

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 1018 OF 2011**

1. Ashwin Crane & Construction)
A partnership firm, having their office)
At C-7/8, Ground Floor, Satyam Shopping)
Centre, M.G.Road, Ghatkopar (E),)
Mumbai – 400 077)

2. Ashwin Virji Dhame)
Having his address at 605/606,)
Karvey Neelkanth Valley, 7th Rajawadi)
Road, Ghatkopar, Mumbai – 400 077)

..... Petitioners**VERSUS**

L & T Finance Ltd.)
A Company incorporated under the)
provisions of the Companies Act, 1956)
And having its registered office at)
L & T House, Ballard Estate,)
Mumbai – 400 001 and interalia, office at)
802, Swastik Chambers, 8th Floor, C.S.T.)
Road, Chembur, Mumbai – 400 071)

..... Respondents

Mr.Simil Purohit, a/w. Mr.Krunal Sampat, i/b. S.K.Jain & Associates for the
Petitioners.

Mr.Anand Poojari, a/w. Ms.S.I.Joshi, Mr.Nilesh Gala, Ms.Nikita Pawar, i/b.
S.I.Joshi & CO. for the Respondents.

CORAM : R.D. DHANUKA, J.**RESERVED ON : 20th DECEMBER, 2014****PRONOUNCED ON : 08th JANUARY, 2015**

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act 1996 (for short 'the said Arbitration Act') the petitioners have impugned the arbitral award dated 7th July, 2011 made by the learned arbitrator directing the petitioners to pay a sum of Rs.56,44,422/- with delayed payment charges at the rate of 36% per annum from 30th November, 2001 to 3rd June 2002 and at the rate of 24% per annum from 4th June 2002 till payment and/or realisation thereof. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioners are the original respondents whereas the respondents are the original claimants in the arbitration proceedings. It was the case of the respondents that pursuant to the proposal of the petitioner no.1 herein to have two numbers of L & T Make Hydraulic Excavator Model 72 CK and one no. Tata Hitachi EX 200 and two nos. Krupp HM 720 CS Rock breaker on hire purchase basis which proposal was accepted by the respondents. The respondents provided those machineries to the petitioner no.1 on hire purchase basis under an agreement for hire purchase 11th October 2000 on the terms and conditions mentioned therein. It was the case of the respondents that as requested by the petitioner no.1, the said machineries had been acquired from the petitioner no.1 on payment of Rs.67 lacs and the same were given to the petitioner no.1 on hire purchase basis.

3. Under the said hire purchase agreement the petitioners agreed to pay the hire charges totalling to Rs.88,42,392/- in monthly installment of Rs.2,45,622/- as stipulated in the repayment schedule attached to the said agreement within the period of 36 months commencing from 11th November 2000 and ending on 11th October 2003. Under clause 12 of the said agreement, it was agreed that the petitioners would pay 3% per month on unpaid and delayed hire charges. Under

the said agreement the petitioners were put in possession of the said machineries. The petitioner no.2 guaranteed the due observance and full performance by the petitioner no.1 of all the terms and conditions of the said agreement. Clause 12 of the said agreement provided for payment of 36% per annum as and by way of additional finance charges by the petitioner no.1 to the respondents in case of the default, from the date of default till payment of such installment. The respondent no.1 was also entitled to take possession of the said machineries from the petitioner no.1 in case of default.

4. It was the case of the respondents that under the said hire purchase agreement, the petitioner no.1 made a payment of Rs.2,45,622/- on 26th November 2000 towards the hire installment of the said machineries and failed to pay the other installments. The cheques issued by the petitioners towards the payment of other installments were dishonoured.

5. According to the respondents the petitioners were liable to pay a sum of Rs.89,92,062/- as on 29th November 2001 and compensation at the rate of 36% per annum from 30th November 2001 on Rs.46,66,818/- till payment or realisation of the said amount.

6. On 18th December 2001 the respondents issued a notice of demand upon the petitioners and called upon the petitioners to pay the overdue hire installment alongwith additional finance charges aggregating to Rs.33,42,756/- as on 29th November 2001 making it clear that in case of failure, the agreement shall automatically stand terminated and the respondents would be entitled to re-possession of the machineries. It was also made clear that in case of failure, the dispute shall stand referred to the arbitration as provided under clause 21 of the said hire purchase agreement. The petitioners neither gave any reply to the said

notice nor made any payment.

7. The respondents therefore appointed a sole arbitrator under the provisions of the said hire purchase agreement. In the month of June 2002 the respondents filed a statement of claim before the learned arbitrator inter alia praying for an order and decree against the petitioners to pay an aggregate sum of RS.89,92,062/- consisting of overdue hire installment, unmatured hire installments and delayed payment charges as on 29th November 2001 and delayed payment charges at the rate of 36% per annum on the sum of Rs.46,66,818/- from 30th November 2001 till payment and/or realisation or at other rate as the learned arbitrator may deem fit. The respondents also prayed for a direction against the petitioners to surrender the machineries to the respondents.

