

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED : 16.02.2017**

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
07.02.2017	16.02.2017

CORAM :**The Honourable Mr.Justice T.S.SIVAGNANAM****O.P.No.389 of 2010**

B.S.Chandrasekar

..... Petitioner

Vs

1.M/s.Sundaram Finance Limited,
21, Patullos Road,
Chennai – 600002

2.M/s.L.S.P.Agro Ltd.,
No.12, Ponneri High Road,
Elanthancheri, Anderkuppam Check Post,
Manali New Town,
Chennai – 600013.

3.B.S.Arunachalam,
No.281, Raman Road,
A.V.K.Nagar,
Salem -636004.

4.B.S.Selvakumar,
No.281, Raman Road,
A.V.K.Nagar,
Salem -636004.

5.B.S.Krishnan,
 No.281, Raman Road,
 A.V.K.Nagar,
 Salem -636004. Respondents
 (Respondents 2 to 5 given up as unnecessary parties)

Prayer: Original Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 18.05.2005, passed by Shri.N.Meenakshisundaram, under Arbitration Case No.M/SF/9 of 2003, insofar as the petitioner herein is concerned.

For Petitioner	:	Mr.K.Raman Raj
For Respondents	:	Mr.S.Suresh for Mr.T.Srinivasa Ragavan

ORDER

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act'), to set aside the award dated 18.05.2005.

2. The second respondent, a public limited company, was carrying on business of manufacturing, trading, refining and marketing of vegetable oils, vanaspathi and bakery shortenings and in the course of

business entered into a financial transaction with the first respondent finance company, which essentially was a Bill Discounting Facility. The petitioner herein and the fifth respondent are the Directors of the second respondent company. The petitioner and the fifth respondent herein had joined as guarantors and the respondents 3 & 4 created equitable mortgage by deposit of title deeds of their properties to secure due payment of the amounts that the second respondent company might become liable in the Bill Discounting Transactions. It appears that there were certain defaults, the first respondent initiated arbitration proceedings in terms of the Arbitration clauses contained in the Bill Discounting Agreement, dated 10.03.1999, 11.08.1999 and 12.01.2000, and the sole Arbitrator was appointed in terms of the agreement. The sole Arbitrator entered reference and issued notice to the parties directing them to appear for personal hearing on 08.05.2003. The claim statement was filed by the first respondent company along with documents on 22.01.2004, copies of which were sent to the petitioner and respondents 3 to 5 as well as the company. However, it appears that neither the petitioner nor the company filed any counter to the claim statement and the notice sent to the fourth respondent returned with postal endorsement 'intimation sent not claimed'. Notice was published in the Tamil daily, despite which the

parties did not appear before the learned Arbitrator and therefore, the learned Arbitrator proceeded *exparte*. After considering the claim made, an award was passed on 18.05.2005, in favour of the first respondent company for a sum of Rs.1,34,34,137/- together with 18% interest thereon from 02.04.2003 till payment and a sum of Rs.27,000/- by way of cost of the proceedings and the petitioner and the fourth respondent herein were held to be jointly and severally liable to the first respondent/claimant. This award is put to challenge by the petitioner.

3. Mr.K.Raman Raj, learned counsel for the petitioner contended that there is no arbitration agreement between the parties and the entire proceedings are flawed and consequently the award is liable to be set aside. Further, it is submitted that notice regarding the arbitration was not served on the petitioner and therefore, there has been violation of principles of natural justice. In the guarantee deed dated 10.03.1999, it is stated that the guarantor shall deem to have incorporated the clause relating to the arbitration mentioned in the agreement, dated 12.03.1999, entered into between the company and the client and this agreement should be treated as part of the agreement, dated 10.03.1999. It is pointed out that there is no agreement dated 10.03.1999. Further, with regard to the agreement

dated 11.08.1999, the petitioner has not executed any guarantee deed and it is only the fifth respondent, who had executed a guarantee, therefore, the petitioner cannot be made liable. Referring to the deed dated 12.01.2000, it is submitted that the dues were brought down to Rs.25,00,000/- and this aspect of the matter was not considered by the learned Arbitrator. It is further submitted that by referring to the other agreements, more particularly, the Bill Discounting Agreement, dated 12.01.2000, it is submitted that the company alone can be held liable and not the petitioner. In support of his contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Yoki Agarwal vs. Inspiration Clothes & U, and Ors., in Special Leave Petition (C).No.29333/2008, [CCNO.15612/2008], dated 01.12.2008*** and in the case of ***BSNL vs. Telephone Cables Ltd., in Appeal [Civil No.868 of 2010], dated 22.01.2010.***

4. Mr.S.Suresh learned counsel appearing for the respondent submitted that the guarantee deed dated 10.03.1999, is not a guarantee simplicitor, but it is a continuing guarantee. Further, the petitioner, who was the guarantor acted in two capacities, namely as the Director of the second respondent company as well as he offered a personal guarantee. Therefore, it is submitted that in cases of

continuing guarantee, it shall continue till the ledger balance is reduced to "NIL". It is further submitted that the company had admitted its liability in its letter dated 07.01.2001 and the communication was signed by the Managing Director of the company, who is the fifth respondent herein. Further, it is submitted that the first respondent is entitled to execute the award and the Execution Petition has been filed and as the petitioner alone has immovable property, the award is to be executed against the petitioner. It is further submitted that the learned Arbitrator has considered all aspects and despite sufficient opportunity having been granted to the petitioner, he did not appear before the learned Arbitrator and the award is just and proper.

