IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.11.2016

CORAM

THE HONOURABLE MR. JUSTICE **RAJIV SHAKDHER**

O.P.No.553 of 2016

1. M.Sowndharya
2. T.Megavarnan ... Petitioners

vs.

1. M/s.Sundaram Finance Limited,
   No.21, Patullos Road,
   Chennai-2.

2. S.Shanmugam ... Respondents

Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996.

For Petitioner : Mrs.K.Sunitha

For 1st Respondent : Mr.M.S.Sampath

O R D E R

1. This is a petition which seeks to assail the Award dated 22.04.2016.

2. The challenge to the award has been made in the background of the following facts:

2.1. The petitioner No.1 has entered into a loan agreement dated 31.08.2011 with the respondent No.1.

2.2. The petitioner No.2 and the respondent No.2 are guarantors to the monies borrowed by the Petitioner No.1 vide Loan Agreement dated 31.08.2011.

2.3. Under the loan agreement, the Petitioner No.1 was disbursed a cultivation loan in the sum of

Rs.17,65,000/-.

2.4. After factoring the interest, the total amount which was payable under the said agreement by Petitioner No.1 was a sum of Rs.23,65,100/-.

2.5. The loan amount was repayable in 47 Equated Monthly Instalments (EMIs).

2.6. As per the II Schedule appended to the loan agreement, three (3) EMIs were payable at the rate of Rs.30,000/-. The due dates for these three (3) instalments were 01.10.2011, 01.11.2011 and 01.12.2011. The bulk of the EMIs, which were forty three (43) in number, were payable at the rate of Rs.52,000/-. The due dates qua them spanned the period between 01.01.2012 and 01.07.2015. The forty seventh (47th) instalment was valued at Rs.39,100/- and was payable on 01.08.2015. As would be evident, each instalment was due and payable on the first day of each month.

3. The Petitioner No.1, as is evident upon a perusal of the records, was not only irregular in making payments qua Scheduled EMIs, but also stopped making payments, completely, after the 11th EMI. Consequently, the respondent No.1, triggered the arbitration agreement obtaining between the parties. Resultantly, an Arbitrator was appointed in terms of Clause 22 of the Loan Agreement by the Managing Director of Respondent No.1.

4. The Arbitrator, upon giving due opportunity to the parties, which included the Respondent No.1, i.e., the

original claimant, the petitioners herein, and the respondent No.2, passed the impugned award.

5. The record shows that the contesting parties were allowed to lead evidence and cross-examine each others' witnesses.

6. The learned Arbitrator, after appreciating the material placed before him, has passed the impugned award, whereby, the petitioners herein along with the Respondent No.2 have been jointly and severally held to be liable for payment of Rs.6,65,772.45 to the respondent No.1. In the award, the Arbitrator has also awarded interest at the rate of 18% from 28.10.2013 till the date of realisation along with costs to the tune of Rs.6,700/-.

6.1. The cost awarded was bifurcated into the following:

(i) The Arbitrator fees amounting to Rs.6,000/-; Arbitration Expenses quantified at Rs.550/-; and lastly, the value of non-judicial stamp, which was pegged at Rs.150/-.

7. Mrs.K.Sunitha, learned Counsel appearing for the petitioners says that the amount awarded is contrary to the public policy for the following reasons:

(i) Firstly, the Arbitrator was appointed without consent of the petitioners.

(ii) Secondly, the subject machinery, which was purchased by utilising the funds advanced by the respondent

No.1, was sold without notice to the petitioners.

(iii) Thirdly, a sum of Rs.1,06,207.55 paid by the petitioners, while the dispute was pending resolution, was illegally adjusted by respondent No.1 against interest, as against, the outstanding principal amount.

8. Mr.Sampath, who appears for the respondent No.1, which is, the contesting party, relied, largely, on the findings recorded by the learned Arbitrator.

9. I have heard the learned Counsel for the parties and perused the records.

10. In my view, none of the grounds of challenge articulated by the learned Counsel for the petitioner are sustainable for the following reasons:

10.1. The appointment of the Arbitrator by the Managing Director of Respondent No.1 is clearly in terms of Clause 22(a) of the Loan Agreement entered into between the parties. The said Clause alludes to the power vested in the Managing Director of Respondent No.1, to appoint, an arbitrator.

10.2. This objection was also taken before the learned Arbitrator. The learned Arbitrator has considered the objection and thereafter made the following observations in paragraph 13 of the Arbitration Award:

''13. Regarding the objection about the

appointment of the arbitrator, if the respondents have got any grievance, they will have to give their objections in writing within 15 days from the date R1 was aware of the constitutions of the arbitral tribunal. Respondent 1 received notice on 04.08.2014 and the objections was filed on 26.11.2014 more than 15 days after the notice. Hence the objections are liable to be rejected."