8. On 22nd August 2002 the petitioners filed reply and counter claim in the said proceedings before the learned arbitrator and denied the claim made by the respondents on various grounds including on the ground that the said agreement was though labelled as hire purchase agreement, the same was a purely finance agreement. Both the parties filed further pleadings before the learned arbitrator.

9. The respondents examined Mr.Rajesh S.Talwatkar, Assistant Manager – Legal as witness in the said arbitration proceedings who was cross examined by the learned advocate representing the petitioners. The petitioners examined petitioner no.2 as witness who was cross examined by the respondents' advocate.

10. The respondents filed a petition in this court under section 9 of the said Arbitration Act against the petitioners herein for interim measures. By an order dated 3rd June 2002 this court appointed the court receiver to take possession of the machineries and directed that the petitioners be appointed as agent of the court

receiver on such terms and conditions which were in consonance with the hire purchase agreement dated 11th October 2000 with security in the sum of Rs.5 lacs. By an order dated 1st October 2002 the Division Bench of this court dismissed the Appeal (821 of 2002) filed by the petitioners herein. By an order dated 4th July 2003 this court refused to modify the order dated 3rd June 2002 on the application of the respondents herein. It was contended by the respondents that by the said order dated 3rd June 2002, this court did not intend to appoint receiver in respect of item no.2 i.e. two number Krupp Rock Breakers, Model 720 CS. This court held that the order dated 3rd June 2002 was clear and the court receiver was appointed in respect of the said machineries. This court also recorded that there was no dispute that the application for appointment of the court receiver was made in respect of the machineries which were given on hire purchase to the petitioners herein. This court accepted the request of the petitioners that agency agreement in respect of those two machines should commence from the date the machineries were made available to the petitioners under the agency agreement. By an order dated 16th September 2003 the Division Bench of this court disposed of the appeal (753 of 2003) filed by the respondents. It was clarified that if at all the respondents herein wanted any variation of the order passed by the learned Single Judge, they may apply.

11. The respondents thereafter filed Judge's Order (197 of 2003). By an order dated 9th October 2003 this court directed the receiver to take possession of all the four items mentioned in the order dated 3rd June 2003 and keep the machineries with him and not to part with possession unless there was direction from the court in that behalf. The court receiver was directed to submit a report to this court about taking over possession of all those items within four weeks from the date of the said order. By an order dated 5th November 2003 the Division Bench of this

court dismissed the Notice of Motion no.2796 of 2003 filed by the respondents inter alia praying for condonation of delay in filing appeal against the order dated 3rd June 2002.

12. By an order dated 20th December 2004 passed by this court, Judge's Order No. 258 of 2004 filed by the respondents herein is rejected. The respondents however were granted liberty to take out appropriate application for further reliefs as may be available under the law.

13. By an order dated 1st March 2005 in Arbitration Petition No.75 of 2005, this court recorded that the respondents herein had not complied with the order dated 9th October 2003 and had not handed over the possession of the machineries which was described at item no.1 in paragraph 2 of the order dated 3rd June 2002. It was made clear that unless the order dated 9th October 2003 which was binding between the parties was implemented by the respondents herein, no further orders could be passed.

14. By an order dated 26th April 2005 passed by the Division Bench in Appeal No.369 of 2005, the said appeal was disposed of. The Division Bench did not interfere with the order passed by the learned Single Judge passed on 1st March 2005. However it was made clear that it would be open for the respondents herein to apply for appropriate interim relief before the learned arbitrator under section 17 of the said Arbitration Act and if any such application is made, the learned arbitrator will decide the same in accordance with the law uninfluenced by the order passed by this court.

15. On 8th May 2006, the learned arbitrator passed an order under section 17 of the said Arbitration Act on the application dated 29th June 2005 filed by the

respondents herein in terms of the minutes of order. The respondents herein was permitted to take possession of all the three machineries which were in custody of the court receiver and was permitted to sell and dispose of the said machineries/equipments by inviting offers from interested buyers by issuing public notice. It was directed that the bid shall take place before the learned arbitrator with an option to the petitioners herein or its associates to bid and purchase the said machineries. The respondents were permitted to adjust all the expenses incurred on the sale of the said machineries out of the sale proceeds and to keep the net sale proceeds and adjust the same against its overdue hire installment amount as per particular of claims annexed to the statement of claim subject to the account and final result of the dispute and award. The court receiver stood discharged without passing accounts.

16. Pursuant to the said order passed by the learned arbitrator the respondents realised Rs.22 lacs from sale of the machineries. The respondents also received insurance claim in respect of one of the machineries destroyed in riots in the sum of Rs.2,91,000/-. In the affidavit of evidence dated 28th June 2007 filed by the witness of the respondents, the respondents gave credit of Rs.22 lacs towards sale value of the machineries and Rs.2,91,000/- towards insurance claim received against the claim of Rs.89,92,062/- to the petitioners and reduced the claim amount to Rs.65,01,062/- with interest.

