IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2018

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THE HONOURABLE MR.**JUSTICE M.M.SUNDRESH**

O.P.Nos.141 to 145 of 2011

1.M/s Jawahar Mills Limited,
No.4, Nehru Nagaram,
Salem-636 005.

2.P.L.Vivekanandan,
79, New Fair Lands,
Salem-636 106. ..Petitioners in all O.Ps

Vs.

1.M/s India Cements Capital Limited,
827, Anna Salai,
Chennai-600 002.

2.N.C.Vijairagavan,
Second Floor, "Thangam",
New No.X-59, 5th Main Road,
Anna Nagar, Chennai-600 040. .. Respondents in all O.Ps.

Original Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Awards dated 10.12.2010 passed by the second respondent in Arbitration Case Nos.75, 72, 71, 72 and 74 in the matter of dispute between the petitioners and the first respondent and direct the first respondent to pay the costs.

For Petitioners : Mr.P.L.Narayanan

For respondents : Mr.K.Rajasekaran for R1

COMMON ORDER

As the issues involved in all these original petitions are one and the same and also arising between the same parties, they are taken up together and disposed of by way of a common order.

2. Hire Purchase Agreements have been entered into between the first petitioner as the hirer, the second petitioner as the guarantor and the first respondent as the Financier on various dates starting from 13.09.1993, 14.05.1994, 14.07.1994, 14.11.1994, and 25.09.1998 respectively. As per these agreements, the machineries originally belonged to the first petitioner were purchased by the first respondent and thereafter, the status of hirer was given to the first petitioner. The agreements also stipulate payments to be made by the first petitioner in specified instalments. The first petitioner committed default in making payments. Therefore, demands have been made on various dates. As the petitioners did not make the payment even thereafter, the first respondent invoked the arbitration clause.

3. As against some of the machineries, the first respondent filed an application under Section 9 of the Arbitration and Conciliation Act, 1996, before the Additional District Judge at Salem in Ar.O.P.No.130 of 2001. Inventories have been taken by the learned Advocate Commissioner. It appears that one machinery was sold by the first respondent, for which,

credit was given to as seen from the claim statement filed in O.P.No.142 of 2011. The learned Arbitrator, once again issued number of notices. The petitioners participated in the proceedings. In the reply affidavits filed, the petitioners did not raise any plea on the issue pertaining to the sale effected by the first respondent in favour of the third party qua the machinery. Not only that, the petitioners did not question the quantum of amount claimed, but contended that the proceedings being subjected to the Board for Industrial and Financial Reconstruction(BIFR), Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, would apply and therefore, the arbitral proceedings cannot be permitted to proceed with.

4. Finally, the petitioners engaged a counsel. The learned counsel has raised the following pleas before the Tribunal.

> "a) The claimant is put to strict proof with regard to the merger of Aruna Sugar & Finance Limited with India Cements Capital and Finance Limited. This Tribunal has verified the records submitted by the claimant and would state us under:-
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> At the time of contract was entered into, the claimant was carrying on business under the name and style of M/s Aruna Sugars Finance Limited and with necessary statutory

approvals the claimant came to be know as India Cements Capital and Finance Limited. A fresh certificate of incorporation consequent upon change of name was issued by the Registrar of Companies on 29.11.2006 and their corporate identity number is L65191TN1985PLCO12362.

b) The rate of interest claimed by the respondent company at the rate of 36% per annum is usurious and unsustainable."

5. Unfortunately, even thereafter the petitioners, for reasons known to it, did not appear. After perusing the records, the Tribunal was pleased to give a finding that having admitted the factum of money being due to the first respondent, the said default in making payment in instalments coupled with the fact that there is no dispute on the agreements entered into between the *inter se* parties, the consequence would follow. However, on the claim made for the interest at 36% as per agreements, it was reduced to 12% though they provided for it. Resultantly, awards have been passed in favour of the first respondent with 18% interest per annum for the award amounts till the date of payments.

6. The learned counsel appearing for the petitioners would submit that there is suppression of fact involved. The first respondent has sold the entire machineries, but never gave credit to it. The machineries have not been valued and even assumed that they were done, not placed before the Tribunal. There is a duty imposed on the Tribunal notwithstanding the plea not raised by the petitioners. The interest was charged actually at 36% as approved by the Tribunal despite the finding otherwise. There was no credit given to the sale of the machineries in its entirety except one machinery. Therefore, it is a fit case where Section 34 of the Arbitration and Conciliation Act, 1996, will have to be pressed into service. To buttress his submissions, the learned counsel for the petitioners has relied on the following decisions.

