

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

CMA.No.3109 of 2012

M.P.No.1 of 2012

G.Srinivasan Appellant /Respondent
Vs.

1)P.Karuppusamy

2)K.Ruckmani

3).P.Easwari

4)M/s.Sakthi Aiswarya Spinning Mill Pvt.Ltd.,
Registered Office at Pachal Post,
Puduchathiram via, Namakkal-637 023.

5)M.B.Kali, M.A., B.L.,
District Judge(Rtd).,
Plot No.18, Eswara Nagar,
K.Vadamadurai Post,
Coimbatore-641 017.

.... Respondents

Appeal filed under Order 37 Rules 1 and 2 of Arbitration and Conciliation Act, against the order made in Ar.O.P.No.21 of 2012 dated 05.10.2012 on the file of the Principal District Judge, Tiruppur, dismissing the petition filed to set aside the award passed by the sole Arbitrator, the 5th respondent in Arb.1 of 2009 dated 15.07.2009.

For Appellant : Mr.D.Venkateswaran

For R1 to R4 : Mr.R.Parthiban

JUDGMENT

The appellant herein is the respondent/opposite party in A.P.1/2009 on the file of the Arbitral Tribunal of the sole Arbitrator, Sri.B.Kali, retired District Judge, Coimbatore and the respondents in this appeal are the claimants/petitioners before the sole Arbitrator. This appeal is filed against the order of dismissal made in Arb.O.P.No.21/2012 dated 05.10.2012 on the file of the learned Principal District Judge, Tiruppur, dismissing the petition filed for setting aside the award passed by the sole Arbitrator, 5th respondent in A.P.No.1/2009 dated 15.07.2009. The respondents 1 to 4 in the CMA are the claimants and they have filed Arbitration Petition

No.1/2009, before the learned Arbitrator, the 5th respondent in this appeal. A.P.No.1/2009 was filed for cancellation of main agreement, dated 23.02.2007, supplementary agreements dated 30.12.2007 and 09.07.2008 for a direction to the opposite party viz., the appellant herein to surrender possession of the company with all its assets and return all the title deeds and share certificates. The claimants/respondents 1 to 4 herein have also claimed damages at the rate of Rs.5 lakhs per mensem from 30.12.2007 and cost of the Arbitration. This Court adopts the rank of the parties as stated in the A.P.1/2009. The 4th petitioner in A.P.1/2009 is the 4th respondent in this appeal. The 4th petitioner is a Private Limited Company of which 70% of share-holding is owned by petitioners 1 to 3. The petitioners/claimants and the respondent/opposite party entered into a memorandum of agreement and identity regarding transfer of shares and management of the company, by name M/s.Sakthi Aiswarya Spinning Mill Private Limited, to the transferee/opposite party on 23.02.2007. The petitioners have agreed to transfer schedule D mentioned shares in the agreement to the opposite party for a consideration of Rupees 12 crores and 50 lakhs, less the ascertained liabilities of the company payable in respect of schedule C mentioned liabilities in the agreement. The petitioners have agreed to transfer 70% of the entire equity shares numbering 1,03,224 of Rs.100/- each to the opposite party for a consideration of Rs.3,30,000/- only. Both the parties have agreed to complete all the obligations under the Memorandum of agreement on or before 30.06.2007. They have agreed that time could be extended by mutual consent, for performance of the obligations.

2. Since the opposite party has failed to perform his part of the obligations within 30.06.2007, a supplementary agreement was entered into, between the parties on 30.12.2007 extending the time, for completing the obligation till 31.03.2008. The petitioners on their part handed over possession of the company to the opposite party, as a going concern. They gave possession of all the properties listed in the agreement, dated 23.02.2007. The opposite party had paid till then, a total sum of Rs.2,68,44,203/- towards a total consideration of 12½ crores. Since the opposite party failed to pay the entire consideration on or before 31.03.2008, time was again extended till 31.10.2008 under another supplementary agreement dated 09.07.2008. Thereafter, time was not extended. The opposite party has issued a cheque for Rs.50,00,000/- without funds in his account and the cheque was dishonored. Thus the opposite party has committed breach of contract. The agreement dated 23.02.2007 is one for the purchase of shares. The inordinate delay on the part of the opposite party in making payment, amounts to abandonment of contract. The petitioners were always ready and willing to perform their part of the agreement and so the petitioners terminated the agreement. After the termination of the agreement, possession of the mill and the properties by the opposite party is illegal from 30.12.2007 and so the opposite party is liable to surrender possession of the company with all its assets. The amount paid by the opposite party is liable to be adjusted towards the loss of production and business.

The opposite party is liable to pay the damages, at the rate of Rs.5 lakhs per mensem, from 30.12.2007 with interest, at 18% per annum on their defaulted payment till realisation. So the claimants/petitioners prayed for an award to be passed.

3. As per clause XIV in the agreement dated 23.02.2007, the petitioners/claimants have nominated the Arbitrator, after due notice to the opposite party. The Arbitrator has issued a notice to the opposite party informing the opposite party on 05.01.2009, about the constitution of the Arbitral Tribunal. This notice was received by the opposite party on 08.01.2009 and the office copy of the notice was marked as Ex.X1 and the acknowledgment has been marked as Ex.X2. The opposite party did not send any reply, objecting to the appointment of the sole Arbitrator, nor has he filed a petition questioning the constitution of the Arbitral Tribunal. After filing of the claim petition by the petitioners, copies of the claim petition and documents of the petitioners were sent to the opposite parties calling upon him to file his written statement in person or through an authorised agent or an advocate on 30.05.2009 at 11 A.M before the Arbitral Tribunal. The opposite party was informed that the procedures to be followed in conducting the Arbitral proceedings would be finalised on 30.05.2009. Copy of this notice was marked as Ex.X3 and the acknowledgment has been marked as Ex.X4. The opposite party failed to appear before the Tribunal. No representation was made on his behalf, so the opposite party was set ex parte, the matter was posted to 26.06.2009 before the Tribunal for evidence. V.Karupphasamy, the 1st claimant was examined as PW1. A copy of the deposition of PW1 was sent to the opposite party informing him that he could cross examine the witness on 04.07.2009 and he was not represented by any one. The claimants advanced their arguments. The learned Arbitrator framed the following points for consideration:-

- (i) Whether the opposite party has abandoned the agreement, dated 23.02.2007?
- (ii) Whether the claimants/petitioners were ready and willing to perform their obligations?
- (iii) Whether the agreement is terminated and has become unenforceable?
- (iv) Whether the respondent/opposite party is liable to re-deliver possession of the company and the assets including the share certificates?
- (v) Whether the opposite party is liable to pay compensation for loss of production and also damages at the rate of Rs.5 lakhs per mensem?
- (vi) To what relief the claimants are entitled?

