IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.12.2018

CORAM:

THE HONOURABLE MR. **JUSTICE S.VAIDYANATHAN**

Original Petition Nos.423 to 425 of 2013

K.Sivakumar ... Petitioner in all O.Ps.

Vs.

M/s.Sundaram Finance Limited,
No.21, Patullos Road,
Chennai – 600 002. ... 1st Respondent in all O.Ps.

Shri.S.Santhanakrishnan,
Retired District Judge,
Old No.5, New No.11/2 First Main Road,
Jothi Nagar, Ekkattuthangal,
Chennai – 600 032. ... 2nd Respondent in all O.Ps.

L.Jagannathan ... 3rd Respondent in O.P.Nos.423 & 425 of 2013

D.Raghupathy ... 3rd Respondent in O.P.No.424 of 2013

Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 04.02.2013 passed by the sole Arbitrator in Arbitration Case Nos.SK/SF/02 of 2011, SK/SF/03 of 2011, SK/SF/04 of 2011, respectively.

For Petitioner in all O.Ps. : Mr.M.Selvaraju

For 1st Respondent in all O.Ps. : Mr.T.Srinivasaraghavan

For 3rd Respondent in all O.Ps. : No appearance

* * * * *

WEB COPY

http://www.judis.nic.in

COMMON ORDER

These Petitions have been filed seeking to set aside the Award dated 04.02.2013 passed by the sole Arbitrator in Arbitration Case Nos.SK/SF/02 of 2011, SK/SF/03 of 2011, SK/SF/04 of 2011, respectively.

2. As the issue involved in all these cases is one and the same, the Original Petitions are taken up for disposal by a common order.

3. It is seen that the Petitioner herein, who is a Contractor engaged in the purchase and distribution of tyres, has entered into three different Loan Agreements with the 1st Respondent/Sundaram Finance Limited, vide Loan Agreements, dated 05.03.2007, 05.04.2008 and 13.02.2009, respectively, towards purchase of Heavy vehicles. Since the Petitioner herein committed default in payment of the monthly instalments, the 1st Respondent herein initiated Arbitration proceedings against the Petitioner.

WEB COPY

4. The learned Arbitrator held that the Petitioner/Borrower and the Guarantors, are jointly and severally liable to pay the outstanding dues together with interest @ 18% per annum. For better appreciation, relevant portion of the Arbitral Award is extracted hereunder:

http://www.judis.nic.in

"45(a) In the result, I pass an Award in SK/SF 02 of 2011 directing Respondents 1 and 2 jointly and severally to pay to the claimant Rs.6,04,470.93 ps/- with interest thereon at 18% per annum from 21.03.2011 till realization.

45(b) In the result, I pass an Award in SK/SF 03 of 2011 directing Respondents 1 and 2 jointly and severally to pay to the claimant Rs.5,92,394.99 ps/- with interest thereon at 18% per annum from 21.03.2011 till realization.

45(c) In the result, I pass an Award in SK/SF 04 of 2011 directing Respondents 1 and 2 jointly and severally to pay to the claimant Rs.9,57,099.86 ps/- with interest thereon at 18% per annum from 22.03.2011 till realization with costs of Rs.1,05,150/- made up the Arbitrator's fee of Rs.1,00,000/- Arbitrator's expenses of Rs.5,000/- and value of Non-judicial stamps Rs.150/- for engrossing this Award and the counter claim of the first Respondent and claim of damages of Rs.20,00,000/- is dismissed with costs (Rs.35,000 made up of) Rs.30,000/- as fees and Rs.5,000/- as expenses (Rs.35,000 already paid by R1 by DD)."

5. According to the learned counsel for the petitioner, the

WEB COPY
http://www.judis.nic.in

petitioner has availed loan to the total extent of Rs.30,00,000/- and the entire loan amount has already been paid to the 1st Respondent/Claimant on 01.07.2009 itself, apart from making cash payment of a sum of Rs.4,00,000/-. He contended that instead of crediting the amount paid by the Petitioner towards the loans in question, the 1st Respondent/Claimant has simply appropriated the same towards various other loans availed by his wife, brother and his business Associates towards purchase of vehicles, wherein, the Petitioner herein stood as Guarantor.

6. Learned counsel for the petitioner drew the attention of this Court to clause 2.10 of the loan agreement, which pertains to the Mode of Payment and the same reads as under:

> “**MODE OF PAYMENT OF INSTALMENT**
>
> (a) Subject to the terms and conditions stipulated hereunder, the repayment, in the case of cars/jeeps, shall be by way of Post Dated Cheques. In case of other vehicles, the repayment shall be by way of Post Dated Cheques or by the Borrower remittance in cash or by Demand Draft to the Lender on the dates specified in the Second Schedule, irrespective of the delivery of the Asset. The Borrower acknowledges that strict compliance by him with the repayment schedule is an essential condition for the grant of the Loan.”

