

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.08.2016

CORAM

THE HONOURABLE MR.JUSTICE **RAJIV SHAKDHER**

O.P.No.355 of 2011
and A.No.2913 of 2016
and Cont.P.No.1997 of 2013

Mr.V.S.Ekambaram,
Proprietor,
Sangupani Fuels,
30-B, Nellukara Street,
Kanchipuram - 631 502.

.. Petitioner in O.P.No.355/2011
and Respondent in Cont.P.
No.1997 of 2013

Vs.

Sri Krishna Tiles and Potteries (Madras) Pvt. Ltd.,
Flat No.A-1, Kumara Vijayam,
Old No.99, New No.187,
Royapettah High Road, Mylapore,
Chennai - 600 004
Rep. By its Director,
Thiru.A.R.Santhanakrishnan

.. Respondent in O.P.No.355/
2011 and Petitioner in
Cont.P.No.1997 of 2013

* * *

Prayer O.P.No.355 of 2011 : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to (i) set aside the Award dated 01.11.2010, as the same is against the petitioner by the second respondent in the disputes between the petitioner and the first respondent as illegal, without jurisdiction and not a proper disposal of

the case ; and (ii) to direct the first respondent to pay the cost of this petition.

Prayer C.P.No.1997 of 2013 : Petition filed under Section 11 of the Contempt of Court Act, 1972 praying to pass suitable orders and punish the respondent for willfully not obeying the orders of this Hon'ble Court passed in Application No.6160 of 2009, dated 21.04.2010.

* * *

For Petitioner in: Mr.Venkatachalapathy,
O.P.No.355 of 2011 Senior Counsel for
and respondent in M/s.Sriram
Cont.P.No.1997 of 2013

For Respondent in : Mr.Kuberan
O.P.No.355 of 2011 for M/s.Rank Associates
and petitioner in
Cont.P.No.1997 of 2013

COMMON ORDER

O.P.No.355 of 2011 :

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act") impugning the award dated 01.11.2010 passed by the Arbitrator.

2. The Arbitrator was appointed pursuant to an application moved by the respondent under Section 11 of the 1996 Act, which was numbered as : O.P.No.458 of 2009. This Court disposed of the said petition on 20.11.2009 and appointed an Arbitrator.

2.1. The learned Arbitrator vide the impugned award has held that the respondent has been able to prove its claim and therefore, would be entitled to a sum of Rs.43,64,250/-, i.e., the sum outstanding as on 30.11.2009. The learned Arbitrator has also indicated that the petitioner would have to pay interest on the sum of Rs.30,00,000/- from 01.12.2009, till the date of realisation.

2.2. It is pertinent to note that in the operative part of the impugned award, the rate of interest is not indicated.

3. Learned counsel for the respondent has argued that, in effect, the learned Arbitrator has allowed payment of interest at the rate, as provided in the loan agreement dated 30.03.2006, pursuant to which, a sum of Rs.30,00,000/- was advanced to the petitioner.

3.1. Learned counsel for the petitioner, on the other hand, contends to the contrary. This is an aspect I will deal with in the course of my discussion.

4. For the moment, I intend to, briefly, record the broad facts, which obtain in the present case.

4.1. The petitioner herein entered into a loan transaction with the respondent, whereby, a sum of Rs.30,00,000/- was advanced to him. The loan transaction is

reflected in a written loan agreement dated 30.03.2006 and, is supported by a Promissory Note of even date, i.e., 30.03.2006. The respondent had advanced the loan via two cheques of even date, i.e, 31.03.2006, which were drawn on ICICI Bank. These cheques bear the following numbers : 697736 and 697737. Each cheque was for a value of Rs.15,00,000/-. The cheques were, admittedly, encashed by the petitioner, and thus, a sum of Rs.30,00,000/- was received by him.

4.2. In terms of the loan agreement, to which, concededly, the petitioner is a signatory, contains certain terms and conditions qua repayment of loan. These terms and conditions are provided in Clauses 3, 4 and 5 of the loan agreement. For the sake of convenience, the said terms and conditions are extracted hereinbelow :

"3) THE PARTY OF THE SECOND PART specifically undertakes to repay the advance of Rs.30,00,000/- (Rupees Thirty Lakhs Only) with 6% P.A. Interest from the date of advance till repayment in full (interest calculated on a daily product basis).

4) THE PARTY OF THE SECOND PART further undertakes to repay the entire advance of Rs.30,00,000/- (Rupees Thirty Lakhs Only) with interest to THE PARTY OF THE FIRST PART

on or before 30.04.2006.