4. The claimants and the opposite party have entered into agreement on 23.02.2007 regarding transfer of shares and management of the company, the 4th claimant. Ex.P1 is the xerox copy of the agreement. The original agreement is with the opposite party. As per the terms of the agreement, the claimants have agreed to transfer 70% of the shares of the company, in favour of the opposite party for

Rs.12½ crores, after discharging the shares from their encumbrance created by way of pledge less the ascertained liabilities of the company. Clause IV of the agreement mentions about the payment schedule of consideration. As per clause IV sub clause (ii), the transferee, i.e., the opposite party has agreed to discharge the liabilities of the company. Both parties have agreed to complete all the obligations on or before 30.06.2007. The parties have agreed that the time limit should be extended to a mutually agreed date.

5. On the date of Ex.P1 agreement, a sum of Rs.1 lakh was paid by the opposite party. But the other obligations mentioned in the agreement were not performed within the stipulated time and so the parties have entered into a supplementary agreement dated 31.03.2008 for completing all obligations. The supplementary agreement Ex.P5 gives the details of the amounts paid by the opposite party till then. It also mentions the obligations to be performed by the claimants. After Ex.P5, Supplementary Agreement extending the time till 31.03.2008, another supplementary agreement Ex.p6 was executed on 09.07.2008, extending the time till 31.10.2008 for completing all the obligations, as on the date of this supplementary agreement, the opposite party has paid a total sum of Rs.4.67 crores towards partial consideration. But the total obligations agreed to be performed by the parties, as per the main and supplementary agreement were not completed, thereafter. PW1 has deposed that even after the extended supplementary agreement, under Ex.P6, the opposite party did not perform his part of obligation. According to PW1, the petitioners were always ready and willing to perform their part of the obligations. As per Ex.P1, agreement, the transferring of the shares by the claimants and payment of money by the opposite party should be done simultaneously, at the same time. The agreement provides for simultaneous performance of the obligations. There is evidence to show that the claimants had executed transfer of deeds in respect of 30,000 equity shares and delivered possession of the company to the opposite party, with all its assets. It is mentioned in the supplementary agreement Ex.P5 dated 30.12.2007 that possession of the company, in a running condition was delivered to the opposite party, as seen in Ex.P5. In para 6 in Ex.P5, it is stated as follows:

"The possession of the undertaking of the company and the company has been handed over this day to the proposed transferee, as a going concern and the proposed transferee shall inter alia has taken care of the day-to-day operation of the company and all the activities connected therewith and incidental thereto."

6. The opposite party has failed to comply with his part of the obligation regarding the payment of consideration. There is a liability of the company regarding repayment of fixed deposits received by the company and also regarding the payment for cotton purchased by the company. According to Ex.P1 agreement, it is the liability of the opposite party to discharge the same, but the opposite party has failed to discharge the liabilities as per Ex.P1.

But in clause 8 of Ex.P6, supplementary agreement, dated 09.07.2008, the liability is fastened on the opposite party and it has been shifted to the petitioners, without assigning any reasons. PW1 has deposed that the claimants are not liable to comply with the new covenant in Ex.P6, regarding the refund of fixed deposits and the payments due to cotton suppliers. The Arbitrator has observed that there is no contra evidence on the side of the opposite party. According to the Arbitrator, if this liability has to be discharged by the claimants, then there should be corresponding change in the payment of consideration for the entire dealings, so the Arbitrator observed that as there was no such change, he is of the opinion that the opposite party is liable to refund and pay the amounts due to fixed deposit holders and cotton suppliers.

7. The opposite party has issued a cheque for Rs.50,00,000/- towards his liability for discharging the amounts mentioned in Ex.P6 agreement, but the cheque was dishonoured and so there was breach of contract. Even though the opposite party has taken possession of the company and the business in a running condition, the opposite party has failed to comply with the obligations. The face value of the shares was fluctuating. The learned Arbitrator has found that the opposite party had abandoned the contract and so, the claimants have terminated the agreement and informed the same, to the opposite party under Ex.P7. As per Ex.P1 agreement the obligations of both the parties are as follows:-

"Obligations of the claimants are as follows:

- (i) They should deliver duly executed instruments of transfer along with the share certificates after discharging the shares from their encumbrances.
- (ii) They are liable for all liabilities of the company including statutory liability and dues to workers of the company.
- (iii) They should deliver all records, books and papers relating to the company.
- (iv) To hand over the company as a going concern.

Obligations of the Opposite Party are as follows:

- (i) Payment of consideration as laid down under Clause IV(i)(a), (b), (c).
- (ii) To discharge the liabilities of the company as enumerated in Schedule C of the agreement.
- (iii) To take over the company as a going concern.
- (iv) Statutory liability and workers dues to be satisfied from the appointed day."