10.3. As would be clear from the observation made by the learned Arbitrator, no objection whatsoever was taken by the petitioner No.1, to the Arbitrator's appointment within 15 days of his appointment. The Arbitrator records that the petitioner No.1 received notice of appointment on 04.08.2014. Notably, the date of receipt of notice has not been challenged before me by the learned Counsel for the petitioners. The challenge or the objection was, therefore, beyond the time limit provided in Section 13(2) of the 1996 Act. As noticed above, under the agreement obtaining between the parties, the power to appoint an Arbitrator is vested in Respondent No.1's Managing Director. The fact that there was no challenge to the appointment of the arbitrator makes it worse. Accordingly, this ground advanced by the petitioners to lay challenge to the award cannot be sustained.

11. The second ground of challenge, which is raised

by the petitioners, is with regard to the sale of the subject machinery without notice to them. In my opinion, even this ground is not sustainable, in view of the following findings of fact returned by the learned Arbitrator in paragraph 14 of the award :

> ''14) Ex.A2 is the loan agreement and as per the terms of the loan agreement if the first respondent committed default even in one instalment the claimant is entitled to repossess of the machinery. As per the evidence of PW1 first respondent committed default from 12th instalment due on 01.09.2012. The machinery was repossessed only on 24.12.2012. Immediately they issued Ex.A4 the notice on 28.12.2012 which was received by R1 and R2 as we see from Ex.A5 and Ex.A6. If R1 has got any grievance she ought to have sent a reply to Ex.A4. She could have informed to the claimant that she is prepared to pay the instalments due or procure purchasers for the machinery for such and such an amount. She has not given any reply nor given any reason for not giving a reply. Thereafter the claimant invited offers and sold the vehicle to the highest offeree. The claimant has also filed the offer letters Ex.A7 to Ex.A9 with the address of the offerees. It is not the case of R1 that the addresses are fictitious one. Further after the

sale the claimant issued the letter under Ex.A10 on 05.11.2013. First respondent has not questioned that either the sale in fictitious or the machinery was sold for a low price. Again the claimant issued another notice through the counsel under Ex.A11. R1 has not given any reply even for this notice. This clearly show that her claim now that the machinery was sold for a low price to a fictitious person is without any basis. The fact that she has not offered to the pay instalments due after Ex.A4 clearly show that she is not in a position to pay the amount due. Hence on the evidence let in the claimant has established that the vehicle was properly repossessed and sold for a proper price after due notice to the respondents. Hence I find no force in the contention of the respondents that they are not liable to pay the amount due.''

12. Clearly the aforesaid observations show that after repossession of the subject machinery, a notice was issued to the petitioners regarding repossession.

12.1. A close perusal of Ex.A.4 i.e. the Notice dated 28.12.2012 would show that the Respondent No.1 indicated not only to the petitioners but also to Respondent No.2 that in case, they failed to satisfy the demand raised, it shall be constrained to sell the subject machinery and adjust the amount against sums payable.

12.2. Furthermore, the learned Arbitrator, as it would be evident, upon perusal of the record, has examined the offer letters received. The subject machinery, as it appears from the records, was sold to the highest bidder. Thus, in my opinion, this ground of challenge, as indicated above, is also, not sustainable.

13. As regard the last ground of challenge, which is, that the sum of Rs.1,06,217.55 paid by the petitioners was adjusted against interest, and not against principal, in my view, is misconceived. It is not the case of the petitioners that while remitting the said amount, they had indicated that the said amount should be adjusted by the respondent No.1 only against principal. In the absence of any such indication, in my view, respondent No.1 was entitled to adjust the amount in the first instance against interest.

14. Having regard to the foregoing discussion, in my opinion, none of the grounds raised before me can be sustained.

14.1. However, in the given facts, which is, that the petitioners are agriculturalists, who have come upon bad days, I had enquired from Mr.Sampath as to whether future interest, which has been awarded by the learned Arbitrator at the rate of 18% p.a. could be reduced.

14.2. Mr.Sampath, agreed. The learned Counsel indicated that having regard to the economic condition of the petitioners, the rate of future interest could be reduced to 6% p.a. (simple), provided, the amount awarded by the learned Arbitrator was paid within three (3) months from the date of receipt of a copy of this Order and that In case, the amount is not paid within the time frame stipulated above, future interest should run at rate awarded by the learned Arbitrator i.e. 18% p.a.

14.3. It is ordered accordingly.

15. The original records filed by the 1st respondent will be kept in a sealed cover.

16. The petition is disposed of in the aforementioned terms.

sd/.R.S.A.J

11.11.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/24.03.2017 COURT OFFICER

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