

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.03.2018

PRONOUNCED ON : 15.03.2018

CORAM

THE HON'BLE MR.JUSTICE **M.M.SUNDRESH**

O.P.Nos.229 & 506 of 2017 and A.Nos.25, 26, 28, 254 to 258, 1692, 3746, 4820 and 4821 of 2017 O.A.Nos.7 and 49 of 2017, & A.Nos.3305, 3742, 4752 of 2017 and O.A.No.627 of 2017

O.P.No.229 of 2017

Lakshmi Murugesan, W/o Mr.Murugesan,
A-21, Lankaram Street, Thirunagar,
Madurai-625 006.
Presently residing at
No.27/1, V.P.Chithan Nagar,
Thanakkankulam, Madurai.

.. Petitioner

-VS-

1.India Growth Fund,
Though its Trustee,
M/s Kotak Mahindra Trusteeship Services Limited,
No.36-38-A, Nariman Bhavan,
No.227, Nariman Point,
Mumbai-400 021.

2.M.Thiagarajan, S/o Murugesan
A-21, Lankaram Street, Thirunagar,
Madurai-625 006.

3.M/s Paramount Mills Private Limited,
Rajapalayam Road, NH-208, T.Pudupatti Post,
Thirumangalam-635 704, Madurai District.

4.M/s Paramount Airways Private Limited
(in liquidation), Rep., by the Official Liquidator,
High Court, Chennai-600 104.

.. Respondents

O.P.No.506 of 2017

M.Thiagarajan,
A-21, Lankaram Street, Thirunagar,
Madurai-625 006.

.. Petitioner

-VS-

1.India Growth Fund,
Though its Trustee,
M/s Kotak Mahindra Trusteeship Services Limited,
No.36-38-A, Nariman Bhavan,
No.227, Nariman Point,
Mumbai-400 021.

2.Lakshmi Murugesan,
A-21, Lankaram Street, Thirunagar,
Madurai-625 006.

3.M/s Paramount Mills Private Limited,
Rajapalayam Road, NH-208,
T.Pudupatti Post, Thirumangalam-635 704,
Madurai District.

4.M/s Paramount Airways Private Limited
(in liquidation), Rep., by the Official Liquidator,
High Court, Chennai-600 104.

.. Respondents

O.P.Nos.229 and 506 of 2017 are filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitration award dated 24.12.2016 passed by the learned Sole Arbitrator Mr.Justice N.K.S odhi (Retired), in the arbitral proceedings arising out of O.P.No.370 of 2012 on the file of this

Court.

For Petitioner
in OP.229/2017

: Mr.M.S.Krishnan S.C., for
Mr.Ramakrishnan for
M/s waraon & Sairams

For Petitioners
in OP.506/2017

: M/s Gupta & Ravi for
Mr.R.Lakshminarasimhan

For Respondents
in OP.229/2017

: Mr.Om Prakash, S.C., for
M/s Ramalingam Associates for R1

M/s Gupta & Ravi for
Mr.R.Lakshminarasimhan for R2

Mr.Anirudh Krishnan for R3

M/s H.Karthik Seshadri for Caveator

For Respondents
in OP.506/2017

: Mr.Om Prakash, S.C., for
M/s Ramalingam Associates for R1

Mr.M.S.Krishnan, Sr.C., for
Mr.Ramakrishnan for
M.s Waron @ Sairams for R2

Mr.Anirudh Krishnan for R3

Mr.H.Karthik Seshadri for caveator

* * * * *

COMMON ORDER

Taking note of the fact that challenges have been made against the same award and petitions have been filed against the same parties, they are accordingly disposed of by a common order.

2. For the sake of brevity, the petitioner in O.P.No.229 of 2017 and the respondents therein are arrayed as such.

3. The petitioner and the second respondent are mother and the son. The petitioner was promoted as Director of the fourth respondent, incorporated on 01.05.1998, which is under the control of the second respondent. The fourth respondent remained dormant till the year 2004-2005.

4. The second respondent approached the first respondent, which is a Ventured Capital Fund Units Scheme on KO19K SCAF fund, a registered Trust. With the first respondent,

various financial institutions, such as, Life Insurance Corporation, UCO Bank have invested their funds. The fourth respondent was a schedule Airline company and mostly operating within the southern India.

5. In pursuant to the efforts of the second respondent, two agreements have been entered into on 18.11.2005 with the first respondent. Accordingly, the first respondent agreed to invest upto a sum of Rs.50 crores, subject to the fulfilling of the conditions of the promoters of the company viz., fourth respondent. Resultantly, the Articles of Association of the fourth respondent was accordingly amended incorporating the relevant clauses contained in the agreements.