7. With reference to the above clause, learned counsel for the Petitioner submitted that by giving a go-by to Article 4 of the Loan Agreement,

http://www.judis.nic.in

the 1st Respondent/Claimant has appropriated the payment made by the Petitioner towards the dues with regard to the loan availed by his relatives towards purchase of vehicles, for which, the Petitioner is no way responsible and contended that the findings of the Arbitrator is perverse.

8. Learned counsel appearing for the 1st respondent/claimant submitted that the petitioner is running a business with a monthly turnover of Rs.50 lakhs. He has entered into a contract with the 1st Respondent/Finance Company and since he required more vehicles, he made arrangements to buy those vehicles in the name of his wife, brother and business associates. In some cases, his wife, brother and other persons have signed the contract and the petitioner has stood as a Guarantor. Learned counsel referred to the counter affidavit dated 22.12.2011 filed by one of the Guarantors, wherein, it has been specifically stated that the Petitioner herein asked others to sign the contract and has agreed to repay the amount. He further submitted that only on the instructions given by the Petitioner, the amount has been appropriated into the other loan accounts.

WEB COPY

http://www.judis.nic.in

9. Learned counsel appearing for the 1st respondent/claimant further submitted that the Arbitrator has rendered a finding of fact and there is no reason why the Petitioner did not examine the other witnesses. It is his specific case that the Petitioner had paid the dues and settled 11 contracts in the name of his business Associates, which is quite evident from the examination of the witnesses and that non-examination of 11 persons would make it very clear that the payments have been made only by the Petitioner herein. Referring to paragraph 36 of the Arbitral Award, learned counsel submitted that the Petitioner was keeping quiet for nearly three years without questioning as to how the amounts paid by him were appropriated by the 1st Respondent, which clearly shows that he is now estopped from claiming that he borrowed amount only in his name.

10. It is further stated by the learned counsel appearing for the 1st Respondent that there is no evidence let in by the Petitioner to show that he had made cash payments and as many as 130 Exhibits have been marked by the 1st Respondent/Claimant, in support of his stand.

11. Heard the learned counsel on either side and perused the material documents available on record.

WEB COPY

12. It is not in dispute that the Petitioner herein has entered into three different loan Agreements with the 1st Respondent/Claimant on different dates towards purchase of Heavy vehicles. In the Agreement, the petitioner has agreed to repay the loan amount in instalments. Apart from these three contracts, there are 27 contracts entered into between the family members and business Associates of the Petitioner with the 1st Respondent/Claimant, to which, the Petitioner stood as Guarantor. But, the Petitioner has not examined the Borrowers with regard to other contracts. There is no need for the 1st Respondent/Claimant to examine the Guarantor to the other contracts. The fact that the Guarantor has not gone into the witness box would make it very clear that the burden is on the Petitioner herein to establish his case and it is not on the 1st Respondent/Claimant.

13. Even though, learned counsel for the petitioner specifically stated that the Petitioner has made cash payments towards outstanding loan amounts, there is no evidence to that effect. If at all, any amount is paid by the Petitioner by means of cash, the same will have to be appropriated towards the outstanding dues. The finding of the Arbitrator that the Petitioner has borrowed amount from the 1st Respondent/Claimant not only in his name, but, also in the name of his wife, brother and business associates, is a finding of fact which cannot be interfered with by this Court.

http://www.judis.nic.in

14. At this juncture, it is worth referring to the Apex Court decision in the case of **W.M.Agnani vs. Badri Das** reported in **(1963) 1 LLJ 684,** wherein, the Industrial Tribunal put one interpretation upon the resolution of the Management and the High Court thought it better to put another. The Apex Court held that it cannot be said to introduce an error apparent on the face of the record in the order of the Industrial Tribunal and it can be said that the view taken by the Tribunal is not even reasonably possible, perhaps an argument can be urged that the error is apparent on the face of the record. In the said case, the High Court exceeded in its writ jurisdiction in interfering with the finding of the Industrial Tribunal based on the construction put by it upon the resolution of the Management.

WEB COPY

http://www.judis.nic.in

15. In view of the above, this Court finds no error in the Arbitral Award under challenge and it needs no interference. However, it is made clear that if any amount has already been paid by the Petitioner herein towards the outstanding loan amount, the same may be given credit to and the balance amount has to be paid by the Petitioner to the 1st Respondent/Claimant in terms of the Arbitral Award.

In the result, the Original Petitions are dismissed. No costs.

10.12.2018

Index : Yes/No

Speaking Order : Yes/No

(tsg/aeb)

WEB COPY

http://www.judis.nic.in

S.VAIDYANATHAN,J.

(tsg/aeb)

O.P.Nos.423 to 425 of 2013

WEB COPY

10.12.2018

http://www.judis.nic.in