

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2020

CORAM

THE HON'BLE Mr. JUSTICE M.SUNDAR

O.P.Nos.386 and 387 of 2012

1.M/s.Brushman India Limited,
represented by its Managing Director,
B-95/3, Phase-I, Naraina Industrial Estate,
New Delhi-110028.

2.Kapil Kumar

... Petitioner in
both O.Ps.

Vs.

1.M/s.First Leasing Company of India Ltd.,
No.749, Anna Salai,
Chennai-600 002.

2.Mr.M.Mohideen Pitchai,
Sole Arbitrator,
330/168, 27M III Floor, Pandu Klix Plaza,
Thambuchetty Street,
Parrys, Chennai-600 001,
(Respondent No.2 stands deleted
in and by this order)

... Respondents in
both O.Ps.

O.P.No.386 of 2012 is filed under Section 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996 seeking to (a) set aside the impugned award

dated 12.11.2011 passed by learned Arbitrator in Arbitration Case No.2 of 2011, (b) award cost of the proceedings in favour of the petitioners and against respondents (c) pass any other or further order of directions as his Court may deem fit, just and proper in the facts and circumstances of the case.

O.P.No.387 of 2012 is filed under Section 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996 seeking to (a) set aside the impugned award dated 12.11.2011 passed by learned Arbitrator in Arbitration Case No.1 of 2011, (b) award cost of the proceedings in favour of the petitioners and against respondents (c) pass any other or further order of directions as his Court may deem fit, just and proper in the facts and circumstances of the case.

For Petitioners : Mr.V.Arunagiri

For Respondents : Mr.S.Gopalakrishnan, for O.L (R-1)

COMMON ORDER

Captioned 'Original Petitions' (hereinafter 'OPs' in plural and 'OP' in singular for the sake of brevity and convenience) are applications under section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, convenience and clarity.

2 This Court, for the sake of further convenience and clarity, deems it appropriate to refer to 'O.P.No.386 of 2012' as 'Senior OP' and 'O.P.No.387 of 2012' as 'Junior OP'.

3 There are two petitioners and two respondents in both senior and junior OPs. Senior and Junior OPs have been filed assailing two Arbitral Awards both dated 12.11.2011 made in Arbitration Case No.2 of 2011 and Arbitration Case No.1 of 2011 respectively. These two arbitral awards which have been assailed in captioned OPs shall hereinafter be referred to as 'impugned awards' in plural and 'impugned award' in singular for the sake of convenience and clarity.

4 Impugned awards have been made by the same sole Arbitrator who constituted the 'Arbitral Tribunal' (AT) for the sake of brevity).

5 Impugned awards arise out of Hire Purchase Agreement dated 26.11.2008 and Hire Purchase Refinance Agreement dated 23.05.2008. To be noted, impugned award in senior OP arises out of Hire Purchase Agreement dated 26.11.2008 and impugned award in junior OP arises out of Hire Purchase Refinance Agreement dated 23.05.2008.

6 The borrower company and its Managing Director who was

the guarantor (who were respondents 1 and 2 respectively before AT) are petitioners 1 and 2 respectively in captioned OPs. The lender company who is the sole claimant before the AT is the first respondent in captioned OPs. To be noted, the borrower company has been described as 'Hirer', lender company has been described as 'Owner' and 'the Company' in the Hire Purchase Agreement and Hire Purchase Refinance Agreement respectively. Be that as it may, sole Arbitrator, who constituted the AT and who made the impugned awards, has been arrayed as respondent No.2 in both captioned OPs.

7 Today, in this web hearing on a video conferencing platform, Mr.V.Arunagiri, learned counsel on behalf of both petitioners and Mr.S.Gopalakrishnan, learned counsel for 'Official Liquidator attached to this Court' ('OL' for the sake of brevity) are before me. To be noted, this Court is informed that the first respondent lender company is a 'Non Banking Financial Company' ('NBFC' for the sake of brevity), it has gone into liquidation and OL is now holding the fort qua first respondent.