8. The main obligation of the opposite party is payment of consideration, as per clause iv(i)(a)(b)(c) of Ex.P1 agreement. As per Ex.P1, the obligations have to be performed, simultaneously and payment of consideration should be complied first. The opposite party has to make the payment, first before the transfer of shares. But the opposite party has failed to perform his obligation fully. As per Section 51 of the Indian Contract Act, the claimants are not

bound to perform their obligations. The opposite party has failed to perform his part of obligation within the stipulated time, especially when time is essential, in cases relating to transfer of a company with assets and shares. So, it is the right of the claimants to avoid the contract. It is seen that an inordinate length of time has elapsed, from the time of taking possession of the company on a going concern to perform the remaining obligations. So the learned Arbitrator has found that the claimants are justified in terminating the contract. The termination notices are Ex.P7 and P8. The learned Arbitrator found the points 1 to 3 in favour of the claimants. The learned Arbitrator has decided the points 4 and 5 as below:

"The possession of the company was delivered to the Opposite Party on 30.12.2007, when Ex.P5 was executed.The opposite party has paid a sum of Rs.3.36 crores for the purposes stated in the Memorandum of Agreement and Indemnity Ex.P1, dated 23.02.2007. Thereafter the petitioners (claimants) had handed over share certificates and duly executed transfer deeds for a total 8550 equity shares in the company for a partial consideration of Rs.4.67 crores. Apart from this amount no other payment was made. It is therefore seen that towards the total agreed consideration of Rs.12,50,00,000/- the initial payment mentioned in the agreement Exs.P1 and P5 and another sum of Rs.4.67 crores mentioned in Ex.P6 were received. Thus, without making entire payment, the Opposite Party has been in possession of all the properties of the company including shares from 30.12.2007. As mentioned earlier, the opposite party has taken possession of the company in running condition together with all the machineries and other assets of the company."

9. The claimants have stated that the opposite party was in illegal possession of the properties of the company, after the termination of the contract, and so the opposite party has no right to continue in possession of the company and the opposite party is liable to re-deliver all the properties to the claimants.

10. A question was raised in this matter whether the opposite party is entitled to get back the amounts paid by him to the claimants towards the partial consideration, but the main agreement Ex.P1 and the supplementary agreement Ex.P5 and P6, do not contain any forfeiture clause, in the event of breach of contract by the opposite party. But there is no clause that the claimants should return all the amounts received from the opposite party in the event of breach of contract by the opposite party, but the learned Arbitrator was of the opinion that the opposite party would not ask for repayment of consideration paid by him, in as much as he had the benefit of running the mill and making some gains. It is for the opposite party to prove whether he had made any gains or suffered any

loss. According to the Arbitrator, the opposite party would have made monetary gains from the business. The opposite party has failed to prove that he had not derived any benefit by running the mill and claim the return of consideration. The opposite party has not done so. Hence, the Arbitrator has found that the opposite party is not entitled to get refund of the amount paid by him, to the claimants.

11. The next question considered by the learned Arbitrator is whether the claimants are entitled to claim compensation from the opposite party for breach of contract. The opposite party has abandoned the contract and failed to perform his part of the obligations and so according to the claimants, since the contract having been rescinded, they are entitled to claim compensation. The claimants have submitted that they could have run the business, if possession of mill was not given to the opposite party, but in the absence of acceptable details, the approximate income by running the mill cannot be calculated. The claimants have stated that they are entitled to compensation under Section 75 of the Indian Contract Act. Section 75 of the Act provides that "a person" who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through the non fulfilment of the contract. In this case, the claimants are out of possession of the mill of the company and the claimants were deprived of their earning through the mill. Since there is no evidence regarding the quantum of income from the mill and the company, the learned Arbitrator has found that the claimants are entitled to nominal compensation, for the loss of business from 30.12.2007 till possession is restored to the claimants. Section 73 of the Indian Contract Act provides for compensation for loss or damage caused by breach of contract. A person cannot unjustifiably enrich himself by retaining anything delivered to him, which does not belong to him. So the learned Arbitrator was of the opinion that a nominal compensation of Rs.1 lakh per mensem can be awarded for the period from 30.12.2007 till possession is restored. The claimants have claimed compensation, at the rate of 5 lakhs per mensem, but there was no document or details furnished before the Arbitrator.

12. In Ex.P1 agreement the list of assets in schedule 'A' is mentioned and it contains a list of machinery, at the time of delivering possession of the company to the opposite party. The learned Arbitrator has found that the opposite party was liable to re-deliver possession of the building with all the accessories and machineries, in the same condition, in which they were delivered to the opposite party on 30.12.2007 and it is open to the claimants to claim compensation for any damage or missing of the accessories or machineries. The Arbitral clause XIV of the agreement is not a bar for redeeming the properties in their original condition or for claiming compensation for the damages caused to the properties. The claimants have handed over the title documents in respect of lands, buildings to the opposite party and the opposite party is liable to return those documents to the claimants and the opposite party shall

transfer all the equity shares in favour of the claimants. The learned Arbitrator passed the following award on 15.07.2009 in the following manner.

"(1) The agreements, dated 23.02.2007, 30.12.2007 and 09.07.2008 entered into between the petitioners and Opposite Party shall stand cancelled.

(2) The Opposite Party shall return possession of the mill with all accessories and machineries to the petitioners. He shall return all the documents and deeds that were given to him as per the agreement, dated 23.02.2007 (Description of the mill given in the Schedule)

(3) The Opposite Party shall retransfer the equity shares to the respective petitioners.

(4) The Opposite Party is liable to pay the accrued compensation of rupees eighteen lakhs till 30.06.2009 and thereafter, at the rate of rupees one lakh per mensem till possession of the company is handed over. The Opposite Party is liable to pay interest to the petitioners at 12% per annum to any delayed payment.

(5) The Opposite Party is liable to pay Arbitration costs of Rs.1,35,000/- to the petitioners.

(6) In the event of non-compliance of any of the above directions 1 to 5 in the award, the Petitioners are at liberty to move the Jurisdictional Court at Coimbatore or at Namakkal Court for enforcing the award since the property is situated at Namakkal."

