

Mr. Francis Perry S/O R. Perry vs Mr. Samuel Johnson S/O Late on 10 January, 2023

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Com.A.P.No.8/2022

In the Court of LXXXIV Addl. City Civil and Sessions
Judge (CCH-85 Commercial Court) Bengaluru

Dated this the 10th day of January 2023

Present: Smt.H.R.Radha B.A.L., LL.M.
LXXXIV Addl. City Civil and Sessions Judge,
(CCH-85 - Commercial Court)
Bengaluru

Com.A.P.No.8/2022

Petitioner Mr. Francis Perry S/o R. Perry, aged 45
years, Proprietor, Total Productions, #205,
Sophia's Choice, Saint Mark's Road,
Bengaluru - 560001
(By Sri.Nagesh, Adv.)

Vs

Respondent Mr. Samuel Johnson S/o Late
S.Bhagyanathan, aged about 54 years,
R/at Flat No. A-302, Mantri Splendor
Apartment, Hennur Main Road,
Geddalahalli Village, Kothanur Post,
Bengaluru - 560077

(By Sri.Dilraj Rohit Sequeira, Adv.)

Date of Institution 28.01.2022

Nature of the petition Sec.34 of the Arbitration and
Conciliation Act for setting
aside the arbitral award
relating to a dispute under
Joint Venture Agreement

Date on which judgment
pronounced 10.01.2023

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Total Duration	Years	Months	Days
	00	11	13

LXXXIV Addl. City Civil and Sessions Judge
(CCH-85 Commercial Court) Bengaluru

JUDGMENT

This petition U/s 34 of the Arbitration and Conciliation Act, 1996 ('the Act' for short) is filed by the respondent in A.C.No.1/2015 seeking to set aside the arbitral award dated 22.10.2018 passed by the learned sole arbitrator (hereinafter referred as 'the Arbitral Tribunal').

2. The parties are referred as per their original rank before the Arbitral Tribunal for clarity.

3. Briefs facts leading to filing of the petition are that the respondent who is into the business of event management, production, artist management and organizing music shows, international music festivals and other allied business under the name and style Total Productions entered into a Joint Venture Agreement ('JVA' for short) with the claimant in 2009 to conduct Rock concert by an Com.A.P.No.8/2022 international band called Mr.Big. The claimant filed O.S.No.3865/2012 before CCH-62, Bengaluru for recovery of Rs.90,00,000/- in all with interest claiming that he advanced Rs.75,00,000/- as investment under the JVA on the respondent's assurance of minimum return of 15% and a further sum of Rs.3,75,000/- for day today expenses and alleging that the respondent defaulted in repayment and to honour the cheque issued towards the same; and also to have initiated criminal proceedings U/s 138 of Negotiable Instruments Act in that behalf.

4. The respondent entered appearance in the suit and filed written statement contending that the claimant voluntarily invested money to conduct the rock concert by the group, Mr.Big and offered to join as a partner, as such he agreed to share the profit and loss at 50% and they accordingly entered into JVA dated 19.06.2009 and 05.11.2009. But most of the agreements got cancelled and he had to invest Rs.1,20,00,000/- to overcome the loss due to claimant delaying the investment; and the claimant is not ready to share his loss. The claimant forced him to enter into JVA dated 19.06.2009 by suppressing that Rs.75,00,000/- was mentioned as loan and stating that it Com.A.P.No.8/2022 was so mentioned to avail loan from Foreign Bank. They had a joint account in State Bank and the claimant misused his signed blank cheques / pronotes and blank papers with his signature on revenue stamp which were obtained to get loan for further investment. He was made to sign another JVA on 05.11.2009 under threat. The claimant has already received 50% profit by cheque, cash and on account transfer in terms of the JVA but refused to return the blank signed cheques / demand pronotes, as such the bank was instructed to stop payment. He has not taken additional loan of Rs.3,75,000/- from the claimant. Nor is he liable to pay Rs.90,00,000/-. He has suitably replied the notice on 14.01.2011. The suit is not maintainable, as the dispute is to be settled either by mediation

or arbitration as per the terms of JVA.