8 Aforementioned two learned counsel consented for captioned OPs being taken up for final disposal and for being heard out

in this web hearing on this video conferencing platform, i.e., in this virtual hearing. Therefore, captioned OPs were taken up for final disposal and heard out.

9 Aforementioned learned counsel submitted that considering the nature of challenge to impugned awards, the sole arbitrator, who constituted the AT (to be noted, sole arbitrator who constituted the AT is a learned Retired District-cum-Sessions Judge in Tamil Nadu) need not be in the array of parties. Therefore, this court following the procedure adopted by Hon'ble Supreme Court in *Vinay Heavy Equipments* case [*Zonal General Manager, Ircon International Limited Vs. Vinay Heavy Equipments* reported in (2015) 13 SCC 680], deletes the second respondent from the array of parties in captioned OPs. Therefore, NBFC becomes sole respondent now in both captioned OPs.

10 Before advertng to rival submissions, captioned OPs being challenges to arbitral awards under section 34 of A and C Act, short facts shorn of elaboration will suffice. It will suffice to say that under aforementioned Hire Purchase Agreement and Hire Purchase Refinance Agreement, first petitioner company was given financial assistance or in other words, advanced sums of money set out therein for purchase of

machinery; that these sums of money had to be repaid by first petitioner company in specified tenors with rate of interest mentioned therein; that second petitioner who is admittedly Managing Director of first petitioner company is the guarantor quo two agreements; that there is arbitration clause in both agreements; that for alleged default in repayment, NBFC triggered arbitration clause and AT was constituted; that there is no dispute that the arbitration clauses in both agreements serve as arbitration agreements between the parties within the meaning of section 2(1)(b) read with section 7 of the A and C Act; that AT so constituted embarked upon the exercise of adjudicating the claim; that notice sent by AT was duly received by first petitioner company, but it was not served on second petitioner guarantor; that AT ultimately made impugned awards holding that NBFC is entitled to realise Rs.1,11,23,240/- qua impugned award in senior OP and Rs.1,27,18,610/-qua impugned award in junior OP; that in both impugned awards, interest at the rate of 18% per annum has been awarded besides cost, which is to be shared equally by both parties; that both impugned awards came to be passed after oral evidence that was let in and documentary evidence which were marked as exhibits by NBFC; that first petitioner borrower company admittedly

did not appear before AT though notice was duly served. Notwithstanding very many contentions in captioned OPs, learned counsel for petitioners focused his arguments / submissions which are captured infra.

11 Assailing impugned awards, learned counsel for petitioners made submissions, summation of which is as follows:

(a) Second petitioner who is an individual is not a party to Hire Purchase Agreement and Hire Purchase Refinance Agreement which have been placed before this court as part of case file.

(b) Sums disbursed as per Hire Purchase Agreement and sums as captured in impugned awards (senior OP) are at variance.

(c) A notice issued by AT being a notice of hearing dated 29.08.2011 is improper as it has fixed 16.04.2011 as the date of hearing.

(d) Impugned awards have awarded interest at the rate of 18% per annum which is in contravention of Section 7 of The Tamil Nadu Money-Lenders Act, 1957

(Tamil Nadu Act 26 of 1957), G.O.Ms.No.406, Cooperation Department, dated 05.07.1979 which stipulates the rate of interest, besides being in contravention of The Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003 (Tamil Nadu Act 38 of 2003).

(e) Company Application No.268 of 2018 in Company Petition No.255 of 2014 claims a different quantum as on 30.11.2013.

12 In response to the above, learned counsel for OL made submissions which are as follows:

(a) The points raised by learned counsel for petitioners are not tenable as they do not fall within the statutory perimeter of section 34 of the A and C Act; and

(b) Interest is in accordance with the contract.