13. The opposite party has filed Arb.O.P.No.219 of 2010 before the learned Principal District Judge, Coimbatore, on 21.06.2010, under Section 34 of the Arbitration and Conciliation Act 1996. The claimant has raised the grounds in the Arbitration O.P., seeking for setting aside the award. In the counter affidavit to the Arbitration O.P., it is contended that the award was passed on 25.07.2009. The Arb.O.P should have been filed on or before 25.10.2009, as per Section 34(3) of the Arbitration and Conciliation Act 1996. The reasons given in the petition for the delay are false and so the Arb.O.P is liable to be dismissed. The Arbitrator has issued a notice to the opposite party and informed him on 05.01.2009, about the constitution of the Arbitral Tribunal. The opposite party has received the notice on 06.01.2009. The office copy of the notice has been marked as Ex.X1 and the acknowledgment has been marked as Ex.X2. The opposite party did not send any reply, objecting to the appointment of sole Arbitrator nor has he filed a challenge petition, as provided under Section 13(2) of the Arbitration and Conciliation Act 1996. The opposite party has not filed a challenge petition within 15 days after coming to know of the constitution of the Arbitral Tribunal. The claim statement, under Section 23 of the Act was filed on 24.04.2009. A copy of the claim petition and copies of the documents filed by the claimants were sent to the opposite party by registered post, with acknowledgment due, on 27.04.2009. The opposite party has received the claim petition with copies of

documents. The opposite party was called upon to file his written statement in person or through a duly authorised agent or an advocate on 30.05.2009. The opposite party was given more than a months time, to file his written statement. The covering letter has been marked as Ex.X3. The postal acknowledgment has been marked as Ex.X4. Since the opposite party did not file his written statement on 30.05.2009, another notice was sent to him on 06.06.2009 extending the time till 17.06.2009, to file his written statement. It was also informed to him in the notice dated 06.06.2009 that if he fails to file his written statement on 17.06.2009, the Arbitral Tribunal would continue the proceedings in his absence.

14. In the counter affidavit, the Arbitrator has further stated that the opposite party has never cared to appear before the Arbitration Tribunal or to file his written statement, and to participate in his Arbitration proceedings, hence, he was set ex parte and evidence of PW1 was recorded. After recording the evidence of PW1 on 24.06.2009, xerox copies of evidence were sent to the opposite party on 26.06.2009, informing him, that he was at liberty to cross examine PW1, on 04.07.2009. It was also informed to him that if he did not participate in the enquiry on 04.07.2009, the matter would be proceeded further, in his absence. This letter was sent under certificate of posting. Even though, it is not incumbent on the Arbitrator to send a copy of the representation to the opposite party, who had never appeared before, the Arbitrator has followed the principle of equity and natural justice and gave time to the opposite party, for cross examination of PW1, but the opposite party had never utilised the opportunity. After completing the enquiry an award was passed on merits, without treating the failure of the opposite party to participate in the Arbitral proceedings, as an admission of the allegations made by the claimants. The first notice was sent to the opposite party on 05.01.2009. The award was passed, on 25.07.2009. In between 05.01.2009 and 25.07.2009, many notices and communications were sent to the opposite party, by registered post and under certificate of posting. The opposite party had acknowledged the receipt of registered notices sent to him. The opposite party is now trying to show that an award was passed, behind his back without his knowledge. It is submitted that under Section 34(3) of the Arbitration and Conciliation Act, a petition to set aside the award has to be filed within 3 months from the date of receipt of the award and the present petition was not filed by the opposite party within the time and therefore, the petition is liable to be dismissed.

15. The 1st claimant, P.Karuppasamy, has filed a counter, which runs as follows:-

The claimants 1 to 3 have entered into an agreement on 23.02.2007 with the opposite party, for transfer of shares and management of the company 4th claimant, to the opposite party. Consideration for transfer was fixed at 12½ crores. The equity shares agreed to be

transferred were 103224 of Rs.100 each, for a total consideration of Rs.3.30 crores and the obligation under the agreement was to be completed by 30.06.2007. On the date of signing the agreement, the opposite party has paid Rs.1 Lakh only and did not fulfil his obligation in time and so a supplementary agreement was executed on 30.12.2007, by which, a sum of Rs.2,68,44,203/- only, was paid to the claimants and possession of the company was handed over. On 30.12.2007, 30,000 shares were also transferred to the opposite party. As the opposite party could not pay the entire consideration, time was extended upto 31.10.2008, though the 2nd supplementary agreement dated 09.07.2008 did not provide for extension of time. The 1st claimant has submitted that the opposite party, issued a cheque for Rs.50 lakhs, as per the supplementary agreement dated 09.07.2008 which was bounced, when presented to the bank. Thus, the opposite party did not discharge the liabilities of the company, as referred in schedule 'c' in the agreement dated 23.02.2007. The opposite party could not comply with the terms of agreement and therefore, the 1st claimant was put to financial loss, apart from the damages caused by the opposite party. The opposite party has no justification to retain possession of the company and the properties. The claimants are in need of money and their valuable asset and property were locked up, by the petitioner. Hence, the claimants have filed the Arbitration proceedings. The 1st claimant has submitted that in the reply notice given on 12.02.2009 for the notice sent by the 1st claimant on 28.01.2009, the opposite party has referred to the appointment of Arbitrator and the Arbitral proceedings initiated for redressal by the claimants. The opposite party has wantonly omitted to participate in the Arbitration proceedings, and so the opposite party, now cannot seek to set aside the award, as no grounds are available, under section 34(2) of the Act. By the notice of the claimants, dated 02.01.2009 to the opposite party, it was informed of the appointment of the sole Arbitrator, and the constitution of an Arbitrary Tribunal and it was also stated therein, that both parties had agreed to nominate a sole Arbitrator and that Mr.B.Kali, a retired District Judge, was nominated, as the sole Arbitrator. This is in conformity with Section 10 of the Act. The opposite party was aware of the constitution of Arbitration Tribunal. They did not challenge the appointment of the Arbitrator, within 15 days, as per section 13 of the Act. The learned Arbitrator has sent a notice on 05.01.2009, to the parties. The opposite party had received it and did not object. Therefore, the opposite party cannot question the appointment of Arbitrator and in support of the same, relevant documents are marked as Ex.X1 and X2. On 24.04.2009, the claimants have filed their claim petition. On 30.05.2009, notice was sent by the Arbitrator to the opposite party, for filing the written statement, by providing the opposite party a copy of the claim petition, along with the documents and that the opposite party has received the notice and the acknowledgment signed by the opposite party have been marked as Ex.X1 and X4. The opposite party having received the claim petition and the documents, has not filed any written statement, even after 35 days of the receipt of the notice.