5. The respondent also filed IA U/o VII Rule 11(d) CPC before CCH-62 for rejection of plaint in O.S.No.3865/2012 on the ground that the JVA provides for resolution of dispute by arbitration. After hearing the parties, the court disposed of the IA by order dated 13.11.2013 and referred the dispute to the Arbitral Tribunal.

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6. The arbitral tribunal treated the plaint and the written statement in O.S.No.3865/2012 as the claim and the statement of defence respectively, framed issues on that basis and recorded evidence. After hearing arguments and considering the material on record, the arbitral tribunal passed the impugned award on 22.10.2018 directing the respondent to pay Rs.90,00,000/- with interest at 12% p.a. from 01.11.2009 till realization and also the cost of arbitration proceedings.

7. Aggrieved by the same, the respondent has filed this petition on the ground that the contract for sharing profit and loss ought not to have been treated as a loan agreement; there was no scope for rising the presumption U/s 118 of the Negotiable Instruments Act and the claimant failed to discharge the initial burden of proving the passing of consideration under the cheque / pronote. The Arbitral Tribunal admitted Ex.P26 and P27 in evidence contrary to the provisions of the Karnataka Stamp Act and also the emails and messages relied upon by the claimant contrary to the provisions of the Evidence Act. The claimant's admission as to receipt of Rs.11,11,800/- and Rs.5,50,000/- is ignored by the Arbitral Tribunal. Therefore, the impugned Com.A.P.No.8/2022 award is in contravention of fundamental policy of Indian Law, the terms of reference and deals with matters not contemplated or falling within the terms of submission to arbitration, and liable to be set aside U/s 34(1), (4) and (5) and explanations 1(ii) and (iii) as well as explanation 2 of the Act.

8. The claimant has filed statement of objections contending that this petition is filed to stall the proceedings in Com.Ex.No.4641/2018 on the file of CCH-88 (Commercial Court), Bengaluru: The respondent had issued demand pronote, consideration receipts and cheques in relation to loan transaction and the Arbitral Tribunal has reasonably interpreted the JVA as loan agreement. Ex.P26 and P27 are sufficiently stamped and the petition should be dismissed as the respondent has failed to make out any of the grounds U/s 34 of the Act for setting aside the impugned award.

9. Heard arguments and perused the written arguments filed by both sides.

10. On behalf of the respondent/petitioner the following judgments are relied upon:

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(i) State of Chhattisgarh & Anr. Vs SAL Udyog Pvt. Ltd. reported in (2022) 2 SCC 275 wherein it is held that the failure on the part of the sole arbitrator to decide in accordance with terms of contract governing parties, would certainly attract "patent illegality ground" as said oversight amounts to gross contravention of Sec.28(3) of the

1996 Act, that enjoins Arbitral Tribunal to take into account terms of contract while making an award, said patent illegality is not only apparent on face of award, it goes to very root of matter and deserves interference.

(ii) Ssangyong Engineering and Construction Co. Ltd. Vs National Highways Authority of India reported in (2019) 15 SCC 131 wherein it is reiterated that when there is purported exercise by the Arbitral Tribunal of a power which it did not possess, the arbitral award would be liable to set aside, where an arbitral tribunal rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, the arbitral award could be said to have Com.A.P.No.8/2022 dealt with decisions and others beyond the scope of submission to arbitration. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which would not apply to international commercial arbitration in the guise of alleging misinterpretation of contract and consequent errors of jurisdiction, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators. To bring in by the backdoor grounds relatable to Sec.28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration U/s 34(2) (a)(iv) is not permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal.

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(iii) PASL Wind Solutions Pvt. Ltd. Vs GE Power Conversion India Pvt. Ltd.

reported in (2021) 7 SCC 1 where it is clarified that the doctrine of public policy is governed by precedents; its principles have been crystallized under different heads and though it is permissible to expand and apply them to different situations, it can be applied only to clear and undeniable cases of harm to the public.