5) In the event of failure by THE PARTY OF THE SECOND PART to repay the entire amount, Rs.30,00,000/- (Rupees Thirty Laksh Only) with interest as per Para 4 above, THE PARTY OF THE SECOND PART hereby agrees to offer acceptable immovable property as security (by way of Registered Mortgage) to THE PARTY OF THE FIRST PART and further undertakes to pay interest @ 15% P.A. for the entire advance of Rs.30,00,000/- (Rupees Thirty Lakhs only) from the date of advance (i.e. 30.03.2006) to date of full and final settlement which date should not extend beyond 31.05.2006."

4.3. A perusal of the aforesaid clauses would show that the petitioner was required to repay the loan along with interest at the rate of 6% interest per annum. The repayment of loan had to be made on or before 30.04.2006. In case, the petitioner was unable to return the loan of Rs.30,00,000/- with interest at the rate of 6% per annum, as provided in Clauses 3 and 4, he was required to offer an acceptable immovable property as security by way of a registered mortgage to the respondent and, was also, required to pay interest at an enhanced rate of 15% per annum, on the sum of Rs.30,00,000/-, received as loan. The

interest at the rate of 15% per annum was required to run from 30.03.2006, till the date of full and final settlement. Under Clause 5, the date of final settlement was indicated as 31.03.2006.

4.4. Admittedly, the petitioner failed to repay the amount. As a matter of fact, the respondent had issued a notice of demand in this behalf dated 17.12.2007.

4.5. It appears that at the insistence of the respondent, the petitioner bought further time, upon furnishing a cheque for a sum of Rs.30,00,000/-. This cheque, on the face of it, is dated 05.02.2009. Evidently, when the respondent deposited the cheque, it was dishonoured and returned by the respondent's Banker with the endorsement "insufficient funds".

4.6. In view of this situation obtaining, the respondent initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881.

4.7. I am told that in the first instance, the petitioner was convicted, however, on appeal being preferred, he was acquitted. Against the acquittal, the respondent has preferred an appeal in this Court, which is numbered as : Cr1.A.No.860 of 2012 and, is pending adjudication.

4.8. Continuing with the narration, the respondent also

triggered the arbitration agreement, as contained in Clause 6 of the loan agreement, by issuing a notice dated 27.03.2009.

4.9. I must indicate here that the petitioner, both before the Arbitrator and this Court, has taken a stand that the said notice was not received by him.

5. Since, the petitioner, did not respond to the notice dated 27.03.2009, an application under Section 11 of the 1996 Act was filed by the respondent, whereupon, this Court appointed an Arbitrator vide order dated 20.11.2009.

5.1. Pertinently, the petitioner participated in Section 11 proceedings.

5.2. It is, in this background that the parties appeared before the Arbitrator and thereupon, the impugned award came to be passed.

6. Being aggrieved by the impugned award, the petitioner has instituted the instant petition, on 28.01.2011.

6.1. It is in this background, arguments have been advanced by the learned counsel for the parties.

6.2. On behalf of the petitioner, submissions were made by Mr.Venkatachalapathy, learned Senior Counsel, instructed by Mr.Sriram, while on behalf of the respondent, arguments were advanced by Mr.Kuberan.

7. The petitioner has submitted that the learned Arbitrator has failed to appreciate that the sum of Rs.30,00,000/- was advanced to him as commission for rendering services for sale of a property worth Rs.300/- crores.

7.1. It was further argued that the respondent, which is a limited company, ought to have ordinarily reflected the transaction in its Income Tax returns, Financial Statements and/or in its Annual Returns for the years 2006-2007, 2007-2008 and 2008-2009. In support of this submission, it was also submitted that the transaction ought to have been reflected in the minute book of the respondent.

7.2. It is the learned counsel's submission that a notice to produce the aforementioned documents, was filed, on which, no orders were passed by the learned Arbitrator.

7.3. It was further argued that the loan agreement was, inadmissible in law, as it was not duly stamped.

7.4. It was also contended that the claim was barred by limitation, as the notice, which the respondent is said to have issued, and is dated 27.03.2009, was never received by the petitioner.

7.5. A submission was also raised that the Arbitrator had committed a grave error in law in not impleading one

Thiru.Sai Narayanan, as party to the proceedings, even though, he was a witness to the loan agreement.

