

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.07.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.605 of 2009

1.Naresh Purushotham
2.Menaka Naresh

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Petitioners

versus

1.TVS Finance & Services Ltd.,
(Formerly known as
M/s.Harita Finance Limited),
Represented by its Authorised Signatory,
G.Saikumar,
Jayalakshmi Estate,
29, Haddows Road,
Chennai - 600 006.

2.Counter Point Advertising Pvt. Limited
(in liquidation)
Represented by the Official Liquidator,
High Court, Madras.
Office at UTI Building, II Floor,
29, Rajaji Salai, Chennai - 600 001.
(as amended by the Order of the Arbitral
Tribunal Dated 20.02.2008)

3.Justice K.P.Sivasubramaniam (Retd.),
Presiding Arbitrator,
New No.1 (Old No.11686),
15th Street, H Block,
Anna Nagar West, Chennai - 600 040.

4. Justice T.Somasundaram (Retd.),
Arbitrator,
No.46, Pulla Avenue,
Shenoy Nagar, Chennai - 600 030.

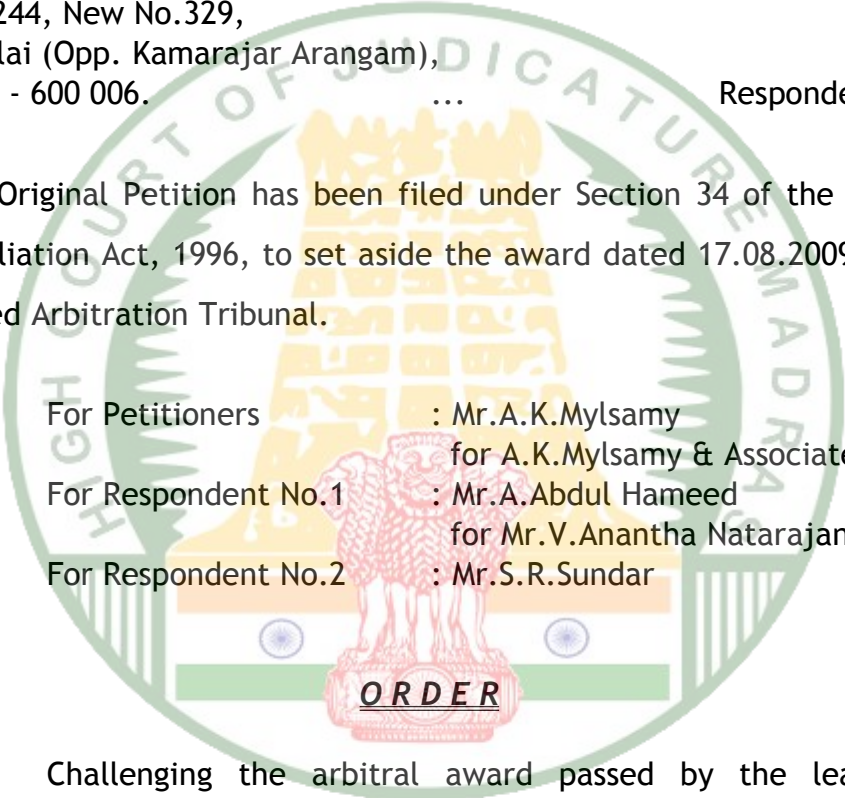
5. A.K.Nirmalanandan,
Arbitrator,
Sanmach Executive Centre III Floor,
Old No.244, New No.329,
Anna Salai (Opp. Kamarajar Arangam),
Chennai - 600 006.

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Respondents

PRAYER: Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 17.08.2009 passed by the learned Arbitration Tribunal.

For Petitioners : Mr.A.K.Mylsamy
for A.K.Mylsamy & Associates
For Respondent No.1 : Mr.A.Abdul Hameed
for Mr.V.Anantha Natarajan
For Respondent No.2 : Mr.S.R.Sundar



ORDER

Challenging the arbitral award passed by the learned Sole Arbitrator, the present Original Petition has been filed.

2. The claim has been preferred based on the Lease Agreements dated 02.08.1997, 05.11.1998 and 03.01.1999 respectively, on the ground that the second respondent has failed to pay the lease charges, despite the factum of sale of the properties, which were given as security.

3. The above claim was resisted by the contesting respondents stating that the properties were given as security had sold in lesser price and no credit has been given. Further, all the equipments have been seized but they have not been sold immediately and thereby, the claimant (first respondent herein) has not taken any steps to mitigate the damages and the very contract itself indicate that immediately after seizure, the equipments have to be sold, which has not been done.

4. Based on the above, the learned Arbitrator has framed the following issues;

- "1) Whether the claimant is aware of the winding up of the Counter Point Advertising Ltd. before the claim was filed before the learned Arbitrators.
- 2) Whether the 3rd respondent has guaranteed the 1st lease agreement dated 02.08.1997.
- 3) Whether the 4th respondent guaranteed the lease agreement dated 05.11.1998 and 31.03.1999, if not whether she is personally liable for the claim.
- 4) Whether as per Memorandum of Understanding dated 16.03.2000, the claimant is bound to withdraw the complaint filed under Section 138 of the Negotiable Instruments Act after the sale of the collateral securities for Rs.17 lakhs.