(1) R.JOSEPH MIRANDA V. DHANDAPANI FINANCE PRIVATE LIMITED, REP. BY ITS AUTHORISED REPRESENTATIVE AND ANOTHER reported in ((2010) 5 Law Weekly 607);

(2)P.R.CATERING COMPANY AND ANOTHER V. OIL AND NATURAL GAS CORPORATION LIMITED AND NOTHERS ((2008) 5 Supreme Court Cases 272); and

(3)K.P.POULOSE V. STATE OF KERALA AND ANOTHER ((1975) 2 Supreme Court Cases 236).

7. The learned counsel appearing for the first respondent would

submit that it is factually incorrect to state that all the machineries have been taken possession physically and thereafter sold. What has been sold has been mentioned in the claim petition, which is the subject matter of O.P.No.142 of 2011. If there is suppression of fact, even the said factum also would have been suppressed. The petitioners cannot be allowed to raise the disputed question for the first time before this Court. It is not, as if, the interest was levied at 36% while computing the claim amount. What was levied was only the additional finance charges, which is inclusive of belated payments and default committed by the first petitioner. Therefore, no ground is made out for interference under Section 34 of the Arbitration and Conciliation Act, 1996.

8. The facts as narrated above are not in dispute. The petitioners did not even dispute the specific averments made by the first respondent in the claim petition with respect to the sale made on the specific items. Secondly, they did not question the sale effected. Such a plea had never been raised either in the reply statement filed or before the learned Arbitrator. The learned Arbitrator was only required to go into the issues framed and not beyond the same. When the petitioners have not raised certain pleas and thereafter did not participate in the proceedings, this Court cannot go into the same, especially, when it involves disputed question of facts, under Section 34 of the Arbitration and Conciliation Act,

1996. Therefore, the contentions raised by the learned counsel for the petitioners with respect to the valuation of the machineries, lack of publication on the sale and the factum of entire machineries having taken possession and sold and not given credit to cannot be gone into by this Court. It is to be noted that prior to the proceedings before the Tribunal and during as well, the petitioners did not question the liability as well as the quantum. In such view of the matter, this Court is not inclined to accept the submissions made by the learned counsel for the petitioners. There is no suppression of fact involved on the part of the first respondent. The fact has to be proved. Since the issues are being raised for the first time, this Court cannot give a finding on the same and therefore, cannot hold the first respondent liable for having suppressed them.

9. The Tribunal has passed a reasoned order. It took into consideration of all the materials. It has given sufficient opportunities to the petitioners to putforth their case. The award was passed in the year 2010, though the claim petitions have been filed in the year 2007.

10. Though a contention was raised before the Tribunal placing reliance upon Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, the learned counsel appearing for the petitioners would fairly submit that the findings rendered by the Tribunal need not be

disturbed. The Tribunal has recorded a finding that the first respondent being the owner, the provisions of the Act do not apply. Further more, it is submitted that the company had since been wound up and all the assets sold.

11. The decisions relied upon by the learned counsel appearing for the petitioners do not apply to the case on hand. In R.JOSEPH MIRANDA V. DHANDAPANI FINANCE PRIVATE LIMITED, REP. BY ITS AUTHORISED REPRESENTATIVE AND ANOTHER reported in ((2010) 5 Law Weekly 607), the Division Bench of this Court was dealing with a case of suppression of fact borne out by the records. Therefore, the above decision does not have any application.

12. In P.R.CATERING COMPANY AND ANOTHER V. OIL AND NATURAL GAS CORPORATION LIMITED AND NOTHERS ((2008) 5 Supreme Court Cases 272), an order of remand was passed after finding that the Tribunal has ignored the material documents. Thus, the said judgment also does not have any application.

13. In K.P.POULOSE V. STATE OF KERALA AND ANOTHER ((1975) 2 Supreme Court Cases 236) also, the Apex Court was dealing with non consideration of relevant documents. Therefore, the said judgment has also got no application to the present case.

14. Suffice it is to state that the petitioners seek a new plea for the first time before this Court contrary to their own stand taken earlier and they did not even question the statement of accounts filed. Hence, this Court does not find any error in the awards passed.

15. However, without prejudice to the contention, the learned counsel appearing for the petitioners made one more submission that the interest awarded by the Tribunal at 18% is excessive. This Court finds some force in the said submission. However, considering the fact that 18% interest has been levied as against the normal practice of 12%, the same stands modified to 12% per annum. Accordingly, the these original petitions stand dismissed modifying the rate of interest awarded by the Tribunal at 18% to 12 % per annum. In all other respects, the awards stand confirmed. No costs.

11.01.2018

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M.M.SUNDRESH,J.

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