8. On the other hand, learned counsel for the respondent says that this Court would have no jurisdiction to reappreciate the evidence placed before the learned Arbitrator. Furthermore, learned counsel for the respondent says that the notice to produce the document was replied to by the respondent. It is stated that in the reply, a stand was taken that no Income Tax returns or Annual Returns were filed.

8.1. It was further submitted by the learned counsel for the respondent, even assuming without admitting, that the respondent had failed to reflect the transaction in its Income Tax Returns or, in its Annual Returns that by itself, would not establish that the loan was not advanced, in view of the fact that there is a written agreement between the parties, the execution, of which, is admitted by the petitioner.

8.2. Insofar as the application filed in this Court is concerned, (which is numbered as : Application No.2913 of 2016) for leave to file additional documents, the same cannot be entertained, at this stage, as this Court would have to examine the tenability of the award, based on the evidence produced before the learned Arbitrator.

8.3. In support of his submissions, learned counsel for the respondent relied upon the following judgments :

- i. Bright Food Industries V. New Delhi Municipal Corporation, 94 (2001) DLT 385 ;
- ii. Krishna Kumar Madhok V. Union of India, 2000 III AD Delhi 966.

8.4. Insofar as the limitation is concerned, learned counsel for the respondent says that the notice was directed to the address of the petitioner and therefore, service should be presumed to have been effected, as provided under Section 27 of the General Clauses Act, 1897.

8.5. In support of this submission, learned counsel for the respondent submitted that this presumption is strengthened by the fact that the copy of the notice dated 27.03.2009 triggering arbitration agreement was sent to Hon'ble Mr. Justice T. Somasundaram, a former Judge of this Court, which was received by him, as is evident from an examination of the acknowledgement due card, marked as Ex.A.8.

8.6. As regards, the submission of the learned counsel for the petitioner that the sum of Rs.30,00,000/- was paid towards commission charges for the service allegedly

rendered by the petitioner for selling an immovable property of the respondent, Mr.Kuberan, says that no proof, as regards this aspect was placed before the learned Arbitrator. It was, thus, contended before me, that the said defence, taken by the petitioner was clearly untenable, and hence, was rightly rejected by the learned Arbitrator.

9. I have heard learned counsel for the parties and perused the record.

10. According to me, what emerges in respect of which, there is no dispute, is as follows :

- i. That the petitioner received a sum of Rs.30,00,000/- via two cheques issued by the respondent in that behalf, each of which, was dated 30.03.2006. The two cheques were equivalent to a value of Rs.15,00,000/-.
- ii. That the petitioner was a signatory to both the loan agreement and a demand promissory note. These documents were also executed on 30.03.2006.

11. While the aforesaid is clearly admitted by the petitioner, what is denied is the nature of the transaction. According to the respondent, the transaction was a loan agreement. The petitioner claims that the amount was actually paid to him as commission for services rendered for sale of an immovable property worth Rs.300

Crores ; owned by the respondent.

11.1. Clearly, the onus to prove that the sum of Rs.30,00,000/- was advanced by the respondent towards commission, and not, in the form of loan, was on the petitioner.

11.2. Admittedly, the petitioner had placed no documents before the learned Arbitrator to substantiate his defence. As a matter of fact, as noted by the learned Arbitrator, the testimony of the respondent discloses that he had never undertaken, prior to the purported transaction, any transaction in an immovable property. The respondent in his deposition also admitted that he had not raised any demand in writing on the respondent claiming a sum of Rs.30,00,000/- towards commission.

11.3. The finding of the learned Arbitrator, in this behalf, for the sake of convenience, is extracted hereinbelow :

".... In cross examination, as P.W.1, the respondent has categorically admitted that he has not undertaken property transaction services before and "I have done this service for the first time only for the Claimant". To the question that the claimant, being a Private Ltd Company, cannot indulge or engage the services by oral instruction, he has denied the

suggestion. He also admitted that he has not given any demand in writing to the Claimant demanding service charges."

11.4. Furthermore, what the petitioner has failed to establish is, as to why, he issued a cheque in favour of the respondent on 05.02.2009. All these facts, demolish the claim of the petitioner that the sum of Rs.30,00,000/- was paid by the respondent towards service charges, and not, in the form of loan.

12. Insofar as the submission of the petitioner, with regard to the claim being barred by limitation is concerned, in my view, the argument advanced by the learned counsel for the respondent has no merit.