- 5) What are the steps the claimant has taken to sell the Chamiers Road flat for the best possible price and to whom it was sold.
- 6) Whether the claimant furnished the statement of account in respect of all the three lease agreements dated (1) 02.08.1997, (2) 05.11.1998 and (3) 31.03.1999 to the respondents and if so whether the same is acknowledged by the respondents.
- 7) Whether the claimant is entitled to claim installments after it took possession of the leased assets from the Official Liquidator.
- 8) Whether the claimant is justified without intimating to the respondents to reverse the entry after having given credit of Rs.17 lakhs in respect of the land situated at Mudichur village.
- 9) Whether the claimant is entitled claim interest @ 36% in respect of overdue instalments.
- 10) Whether the lease has come to an end after the claimant took possession of the assets.
- 11) What are the steps the claimant has taken to sell the leased assets after it took possession from the Official Liquidator.
- 12) Whether the claimant is entitled a sum of Rs.89,40,952/- or any other sum and whether the defendants are jointly and severally liable for the claim.
- 13) Whether the claimant is justified without reference to the respondents to sell the Mudichur property for Rs.10 lakhs having earlier agreed and having given credit to a sum of Rs.17 lakhs towards the value of that property.
- 14) To what relief the parties are entitled to."

5. Finally, the learned Arbitrator has passed an award for a sum of Rs.18,70,832/- with interest at the rate of Rs.12% per annum. However, the learned Arbitrator has dismissed as far as the claim of the additional finance charges or additional lease rentals and also the claim against the fourth respondent therein.

6. The main contention of the learned counsel for the petitioners is that the evidence of the first respondent before the learned Arbitral Tribunal to the effect that all the equipments were seized, had taken possession from the second respondent worth about Rs.30 lakhs, which is not denied and it also established before the learned Arbitral Tribunal that the first respondent had taken possession of all the equipments has not taken any steps to mitigate the damages by selling the same immediately as per the contract.

7. In a nutshell, it is the submission of the learned counsel for the petitioners that Clause 22 of the contract makes it very clear that if any equipments have been repossessed, the same shall be sold immediately to mitigate the losses but the evidence clearly established that the first respondent has not taken any steps to mitigate the losses and the learned Arbitrator has not considered these aspects and hence, prayed for allowing this

Petition.

8. Whereas, the learned counsel for the respondents 1 and 2 submitted that the learned Arbitrator has considered the entire aspects in detail and also taking note of the sale of the properties, credits were given to the petitioners. He further submitted that the learned Arbitrator has analysed the entire factual matter and awarded to the tune of Rs.18,70,832/- as against the claim of Rs.89,40,952/- on proper appreciation and hence, submitted that this Court cannot re-appreciate the entire evidence.

9. I have perused the entire award as well as the rival submissions of the parties.

10. There is no dispute with regard to the Lease Agreements. The Lease Agreements are entered into between the parties and subsequently, MOU also entered into between the parties, whereas the petitioners are also agreed to give the properties as security towards the lease amounts, these aspects are not been disputed. Clause 21 of the agreement also makes it very clear that the lessee failure to pay the amounts, the lessor without prejudice to the rights have absolute power to sell equipments, which are in their possession or repossessed by them.

11. The learned Arbitrator taking note of the fact that the first respondent, namely, the claimant has not taken any steps to mitigate the losses and thereby, the major claim has been negated by the learned Arbitrator. What was ordered by the learned Arbitrator is only with regard to the arrears of rent and on actual basis when the learned Arbitrator has taken note of the entire facts and analysed the evidence, this Court cannot sit as an Appellate Court to re-appreciate the entire evidence. It is the domain of the learned Arbitrator to interpret the contract and also take reasonable decision on the basis of the evidence.

12. On a perusal of the entire award, this Court is of the view that the entire award is very reasonable one, which is based on evidence, the learned Arbitrator in fact considered the plea of the petitioners, particularly, to mitigate the damages has rightly refused the major claim of the petitioners. Such being the position, the contention of the petitioners that the award is to be set aside on the ground that the learned Arbitrator has not taken note of the above fact cannot be countenanced.

13. Accordingly, this Original Petition is dismissed. However, in so far as the interest portion is concerned, this Court has taken note of the delay on the part of the first respondent and also failure to mitigate the damages, the interest is reduced from 12% to 8% per annum from 10.12.2007 till the date of payment. However, there is no order as to costs.

