

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.07.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.412 of 2011

Tulasi Das Goyal

..

Petitioner

versus

1.M/s.India Cements Capital &
Finance Limited,
No.38, Sterling Road,
Chennai - 600 034.

2.Enkay Texofood Industries Limited,
Bhatia Building,
4th Street, 282, Princess Street,
Mumbai - 400 002.

3.N.C.Vijayairaghavan,
Arbitrator,
Block No.A/1, Door No.89/1,
5th Street, Anna Nagar,
Chennai - 600 040.

Respondents

PRAYER: Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award of the Arbitrator dated 30.01.2009 and addendum dated 03.02.2009 arising out of the agreement No.111100056 dated 08.11.1999 entered into between the parties and the petitioner as Guarantor.

For Petitioner

: Mr.Srenik S.Jain

for M/s.P.Subba Reddy

For Respondent No.1

: Mr.K.Rajasekaran

ORDER

This Original Petition has been filed, challenging the award dated 30.01.2009 passed by the third respondent / learned Arbitrator for a sum of Rs.1,43,11,905/- (Rupees One Crore Forty Three Lakhs Eleven Thousand Nine Hundred and Five Only) with interest at the rate of 18% per annum.

2. Originally, the claim has been made on the basis of the Hire Purchase Agreement dated 04.11.1999 entered into between the parties and after placed on the claim statement and pleadings, the learned Arbitrator passed an award for a sum of Rs.1,43,11,905/- with interest at the rate of Rs.18% per annum. The above award has been put into challenge in this Petition.

3. The main contention of the learned counsel appearing for the petitioner is that as per Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 [hereinafter referred to as "SICA Act"], no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company, shall lie when the proceedings are pending before the BIFR.

4. According to the learned counsel, admittedly, the proceedings are pending before the BIFR, however, the learned Arbitrator ignored the above proceedings passed the award. Hence, his contention is that the award passed is contrary to Section 22 of the SICA Act and it cannot be sustainable in law. In support of his submissions, he has placed reliance on the judgment of the Hon'ble Supreme Court in **PARAMJEET SINGH PATHEJA vs. ICDS LTD.** reported in **JT 2006 (10) SC 41**.

5. The learned counsel for the first respondent would submit that the proceedings under Section 22 of the SICA Act will not apply to the arbitral proceedings and the proceedings before the Board is also terminated and abated. In support of his submissions, he has also placed reliance on the judgment of the Hon'ble Supreme Court in **SAN-A TRADUBG CO. LTD. vs. I.C.TEXTILES LTD.** reported in **CDJ 2006 SC 377** and also the Division Bench of Calcutta High Court in **MSTC LTD. vs. MEHERKIRAN ENTERPRISES LTD.** reported in **MANU/WB/0798/2016**.

6. Further, in the case of **MADRAS PETROCHEM LIMITED AND ANOTHER vs. BOARD FOR INDUSTRIAL AND FINANCIAL RECONSTRUCTION**

AND OTHERS reported in **(2016) 4 SCC 1**, the Division Bench of the Hon'ble Supreme Court has held as follows:

"56. Similarly, in *Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.* [(2003) 4 SCC 305], the U.P. Act under which recovery proceedings initiated against guarantors at a post-decree stage were held to be outside the purview of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985."

7. Similarly, he has also relied upon the judgment of the Hon'ble Supreme Court in **RAHEJA UNIVERSAL LIMITED vs. NRC LIMITED AND OTHERS** reported in **(2012) 4 SCC 148** has held as follows:

"31. This Court in the said judgment held as under : *(Jay Engg. Works Ltd. v. Industry Facilitation Council* [(2006) 8 SCC 677], SCC pp. 681-82 paras 17-18 & 21)

"17. The said provision, thus, mandates that no proceeding inter alia for execution, distress or the like against any of the properties of the industrial company and no suit for recovery of money or for the enforcement of any security, shall lie or be proceeded with further, except with the consent of the Board or as the case may be, the appellate authority. The said statutory injunction

will operate when an inquiry had been initiated under Section 16 or a scheme referred to under Section 17 is under preparation and/or inter alia a sanctioned scheme is under implementation. It is not disputed before us that the amount awarded in favour of Respondent 2 by the council finds specific mention in the sanctioned scheme which is under implementation.