17. On 7th July 2011 the learned arbitrator made an award directing the petitioners herein to pay various amounts. Petitioners have impugned the said award by filing this petition.

18. Mr.Purohit learned counsel for the petitioners submits that the transaction entered into between the petitioners and the respondents was a pure financial

transaction although the same was couched as a hire purchase transaction. The assets used were specific and were selected by the petitioners. The respondents were only the legal owner and were only interested in their hire purchase charges and principal amount with interest. The respondents had entered into the transaction only as a financier and did not bear the cost of repairs, maintenance or operation nor rendered any specialised services in respect of the assets.

19. Learned counsel placed reliance on the averments made by the respondents in Arbitration Petition No.88 of 2002 stating that the respondents were the owners of the equipments and had hired the same to the petitioners. The respondents in the said petition had relied upon the invoices showing them as owners of the machines. The respondents however could not establish their ownership of the equipments/machineries and did not produce the bills/books of account though were called upon to produce. It is submitted that none of these arguments advanced by the petitioners before the learned arbitrator have been dealt with in the impugned award.

20. Learned counsel submits that the respondents had advanced a sum of Rs.67 lacs to the petitioners pursuant to the hire purchase agreement dated 11th October 2000. The petitioners have already paid Rs.67,05,043/- to the respondents on 17th October 2000. The said transaction had come to an end. The respondents thus could not make any claim against the petitioners. It is submitted that even if the transaction was considered as a hire purchase transaction, the respondents ought to have given appropriate credit of the sum of Rs.67,05,043/- to the petitioners, receipt whereof was not in dispute. It is submitted that the witness examined by the respondents in his evidence had admitted having received payment in respect of the earlier agreement on 14th October 2000 and both the agreements were

closed. My attention is invited to the submissions of the petitioners referred in paragraphs 23 to 25 of the impugned award and also the findings rendered in paragraphs 48 and 49 and it is submitted that the learned arbitrator though referred to the submission made by the petitioners did not deal with the same and/or render any finding in respect thereof.

21. It is submitted by the learned counsel that though this court in the proceedings filed under section 9 while appointing the court receiver at the instance of the respondents herein had directed that the petitioners be appointed as agent of the court receiver in respect of such machineries/equipments which order was upheld by the Division Bench, the respondents failed and neglected to handover the two krupp rock breakers to the court receiver and thus petitioners could not take the benefit of the agency. It is submitted that the petitioners therefore could not be made liable for the hire charges. The learned arbitrator did not deal with this contention raised by the petitioners.

22. It is submitted by the learned counsel that the learned arbitrator has awarded interest at the rate of 36% per annum on the principal sum of Rs.56,44,422/- being the unmatured hire installment and further interest at the rate of 24% per annum from 4th June 2002. The learned arbitrator did not render any findings with respect to the contention that the interest claimed by the respondents was usurious. It is submitted that the learned arbitrator has in any event awarded interest on interest. Interest awarded at the rate of 36% per annum and 24% per annum is exorbitant. It is submitted that the learned arbitrator did not render any reasons on the counter claim made by the petitioners though referred to the said counter claim in the award.

23. Learned counsel placed reliance on the judgment of Supreme Court in case of *Asea Brown Boveri Ltd. vs. Industrial Finance Corporation of India and Ors. AIR 2005 SC 17* and in particular paragraphs 13 to 19 of the said judgment in support of the submission that the transaction entered into between the parties was though labelled as hire purchase agreement, it was in fact a financial transaction. Paragraphs 13 to 19 of the said judgment read thus :-

13. What is a lease finance? According to Dictionary of Accounting & Finance by R. Brockington (Pitman Publishing, Universal Book Traders, 1996 at page 136) :-

"A Finance Lease is one where the Lessee uses the asset for substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. SSAP 23 required that assets held under a finance lease be treated on the balance sheet in the same way, as if they had been purchased and a loan had been taken out to enable this." **(emphasis supplied)**

14. In Lease Financing & Hire Purchase by Dr. J.C. Verma (4th Edition, 1999 at p.33), Financial Lease has been so defined :-

"Financial lease is a long-term lease on fixed assets, it may not be cancelled by either party.

It is a source of long-term funds and serves as an alternative of long-term debt financing. In financial lease, the leasing company buys the equipment and leases it out to the use of a person known as the lessee. It is a full payout lease involving obligatory payment by the lessee to the lessor that exceeds the purchase price of the leased property and finance cost.

Financial lease has been defined by International Accounting Standards Committee as "a lease that transfers substantially all the risks and rewards incident to ownership of an asset. Title may or may not eventually be transferred." Lessor is only a financier and is not interested in the assets. This is the reason that financial lease is known as full payout lease where

contract is irrevocable for the primary lease period and the rentals payable during which period are supposed to be adequate to recover the total investment in the asset made by the lessor." **(emphasis supplied)**

15. According to Lease Financing & Hire Purchase by Vinod Kothari (Second Edition, 1986, at pp. 6 & 7), a finance lease, also called a capital lease, is nothing but a loan in disguise. It is only an exchange of money and does not result into creation of economic services other than that of intermediation. The learned author has quoted T.M. Clark, one of the most authentic writers on the subject who defines lease and operating lease in the undergoing words :-

"A financial lease is a contract involving payment over an obligatory period of specified sums sufficient in total to amortize the capital outlay of the lessor and give some profit."