11. The claimant has relied upon the judgment in Vishnu Dutt Sharma Vs Daya Sapa reported in (2009) 13 SCC 729 with regard to relevancy of previous judgment of a criminal proceeding in a suit.

12. The following points are raised for determination in the light of the grounds urged, arguments canvassed and having regard to the directions issued by the Division Bench of our Hon'ble High Court in Union of India Vs M/s Warsaw Engineers & Anr. [COMAP No.25/2021 dated 17.04.2021 (DB)]:

1. Whether the respondent/petitioner establishes that Ex.P26 and P27 have been unreasonably interpreted as a loan Com.A.P.No.8/2022 agreement by the arbitral Tribunal relying on Ex.P1 to P16 relating to matters beyond the scope of submission to arbitration?

2. Whether the respondent/petitioner establishes that the Arbitral Tribunal permitted the claimant to introduce novation of contract without pleading;

admitted in evidence Ex.P26 and P27 as well as electronic documents produced by the claimant in contravention of fundamental policy of Indian law?

3. Whether the respondent/petitioner establishes that the Arbitral Tribunal committed patent illegality by ignoring the claimant's admissions while passing the impugned award?

4. Whether the impugned award is liable to be set aside on the grounds U/s 34(2)(iv), (v), 34(2)(b)(ii) and 34(2-A) of the Act as prayed?

5. What order?

13. My findings on the above points are :

Point No.1: In the Negative Point No.2: In the Negative Com.A.P.No.8/2022 Point No.3: In the Negative Point No.4: In the Negative Point No.5: As per the final order for following REASONS

14. Undisputed facts of the case as emerging from the arbitration records are that the respondent is the sole proprietor of M/s Total Productions and has been conducting music concerts since 2001 by providing technical services to the organizers and is into event management, production, artist management and organizing music shows, international music festivals and allied business; and a graduate in industrial relations. During 2009 the respondent decided to conduct rock music concert of international band by name Mr.Big at various places like Bengaluru, Shillong, Chennai and Dimapur; and the claimant advanced Rs.75,00,000/- between July and October 2009 for conducting the same. The respondent and the claimant entered into JVA as per Ex.P26 and P27 dated 19.06.2009 and 05.11.2009 in this behalf. Upon the claimant filing O.S.No.3865/2012 for recovering amount due to him from the respondent, the dispute was referred to arbitration by the City Civil Court, Bengaluru vide order Com.A.P.No.8/2022 dated 13.11.2013 at the instance of the respondent and also considering that the JVA contained arbitration clause.

15. It is argued by the learned counsel for the respondent that Ex.P26 dated 19.06.2009 is purely a business contract. Ex.P27 dated 05.07.2009 providing for payment terms was entered into in furtherance of Ex.P26 and these constitute a contract of joint venture whereby the respondent had assured only 15% income to the claimant. Ex.P1 to P22, P19(A) should have been read in the context of Ex.P26 and P27 but, the Arbitral Tribunal has considered Ex.P1 to P16 independently of Ex.P27. Because of the same and on account of admitting the email communication between the parties at

Ex.P28 without a certificate U/s 65B of the Indian Evidence Act, led to arrive at erroneous conclusion that this is a loan transaction.

16. Per contra, the learned counsel for the respondent argues that Ex.P26 is an agreement between M/s Total Productions represented by the respondent and the claimant; and the dispute was between M/s Total Productions, a proprietary concern and the claimant. Towards this the respondent had issued cheque dated Com.A.P.No.8/2022 06.12.2010 drawn on SBI, Bangalore Main Branch and bearing No.211221 for Rs.90,00,000/-. On its dishnour the the claimant initiated C.C.No.13136/2011 and the respondent was convicted for the offence punishable U/s 138 of N.I. Act. The claim for recovery of Rs.90,00,000/- with interest was referred to arbitration and the respondent's instance. After considering the oral and documentary evidence, the Arbitral Tribunal rightly concluded that there was loan transaction between the parties and it was not a joint venture agreement for sharing the profit and loss. The electronic documents confronted to the respondent was admitted by him during cross examination and therefore, there was no need for complying with Sec.65B of Indian Evidence Act; novation of contract by entering into the second JVA was pleaded by the respondent himself; and the two JVAs were duly stamped, as such the petition should be dismissed as devoid of merits.