18. The award of the council being an award, deemed to have been made under the provisions of the 1996 Act, indisputably is being executed before a civil court. Execution of an award, beyond any cavil of doubt, would attract the provisions of Section 22 of SICA 1985. Whereas an adjudicatory process of making an award under the 1993 Act may not come within the purview of SICA 1985 but once an award made is sought to be executed, it shall come into play. Once the awarded amount has been included in the scheme approved by the Board, in our opinion, Section 22 of SICA 1985 would apply.

21. SICA 1985 was enacted in public interest. It contains special provisions. The said special provisions had been made with a view to secure the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts for preventive, ameliorative, remedial and other

measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto."

8. In the light of the above submissions, Section 22 of the SICA Act states that "no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board, when the proceedings are pending under Sections 16 and 17 of the SICA Act before the Board."

9. In the case of **PARAMJEET SINGH PATHEJA vs. ICDS LTD.** reported in **JT 2006 (10) SC 41**, the Hon'ble Apex Court dealt with notice issued under Insolvency Act held that the expression "suit" in Section 22 of the Act be given its plain meaning, namely, any proceedings adopted for realization of a right vested in a party by law and also held that the Insolvency Notice issued under Section 9(2) of the P.T.I. Act, 1909 cannot be sustained on the basis of arbitral award, which has been passed under the Arbitration and Conciliation Act, 1996.

10. The Hon'ble Apex Court mainly decided the above issue with regard to the validity of the Insolvency Notice on the basis of the arbitration award. In this regard, the judgment of the Hon'ble Supreme Court in **SAN-A TRADUBG CO. LTD. vs. I.C.TEXTILES LTD.** reported in **CDJ 2006 SC 377** has observed as follows:

"14. Section 22 further prohibits taking up of the proceedings of the nature which would be coercive for recovery of money against a sick undertaking. Proceeding in arbitration is neither a suit under sub-section (1) of Section 22 of SICA nor the proceedings thereunder and, therefore, there is no prohibition under Section 22 of SICA to take up the arbitration proceedings to adjudicate the liability of the parties to the arbitration proceedings. In my view, Section 22 of SICA does not debar the arbitration proceedings under the Arbitration and Conciliation Act, 1996. The objections to the arbitration proceedings raised by the respondent fail for the aforesaid reasons and are rejected."

11. The Division Bench of Calcutta High Court in **MSTC LTD. vs. MEHERKIRAN ENTERPRISES LTD.** reported in **MANU/WB/0798/2016** has held

as follows:

"25. In *Paramjeet Singh Patheja Vs. ICDS Ltd.* (supra) cited by Mr.Banerjee, the Supreme Court held that to achieve the purpose for which Section 22 had been enacted, it was imperative that the expression 'suit' in Section 22 be given its plain meaning, namely any proceedings adopted for realization of a right vested in a party by law, and this would clearly include arbitration proceedings. In the aforesaid case, the Supreme Court held that execution proceedings in respect of award cannot be proceeded with in view of the statutory bar of Section 22 of SICA.

26. In *Morgan Securities and Credit (P) Ltd. Vs. Modi Rubber Ltd.* (supra), the Supreme Court held that an arbitral award was under the purview of Section 22(1). Execution of an arbitral award could not therefore be proceeded with.

27. In *San-A Tradubg Company Ltd. Vs. I.C. Textiles Ltd.* (supra), the Supreme Court held that Section 22 does not debar arbitration proceedings. Mr.Banerjee however submitted that this decision was impliedly overruled by *Paramjeet Singh Patheja Vs. ICDS Ltd.* (supra).

28. A judgment is a precedent for the authority of law which is raised and decided. In *Paramjeet Singh Patheja Vs. ICDS Ltd.* (supra), the

question was whether execution proceedings in respect of the award could not be proceeded with. Execution proceedings are clearly in the nature of distress proceedings."