6. The following clauses would be apposite.

“12. **TERMINATION**

12.1 The Parties may discuss and mutually terminate this Agreement at any time during the term of this Agreement by expressing the same in writing. If the Parties agree to terminate this Agreement, then any Party may offer its Shares for sale to the other Parties. The sale and purchase of the

Shares shall be completed by the Parties within 60 (Sixty) days from the date of receipt of the notice from the relevant Party agreeing to purchase the Shares, provided however that the 60 (Sixty) day period shall be computed from the date of receipt of requisite Consents from Governmental Authorities.

12.2 The non-defaulting Party may terminate this Agreement forthwith with notice effective immediately to the defaulting Party upon the occurrence of any of the following events:

- (a) If the defaulting Party is declared insolvent or bankrupt or if any proceeding in this regard is admitted by any court of competent jurisdiction.
- (b) If a trustee or receiver is appointed to take over the assets of the defaulting Party;
- (c) if the defaulting Party has committed any material default or breach of any of the provisions to this Agreement and fails to remedy the breach within 30 (Thirty) days from the date of the written notice being given or such other period as may be mutually agreed to in writing.

12.3 Any Party may terminate this Agreement forthwith with notice effective immediately to the other Parties if a resolution for winding up the Company shall have been passed, or the Company shall be dissolved or wound up, either voluntary or involuntarily. This agreement shall automatically terminate if all of the Investor, the nominees of the Investor and the Promotor Group cease to hold any Shares in the Company or on the completion of a Qualified IPO/IPO.

12.4 Notwithstanding anything to the contrary contained

elsewhere, the investor may terminate this Agreement on its behalf and/or on behalf of its nominees as aforesaid in respect of its rights and obligations hereunder and such termination shall not be deemed to affect the rights and obligations of the Party who opts not to terminate this Agreement and the Promoter Group and the Company shall continue to be bound by the terms of this Agreement to such Party. Notwithstanding anything to the contrary contained elsewhere, the Promoter Group may terminate this Agreement as specified in this Agreement in respect of a breach by the investor or its nominees and such termination shall not be deemed to affect the rights and obligations of the other Party (Investor or its nominees) who has not committed the breach and the Promoter Group, the Company and such other Party shall continue to be bound by the terms of this Agreement.

13. Consequences of Termination

13.1. Upon the occurrence of any of the event listed in Clause 12.2 above owing to breach by Company/Promoter Group the non-defaulting Party (if such Party is investor and/or its nominees) shall, at its option and subject to applicable law, be entitled to (i) require the Company to redeem the entire Preference Shares held by the Investor and the nominees of the Investor at the price arrived at in accordance with Part A of Annexure 5 and the Company shall redeem the entire Preference Shares held by the Investor and the nominees of the Investor at the price arrived at in accordance with Part A of Annexure 5. Notwithstanding anything to the contrary contained elsewhere, in the event the Investor exercise the

option specified herein, the Company shall ensure that the Preference Shares held by the Investor and the nominees of the Investor are redeemed in priority over all other shareholders of the Company, and (ii) require the Promotor Group to purchase the Equity Shares and equity shares held by the Investor and/or the nominees of the Investor in the company for a purchase price arrived at in accordance with Part B of Annexure 5. The redemption and sale and purchase of the Shares shall be completed by the Parties within 60(Sixty) days from the date of receipt of the notice from the Investor requiring the Company to redeem the Shares and the Promotor Group to purchase the Shares, provided however that the 60 (Sixty) day period shall be computed from the date of receipt of requisite Consents from Government Authorities. The remedy specified herein may be exercised in full or partially by the investor.

13.2 Upon the occurrence of any of the event listed in Clause 12.2 above owing to breach by Investor/its nominees, the non-defaulting Party (if such Party is the Promoter Group/Company) shall have the right to require the Investor/its nominees to sell all the Shares held by the Investor/its nominees in the Company to the Promotor Group or its nominees or at the Company's option redeem all the Shares for a purchase price/redemption price arrived at in accordance with Part C of Annexure 5. The sale and purchase/redemption of the Shares shall be completed by the Parties within 60 (Sixty) days from the date of receipt of the notice from the Promotor Group/Company requiring the Investor/its nominees to sell/redeem the Shares, provided

however that the 60 (Sixty) day period shall be computed from the date of receipt of requisite consents from Governmental Authorities.”

7. Thus, these clauses would indicate the manner of termination for the breach committed by one party and its consequences, by which, either the company or the promoters would be made to buyback the shares on a specified rate.

