arbitration Award under Article 227 of the Constitution

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of India. Therefore, it is not maintainable and liable to be dismissed.

12. Accordingly, this Civil Revision Petition stands dismissed.

Consequently, connect miscellaneous petition is closed. There shall be

no order as to costs.

03.02.2023

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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To

M/s.Vedavalli Kumar,
Sole Arbitrator,
Chennai.



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G.K.ILANTHIRAIYAN,J.

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