"An operating lease is any other type of lease -that is to say, where the asset is not wholly amortized during the non-cancelable period, if any, of the lease and where the lessor does not rely for his profit on the rentals in the non-cancelable period."

16. The features of the financial lease, according to the learned author are as under :

"1. The asset is use-specific and is selected for the lessee specifically. Usually, the lessee is allowed to select it himself.

2. The risks and rewards incident to ownership are passed on to the lessee. The lessor only remains the legal owner of the asset.

3. Therefore, the lessee bears the risk of obsolescence.

4. The lessor is interested in his rentals and not in the asset. He must get his principal back along with interest. Therefore, the lease is non-cancelable by either party.

5. The lease period usually coincides with the economic life

of the asset and may be broken into primary and secondary period.

6. The lessor enters into the transaction only as a financier. He does not bear the costs of repairs, maintenance or operation.

7. The lessor is typically a financial institution and cannot render specialized service in connection with the asset.

8. The lease is usually full-pay-out, that is, the single lease repays the cost of the asset together with the interest."

17. In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property inasmuch as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the above mentioned expenses. The period of lease extends over and covers the entire life of the property for which it may remain useful divided either into one term or divided into two terms with clause for renewal. In either case, the lease is non-cancelable.

18. All the abovesaid features are available in the transaction entered into by the appellant. In addition, we find that the registration of the 56 cars stood in the name of the appellant from the very beginning and on payment of full amount including termination fee, as agreed upon, nothing more was needed to be done to vest the appellant with ownership and only loan documents were needed to be discharged and cancelled.

19. There are certain tax benefits which by styling the transaction like a financial lease become available to the lessor (financer) and the lessee (borrower) both. Accounting standards have been devised consistently with which the entries are made in the accounts so as to satisfy the requirements of tax laws and to avail the best benefits by way of tax planning to both the parties.

24. Per contra learned counsel for the respondents submits that admittedly the petitioners had acquired the machineries/equipments in the year 1996 and 1997. The petitioners had furnished bills in respect of the equipments and on the basis of the bills of such equipments, the respondents acquired the said equipments and given the same to the petitioners on hire purchase basis. It is submitted that it was specific case of the respondents that the petitioners had cleared an amount of Rs.67,05,043/- in respect of earlier transaction and on the same day the respondents re-financed by purchasing the equipments of the petitioners and had given back the same to the petitioners on hire purchase basis. The petitioners had acted upon the said hire purchase agreements and issued post-dated cheques towards payment of hire charges. The petitioners however cleared only one installment by honouring the cheque in respect of the first installment and did not pay the balance amount.

25. Learned counsel invited my attention to the written arguments filed by the petitioners before the learned arbitrator and also the written statement and would submit that the petitioners have accepted the execution of hire purchase agreement and that the hire charges were payable in installment under the said agreement. The petitioners also accepted the offer letter of the respondents by which there was re-finance to the petitioners under hire purchase agreement. It is submitted that the amount financed under the earlier agreement in the sum of Rs.67 lacs was repaid by the petitioners. The earlier agreements were treated as closed. In the sur-

rejoinder of the petitioners, the petitioners admitted the finance of Rs. 67 lacs. My attention is invited to the statement of account of the petitioners annexed at page 166 and it is submitted that the petitioners had repaid Rs.67,05,043/- against the finance amount of Rs.67,00,000/- which was under a separate agreement. The petitioners are trying to confuse the issue by falsely alleging that the respondents have not given credit of the said amount of Rs.67,05,043/- to the petitioners. The transaction entered into between the parties was not a money lending transaction but was hire purchase transaction.

26. Learned counsel for the respondents invited my attention to the affidavit of evidence filed by the witness examined by the petitioners who alleged that signatures of blank documents were obtained from the petitioners by the respondents. In the cross examination of the said witness, he admitted that the said witness was a chartered accountant. The witness admitted that the petitioners had paid one installment. The witness also admitted that the petitioner no.1 firm was closed in the month of April 2001. In paragraph 10 of the evidence, the witness admitted that the petitioner no.1 had issued postdated cheques in discharge of the liability under the hire purchase agreement. The witness also admitted that he had signed the documents on his own. The witness admitted that the postdated cheques were issued for repayment of hire installment due under the hire purchase agreement and one cheque out of various postdated cheques was honoured.

27. My attention is invited to the deposition of the witness of the petitioners recorded in paragraph 30. The witness admitted that the books of accounts of the petitioner no.1 was audited and all the entries of dealings with the respondents were entered in the books of accounts. Though the witness agreed to find out the entries and to produce the books of accounts, the witness did not produce the same.