8. In pursuant to the aforesaid agreements and the amendments made to the Articles of Association of the fourth respondent, the first respondent invested about Rs.40 crores between February 2005 and April, 2006. The remaining amount of Rs.10 crores was not paid as the petitioner, respondents 2 and 4 have not complied with the terms and conditions of the agreement, the Memorandum of Association. They also did not invest more amount as promised. The fourth respondent has also suffered more loss. It is also to be noted that allotment of shares are preferential as agreed upon and the payment of money was on terms. Thus,

there was no mandate to compel the first respondent to make the payment in all contingencies. The petitioner and respondents 2 and 4 also did not appoint the nominated Directors of the first respondent on its Board apart from providing information on the business of the investors and furnish audit accounts for seven years. It is to be noted that neither the petitioner nor respondents 2 and 4 made any attempt to get the remaining amount nor proved the factum of compliance.

9. Taking note of the aforesaid situation, the first respondent approached the Company Law Board to convert the preferential shares allotted to it earlier as per the agreement aforesaid into equity ones in accordance with the agreements not else. The plea was accordingly found in its favour by the Company Law Board.

10. One of the contingencies provided for termination of the contract and thereafter invoking clauses qua a consequence was admission of a company petition at the hands of the creditor. As this clause was satisfied and after knowing it, the first respondent

terminated the agreements in terms of Clauses 15.1 and 12.2 respectively. In the meanwhile, the preferential shares held by it were duly converted as per the orders of the Company Law Board. Intimation sent followed by the legal notice did not evince any reply from the petitioner and respondents 2 and 4. Thus, arbitral proceeding was initiated.

11. Stoic silence continued leading to the first respondent approaching the Court under Section 11 of the Arbitration and Conciliation Act. The learned Arbitrator appointed by the Court issued notices to the parties framed the issues, analyzing the pleadings, permitted the parties to amend the pleadings, examination of witnesses, heard the arguments and thereafter passed the following award, which is obviously a speaking one.

"Relief:- In view of my aforesaid discussion on the issues, I make the following award:

- (i) Respondent Nos.1 to 3 are directed to pay to the claimant a sum of Rs.112,86,00,000/- (Rupees one hundred and twelve crores and eighty six lacs);
- (ii) Respondent Nos.1 to 3 shall also pay to the

claimant interest on Rs.112,86,00,000/- at the rate of 15% per annum with effect from March 1, 2012 till today;

(iii) The amounts mentioned in (i) and (ii) above shall be paid on or before March 31, 2017 failing which both these amounts shall carry interest at the rate of two percent higher than the current rate of interest prevalent today from today till the date of payment;

(iv) Respondent Nos.1 to 3 shall also pay to the claimant costs of the present arbitration proceedings which are assessed at Rs.5 lacs;

(v) Respondent Nos.1 to 3 shall be jointly and severally liable to pay all the aforesaid amounts."

12. This award is challenged by the petitioner and the second respondent. Inter alia, alleging that the fruits of the award is being denied by the clandestine activities of the petitioner and the second respondents, a series of applications have been filed by the first respondent. The allegations are to the effect that there are violations of the earlier orders passed and dubious transactions, transfers have taken place within the members of the family at the instance of the petitioner and the second respondent anticipating the award and its

implementation.

13. With the aforesaid brief narration, let us see the submissions of the learned counsels.

14. Heard Mr.M.S.Krishnan, learned Senior Counsel for Mr.Ramakrishnan, learned counsel for the petitioner in O.P.No.229 of 2017 and second respondent in O.P.No.506 of 2017, M/s Gupta and Ravi for Mr.R.Lakshminarasimhan, learned counsel for the petitioner in O.P.No.506 of 2017 and the second respondent in O.P.No.229 of 2017, Mr.Om.Prakash, learned Senior counsel for M/s Ramalingam & Associates for first respondent in both petitions and Mr.Anirudh Krishnan, learned counsel for the third respondent in both petitions and Mr.H.Karthik Seshadri for Caveator in both petitions and considered the written arguments.

15. Submissions of the petitioner and respondent No.2:-

The learned Senior Counsel appearing for the petitioner would submit that the fact that except the second respondent was born

through her, she does not have any other truck with him. A poor mother has been misled by the son. The agreements cannot form basis of the award. The Tribunal has treated the claim in to a specific performance one. There is no plea of offer and acceptance followed by findings. The first respondent did not even make an offer and therefore, there is no question of acceptance. The lis plea being legal and compliance of Section 16 (c) of the Specific Relief Act, 1963, being mandatory, can be raised at any point of time. The transaction made by the petitioner with respect to the other shares and properties in favour of the third parties cannot be made subject matter of these petitions, while the interim orders granted in all applications can be made absolute. There is a bar under Section 536 (2) of the Companies Act, 1956, as the winding up petition is pending. There is a patent illegality of the award and hence, seeks interference. In support of his contention, the learned Senior Counsel has made reliance upon the following decisions.