The Arbitrator has sent a notice on 06.06.2009, extending the time till 17.06.2009 for entering on defence, by the opposite party, but no statement was filed by the opposite party. Evidence of PW1, has been recorded on 24.06.2009, and not on 17.06.2009 and copy of the deposition has been sent to the opposite party on 26.06.2009 and the opposite party was permitted to cross-examine PW1 on 04.07.2009 and copy of the same has been sent under certificate of posting. The opposite party, in spite of knowledge and opportunities given, did not participate in the proceedings, nor he had objected to the proceedings, and so, an award was passed on merits on 15.07.2009, and a copy of the award was sent to both the parties, and now the application has been filed under Section 34(2) of the Act, and it is hopelessly barred by limitation. The opposite party has deliberately absented himself to drag on the matter and the allegations made in the application AOP.219/2010, are false to the knowledge of the Opposite Party. It is contended that the appointment of the Arbitrator, was legal. The allegation that consent of the opposite party was not obtained for appointment of the Arbitrator is not correct, in view of the receipt of several notices of proceedings from the Arbitrator. To the knowledge of the claimants the opposite party has not filed application under Section 11 and 16 of the Act. The other allegations are not admitted and therefore, the 1st claimant has prayed for the dismissal of the application.

16. The 4th claimant M/s.Sakthi Iswarya Spinning Mills Pvt Ltd., filed counter. O.P.219/2010 is barred by limitation. The claimants 1 to 3 have entered into an agreement, with the opposite party, for transfer of shares held in the 4th respondent company, to the opposite party for a total sum of Rs.12.50 crores and the 4th respondent has signed the agreement as a nominal party for the limited purpose, to recognise the transfer of shares and that the 4th respondent has signed the agreement, for the limited purpose of recognising the transfer of shares. The 4th respondent has simply repeated the contentions raised by the 1st claimant. In the original agreement, there is a clause that in case of any dispute with regard to an agreement, the same should be referred to a sole Arbitrator nominated by the parties, and thus the sole Arbitrator was appointed and the learned Arbitrator has issued a notice of his appointment on 05.01.2009 and that of the constitution of Arbitral Tribunal. The 4th respondent company has submitted to the jurisdiction of the Arbitrator and the opposite party was also served. The opposite party has failed to file his written statement. Therefore, the Arbitrator continued his proceedings under Section 25(B) of the Act. This respondent has almost adopted the counter affidavit filed by the 1st claimant and this Court is of the view that no repetition is required. The opposite party, having refused to receive the copy of the award, sent to him on 25.07.2009, has filed a petition for obtaining a fresh copy of Arbitration proceedings, and the same would not save the period of limitation. The application, AOP should have been filed on or before 25.10.2009 and the present AOP, dated 21.06.2010, is barred by limitation. The respondent does not admit

the other allegations made by the opposite party, excepting those which are expressly admitted. Even in the reply notice issued by the opposite party, under Section 138 of the Negotiable Instruments Act, the opposite party has only stated that the entire matter, was under Arbitration, referred to an Arbitrator, and that the opposite party has claimed that the claimants have not presented the cheque, and so, the opposite party, was well aware of the Arbitration proceedings. A criminal complaint was also pending disposal before the learned Judicial Magistrate I, Coimbatore, in C.C.No.1406/2009. The claimants have denied that the opposite party has paid 8 crores. As the claimants have presented the award for execution, at Namakkal, the opposite party has filed this application in Arb.O.P.219/2010. Since the opposite party has failed to fulfil his part of the agreement, and the further obligations, like, the liability of cotton supplies, sale tax due, provident fund dues and settlement of unsecured and secured creditors was pending and the interest for the belated payment was agreed to be borne by the opposite party and the claimants in equal proportion, so the claimants were compelled to refer the dispute to an Arbitrator and the Arbitrator has issued notice on 05.01.2009 about his appointment to all the parties.

17. The 4th claimant in its counter statement has filed its grounds by way of reply and they are as follows:-

"(i) The allegations in ground 1 is false and misleading. The arbitrator has been duly appointed and the petitioner has not raised any objection to the appointment of the arbitrator nor did he express his displeasure to the appointment of the arbitrator. The petitioner simply excluding himself from the arbitration proceedings, after having knowledge about it will not affect the arbitration proceedings.

(ii) The allegations in ground 2 are denied as false. As per the original agreement, when the disputes arisen between the parties, it is clearly stated in Clause 14 of the agreement that 'any dispute', difference or claim whatsoever out of or in relation to MOU shall be resort to arbitration to be conducted in accordance with the provisions of Arbitration and Reconciliation Act, 1996 and the jurisdiction shall be at Coimbatore.' The appointment of arbitrator was intimated to the petitioner and he had not objected to the appointment and the appointment of arbitrator is perfect and there is no contravention of the provision, under Section 11(2) (3) of the Act.

(iii) The allegation in ground 4 is false and misleading. The arbitrator informed the constitution of the Arbitration Tribunal and the award for more than 30 days before proceedings in the matter.

(iv) The allegation in ground 6 is false, frivolous and misleading. The arbitrator had exercised his jurisdiction perfectly under law and has not exceeded any scope of authority.