12.1. As indicated above, learned counsel for the respondent has placed material on record, which would demonstrate that a notice, dated 27.03.2009, triggering the arbitration agreement was despatched to the petitioner at the correct address. The postal cover containing the notice was returned with the endorsement "not claimed, returned to sender". The respondent has also established that a copy of the notice dated 27.03.2009 was sent to Hon'ble Mr. Justice T. Somasundaram, a former Judge of this Court, who at the relevant point in time, had been chosen by the

respondent as its nominee. The receipt of the copy of the notice was proved by the respondent. Therefore, bearing in mind, these facts, the presumption that the petitioner has received the notice dated 27.03.2009 would have to be drawn against him as correctly contended by Mr.Kuberan.

12.2. I may only indicate that one cannot quarrel with the proposition that the presumption, which a court is empowered to draw based on the statutory principle incorporated in Section 27 of the General Clauses Act, 1897, is a rebuttable one.

12.3. Having said so, nothing has been placed on record by the petitioner, which would persuade me to come to the contrary conclusion. Therefore, if one were to take into account the provision under Section 21 of the 1996 Act, the arbitration commenced on the date when notice was issued, and thus, even, according to the petitioner, if on that date notice is taken to have been served and that date is taken into account, the claim made before the Arbitrator, would have to held to be, well within the period of limitation.

13. The submission advanced on behalf of the petitioner that an adverse inference ought to have been drawn against the respondent, since it failed to produce the documents with regard to which notice had been served upon it, cannot

help his cause for the following reasons.

13.1. Firstly, the contention of the respondent that since, documents were not filed with the relevant authorities, they were not produced.

13.2. Secondly, if the petitioner was dissatisfied with the reply, he ought to have carried the matter further by filing an appropriate application with the learned Arbitrator. Admittedly, no such application was filed.

13.3. Thirdly, as is correctly argued before me by the learned counsel for the respondent that even if I were to assume the transaction pertaining to Rs.30,00,000/- was wrongly not shown by the respondent either in its annual returns or in its Income Tax returns, it would only lead to the conclusion that the respondent was in violation of relevant statutory provisions, with the possibility of concomitant consequences, being visited upon it, but that by itself, would not lead to a conclusion that the transaction in issue was not a loan transaction. The finding that the transaction in issue was a loan transaction is based on the admitted documents generated between the parties. These being : the loan agreement, the Demand Promissory Notice and the two cheques which had been issued in that behalf. The weight of the evidence is, clearly, in favour of the respondent, as against the

petitioner.

13.4. Therefore, in my view, this submission has no merit and is accordingly, rejected.

14. As regards the submission that loan agreement was insufficiently stamped and therefore, ought not be admitted in evidence, is not supported by material particulars. Assuming without admitting one were to exclude the loan agreement from the equation, even then, the two demand promissory notes and cheques would be sufficient to establish that the transaction in issue was nothing, but a loan transaction. Especially, given the fact, the contrary stand that cheques were issued towards commission is completely bereft of any material.

15. This brings me to the last contention raised on behalf of the petitioner, which is that, Thiru.Sai Narayanan, who was a witness to the loan agreement was not arrayed as a party in the arbitration proceedings.

15.1. According to me, this submission, is also, thoroughly misconceived for more than one reason. Thiru.Sai Narayanan was not party to the loan agreement and hence, could not have been made a party in the arbitration proceedings.

15.2. Furthermore, nothing prevented the petitioner from citing Thiru.Sai Narayanan, as a witness and having him

depose before the learned Arbitrator. The fact that Thiru.Sai Narayanan is the brother of the petitioner is not denied by both, learned counsel for the petitioner and the petitioner, who is present in the Court.

15.3. Upon the petitioner being asked by me as to why Thiru.Sai Narayanan was not cited as a witness, he disclosed to me that, since, his relationship with Thiru.Sai Narayanan was not good, he was not cited as a witness. This, in my view, seals the case against the petitioner, that the transaction in issue was a loan transaction. The petitioner, perhaps, apprehending that Thiru.Sai Narayanan would spill the beans did not cite him as a witness.

15.4. However, as would be evident from my discussion hereinabove, I have not founded my reasoning only on the response of the petitioner, though under Section 165 of the Evidence Act, 1885, the Court is empowered to seek evidence at any stage of the proceedings.

16. There is only one other aspect of the matter, which requires discussion, that is, with regard to the element of interest to be paid to the respondent.

17. At this stage, Mr.Venkatachalapathy, learned Senior Counsel for the petitioner, based on instructions of Mr.Sriram, as also, the petitioner, who is present in

Court, says that the petitioner is willing to pay the awarded amount with simple interest for the period, indicated in the impugned award, *albeit*, at the rate of 12% per annum.