17. Points 1 to 3: Since interrelated these are taken up together for discussion for clarity and to avoid repetition.

18. In the light of the rival contentions of the parties, it is to be noted that the Arbitral Tribunal specifically framed Com.A.P.No.8/2022 Issue No.6 because of the defence that though no financial assistance was sought by the respondent the claimant voluntarily offered himself to be a partner of M/s Total Productions agreeing to invest money for conducting Mr.Big's rock concert.

19. The respondent does not dispute execution of Ex.P3 to P16 or P26 and P27 in connection with conducting of the rock concert by Mr.Big. Ex.P26 JVA dated 19.06.2009 is an admitted document. It speaks about the claimant lending Rs.75,00,000/- to the respondent. In the written statement which was treated as statement of defence by the Arbitral Tribunal, the respondent admits in one breath to have entered into JVA as per Ex.P26 and in the other, he claims that the claimant had suppressed about showing payment of Rs.75,00,000/- as loan in the JVA. There is no clarity as to when the respondent came to know about the alleged suppression of fact. Nor has he taken any steps to question the same at the earliest point of time.

20. It is also the respondent's defence that there was a demand by the claimant for return of the principal amount with interest. Pursuant to this JVA dated 05.11.2009 at Com.A.P.No.8/2022 Ex.P27 was got executed by causing threat over telephone, by sending SMS and emails. When confronted with Ex.P28 correspondence between samuel.johnson@supervision.ag and francies@totalproductions.net , the respondent admits francies@totalproductions.net is his email ID and that he was in touch with the claimant through email since January 2009. Therefore, there is no merit in the argument that the Arbitral Tribunal has acted in contravention of the provisions of Evidence Act in admitting the emails without the certificate U/s 65B of the Evidence Act.

21. The arbitral records reveal that the claim was based on dishonoured negotiable instruments issued towards repayment of the claimant's investment pursuant to the JVA and the arbitration clause is severable from the remaining terms thereof. Such being the case, even assuming that the JVAs are insufficiently stamped, the respondent's argument that the arbitral award is contrary to Sec.34 of the Karnataka Stamp Act cannot be accepted.

22. Upon considering the evidence with regard to the respondent's experience in dealing with men and matters as elicited during cross examination, the Arbitral Tribunal Com.A.P.No.8/2022 has rightly concluded that being a person having sufficient experience in the field of business it is highly improbable that he signed blank cheques, blank promissory notes, blank stamp papers as contended.

23. Ex.P3 to P16 are the demand pronote and consideration receipts executed by the respondent in favour of the claimant on various dates between 01.07.2009 and 01.10.2009. The claimant has examined his father in law as Pw2 to prove due execution of the same. Ex.R3 produced by the respondent is Pw2's deposition in C.C.No.13136/2001 claiming to have attested on demand pronotes at Ex.P3, P5, P7, P9, P11, P13 and P15 as witness.

24. When Ex.P3 to P16 were confronted to the respondent, he has admitted signing Ex.P3 to P5, P7 to P13. But Ex.P6 and P14 are the consideration receipts for Rs.20,00,000/- and Rs.5,00,000/- accompanying the admitted DP notes dated 12.08.2009 and 26.09.2009 at Ex.P5 and P13. By duly appreciating this and by comparing the respondent's admitted signature on Ex.P29 the Arbitral Tribunal has concluded that Ex.P6 and P14 are executed by the respondent. It is pertinent to note that Ex.P6 and P14 bear Com.A.P.No.8/2022 the seal of M/s Total Productions.