My attention is invited to the ruling given by the learned arbitrator after closure of the evidence that in the event the documents agreed to be submitted by the witness of the petitioner no.1 were not produced on the next occasion, it would be deemed that the petitioners had no such documents. The said witness also admitted that the petitioners had not addressed any letter to the respondents claiming alleged counter claims from the respondents. The petitioners also did not dispute the demand of the respondents claiming a sum of Rs.89,92,062/- in writing.

28. Learned counsel invited my attention to the findings recorded by the learned arbitrator in paragraphs 57 to 59 of the impugned award holding that the said agreement was hire purchase agreement and all the clauses were in the nature of hire purchase transaction. Learned counsel submits that this court cannot re-appreciate the findings of fact and the evidence led by the parties before the learned arbitrator. The learned arbitrator has after considering the evidence and after interpreting the terms of the agreement has held that from the conduct of the parties, the intention of parties was very clear behind the said transaction that unless and until entire amounts payable under the said agreement was duly paid to the respondents by the petitioners, the respondents shall continue to be the owners of the agreement equipments. Learned arbitrator placed reliance on the judgment of Supreme Court in the case reported in **AIR 1966 SC 1178**.

29. Learned counsel submits that the petitioners did not rely upon any documentary evidence or could not prove by leading oral evidence that the respondents had not given credit of the amount of Rs. 67 lacs. On the contrary the petitioners had admitted that the said amount was repaid by the petitioners in respect of the amount advanced under an earlier agreement which agreement was treated as closed.

30. Learned counsel for the respondents placed reliance on the judgment of Supreme Court in case of ***Fiza Developers and Inter-Trade Private Limited vs. AMCI (India) Private Limited and another (2009) 17 SCC 796*** and would submit that there should be minimal interference by courts in matters relating to arbitration. An arbitral award can be set aside only upon one of the grounds mentioned in section 34 (2) of the said Arbitration Act if the petitioners proves that such ground exist which in this case the petitioners have failed. Paragraphs 17 to 22 of the said judgment read thus :-

17. The scheme and provisions of the Act disclose two significant aspects relating to courts vis-à-vis arbitration. The first is that there should be minimal interference by courts in matters relating to arbitration. Second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal.

18. Section [5](#) of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by part I of the Act, no judicial authority shall intervene except where so provided in the Act.

19. Section [34](#) of the Act makes it clear than an Arbitral award can be set aside on the grounds enumerated in Sub-section (2) of Section [34](#) and on no other ground. Sub-section (3) of Section [34](#) provides that an application for setting aside may not be made after three months and the maximum delay that can be condoned is only 30 days. In other words, the maximum period for challenging an award is three months plus 30 days, even if there is sufficient cause for condonation of a longer period delay.

20. Section [36](#) provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section [34](#), or such application having been made, only after it has been refused. Thus, until the

disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.

21. We may therefore examine the question for consideration, by bearing three factors in mind. The first is that the Act is a special enactment and Section 34 provides for a special remedy. The second is that an arbitration award can be set aside only upon one of the grounds mentioned in Sub-section (2) of Section 34 exists. The third is that proceedings under Section 34 requires to be dealt with expeditiously.

22. The scope of enquiry in a proceeding under Section 34 is restricted to consideration whether any one of the grounds mentioned in Sub-section (2) of Section 34 exists for setting aside the award. We may approvingly extract the analysis relating to 'Grounds of Challenge' from the Law & Practice of Arbitration and Conciliation by Shri O. P. Malhotra [First Edition, Page 768, Para (I) 34-14]:

“ Section 5 regulates court intervention in arbitral process. It provides that notwithstanding anything contained in any other law for the time being in force in India, in matters governed by Part I of this Act, the court will not intervene except where so provided in this Part. Pursuant to this policy, Section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. It provides, in all, seven grounds for setting aside an award. In other words, an arbitral award can be set aside only if one or more of these seven grounds exists.

The first five grounds have been set forth in Section 34(2)(a). In order to successfully invoke any of these grounds, a party has to plead and prove the existence of one or more of such grounds. That is to say, the party challenging the award has to discharge the burden of proof by adducing sufficient credible evidence to show the existence of any one of such grounds. The rest two grounds are contained in section 34(2)(b) which provides that an

award may be set aside by the court on its own initiative if the subject matter of the dispute is not arbitrable or the impugned award is in conflict with the public policy of India.”

The grounds for setting aside the award are specific. Therefore necessarily a petitioner who files an application will have to plead the facts necessary to make out the ingredients of any of the grounds mentioned in Sub-section (2) and prove the same. Therefore, the only question that arises in an application under Section [34](#) of the Act is whether the award requires to be set aside on any of the specified grounds in Sub-section (2) thereof. Sub-section (2) also clearly places the burden of proof on the person who makes the application. Therefore, the question arising for adjudication as also the person on whom the burden of proof is placed is statutorily specified. Therefore, the need for issues is obviated.