**(1) CRUZ CITY I MAURITIUS HOLDINGS V.
UNITECH LIMITED (EX.P.132/2014 & EA(OS)
NOS.316 & 1058 OF 2015 & 151 OF 2016 DATED
11.04.2017);**

- (2) ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49) ;
- (3) OIL & NATURAL GAS CORPORATION LTD., V. SAW PIPES LTD.,((2003) 5 Supreme Court Cases 705);
- (4) MAN KAUR (DEAD) BY LRS. V. HARTAR SINGH SANGHA((2010) 10 Supreme Court Cases 512);
- (5) A.S.M.BALASUBRAMANIAN V. S.P.SWAMINATHAN ((2012) 2 Law Weekly 917)
- (6) I.P.BUILDERS AND ANOTHER V. A.RAMADAS RAO AND ANOTHER ((2011) 1 Supreme Court Cases 429);
- (7) BALRAJ TANEJA AND ANOTHER V. SUNIL MADAN AND ANOTHER((1999) 8 Supreme Court Cases 396);
- (8) DELHI DEVELOPMENT AUTHORITY V. R.S.SHARMA AND COMPANY, NEW DELHI ((2008) 13 Supreme Court Cases 80)
- (9) OIL & NATURAL GAS CORPORATION LTD., V. WESTERN GECO INTERNATIONAL LIMITED ((2014) 9 Supreme Court Cases 263);

16. The learned counsel appearing for the second respondent, who is the petitioner in O.P.No.506 of 2017, would submit that there is a non-compliance on the part of the first respondent in not bringing Rs.50 crores as against Rs.50 crores. The first respondent ought to have proceeded against the company as against the

promoters. The agreements are to be seen as a whole.

17. SUBMISSIONS OF THE RESPONDENTS:-

The learned Senior Counsel appearing for the first respondent would submit that the award, being the one passed on facts, not disputed, is not liable to be interfered with. As the very same clauses in the agreements got included into the Articles of Association of the Company, the contention raised that there are no agreements in the eye of law, by no stretch of imagination, can be countenanced. Though the petitioner did not sign the agreements, they were accordingly signed by the second respondent on his own behalf and on her behalf being the power holder. Therefore, the aforesaid contention also cannot be accepted. The petitioner and the second respondent never took the plea of non payment, compliance of the terms of the agreement earlier and not even challenged the order of termination which was after communication and legal notice. The legal notice issued was not replied. There was a put notice issued by the first respondent on 25.11.2011 followed by an order of termination. The termination order was passed by invoking Clauses 15(2), 12 and 13 of the agreement. It is for the first respondent to choose the option between the company and the promoters while seeking the

relief. As the first respondent did not see the relief against the company, the pendency of the company petition has got no relevancy. Readiness and willingness was not pleaded. A combined reading of legal notice, notice on termination and put notice would show the readiness and willingness on the part of the first respondent. It is not a case of specific performance simpliciter to seek the relief in pursuant to a breach.

18. Insofar as the applications filed are concerned, it is submitted that there is a continued breach and violations of the orders passed. With the sole object of defeating the fruits of the award, transfers and transactions were undertaken to other members of the family. Therefore, the applications will have to be ordered as prayed for while dismissing the petitions filed under Section 34 of the Arbitration and Conciliation Act.

19. The primary facts are not in dispute. The execution of the agreements on 18.11.2005, followed by the communication between the parties, the proceeding initiated before the Company Court and the process followed by the Tribunal, are not in dispute. The Tribunal has rightly rejected the contentions on the agreements entered into between

the parties. The factual findings recorded on the binding nature of the

agreements as against the petitioner and the second respondent cannot be faulted with. They have been executed voluntarily by signing in the registered power of attorney. They have never been challenged. The petitioner and the second respondent were also the beneficiaries of the agreements. The relevant clauses were also incorporated by amending the articles of the fourth respondent.

