

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.01.2017

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

O.P.No.326 of 2009

1.Mega Constructions, rep. by its
Partner V.Jayalakshmi,
No.105, Baby Nagar, Velachery,
Chennai - 600 042.
2.V.Jayalakshmi
3.Kausalya Ramakrishnan
4.G.Ramakrishnan
5.A.A.Philip ... Petitioners

vs

1.Srikumar Fomra,
13, Appah Garden St.,
Kilpauk, Chennai - 600 010.
2.Sreekant Phumbhra Rep. by
Power of Attorney, Mr.Sri Kumar Fomra,
13, Appah Garden St.,
Kilpauk, Chennai - 600 010.
3.The Sole Arbitrator,
Mr.Justice N.V.Balasubramanian (Retd.)
No.3, Sankarapuram, Mylapore,
Chennai - 600 004. ... Respondents

Prayer: Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 28.07.2008 passed by the third respondent in the matter of the Agreement and Memorandum of Understanding dated 03.12.1998.

For Petitioners : Mr.A.Gunaseelan

For Respondents : Mr.R.Dasaratha Rao (For R1 & R2)

ORDER

Heard Mr.A.Gunaseelan, learned counsel appearing for the petitioners and Mr.R.Dasaratha Rao, learned counsel appearing for the respondents 1 and 2.

2.This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to set aside the award dated 28.07.2008. The matter arise out of a construction contract between the parties and since there was a dispute, the respondent by notice dated 08.06.1999 issued to the petitioners stated that under the agreement dated 03.02.1998, the petitioners jointly and severally undertook to repay Rs.71 lakhs and the balance remaining after the payment of Rs.10 lakhs on the date of agreement was on agreed terms between December 1998 and June 1999. Further it was stated that the time for payment is the essence of the agreement and it also provided that if delay is committed in the payment of the amount on due date, the petitioners would be liable to pay interest @ 20% on Rs.60

lakhs from January 1999 to June 1999. The amount payable on or before 30.12.1998 was paid in three installments between 08.01.1999 and 05.02.1999. Further amount payable on 30.01.1999, 28.02.1999, 31.03.1999, 30.04.1999 and 30.05.1999 had not been paid and therefore the respondent has stated that the petitioners had committed default. With these facts, the respondent informed the petitioners that they are liable to pay interest on Rs.60 lakhs. In terms of Clause 6 of the agreement, the respondent appointed a Retired District Judge as their Arbitrator and called upon the petitioners to nominate an Arbitrator within thirty days from the date of receipt of the said letter. It is not in dispute that the petitioners received the said letter from the counsel for the respondent setting out the claim and nominating an Arbitrator. Nevertheless, the petitioners did not choose to appoint an Arbitrator and in between there was certain other litigation and ultimately, the respondents had to move the Hon'ble Chief Justice of this Court in O.P.No.812 of 2001 under Section 11 of the Act for appointment of an Arbitrator. The Hon'ble Chief Justice by order dated 24.03.2006 appointed an Arbitrator who entered upon reference on 24.04.2006.

3.The learned counsel for the petitioners was fair enough to submit that though several grounds have been raised in the petition filed under Section 34 of the Act, those grounds are factual in nature and he is aware of the fact that the jurisdiction of this Court exercising the power under Section 34 of the Act is very limited and seeks to advance arguments as regards the award of interest with regard to the two periods. The learned counsel elaborately referred to the nature of agreement between the parties, memo of calculation filed by the parties and invited the attention of this Court to the finding rendered by the learned Arbitrator from paragraph 16 onwards. The learned counsel further pointed out that the claim is to award interest @ 20% from 01.01.1999 till 24.04.2006, out of which, the learned Arbitrator entered reference and awarded interest @ 7.5% per annum on Rs.55 lakhs from the date of the award till the date of realisation. The Court has to examine as to whether the respondent would be entitled to the interest at the rate fixed by the learned Arbitrator for the periods referred above.

4.To examine the same, this Court would straight away proceed to examine the reasons assigned by the learned Arbitrator with regard to the interest Pending tillite. The

learned Arbitrator after referring to the decision of the Hon'ble Supreme Court in **Secretary, Irrigation Department, Government of Orissa vs.** reported in **1992 (1) SCC 508**, wherein, the Hon'ble Supreme Court observed that it does not mean that the learned Arbitrator should necessarily award interest pendente lite and it is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case keeping the ends of justice in view. Bearing this legal principle in mind, the learned Arbitrator proceeded to examine the conduct of the petitioners and taking note of the fact that she had paid a sum of Rs.15 lakhs by way of Bankers Cheques thought the cheques issued initially were dishonoured. Subsequently, they could not keep up the promise to repay the further sum as agreed on 03.04.2007. They were set aside and subsequently, the set aside order was set aside and she participated in the proceedings. The learned Arbitrator has recorded the fact that the petitioners have extended cooperation after the set aside order was set aside and willing to settle the money claim. Thus, taking into consideration the conduct of the parties and exercising discretion, the learned Arbitrator awarded interest @ 7.5% per annum on Rs.55 lakhs from 25.04.2006 till the date of

realisation.

5. With regard to the interest at contractual rate at 20% from 01.01.1999 at Rs.55 lakhs till 24.04.2006, the learned Arbitrator took note of the fact that the petitioners 1 and 2 herein who were the respondents therein have not paid the money agreed in the Memorandum of Understanding dated 03.02.1998 (Ex.C.6) approached the Court and they have neither paid the money nor deposited the money in the Court. After analysing the other factual aspects, the learned Arbitrator observed that there is absolutely no evidence to show that the respondents 1 and 2 were ready and willing to settle the amount but the claimants created problem by preferring criminal complaints and issued notice to the intending buyers. There is a finding that there is no evidence to show that the business of the second petitioner herein was in any way affected by the alleged notice from the claimants and no evidence to show that her representation was admitted.

6. In the considered view of this Court, there appears to be a clear contradiction while analysing the conduct of the second petitioner with regard to the award of interest from 25.04.2006 and from 01.01.1999 to 24.04.2006. In

fact, the learned Arbitrator while justifying the award of interest @ 7.5% has taken note of the cooperation extended by the petitioners in the arbitration proceedings after the exparte order was set aside. Therefore, this Court is of the considered view that uniform rate of interest ought to have been fixed both for the period prior to 25.04.2006 and post the said date.

7. Accordingly, the Original Petition is allowed to the extent indicated above. The award passed by the learned Arbitrator is modified to the extent that the petitioners will be liable to pay interest @ 9.5% from 01.01.1999 to till the date of realisation. The petitioners are directed to pay the interest amount within a period of four months from the date of receipt of a copy of this order.

sd/.T.S.S.J
25.01.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/24.03.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.