25. As per Ex.P17 and P18 the amount sanctioned by RAK Bank, Dubai on 30.06.2009 was credited into the claimant's account with HSBC Bank, Dubai. Based on the same, the Arbitral Tribunal has drawn inference that the claimant had sufficient money to lend to the respondent on various dates between July and October 2009. Therefore, there is no merit in the contention that the Arbitral Tribunal ought not have raised presumption U/s 118 of Negotiable Instruments Act with regard to passing of consideration under the DP notes.

26. Further, the email correspondence between the parties reveals that the respondent claiming to be the operation head of M/s Total Productions not only forwarded the project report seeking opinion but also wanted the claimant to make advance payment of Rs.32,50,000/- towards band fees and initial marketing expenses assuring that in case of no profit or loss, he can still be covered with a minimum of 15% returns. On 01.07.2009, the claimant informed the respondent about transferring USD of 65,000 to Tapestry Artists from the account of Supervision Electronics LLC with HSBC Bank Dubai branch.

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27. Only after considering the emails at Ex.P28 along with Ex.P17 and P18 and also the respondent's email dated 30.06.2009 addressed to Tapestry Artists, the Arbitral Tribunal has concluded that the

claimant transferred 65,000 USD (Rs.32,00,000/-) to Tapestry Artists at the respondent's instance. In so far as the remaining Rs.43,00,000/-, there is a clear admission on the part of the respondent for having received the same from the claimant.

28. In the above circumstances, it is not possible to come to any other conclusion than the one arrived at by the Arbitral Tribunal i.e. Ex.P26 and P27 did not make the claimant a part of the joint venture for conducting the rock concert of Mr.Big but there was clear understanding between the claimant and the respondent that the claimant shall lend Rs.75,00,000/- recoverable from the respondent with 15% minimum return. But the pronotes were executed for a sum including interest at 12%. Even under Ex.P27, the rate of interest agreed was 12% from 01.11.2009.

29. From the discussion at para 21 of the arbitral award it is noticed that the respondent did not chose to deny issuance of Ex.P24 and P25, cheques dated 07.04.2010 and Com.A.P.No.8/2022 30.01.2010 for Rs.1,50,000/- and Rs.2,25,000/- respectively. The specific case of the claimant is that these two cheques were issued towards repayment of Rs.3,75,000/- borrowed in cash by the respondent towards his day to day expenses, after entering into the JVA dated 05.11.2009, Ex.P27. When the respondent admits during cross examination that these cheques are drawn on the account of M/s Total Production and his signature but only claims that he is not sure of issuing the same, the Arbitral Tribunal has rightly concluded that Rs.3,75,000/- was borrowed by the respondent and Ex.P24 and P25 were issued in discharge of the said liability.

30. Yet another ground urged by the respondent is that the Arbitral Tribunal has ignored the admissions of the claimant with regard to receipt of Rs.11,11,800/-. It is relevant to note here that the claimant has also pleaded that payment of the said amount by the respondent amounts to acknowledgment of debt. The Arbitral Tribunal in fact has framed issue No.4 casting the burden on the claimant to prove such payment and answered it in the affirmative. Therefore, the argument that the Arbitral Tribunal has not taken into account the claimant's admissions with regard to receipt of Rs.11,11,800/-, cannot Com.A.P.No.8/2022 be accepted.

31. Ex.P1 is the cheque drawn on the account of M/s Total Productions issued in favour of the claimant for a sum of Rs.90,00,000/-. It was dishonoured vide Ex.P2 on the ground that the payment was stopped by the drawer. During cross examination Rw1 has admitted Ex.P1 to be his signature.

32. The outcome of C.C.13136/2011 initiated by the claimant with regard to dishonour of the cheque, absolutely has no bearing on a civil proceeding, in view of the law laid down in Vishnu Dutt Sharma's case cited supra. As the claim was based on a cheque issued pursuant to the JVA and after it was dishonoured, the Arbitral Tribunal was rightly directed payment of the cheque amount with interest at the rate agreed under Ex.P27 and the same cannot be held to be patently illegal.