20. As observed above, there is a clear breach. The breach occurred due to the failure to comply with the terms and conditions. They neither brought the money as promised nor made compliance of the terms and conditions, such as, induction of nominated contractors of the first respondent, information qua the business of investors, audit accounts for seven years and extending financial year without consent of the first respondent. The Tribunal has rightly held that there is no mandate on the first respondent to get the remaining money. The letter of the first respondent bringing to the non compliance on the part of the petitioner and the second respondent was also taken note of. The fourth respondent was continuing to incur loss. Strategically the petitioner and the second

respondent along with the fourth respondent kept their silence. As the first respondent found that there was a willful violation of the terms and conditions, the Tribunal, while accepting the same, has rightly held that there was no obligation on its part to make the claim in full. The Tribunal has rightly viewed that it was a right to be exercised by the first respondent.

21. Much has been said on the clauses governing termination and its consequences. As said earlier, there was indeed breach leading to termination. The first respondent has followed the procedure. Notice of termination was proceeded by legal notice dated 25.11.2011, which was not liable to. Strangely the notice of termination was not even challenged. There was not even a counter claim made. It cannot be said that the first respondent has to go against the company as against the petitioner and the second respondent. It is a discretion rightly exercised by the first respondent on the facts of the case. For the aforesaid reason, the pendency of the company petition would not create a bar. Therefore, there is neither a breach on the part of the first respondent nor any entitlement to receive as of right.

22. On the submission made that there is no plea of readiness and willingness and therefore, the claim has to be rejected resulting the award to be set aside, in the termination notice itself it has been clearly stated that notice is being issued under Article 74 of the Articles of Association read with clause 13 .1 of the shareholding agreement to purchase the investors shares. That is the reason why, the put notice was issued. The petitioner and the second respondent have clearly understood the intendment of the termination of the notice and the put notice.

23. We are not dealing with an usual case of offer and acceptance. Thus, the issue is not with an offer coming out of an agreement. On the contrary, the right of the first respondent accrues following the breach of the other Clauses in the Agreement and the prevalence of the contingencies and then termination. When these factors occurred and as a consequence thereon the first respondent asked the petitioner and the second respondent to make the payment, they are bound to do so and there is no question of offer that would come in. Perhaps, this is a contention comes through the wisdom of the learned Senior Counsel for the petitioner as it was not raised at the earlier point of time. Hence,

while there is no difficulty in accepting the contentions of the learned Senior Counsel appearing for the petitioner on the scope and applicability of Section 16(c) of the Specific Relief Act, 1963, the same does not have an application to the case on hand. To put it differently, the petitioner and the second respondent were never ready and willing to make the payment. The claim made along with the contents of the termination order and put notice makes it abundantly clear the first respondent did not want to hold on the shares. After all, one has to see the object of the agreements resulting in amendment of the articles. The ultimate intention is to pave way for a safe exit to the first respondent while providing for sufficient security in its endeavour to earn profit. If the petitioner and the second respondent are willing to purchase equity shares, there is no need to challenge the award. For the aforesaid reason, this Court is not willing to go into the judgments relied upon with respect to the law governing Section 16(c) of the Specific Relief Act, 1963, and the scope of Section 34 of the Arbitration and Conciliation Act, 1996.

24. Number of applications have been filed seeking various reliefs by the respondents invoking Section 9 of the Arbitration and Conciliation Act, 1996. In some of the applications, orders have been granted by the

Court. The learned Senior Counsel appearing for the petitioner in O.P.No.229 of 2017 and the second respondent in O.P.No.506 of 2017 would submit that these orders may continue but their objections are for the further orders in such applications where no orders have been granted. As submitted by the learned counsel for the first respondent, prima facie it appears to be a case of non compliance of the earlier orders passed and an attempt to evade the consequence of the award and frustrate the first respondent from getting the relief. However, this Court is not willing to dwell much into these applications. While making it clear that the interim orders granted in Application Nos.7, 28,49, 254, 255 and 627 of 2017 would continue till the completion of the execution petitions, the other applications are accordingly closed with the observation that it is well open to the first respondent to raise a contention before the Execution Court that transfers, transactions and other activities indulging the petitioner and the second respondent are deliberate and willful and in order to defeat the fruits of the award. For the aforesaid reason, the first respondent can also implead the third parties, if so advised. Thus, all the applications filed under Section 9 of the Arbitration and Conciliation Act, 1996 are accordingly disposed of while extending the interim order granted including undertakings given by the petitioner and the second

respondent until the disposal of the Execution petition.

25. In the result, O.P.No.506 of 2017 stands dismissed confirming the award passed on 24.12.2016 and O.P.No. 229 of 2017 stands disposed of. No costs.

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M.M.SUNDRESH, J.

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**Pre-Delivery Order in
O.P.Nos.229 & 506 of 2017**

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