31. Learned counsel also placed reliance on judgment of this court in case of ***Laxmi Mathur vs. The Chief General Manager, MTNL, Mumbai 2000(4) Bom.C.R. 89*** in support of the submission that the court cannot re-appreciate the facts and evidence under section 34 of the said Arbitration Act. Paragraphs 10 and 12 of the said judgment read thus :-

10. When the Court is called upon to decide the objections raised by a party against the arbitral award, the jurisdiction of the Court is limited, as expressly indicated in section [34](#) of the Act and it has no jurisdictions to sit in appeal and to examine the correctness of the award on merits with reference to the material produced before the Arbitral Tribunal. The Court cannot sit in appeal over the views of the Arbitral Tribunal by re-examining and reappreciating the material.

12. The arbitral award is not open to challenge on the ground that the Arbitral Tribunal has reached to a wrong conclusion or has failed to appreciate the facts and evidence. It is well settled that the parties constitute the Arbitral Tribunal as the sole and

final Judge of the disputes arising between them and they bind themselves as a rule to accept the arbitral award as final and conclusive. The arbitral award is not liable to be set aside on the ground that either on facts or in-law it is erroneous. In the aforesaid backdrop of the challenges set out in the petition to challenge the arbitral award are outside the scope of section [34](#) of the Act. Therefore, it is not possible to set aside the award on any of the grounds set out in the petition.

In the result, petition is devoid of any substance and the same is, therefore, dismissed in limine with no order as to costs.

32. In so far as claim for interest is concerned, the learned counsel submits that under clause 12 of the hire purchase agreement the petitioners in case of default in payment of installment were liable to pay additional finance charges at the rate of 36% per annum. The learned arbitrator has awarded delayed payment charges at the agreed rate which cannot be challenged by the petitioners. It is submitted that the respondents have already given credit of the amounts received by way of sale proceeds on the equipments/machineries sold pursuant to the order passed by the learned arbitrator accepting the minutes of order. The respondents had after giving credit of the sale proceeds and the amount recovered from insurance company in respect of one of the equipment has reduced the claim to Rs.56,66,422/- and claimed interest thereon. It is submitted that if this court comes to the conclusion that interest could not have been granted by the learned arbitrator on the sum of Rs.56,44,422/- from 30th November 2001 to 3rd June 2002 but could be granted only on the principal amount, respondents have no objection if to that extent the award is modified. In so far as interest at the rate of 24% awarded is concerned, it is submitted that the said rate is reasonable rate of interest.

33. Learned counsel invited my attention to the break up of the amount claimed

in the statement of claim. It is submitted that out of the sum of Rs.89,92,062/- originally claimed in the particulars of claim, the respondents had claimed Rs.46,66,818/- towards overdue hire installment as on June 2002, Rs.3,95,292/- towards delayed payment charges/overdue interest as on 29th November 2001 and Rs.39,29,952/- towards unmatured hire installments. It is submitted that if this court comes to the conclusion that the learned arbitrator could not have awarded interest on the sum of Rs.3,95,292/- which was claimed by way of delayed payment charges, interest awarded on the said amount of Rs.3,95,292/- may be set aside by this court.

34. Learned counsel invited my attention to paragraph 20 of the impugned award and would submit that the learned arbitrator has considered the reduced claim of the respondents which is also referred in paragraph 51 of the impugned award.

35. In so far as submission of the learned counsel for the petitioners that the petitioners were deprived of the agency in respect of the equipments though directed by this court and on that ground the petitioners will not liable to pay any hire charges for part of the period is concerned, it is submitted that both the parties agreed before the learned arbitrator that all the equipments which were available with the respondents could be sold by the respondents and the sale proceeds be appropriated against the dues of the respondents recoverable from the petitioners. The said order passed by the learned arbitrator under section 17 was not challenged by the petitioners. It is submitted that in any event since the petitioners had committed default, under the hire purchase agreement the petitioners were entitled to repossess the equipments/machineries and thus there was no question of the petitioners refusing to pay the balance installments.

36. In rejoinder the learned counsel for the petitioners reiterated their submissions and would submit that the petition be made absolute and the impugned award be set aside.

REASONS AND CONCLUSIONS :

Whether agreement dated 11th October, 2000 was a pure financial transaction or was a hire purchase transaction.

37. The learned counsel for the petitioners urged that the agreement entered into between the parties was a pure financial transaction though it was labelled as a hire purchase transaction. It is also the case of the petitioners that the petitioners had paid a sum of Rs.67,05,043/- to the respondents but the respondents did not give credit of the said amount while executing the so called Hire Purchase Agreement. It was the case of the petitioners that the respondents did not bear any cost of repairs, maintenance or operation and had no say in the selection and use of the assets. It is the case of the petitioners that the learned arbitrator did not consider any of these submissions urged by the petitioners.

38. It is not in dispute that both the parties had led oral evidence before the learned arbitrator. The respondents had produced a statement of account of the petitioners showing the finance amount of Rs.67 lacs given by the respondents to the petitioners on 11th October, 2000 and showing the re-payment of Rs.67,05,043/- from the petitioners to the respondents. The said statement of account also indicates that the agreement under which the said transaction took place was closed.

