

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2017

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.No.350 of 2014

Mr.R.P.Rjaram, ... Petitioner

Vs.

1.M/s.Tamil Nadu Industrustrial
Development Corporation Ltd.,
rep. by its General Manager and
Secretary, Mr.T.K.Arun,
Egmore, Chennai-600 008.

2.Mr.Justice A.S.Venkatachalamoorthy,

3.Mr.Justice M.S.Janarthanam

4.Mr.Justice K.Govindarajan ... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 09.11.2013 served on 12.11.2013 in the matter of Arbitrators Mr.Jstice A.S.Venkatachala Moorthy, (Retd) Mr.Justice M.S.Janarthanan (Retd) and Mr.Justice Govindaraj (Retd).

For Petitioner : Mr.P.K.Ramachandran

For Respondents : Mr.K.M.Vijayan for R1
for M/s.King & Partridge

ORDER

The first respondent is a public limited company wholly owned by the Government of Tamil Nadu. It entered into an equity participation with the petitioner/Promoter of the company, for the purpose of encouraging venture. Accordingly, an Associated Sector Agreement was entered into between the petitioner and the respondent on 19.10.2007. As per the said agreement, the respondent holds 4,90,000 equity shares of Rs.100/- each. It deals on disinvestment, which are as follows:

"Section 20(a) :

The Second Party confirms that the First Party has agreed to participate and subscribe in the equity capital of the Company only based on the undertaking given by the Second Party to purchase the entire shares being disinvested/offered for sale by the First Party as its option at the price calculated in accordance with Clause 20(e) at the end of three years from the date of investment by the First Party and supported by the following:

(i) Post dated cheques given by the Second Party towards the sale consideration determined as per this agreement for disinvestment of shares held by the First Party at

the end of three years from the date of investment.

(ii) Pledge of 4,90,000 equity shares having face value of Rs.49 lakhs held by the Second party and its associates in the Company in favour of the First Party together with the transfer from duly executed by the Second Party and its associates.

Section 20(b) :

The First Party at its option may sell its entire or part of its shareholdings in the Company at the end of three years from the date of investment by the First Party by giving notice of 30 days in advance prior to the date of sale to the Second Party who agrees and undertakes to purchase the entire equity shares if the option for sale is exercised by the First Party/its associates or nominees. The Second Party shall pay the price calculated in accordance with the Clause 20(e) of this agreement as on the date of sale within seven days from the date of sale. If the price is not so paid, the First Party shall take all actions necessary to endorce the undertaking given hereunder including encashing the post dated cheque deposited with the First Party and / or selling the pledged shares. The date on which

three year period of investment made by the First Party ends, shall be called the 'date of sale'. If the First Party has made its investment in more than one instalments/lots, the date of last instalment/lot, shall be taken as the date of investment for the purpose of this agreement.

Section 20(c) :

In the event of failure on the part of the Second Party to purchase the shares being disinvested in whole or in part by the First Party, in terms set out herein above for any reason whatsoever, the Second Party specifically agrees and undertakes:

(i) to indemnify and continue to indemnify the First Party against all such claims/losses and damages suffered by the First Party including reasonable attorney's fees if any that may be paid/payable by the First Party on account of default of the Second Party to buy the shares of the First Party.

(ii) The First Party shall encash the post dated cheques given by the Second Party and sell the 4,90,000 shares pledged in its favour by the Second Party and its associates.

(iii) to reimburse to the First Party the expenses incurred by the First Party in enforcing

the Undertaking herein mentioned and / or in encashing the post dated cheques provided by the Second Party and / or in selling the pledged shares.

(iv) To pay the difference, if any, between the sale consideration determined as per this agreement and the amount of post dated cheques encashed by the First Party and also to pay the interest at the rate of 18% p.a. on the sale consideration from the date of sale till the date of payment/realisation.

Section 20(d) :

If the First Party decides to disinvest the whole or a part of the shares held in the Company after the end of 3 years, it shall give the right of first refusal to the Second Party, by giving not less than 30 days' notice. In such case, the consideration for sale shall be calculated in accordance with clause 20(e) herein.

2. On 14.09.2010, a notice was given by the first respondent to the petitioner seeking compliance of Clause 20(a) and since the petitioner did not comply with the request made, the arbitration clause was invoked.

3.The learned Arbitrator, by making a combined reading of Clause 20(a) with 20(d) was pleased to pass an award with interest at 12.5% to be compounded annually. Challenging the same, the present petition has been filed.

4.The learned counsel appearing for the petitioner would submit that what is relevant is Clause 20(d) as against Clause 20(a), if one goes by Clause 20(d), the right of the first revision is available to the petitioner. Therefore, the Arbitral Tribunal has committed an error in this regard, in respect of issue Nos.2 and 3.

5.The learned counsel appearing for the first respondent would submit that Clause 20(a) and 20(d) operate on different areas. As per Clause 20(a), there is no option left to the petitioner except to make the payment. One has to see the rationale behind the agreement resulting in the participation of the first respondent, which is to encourage a business entrepreneur. Even when two interpretations are possible, the one given by the Arbitral Tribunal being logical and conforming to the principle of law has to be accepted and therefore, no interference is required under Section 34 of the Arbitration and Conciliation Act.