5. Heard the learned counsels appearing for the parties and perused the materials placed on record.

6. Before this Court ventures into the merits of the contentions raised by the learned counsel for the petitioner and the defence as pleaded by the learned counsel for the respondent, it would be essential to mention that this petition has been filed under Section 34 of the Act. To challenge the award, the petitioner should make out a ground or grounds, as contemplated under Section 34(2) of the Act, the Court cannot re-appraise the evidence nor test the sufficiency of the reasoning

nor act as an appellate Court over the award of the Tribunal. Thus, the jurisdiction of this Court to interfere with the impugned award is limited.

7. Bearing in mind the above legal principle, the correctness of the impugned award has to be tested. Firstly, it is submitted that there was no Arbitration clause in the agreement. This submission is not tenable for the simple reason that when the petitioner executed the deed of guarantee, dated 10.03.1999, he has specifically agreed that the Arbitration clause in the agreement, dated 12.03.1999 should be read as part and parcel of the deed of guarantee. In page 3 of the said deed of guarantee in paragraph 3, there appears to be a typographical mistake, while mentioning the date of the agreement i.e., in one place, it is mentioned as 12.03.1999, whereas, in the other it is mentioned as 10.03.1999.

8. Admittedly, the Bill Discounting Agreement is dated 10.03.1999. Therefore, the petitioner cannot sustain his case based on this typographical error, more particularly, when the petitioner has failed to produce the copy of so called agreement, dated 12.03.1999. Therefore, the contention raised by the petitioner in this regard stands rejected.

9. Second aspect of the matter is that the petitioner did not receive notice of the Arbitral proceedings. This argument again is not sustainable, as the notice sent by the learned Arbitrator was returned with endorsement 'intimation sent not claimed'. This is sufficient to hold that the notice is deemed to have been served. Added to that, paper publication was effected in the Tamil daily dated 29.07.2000, despite that the petitioner remained absent. Therefore, the petitioner cannot state that he had no notice of the Arbitral proceedings. Therefore, such plea stands rejected.

10. The next contention is by stating that the deed of guarantee can at best be referable to only one Bill Discounting Agreement, but the first respondent has made the petitioner liable for other agreements as well. This contention is stated to be rejected for the simple reason that the petitioner is the Director of the second respondent company. The deed of guarantee executed by the petitioner is a continuing deed of guarantee, which would enure in favour of the first respondent/claimant till the balance is fully settled. The transaction between the company represented by the Directors and the first respondent appears to be a continuous transaction, as there are series of agreement entered into between the parties. Therefore, this Court holds that the deed of

guarantee executed by the petitioner shall bind him and it will enure in favour of the first respondent/claimant till the account is settled.

11. With regard to the plea that the respondents 3 & 4 herein have been exonerated by the learned Arbitrator, it is seen that the learned Arbitrator has considered the Exhibits A-10 & A-11, which are documents creating a equitable mortgage by deposit of title deeds to secure payment and the said documents do not refer to any Bill Discounting Agreement, which is said to contain an Arbitration clause and what is referred to is merely the Bill Discounting Facility extended by the first respondent/claimant. Therefore, the learned Arbitrator concluded that the respondents 3 and 4 herein, cannot be roped into the Arbitration proceedings, as there is no binding Arbitration clause, as against them. The factual finding recorded by the learned Arbitrator is borne out by records and documents and cannot be interfered. Therefore, the decisions relied on by the learned counsel for the petitioner in the case of **Yoki Agarwal** (supra), and **BSNL vs. Telephone Cables Ltd.**, (supra), are clearly distinguishable on facts.

12. From the documents, which were placed before the learned Arbitrator, more particularly, the returned covers, it is seen that the

endorsement is 'not claimed' in spite of the intimation being given. If such is the case, the petitioner was aware of the Arbitration proceedings, which were commenced by the first respondent/claimant. This conclusion is further supported by the fact that the second respondent company had received notice of the proceedings and the Manager had signed the postal acknowledgement.

13. Thus, when the petitioner was acting in a dual capacity, as the Director of the company as well as the guarantor in his personal capacity, service of notice on the company pre-supposes that the petitioner had knowledge of the Arbitral proceedings.

14. Thus, the petitioner has failed to make out any grounds to bring the challenge to the impugned award under Section 34(2) of the Act and consequently, the challenge to the impugned award has to necessarily fail and accordingly, petition stands dismissed.

16.02.2017

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Index : Yes/No
Internet:Yes/No

To

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T.S.SIVAGNANAM, J.

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Pre-Delivery Order in
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