(v) The allegation in ground 7 is denied as false. The award of the learned arbitrator is perfectly valid and is not void as stated by the petitioner and the award is perfectly in order.

(vi) The allegation in ground 8 is denied as false. The Arbitration Tribunal had intimated at every stage of the arbitration proceedings and the petitioner by keeping himself away, he cannot express displeasure against the arbitration.

(vii) The allegation in ground 9 is false and misleading. The arbitration has been in perfect and it is in accordance with law and there is no illegality and it is perfectly in order.

(viii) The allegations in ground 10 and ground 11 are false. The award passed is perfectly valid and it discloses the reason for passing the award. The allegation that the petitioner has preferred an application under Section 11 before the Hon'ble High Court of Madras for appointment of arbitrator and no notice has been received in this regard and there is no reason for the petitioner to keep away from the arbitration proceedings.

(ix) Having got himself away from the arbitration proceedings, the petitioner cannot file an application seeking that the arbitration proceeding was a biased one against him. Further, having refused to receive the copy of the award sent to him on 25.07.2009, the petition filed for obtaining a fresh copy of the arbitration proceedings will not save the limitation. The copy of the award was dispatched on 25.07.2009 and the petitioner was well aware of the fact that the arbitration proceedings, the application should have been filed on or before 25.10.2009 and the application dated 21.06.2010 is belated and the petition is not maintainable and the same is hopelessly barred by limitation.

(x) The arbitration award passed is perfect and valid. The application filed by the petitioner is devoid of any merits and the same has to be dismissed in limine.

(xi) This respondent therefore pray that this Hon'ble Court may be pleased to dismiss the petition and thus render justice."

18. The 1st claimant has filed additional counter statement. The 1st claimant has stated that the award copy sent to the address of the opposite party was returned, as unclaimed and any challenge to the award should be filed within 45 days from the date of the award and the court is empowered to condone any further delay after 45 days, but beyond 90 days, no application for setting aside the Arbitration award is maintainable. Though the opposite party was well aware of the award, having sent to him, by the Arbitrator on 15.07.2009, the opposite party has filed this Ar.OP.21/2012, beyond the prescribed time and so, the application is hopelessly barred by limitation. The 1st claimant has almost repeated the facts in his additional counter and therefore, it may not be necessary for this Court to repeat the same. The opposite party has failed and neglected to challenge the appointment of Arbitrator and the Arbitration proceedings and therefore, the opposite party has waived his right to object to the Arbitration proceedings. The Arbitrator had sent the postal cover to the address of the opposite party and he has purposefully failed to claim the award copy, so the award copy is deemed to have been served on the opposite party and Ar.O.P., has been filed after a long period of 1½ years and therefore, OP., is not maintainable.

19. The claimants 1 to 4 have filed written arguments before the learned District Judge, Tiruppur. The learned Principal District Judge, Tiruppur, passed an order in Ar.O.P.21/2012 on 05.10.2012 dismissing the petition with cost. The learned District Judge has narrated the facts of the case put forward by the claimants and considering the oral and documentary evidence has passed the above said order in a cogent manner. The opposite party has filed this CMA as against the order made in Arb.O.P.21/2012. The opposite party is the appellant in CMA.3109/2012 and the claimants are respondents 1 to 4 in this appeal and the 5th respondent in this appeal is the Arbitrator. The appellant has raised the following grounds in the appeal.

20. The constitution of Arbitration Tribunal the ex parte proceedings therein and the award dated 15.07.2009 are all void ab initio as they are not in conformity with the Arbitration and Conciliation Act. The claimants had not obtained the consent of the opposite party for appointment of the 5th respondent Mr.B.Kali, District Judge, retired as an Arbitrator. The claimants have not waited for 30 days to see whether the opposite party agreed for the nomination of the Arbitrator. The Arbitration Tribunal passed an illegal award in the ex parte proceedings. The award according to the opposite party is non-est in law not binding on him. The opposite party has filed an application under Section 11 of the Act for appointment of an Arbitrator. The opposite party has filed the Ar.O.P.21/2012 within a period of limitation under Section 34 of the Act. The opposite party was not served with a copy of the award on 25.07.2009 or 28.07.2009. The opposite party submitted that he had no knowledge about the proceedings of the award and that there is

violation of natural justice. Learned counsel for the appellant submitted that the award has to be set aside as it is patently illegal.

21. With regard to appointment of Arbitrator, the learned Arbitrator was nominated by the claimants after due notice to the opposite party. The Arbitrator informed the opposite party on 05.01.2009 about the constitution of the Arbitration Tribunal and this notice was received by the opposite party on 06.01.2009 and the office copy of the notice is marked as Ex.X1 and the acknowledgment is marked as Ex.X2. The opposite party did not send any reply objecting to the appointment of the Arbitrator nor has he filed a challenging petition questioning the constitution of the Arbitration Tribunal. The Arbitrator has sent copies of the claim petition and the documents relied upon by the claimants were sent to the opposite party calling upon him to file his written statement on 30.05.2009 at 11 A.M before the Arbitration Tribunal. It is seen from the award that the opposite party was informed that the procedure to be followed in conducting the Arbitration proceedings would be followed on 30.05.2009. Copy of this notice is marked as Ex.X3 and the acknowledgment is marked as Ex.X4. The opposite party has not attended the Tribunal and so he was set ex parte. The claimants were asked to let in evidence on 26.06.2009. PW1 was examined and copy of the deposition was sent to the opposite party informing him that he would cross examine the witness on 04.07.2009. The opposite party was absent on 04.07.2009 and he was not represented by anybody. The opposite party has wilfully avoided the Arbitration proceedings and therefore the learned Arbitrator passed the award.