17.1. The learned Senior Counsel further submits that given the financial position of the petitioner, the amount will be paid in instalments.

17.2. I have put this aspect to Mr.Kuberan, learned counsel for the respondent. He contends otherwise.

17.3. However, upon a bare perusal of the award, he cannot, but submit that, in the operative directions issued by the learned Arbitrator, he has erred in not indicating the rate of interest. Though, the learned counsel for the respondent, has sought to argue that if, the impugned award is read holistically, the rate of interest, impliedly, would be 15% per annum, in my view, there is not much scope for debate on this issue.

17.4. Therefore, while sustaining the award in respect of the principal sum awarded, i.e., Rs.43,64,250/-, I am inclined to direct that in addition, simple interest will be paid to the respondent, which will run at the rate of 12% per annum (simple interest), *albeit*, on the sum of Rs.30,00,000/-, with effect from 01.12.2009 till the date

of realisation.

18. The captioned petition is, thus, disposed of, in the aforesaid terms. The parties shall, however, bear their own costs.

18.1. Insofar as A.No.2913 of 2016 is concerned, it cannot be sustained, as no documents can be taken on record, which were not before the learned Arbitrator. The application is also disposed of. The parties shall, however, bear their own costs.

Cont.P.No.1997 of 2013

19. On the previous date, i.e., on 28.07.2016, learned Senior Counsel for the petitioner had indicated that he would be willing to deposit the title deeds of the property described as : 30-B, Annai Indira Gandhi Salai, Kancheepuram Town.

19.1. Learned Senior counsel had also indicated that the valuation report qua the property will be brought to Court.

19.2. Today, photocopy of the original title deeds as also the original title deeds have been shown in the Court.

19.3. It is also indicated that the guideline value of the said property is, approximately, Rs.1,16,00,000/- (Rupees One Crore and Sixteen Lakhs only), whereas, the market value is Rs.2,10,00,000/- (Rupees Two Crores and Ten

Lakhs only).

19.4. The learned Senior Counsel says that since, the petitioner, has indicated that he will pay the awarded amount with interest at the rate of 12% per annum, as indicated in the order passed today in O.P.No.355 of 2011, the original title deeds may be kept in Court, till the entire amount is paid.

20. Learned counsel for the parties agree that in terms of the order passed today in O.P.No.355 of 2011, the petitioner will be called upon to pay a total sum of Rs.67,68,250/-. This amount would include a sum of Rs.43,64,250/- towards principal and Rs.24,04,000/- towards interest.

20.1. To be noted, interest is calculated on the sum of Rs.30,00,000/- with effect from 01.12.2009 till 04.08.2016, i.e., for six (6) years, eight (8) months and four (4) days.

20.2. Learned counsel for the parties are agreed that the said amount can be paid in nine (9) equal monthly installments of Rs.7,52,028/- each.

21. The captioned contempt petition is, accordingly, disposed of, on the following undertaking given by the petitioner, who is present in the Court :

i) That the petitioner will pay a monthly installment of Rs.7,52,028/- commencing from 10.09.2016. The remaining eight installments will be paid on or before 10th day of each Calender month.

ii) That the original title deeds, which are presented in Court today, will remain in the custody of the Registrar General of this Court, in a sealed cover, till such time, the entire debt equivalent to a sum Rs.67,68,250/- is paid by the petitioner.

iii) Upon failure / default by the petitioner in the payment of any one installment, the respondent would have liberty to approach this Court for bringing the property to sale.

iv) That the petitioner, who is present in Court, has indicated in no uncertain terms that the aforementioned title deeds submitted are free of encumbrances.

v) The petitioner also undertakes not to create any third party interest in the aforementioned property without the leave of the Court till such time, the entire amount, as indicated above, is paid to the respondent.

22. The petitioner, however, will have liberty to

approach this Court for release of the original documents, once, the entire amount, as stipulated above, is paid to the respondent.

23. The captioned petition is, disposed of, accordingly.

24. In view of the settlement arrived at hereinabove, learned counsel for the respondent says that, in case, the petitioner were to move the concerned Court for closing pending criminal proceedings, his client would assist the petitioner, in that behalf, provided the entire amount is paid. The said statement made on behalf of the respondent is taken on record.

Sd/.R.S.A.J
04.08.2016

//Certified to be a true copy//

Dated this the day of 2016

S.s/17.10.2016

COURT OFFICER

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