13 This Court now embarks upon the exercise of discussing rival submissions and giving its dispositive reasoning.

14 The first point pertains to second petitioner individual not being a party to Hire Purchase Agreement and Hire Purchase Refinance Agreement. There is nothing to demonstrate before this Court that second petitioner has not executed a separate guarantee qua two agreements. It is also to be noticed that there is no dispute that second petitioner is the Managing Director of first petitioner. Second petitioner has signed two agreements describing himself as authorised signatory in one and as Managing Director in another. This Court called for (from Registry) vakalatnamas in captioned OPs and they were placed before this Court. This Court has carefully looked at / compared the signatures in the two agreements and vakalatnamas of the two petitioners. On such examination / comparison, it is clear that all have been signed by the same person and that is obviously the second petitioner Mr.Kapil Kumar. Therefore, the submission that the second petitioner was not a party to two agreements pales into insignificance.

15 In the light of the above, considering the peculiar facts and circumstances of this case, as the notice has been duly served on first petitioner company which is represented by the Managing Director and

also taking into account the fact that first petitioner company has not chosen to go before the AT, this Court is of the view that the plea of no notice to second petitioner does not hold water as it cannot be gainsaid that the second petitioner did not have knowledge about the proceedings or the date of proceedings before the AT. To put it differently, it is clear from the peculiar facts and circumstances of this case that second petitioner was not under any incapacity qua AT. This court is conscious of legal position that first petitioner is a juristic person and second petitioner is a natural person which are distinct, but the view taken in captioned OPs is in the light of the peculiar facts and circumstances of the instant case and therefore, shall not serve as a precedent.

16 This takes us to the issue of sums mentioned in the two agreements and those captured in the impugned awards being at some variance. This argument is clearly in the nature of appeal grounds which cannot be countenanced in a challenge to an arbitral award under section 34 of the A and C Act. Therefore, this also does not aid the cause of petitioners in cases on hand. To be noted, there is nothing to demonstrate that petitioners could not take recourse to section 33 of A and C Act.

17 With regard to notice from AT dated 29.8.2011 fixing the

hearing on 16.04.2011, it is obviously a typographical error and what is of significance is no prejudice has been caused to petitioners as subsequently, a notice dated 05.09.2011 has been duly issued by AT fixing the date of hearing on 24.09.2011. There is no dispute that this notice has been duly served on first petitioner company as already alluded to supra.

18 This takes us to the last point on interest.

19 A perusal of the two agreements reveals that the agreed rate of interest is 13% per annum as per State Bank of India PLR Rate in Hire Purchase agreement and 12.25% per annum as per State Bank of India PLR rate in Hire Purchase Refinance Agreement and vide clause 30, clauses 3(c) and 4(c) in Hire Purchase Agreement and Hire Purchase Refinance Agreement respectively, it has been covenanted that in the event of default, rate of interest shall be 2.75% per month over the bank lending rate. To be noted, this 2.75% translates to 33% per annum.

20 This Court has carefully examined the two impugned awards and finds that the AT has awarded interest only at the rate of 18% per annum after noticing the aforementioned covenants though NBFC had claimed interest at the rate of 33%. This by itself puts an end to the

argument projected qua 'Tamil Nadu Money Lenders Act, 1957', G.O.Ms.No.406, Cooperation Department, dated 05.07.1979 and 'Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003'. These two Acts shall hereinafter be referred to as 'Money Lenders Act' and 'Exorbitant Interest Act' respectively for the sake of convenience and clarity. Though the approach of AT does not warrant any interference, as the point has been raised, this Court deems it appropriate to deal with the same.

21 In Money Lenders Act, it is clear that the term 'bank' has been defined in section 2(1) and includes clauses (a) to (k). NBFC in the case on hand does not fall under clauses (a) to (j) and there is nothing to demonstrate that it has been notified vide section 2(1)(k). Therefore, Money Lenders Act or G.O.Ms.No.406 dated 05.07.1979 qua section 7 of Money Lenders Act do not come into play. Similarly, with regard to Exorbitant Interest Act, different kinds of interests which are covered have been defined / adumbrated in sub sections (1) to (9) of section 2 and they are in the nature of daily rate of interest. The term 'debtor' is defined in sub section (2) of section 2 and it says that it is a person who receives loan for exorbitant interest. To be noted, sub section (9) deals with the

term 'thandal' referred to section 7 of Money Lenders Act and this court has already discussed and held that Money Lenders Act does not apply to cases on hand. In any event, even this sub section (9) which refers to section 7 of Money Lenders Act, has to be such that it has to be collected daily along with the part of loan amount.