6.As no facts are in dispute, let us go into the only issue raised in this petition. The issue is with reference to the application of Clause 20(a) as against 20(d) of the associated sector agreement dated 19.10.2007.

7.Clause 20(a), as rightly submitted by the learned counsel appearing for the first respondent, is on a different field. As per Clause 20(a), it is mandatory on the part of the petitioner to purchase the entire shares being disinvested/offered by the first respondent at its option. This is also at the price calculated in accordance with Clause 20(e). This option is to be exercised by the first respondent at the end of three years from the date of investment by the First Party that is the first respondent. As against this, Clause 20(d) deals with disinvestment either whole or part after the end of three years. Therefore, Clause 20(a) comes first. When once Clause 20(a) is exercised, then, there is no option that lies with the petitioner except to make the payment. After Clause 20(a), comes Clauses 20(b) and 20(c). Clause 20(b) speaks about the notice period and Clause 20(c) speaks about the consequences on the part of the petitioner to purchase. If one goes to Clause 20(c), it gives substantial rights and powers to the first respondent. This would only mean that the

petitioner cannot wriggle out of Clause 20(a), in so far as his compliance is concerned. As per Clause 20(b), there is no choice that is left to the petitioner. If the petitioner does not comply with Clause 20(a), then the rigor of Clause 20(c) will come. Therefore, Clause 20(a) has to be read in consonance with Clauses 20(b) and 20(c), which do not give any option to the petitioner except to comply otherwise it will amount to re-writing an agreement inter se parties.

8.Clause 20(d) deals with a different situation. This situation would arise, when the first respondent does not want to invoke Clause 20(a). As stated above, Clause 20(a) is to be invoked at the end of the three years, as against Clause 20(d), which comes after the end of three years. While invoking Clause 20(d), the rigor of Clause 20(a) as well as Clauses 20(b) and 20(c) also would vanish. Therefore, an option was given to the petitioner either to accept or refuse. As stated above, I do not have such a situation on hand. After all clauses containing in agreement ought to be read in order to avoid possible conflict.

9.Thus, this Court does not find any merit in this petition. However, I find that the Tribunal on hand awarded 18% interest. The

normal interest that is being levied has been held by the Apex Court in various cases at 12% per annum. Accordingly, the award stands modified, in so far as the interest award is concerned. Thus, resultantly, the interest has to be charged at 12% per annum.

Accordingly, the original petition stands disposed of.

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Index : Yes/No

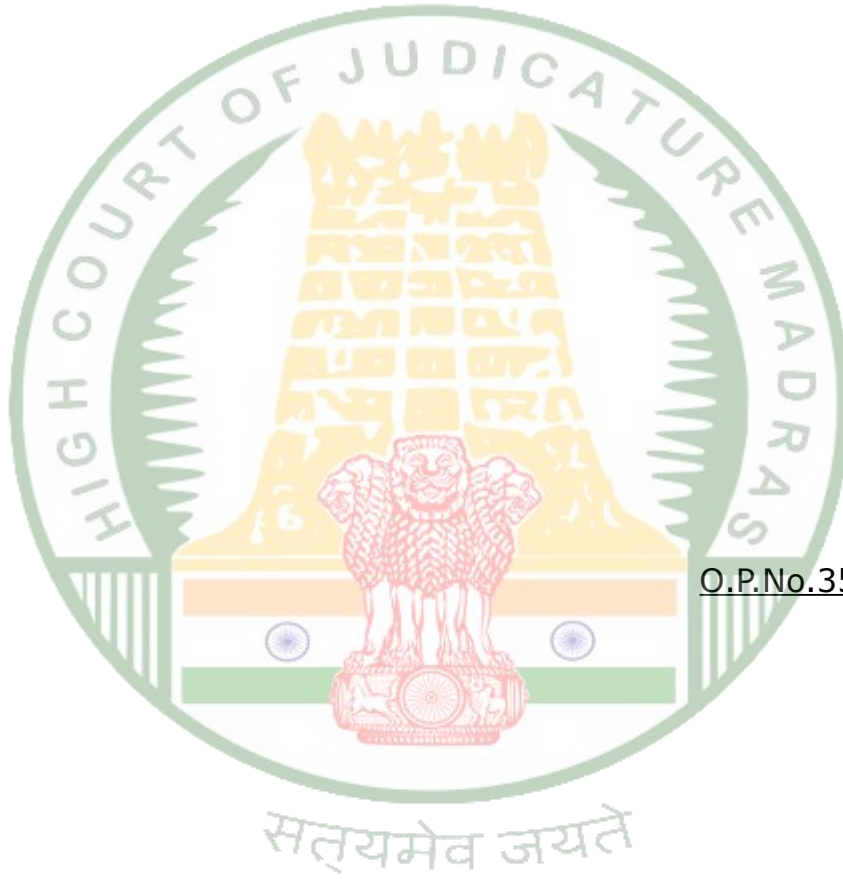
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M.M.SUNDRESH, J.

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