39. A perusal of the record indicates that in various pleadings filed by the

petitioners themselves, it was admitted by the petitioners that there was Hire Purchase Agreement and there was re-finance under the said Hire Purchase Agreement. The petitioners admitted in the oral evidence that the petitioners had signed such Hire Purchase Agreement. Petitioner no. 2 is a Chartered Accountant. The petitioners had issued several post dated cheques towards payment of hire charges under the said Hire Purchase Agreement. One of such cheque however was cleared by the petitioners. Rest of the cheques were dishonoured. There was no response to the notice of demand. At no point of time prior to the date of filing reply in the arbitration proceedings, the petitioners raised a plea that there was no transaction of Hire Purchase between the parties but transaction was in the nature of money lending transaction and/or financial transaction.

40. The witness examined by the petitioners admitted that the petitioner no. 1 had issued post dated cheques in discharge of liability under the said Hire Purchase Agreement. The witness of the petitioners also admitted that the post dated cheques were issued for repayment of hire installments under the said agreement dated 11th October, 2000. The witness also admitted that except payment of one installment the petitioners had committed default of the other installments. The said witness admitted that the petitioner no. 1 did not dispute the monthly installment of Rs.2,45,622/- within a period of 36 months as shown in the said agreement dated 11th October, 2000.

41. A perusal of the record indicates that though the witness examined by the learned arbitrator deposed that the petitioners were maintaining books of accounts and such books of accounts were audited and all the entries dealing with the respondents were entered into books of accounts of the petitioners, the petitioners did not produce any such books of accounts before the learned arbitrator. After

closure of evidence learned arbitrator rightly gave a ruling that if the petitioners failed to produce the documents on the next occasion it would be deemed that the petitioners had no such documents. A perusal of the award on this issue indicates that the learned arbitrator has referred to and dealt with various parts of the oral evidence also in the impugned award and has rendered a finding that from the conduct of the parties, intention of the parties was very clear behind said transaction. It is held that there was clear cut understanding between the parties that unless and until entire amount payable under the said agreement was duly paid to the respondents, the respondents shall continue to be the owners of the agreement equipments.

42. The learned arbitrator rightly placed reliance on the judgment of Supreme Court reported in **AIR 1966 SC 1178** and rightly rendered a finding that the transaction was hire purchase transaction and thus the respondents were entitled to possession of the equipments/machineries. In my view the learned arbitrator has dealt with all the submissions urged by the petitioners and has also considered the evidence and has interpreted the terms of the agreement. In my view the findings of the learned arbitrator are not perverse and thus this court cannot interfere with the findings of fact and cannot re-appreciate the oral and documentary evidence led before the learned arbitrator. On interpretation of the provisions of the agreement and after considering the evidence, the learned arbitrator has rendered a finding that the said agreement was hire purchase agreement and was not a finance transaction. In my view the interpretation of the learned arbitrator is a possible interpretation and cannot be substituted by this court by another interpretation.

43. In so far as the submission of the learned counsel for the petitioners that the respondents had not given credit of the sum of Rs.67,05,043/- which was paid by

the petitioners is concerned, the record clearly indicates that there was no dispute that the petitioners had returned the finance provided by the respondents in the sum of Rs.67 lacs. The said agreement on receipt of the said amount by the respondents from the petitioners was closed. The machineries were thereafter given to the petitioners on re-finance on payment of hire charges. The petitioner no. 2 who was Chartered Accountant had admittedly read the said document. If according to the petitioners the respondents had not given credit of the amount paid by the petitioners in the said Hire Purchase Agreement, the petitioners would not have agreed to pay the hire charges payable in 36 installments and would not have cleared even one cheque. The petitioners did not inform the respondents that the respondents had not given credit of the amount paid already and nothing was due and payable. The submissions urged by the learned counsel for the petitioners is contrary to the records and also the oral evidence led before the learned arbitrator by their witness.

44. A perusal of the award indicates that the learned arbitrator has dealt with this issue in the impugned award and rejected the said contention. It is held by the learned arbitrator that it was not believable that the petitioners had repaid the amount in reference to the context with the deposition made by the witness of the petitioners. In my view if according to the petitioners the transaction entered into between the parties was not a hire purchase transaction but was a finance transaction or that the respondents had not given credit of the amount of Rs.67,05,043/- to the petitioners, the petitioners ought to have applied for cancellation of the said document on that ground which the petitioners have admittedly failed.

45. In so far as judgment of Supreme Court in case of *Asea Brown Boveri Ltd.*

(supra) relied upon by the petitioners in support of the submission that the agreement entered into between the parties was the financial transaction and not hire purchase transaction is concerned, in my view, the said judgment is of no assistance to the petitioners. The petitioners had signed the said agreement with open eyes and had acted upon the said agreement as if the same was hire purchase agreement. The witness examined by the petitioners also admitted in the oral evidence that the post dated cheques were issued towards payment of hire charges under the said Hire Purchase Agreement.