22 This Court also notices that mechanisms have been put in place qua Money Lenders Act and Exorbitant Interest Act. This Court is of the view that as Money Lenders Act and Exorbitant Interest Act on the face of it are not attracted qua the cases on hand, this court deems it unnecessary to burden this order by examining various provisions of the Acts in great detail.

23 With regard to last point touching upon the company petition, this Court is informed that the company petition is for winding up and the same is pending. This point is left open to be decided by the company court in the concerned company petition. This being a section 34 petition, this court does not express any opinion on the same.

24 Before concluding, this Court deems it necessary to set out that both captioned OPs are of the year 2012 and both senior and junior OPs were presented on 16.04.2012. Both captioned OPs are more than

eight years old and therefore, they are vintage OPs. In the light of sub section (6) of section 34 of the A and C Act, though it was brought into the statute book on and from 23.10.2015, it may be appropriate to describe the captioned OPs as ancient. Be that as it may, this court hastens to add that captioned OPs have been examined by applying pre 23.10.2015 regime of the A and C Act.

25 In the light of discussion and dispositive reasoning set out supra, both captioned OPs fail and the same are dismissed. There shall be no order as to costs.

09.11.2020

Speaking order

Index : Yes

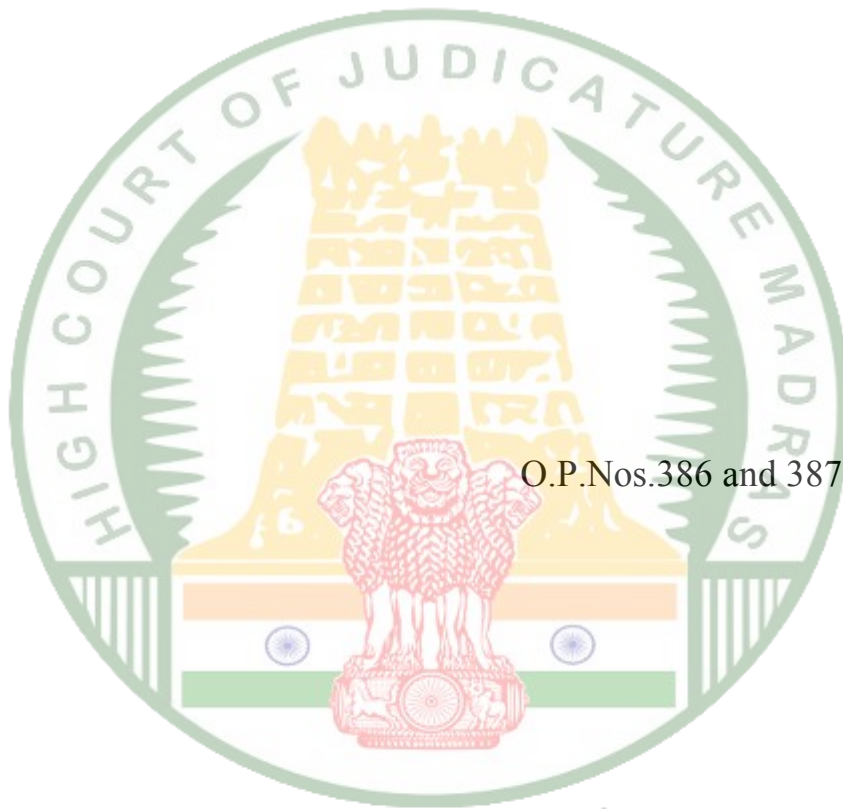
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M.SUNDAR, J.

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