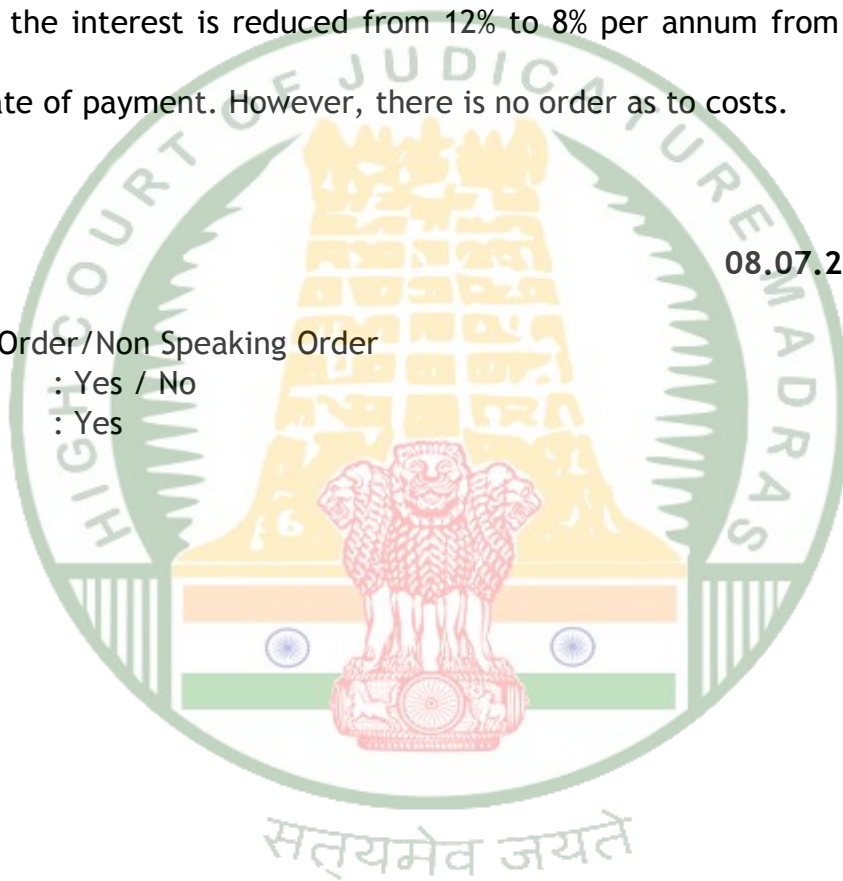
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Speaking Order/Non Speaking Order

Index : Yes / No

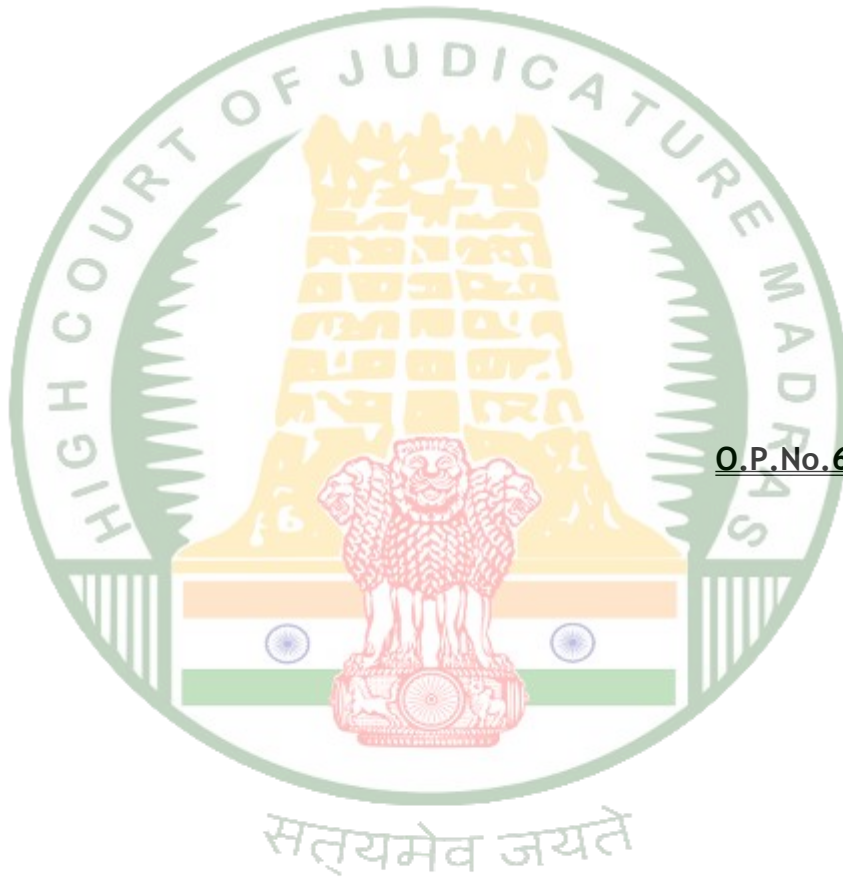
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N.SATHISH KUMAR, J.,
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