33. The respondent has failed to establish that the Arbitral Tribunal failed to decide the dispute in accordance with any substantive law. The claimant is a resident of Bengaluru and the respondent is also a resident of Bengaluru running his concern M/s Total Productions in Bengaluru. Under such circumstances, the ratio in PASL Wind Solutions Pvt. Ltd.

Com.A.P.No.8/2022 cited supra is of no avail to the respondent because the same deals with the questions (i) whether two companies incorporated in India can choose a forum for arbitration outside India? and (ii) whether an award made at such forum outside India, can be a foreign award under Part-II of the Act?

34. From the forgoing discussion, it becomes clear that the respondent has failed to establish failure on the part of Arbitral Tribunal to decide in accordance with the terms of contract Ex.P26 and P27 or the substantive law of the land. It is not the respondent's case that the Arbitral Tribunal violated the principles of natural justice and conducting the proceedings. Therefore, the ratio in State of Chattisgarh and Anr. Vs SAL Udyog Pvt. Ltd. relied upon by the respondent, in my considered opinion has no application to the facts of this case.

35. The respondent has not made out a case of misinterpretation of contract or the Arbitral Tribunal deciding matters beyond the scope of submission to arbitration. Nor has the respondent demonstrated that the impugned award amounts to creation of new contract Com.A.P.No.8/2022 between the parties. The grounds urged seek to assail appreciation of evidence and interpretation of Ex.P26 and P27 by the Arbitral Tribunal.

36. As clarified by the Hon'ble Supreme Court in Ssangyong Engineering and Construction Company Ltd. relied upon by the respondent, reappraisal of evidence cannot be permitted on the ground of patent illegality appearing on the face of the award and construction of terms of a contract is primary for an arbitrator to decide. Only if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction that would fall under Sec.34(2A). But the respondent has failed to demonstrate that the view taken by the Arbitral Tribunal of the terms of Ex.P26 and P27 is not even a possible one.

37. Further, the ground of "most basic notions of justice", qua contravention of the public policy of India, can be attracted only in exceptional circumstances when the conscience of the court is shocked by infraction of fundamental notions or principles of justice and mere contravention of substantive law of India, by itself is no Com.A.P.No.8/2022 longer a ground available to set aside the arbitral award, as held in Ssangyong Engineering and Construction Company Ltd Vs NHAI. Therefore, the point for consideration is answered in the negative.

38. Point No.4: It is well established that the arbitrator is a Judge chosen by the parties and his decision is final; the court dealing with a petition U/s 34 of the Act cannot reappraise the facts and evidence. No interference with the award is permissible unless the reasons given by the Arbitral Tribunal are totally perverse. If the view taken by the arbitrator is a plausible one, in the facts and circumstances of the case, the court cannot interfere with the award and closer scrutiny of the merits of the documents and the material placed before the Arbitral Tribunal is not permitted under any circumstances.

39. From the discussion on points 1 to 3, it can be safely concluded that the respondent, on the basis of arbitration records, has failed to establish the contention that the Arbitral Tribunal dealt with dispute not contemplated by or not falling within the terms of submission to arbitration or that the

impugned award is in conflict with public policy of Com.A.P.No.8/2022 India and vitiated by patent illegality so as to attract the grounds U/s 34(2)(iv), (v), 34(2)(b)(ii) and 34(2-A) of the Act. Therefore, the point for consideration is answered in the negative.

40. Point No.5: In the result, I pass the following:

ORDER The petition U/Sec.34 of the Arbitration and Conciliation Act is hereby dismissed.

Issue copy of the judgment to the parties through e-mail as provided U/o XX Rule 1 of CPC, if email ID is furnished.

(Dictated to the stenographer, transcribed and typed by her, corrected and then pronounced by me in the open court on this the 10th day of January 2023)
(H.R.Radha) LXXXIV Addl. City Civil and Sessions Judge, (CCH-85 Commercial Court) Bengaluru