46. In so far as submission of learned counsel for petitioners that since the petitioners were deprived of use of the machineries, as an agent of the Court Receiver though directed by this court and was therefore, not liable to pay any hire charges is concerned, in my view, since the petitioners had already committed default in payment of hire charges, under the terms and conditions of the Hire Purchase Agreement, the respondents were entitled to repossess such machineries/equipments from the petitioners. The Respondents had already exercised that right. There is thus no merit in this submission of the learned counsel for the petitioners.

47. Supreme Court in the case of **Fiza Developers and Inter-Trade Private Limited (supra)** has held that scope of enquiry in a proceedings under section 34 is restricted to the grounds set out in section 34 (2) of the said Arbitration Act and it is necessary for the petitioners to plead the facts necessary to make out the ingredients of any of the grounds set out in section 34(2) of the said Act and has to prove that such grounds are made out. In my view none of the grounds raised by the petitioners in this case for impugning the arbitral award falls under section 34(2) of the Act. I am respectfully bound by the judgment of the Supreme Court in

case of *Fiza Developers and Inter-Trade Private Limited (supra)* which squarely applies to the facts of this case.

48. In so far as claim for interest/delayed payment charges is concerned, the learned Arbitrator has awarded the said claim at the rate of 36% p.a. on the amount of Rs.56,44,422/- from 30th November 2001 to 3rd June 2002 and at the rate of 24% pa from 4th June 2002 till payment and/or realization thereof. In paragraph 72(1), the learned arbitrator has held that the said amount of Rs.56,44,422/- was comprising of overdue hire installments, un-matured hire installments and delayed payment charges computed till 29th November, 2001.

49. A perusal of the statement of claim filed by the respondents herein before the learned arbitrator indicates that the respondents had claimed an amount of Rs.89,92,062/- which was comprising of overdue hire installments as on June, 2002 of Rs.46,66,818/-, towards delayed payment charges for overdue interest as on 29th November, 2001 at Rs.3,95,292/- and un-matured hire installments at Rs.39,29,952/-. The respondents had also claimed further compensation at the rate of 3% p.m., from 30th November, 2001 on Rs.46,66,818/- till payment. In view of the interim order passed by the learned arbitrator, the respondents had sold some of the equipments/machineries and after giving credit of the amount realized reduced the claim before learned arbitrator to Rs.56,66,422/- with interest at the rate of 3% pm from 30th November, 2001 to 3rd June 2002 and further interest thereon.

50. A perusal of the record thus makes it clear that the learned arbitrator while considering the claim for interest/delayed payment charges @36% p.a. for the period 30th November, 2001 to 3rd June, 2002 on Rs.56,44,422/- and thereafter at the rate of 24% p.a. from 4th June 2002 till payment has awarded the said claim on

the said amount of Rs.56,44,422/- which is admittedly inclusive of Rs.3,95,292/-. The Supreme Court in case of ***State of Haryana and Ors Vs. S.L. Arora and Co. (2010) 3 SCC 690*** has held that under section 31(7) of the said Arbitration Act, the Arbitral Tribunal is authorized to award interest in accordance with the contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It is held that if the award is silent about interest from the date of award till the date of payment, the person in whose favour the award is made, will be entitled to interest at the rate of 18% p.a., on the principal amount awarded from the date of award till the date of payment. Paragraph 34 of the said judgment in case of ***State of Haryana and Ors. (supra)*** reads thus :

“34. Thus it is clear that Section [31\(7\)](#) merely authorizes the arbitral tribunal to award interest in accordance with the contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till date of payment. The calculation that was made in the execution petition as originally filed was correct and the modification by the Respondents increasing the amount due under the award was contrary to the Award.”

51. In my view the interest awarded by the learned arbitrator on the interest/delayed payment charges of Rs.3,95,292/- for the period 30th Nov. 2001 to 3rd June 2002 and thereafter till payment is contrary to the judgment of the Supreme Court in case of ***State of Haryana (supra)***. In my view the learned arbitrator could have awarded interest only on the principal amount from the date on which the cause of action arose till the date of payment. I am respectfully

bound by the judgment of the Supreme Court in case of *State of Haryana (supra)*. In so far as interest at the rate of 24% 4th June, 2002 till payment is concerned, in my view the rate of interest awarded at 24% p.a. from the date of filing statement of claim till realization is exorbitant and is not the reasonable rate of interest. I am of the view that the rate of interest awarded for the period from 4th June, 2002 till payment can be reduced to 12% p.a. The impugned award is accordingly modified to the aforesaid extent.

52. I therefore, pass the following order :-

The impugned award dated 7th July, 2011 is partly modified. The interest awarded by the learned arbitrator on Rs.3,95,292/- which is included in the amount of Rs.56,44,422/- for the period 30th November, 2001 till payment is set aside. The rate of interest awarded at the rate of 24% p.a. from 4th June, 2002 till payment is reduced to 12% p.a. Rest of the award is upheld. The Arbitration Petition is disposed of in aforesaid terms. There shall be no order as to costs.

(R.D. DHANUKA,J.)