22. The learned Principal District Judge, Tiruppur, has framed the points for consideration.

Whether there is any ground to set aside the award passed by the Arbitrator on 15.07.2009. There were 3 agreements between the opposite party and the claimants 1 to 4 on 23.02.2007, 20.12.2007 and 09.07.2008. The 1st one being the memorandum of agreement and the other two are being supplementary agreements. The opposite party has stated that the claimants 1 to 3 have not carried out their obligations and they have unilaterally appointed Mr.B.Kali, the 5th respondent as sole Arbitrator. According to the opposite party, he was not served with a copy of the award and with great difficulties, he got the copy of the award only on 28.04.2009. According to the Arbitrator, the opposite party refused to receive copy of the award sent to him on 25.07.2009, but the opposite party has stated that he got the copy of the award by filing an application before the Arbitrator. The application for setting aside the award was filed on 25.06.2010, but the application for setting aside the award should have been filed on or before 25.10.2009. Section 11(2) of the Act deals with the right of the parties to freely agree on a procedure for appointing an Arbitrator and the 1st agreement dated 23.02.2007 which is Ex.P1 the Arbitration clause is termed "any dispute,

difference or claim arising out of or in relation to Ex.P1 agreement shall be referred to Arbitration to be conducted in accordance with the provisions of the Act and the venue of Arbitration authority shall be at Coimbatore. The learned counsel for the claimants 1 to 3 have argued that the opposite party has orally agreed to appoint a sole Arbitrator and so that the 5th respondent who is a retired District Judge as the Arbitrator, was appointed. The 1st claimant has sent a notice on 02.01.2009 under Ex.P11 informing the opposite party that the 5th respondent Mr.B.Kali was nominated as sole Arbitrator as per Section 10(2) of the Act and he has also stated that both of them have agreed to nominate a sole Arbitrator. It is mentioned that the receipt of this letter has been admitted by the opposite party in the petition. The 5th respondent Arbitrator has sent copy of the claim petition which was received by the opposite party under Ex.X4 acknowledgment. The opposite party himself has produced a copy of the notice dated 05.01.2009 under Ex.P14 but the opposite party has denied his signature in Ex.X2 and X4. The opposite party has claimed to have filed a petition under Section 11 of the Act, for an appointment of an Arbitration for resolving a dispute under the agreement dated 23.02.2007, but in the cross examination the opposite party has stated that he did not state like that.

23. It is on record that the opposite party has produced copy of the letter dated 02.01.2009 and notice of the Arbitrator dated 05.01.2009 and so it is clear that the opposite party has received both the letter and the notice, but now the opposite party denies the receipt of the notice dated 05.01.2009 and acknowledgment. The claimants submitted that as per Section 13(2) of the Act, if the Opposite Party to challenge an Arbitration, he shall within 15 days after becoming aware of the constitution of the Tribunal and of any circumstances, as per sub section 2 of section 12 sent a written statement of the reasons for the challenge to the Arbitration Tribunal otherwise any challenge to the appointment of the Arbitrator made after 15 days as per Section 13(2) would become time barred and cannot be entertained for any reasons. The opposite party has received the letter of the 1st claimant dated 02.01.2009 under Ex.P11 and the notice of the Arbitrator dated 05.01.2009 (Ex.p14) Ex.X2 is the acknowledgment signed by the opposite party on 06.01.2009 for having received the notice dated 05.01.2009 under Ex.P14, so in order to avoid the legal impediment under Section 13(2) of the Act, the opposite party has now denied his signature in Ex.X2, so the finding of the learned District Judge, Tiruppur, that challenge by the opposite party regarding the appointment of Arbitrator cannot be entertained now. I agree with the finding of the learned District Judge, Tiruppur. The learned counsel for the opposite party submits that Section 34(2) of the Act mentions of the grounds under which the award could be set aside. In this case, the opposite party was given proper notice on the appointment of Arbitrator and the Arbitral proceedings. The Arbitrator was appointed in view of Section 10(2) of the Act. The opposite party has not invoked the grounds mentioned in Section 34(2) of the Act. The learned counsel for the claimants 1

to 4 argued that the grounds mentioned in Section 34(2)(a) and (b) are not and cannot be invoked by the opposite party and he cannot challenge the award on any other grounds. I do not accept the argument of the Opposite Party that the Arbitral Tribunal has got bias against the opposite party.

24. Further, the learned counsel for the opposite party has submitted that the Arbitrator was biased against the opposite party. But there is no material available from oral and documentary evidence. But the lower court cannot re-appreciate the evidence recorded by the Arbitrator as if the lower court is an appellate authority. The opposite party remained silent and has not sent any objection to the appointment of the Arbitrator or the Arbitral proceedings despite several notices sent by the Arbitrator informing the Opposite Party by sending copies of the documents to the opposite party, the lower court observed that the opposite party has consented for the appointment of sole Arbitrator and has allowed the proceedings to go on. The claimants submitted that the opposite party cannot say now that the claimants should have filed an application before My Lord The Hon'ble Chief Justice for appropriate relief. The lower court held that there is no ground under which the award can be set aside. I concur with these findings of the lower court.

25. The learned counsel for the claimants submitted that under Section 34(3) of the Act, the challenge regarding the award can be made only within 3 months from the date on which the party challenging the award has received. The award was passed on 15.07.2009 and since the opposite party has refused to receive the award copy sent by the Arbitrator immediately after the award, this petition in Ar.O.P.21/2012, filed on 22.07.2010, is barred by limitation. The learned Arbitrator has produced the cover in which the award copy was sent to the opposite party and the opposite party has not received the postal cover and in the cover it is mentioned as "intimation refused and door locked". This letter was sent to the address "G.Srinivasan s/o R.Gokuldas, 126, Mani Building, Udumalaipet". This is the address of the opposite party given in the Ar.O.P.21/2012. The learned counsel for the claimants submitted that opposite party knowing the contents of this letter maneuvered to see that the cover is returned by the postman and has subsequently sent some letters to the Arbitrator seeking copy of the award. The opposite party has sent a letter dated 03.04.2010 to the Arbitrator and for this the Arbitrator has sent a reply under Ex.P4. The opposite party by his letter dated 12.04.2010 under Ex.P5 asked for a copy of the award from the Arbitrator. The Arbitrator has sent a reply dated 15.04.2010 under Ex.P6 wherein the Arbitrator has stated that the copy of the award was sent to the opposite party by registered post as early as on 25.07.2009 and it was returned with endorsements. The opposite party has denied this fact but after exchange of notices, the Arbitrator has sent a copy of the award again on 26.04.2010.