12. The Division Bench of the Hon'ble Apex Court in **MADRAS PETROCHEM LIMITED AND ANOTHER vs. BOARD FOR INDUSTRIAL AND FINANCIAL RECONSTRUCTION AND OTHERS** reported in (2016) 4 SCC 1, placing reliance in the case of **KAILASH NATH AGARWAL vs. PRADESHIYA INDUSTRIAL & INVESTMENT CORPN. OF U.P. LTD.** reported in (2003) 4 SCC 305 has held that the recovery proceedings initiated against guarantors at a post-decree stage were held to be outside the purview of Section 22 of the SICA Act, indicated that Section 22 of the SICA Act does not apply to the arbitration proceedings.

13. In view of the above decisions and the fact that the proceedings pending before the BIFR has already terminated, which is not in dispute. The BIFR has passed an order stating that the proceedings are pending before the Board stands abated under the provision of Section 15(1) of the SICA Act.

14. It is to be noted that any enquiry or proceedings commenced under Sections 16 and 17 of the SICA Act, any declaration shall have effect notwithstanding anything contained in the Companies Act, 1956, or any other law and all proceedings shall remain stayed or be continued to such declaration. Sub-clause 4(b) of Section 22 of the Act deals with ceasing of declaration, any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made. Similarly, the proceedings shall be continued from the stage, which had been reached when the proceedings became stayed.

15. The above clause would make it very clear that once the proceedings terminated, obligation and liability was automatically suspended or modified, shall become revived and enforceable as if the declaration had never been made. Such being the position, the Hon'ble Apex Court has also held that the arbitral proceedings is not fall under Section 22 of the SICA Act. Therefore, the contention of the learned counsel for the petitioner that the award is null and void cannot be countenanced.

16. Accordingly, this Original Petition is dismissed. However, there is no order as to costs.

03.07.2019

Speaking Order/Non Speaking Order

Index : Yes / No

Internet : Yes

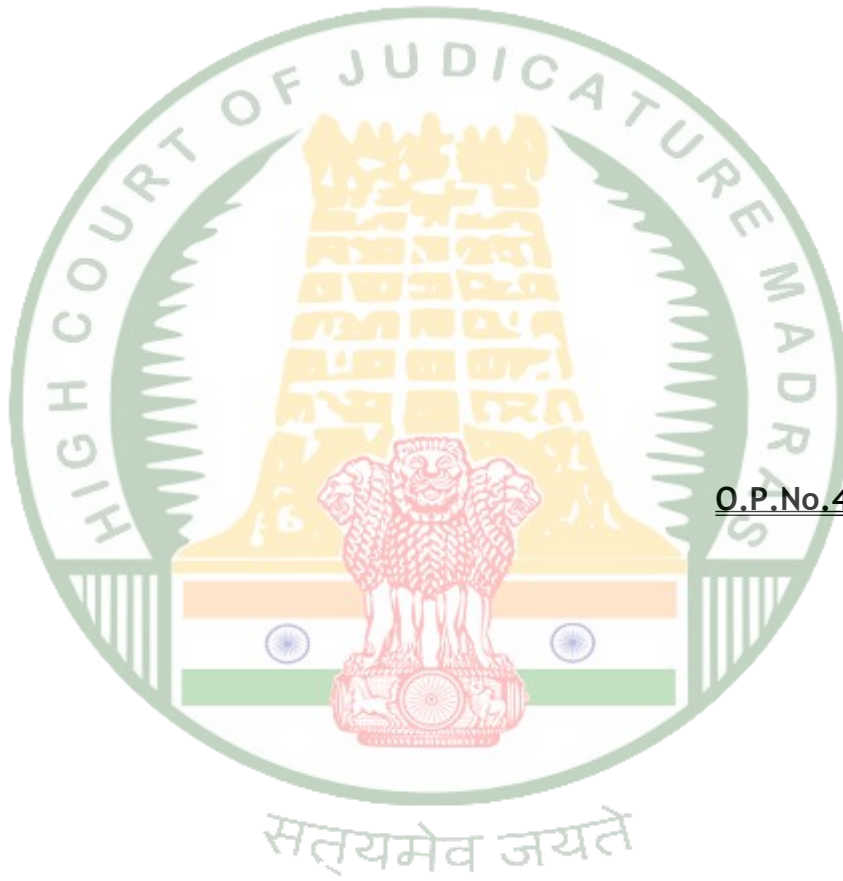
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N.SATHISH KUMAR, J.,

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