26. From the materials on record, it is seen that the copy of award was sent to opposite party, by registered post on 25.07.2009 but it was returned unserved as "intimation refused". So the lower court held that there is deemed service of the award on the opposite party on 28.07.2009 being the date on which the letter was returned. The argument of the learned counsel for the opposite party is that the Ar.O.P.21/2012 is within time but from evidence oral and documentary it is seen that the opposite party has refused to receive the award sent by registered post as early as on 25.07.2009 and the lower court has held that the present petition is barred by limitation as per Section 34(3) of the Act. Since the other grounds mentioned in the provisions of Section 34 of the Act are not attracted and so there is no need to go into other aspects. The learned District Judge, Tiruppur, found that there is no ground for setting aside the award. The lower court also found that the opposite party is not entitled to any relief and thus, dismissed the OP with costs, on the respondents 1 to 4. The 5th respondent, Arbitrator, remained ex parte in the lower Court and therefore he was not awarded any costs.

27. The learned counsel for the appellant has raised the following questions at the time of argument which are stated below:-

(1) Whether the application under Section 34 of the Arbitration and Conciliation Act 1996 is barred by limitation?

(2) Whether the unilateral appointment of the Arbitrator by one party without consent of other party confers jurisdiction upon the Arbitration Tribunal?

(3) Whether such an award passed by such Arbitration Tribunal is being void ab initio and non-est in law?

(4) Whether the Arbitrator has followed the principles of natural justice while passing the ex parte award?

(5) Whether the ex parte award passed by the Arbitrator is iniquitous and lopsided award without following the principles of equity, good conscience and fair play?

28. The learned Arbitrator and the learned Principal District Judge, Coimbatore, found that the application under Section 34 is barred by limitation. It is seen from the records that the learned Arbitrator has sent the award by registered post and it was returned as "intimation refused" and "door locked". If the intimation is found as refused, then under Section 27 of the General Clauses Act, 1898 (Central Act X of 1897), the opposite party is deemed to have known the contents of the letter. The intimation was sent to the correct address of the opposite party. As per the judgement reported in AIR 1989 SC 630 [M/s.Madan and Co., v. Wazir Jaivir Chand], the Hon'ble Supreme Court has held that there is presumption of service of notice, under Section 27 of the General Clauses Act, 1897. The

intimation was sent to the correct address of the opposite party, the award was passed on 15.01.2009 and the Arbitrator has sent a copy of the award on 25.07.2009. The Ar.OP was filed on 22.07.2010 and hence, the Ar.O.P filed on 22.07.2010, under Section 34, is barred by limitation.

29. The next argument made by the learned counsel by the opposite party that the unilateral appointment of Arbitrator by one party without the consent of the other party would confer jurisdiction upon the Arbitration Tribunal. The learned Arbitrator informed the opposite party on 05.01.2009 about the constitution of the Arbitral award. The opposite party received the notice on 16.01.2009. The office copy of the notice is marked as Ex.X1 and the acknowledgment is marked as Ex.X2. The opposite party did not send any reply objecting to the appointment of the Arbitrator nor he has filed any challenging petition within 15 days after becoming aware of the constitution of Arbitration Tribunal under Section 13(2) of the Act, but the opposite party denied his signature under Ex.X2. The opposite party was also informed about the procedure to be followed and copy of the notice in Ex.X3 and the acknowledgment is marked as Ex.X4. The opposite party failed to appear before the Arbitration Tribunal and so the opposite party was set *ex parte*, but the opposite party denied his signature in Ex.X4 in his reply. Therefore, I am of the opinion that the opposite party is aware of the Arbitration and he had consented to the appointment of the Arbitrator.

30. The third question is whether, the award is void ab-initio and non-est in law and the fourth question is whether the Arbitrator has followed the principles of natural justice, while passing the award. The Arbitral Tribunal has followed the procedure properly and legally by sending the intimation at every stage and the opposite party has not at all taken part in the proceedings and the award was given by examining PW1, the 1st claimant and considering the Exs.P1 to P10 and Ex.X1 to X4 and so there is no violation of law and natural justice and the learned Arbitrator has considered all the documents and evidence let in by the party. There is no justification by the opposite party to avoid the Arbitral Tribunal and the opposite party knew about the proceedings. The opposite party gave a cheque of Rs.50 lakhs to the claimants without funds in his account and the cheque was dishonoured. A criminal complaint was filed by the claimants in C.C.No.1406 of 2009 before the Judicial Magistrate I, Coimbatore, and that opposite party has sent a reply to the claimants that the entire matter was under Arbitration, referred to the Arbitrator, so the opposite party was consciously aware of the Arbitral proceedings. Therefore, it cannot be now contended by the opposite party that he was not aware of the Arbitration proceedings. Therefore, I find that the award is not void ab initio and non-est in law. Principles of natural justice have been followed by the learned Arbitrator.

31. The last question is whether ex parte award is iniquitous without following the principles of equity, good conscience and fair play. The learned counsel for the appellant is unable to support his argument on false principles except in the interested testimony relating to the denial of receipts of notice, sent by the learned the Arbitrator. Therefore, I do not find any irregularity or illegality in the findings of the lower court and therefore, the CMA is devoid of merits and dismissed. No costs. Consequently, M.P.No.1 of 2012 is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

skm/nb2

To
1.The Principal District Judge
Tiruppur

+1 cc to M/s.S.D. Venkateswaran Advocate sr.27172

+5 cc to Mr.R.Parthiban Advocate sr.27226

CMA.No.3109 of 2012
M.P.No.1 of 2012

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