IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.10.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.732 of 2015

and

O.P.No.32 of 2016

1. Venkateswara Wines
   Rep. by P.Shaji Purushotman
   340-A, Pantheon Road,
   Egmore, Chennai-600 008.

2. A.K.Pradeep
   S/o.Mr.Kunhikannan
   693, Mount Road
   Chennai-600 002.

3. A.K.Sajeevan
   S/o.Kunhikannan
   693 Mount Road,
   Chennai-600 002.

4. P.Shaji Purushothaman
   S/o.M.P.Purushothaman
   340-A, Pantheon Road
   Egmore, Chennai-600 008.

5. P.Sheeju Purushothaman
   S/o.M.P.Purushothaman
   340-A, Pantheon Road
   Egmore, Chennai-600 008.

6. M/s.Empee Distilleries Ltd.,
   Rep. by its Chairman & Managing Director
   59, Harris Road,
   Chennai-600 002. ... Petitioners in O.P.No.732/2015
   and respondents 1 to 6 in O.P.No.32/2016

vs.

1. Indumathi
   W/o.V.Selvapandian
   Proprietrix, RVS Enterprises
   112, Muthumariamman Koil Street
   Pondicherry - 605 001. ... first respondent in O.P.No.732/2015
   and petitioner in O.P.No.32/2016

2. Mr.Justice J.Kanakaraj
   Hon'ble Sole Arbitrator
   7/3 Justice Ramanujam Road
   Malavia Avenue, Thiruvanmiyur
   Chennai-600 041. ... 2nd respondent in O.P.No.732/2015
   and 7th respondent in O.P.No.32/2016

Original Petition No.732/2015 filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award passed by the 2nd respondent dated 21.05.2015.

Original Petition No.32/2016 filed under Section 34 of the Arbitration and Conciliation Act, 1996, to modify the award dated 21.05.2015 passed by the 7th respondent by allowing the claim amounts made in the claim petition in other heads in paras 22 (b) (i) and (ii) and para 22 (c) to (i).

For Petitioners in O.P.No.732/2015
and respondents 1 to 6 in O.P.No.32/2016 : Mr.K.V.Ananthakrushnan

First respondent in O.P.No.732/2015
and petitioner in O.P.No.32/2016 : Mr.R.Natarajan

2nd respondent in O.P.No.732/2015
and 7th respondent in O.P.No.32/2016 : Sole Arbitrator

COMMON ORDER

This common order will govern aforementioned captioned two 'Original Petitions' ('OPs' in plural and 'OP' in singular for the sake of brevity).

2. An 'arbitral award dated 21.05.2015' (hereinafter 'impugned award' for the sake of convenience) has been called in question in both captioned OPs, while O.P.No.732 of 2015 has been filed by the six respondents before the 'Arbitral Tribunal' ('AT' for the sake of brevity), O.P.No.32 of 2016 has been filed by the sole claimant before AT. From here on, for the sake of convenience and clarity 'O.P.No.732 of 2015' shall be referred to as 'Senior OP' and 'O.P.No.32 of 2016' shall be referred to as 'Junior OP'. To be noted both captioned OPs are directed against the same

impugned award, but as mentioned supra, Senior OP is at the instance of respondents before AT and Junior OP is at the instance of claimant before AT. Therefore, captioned OPs are in the nature of cross OPs.

3. In the web hearing on a video conferencing platform today, Mr.K.V.Ananthakrushnan, learned counsel on record for six petitioners in senior OP (6 respondents in junior OP) and Mr.R.Natarajan, learned counsel on record for petitioner in junior OP (sole respondent in senior OP) are before me. Both learned counsel consented for captioned OPs being taken up for final disposal in the web hearing and therefore, both captioned OPs were taken up for final disposal and heard out.

4. Captioned OPs are applications under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of convenience and clarity. Therefore, short facts shorn of elaboration or in other words, factual matrix in a nutshell containing essential facts imperative for appreciating the instant common order will suffice.

5. The fulcrum of captioned OPs is constituted by a dealership agreement dated 01.12.2001 (for the period 01.12.2001 to 30.12.2001) and a renewal agreement, both of which shall be collectively referred to as 'said contract' for the sake of convenience and clarity; that there is an arbitration clause in said contract; that the arbitration clause in said contract serves as an arbitration agreement between the parties being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that sixth petitioner-company in Senior OP is a manufacturer of Indian Made Foreign Liquor (IMFL), first petitioner in Senior OP, which is a partnership firm of which the Managing Director of sixth petitioner Company is a distributor and the sole respondent in Senior OP was appointed as a dealer for sale of IMFL products qua said contract; that from here on, parties shall be referred to by their respective ranks before AT. In other words, 'sole respondent' in Senior OP shall be referred to as 'claimant' and 'six petitioners' in Senior OP shall be referred to as 'respondents'; that arbitral disputes arose between the parties; that claimant filed a petition under Section 11 of A and C Act in O.P.No.841 of 2007; that vide order

dated 01.03.2013 in O.P.No.841 of 2007, the then Hon'ble Chief Justice of this Court appointed a former member of the Bench of this Court as sole arbitrator; that the sole arbitrator, who constituted the AT entered upon reference qua arbitrable disputes between the parties; that sole arbitrator who constituted the AT, after full contest which *inter-alia* includes oral evidence being let in and documentary evidence being marked (one witness each on the part of claimant and respondents besides Exhibits P1 to P13 on the part of claimant and Exhibits R1 to R10 on the part of respondents) made the impugned award; that arbitrable disputes essentially turn on refund of security deposit, certain claims for service charges, trade discount, trade incentives etc., by the claimant and a counter claim by the respondents towards, what according to respondents, are collection qua over due from customers as on 30.03.2005; that AT embarked upon the exercise of resolving the claim of claimant under different heads set out herein as well as the counter claim of respondents and made the impugned award; that assailing the impugned award, senior OP has been presented in this Court by the respondents on 20.08.2015 and junior OP has been presented before this Court by claimant on 19.08.2015; that both captioned OPs have now been heard out.

6. Before this Court embarks upon the exercise of capturing the rival submissions made by learned counsel on both sides, it is necessary for the purpose of clarity and specificity to set out certain aspects of the matter.

7. Both captioned OPs i.e., senior OP and junior OP have been presented in this Court prior to 23.10.2015 and therefore, applying the ***Ssangyong*** principle or in other words the principle laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** *reported in* ***(2019) 15 SCC 131, (equivalent is (2019) SCC Online SCC 77)***, both captioned OPs will be governed by pre 23.10.2015 regime of the A and C Act. In other words, both captioned OPs will be governed by A and C Act as it stood prior to amendment by Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015.

8. The next aspect of the matter pertains to the prayers in the

captioned OPs. Prayer in senior OP is as follows:

> *'Therefore it is just and necessary that this Hon'ble Court may be pleased to set aside the arbitral award passed by the 2nd respondent dated 21.05.2015 and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice.'*

9. Prayer in junior OP is as follows:

> *'The petitioner therefore prays that this Hon'ble Court may be pleased to modify the award dated 21.05.2015 passed by the 7th respondent by allowing the claim amounts made in the claim petition in other heads in paras 22(b)(i) and (ii) and para 22(c) to (i) and costs and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.*

10. In the hearing today, it came to light that respondents before AT are not aggrieved by the entire award. The respondents before AT are aggrieved by interest qua return of security deposit, rejection of counter

claim of the respondents and the award directing refund of security deposit. As far as the limbs of award, which have been negatived, i.e., the prayers of the claimant pertaining to service charges, trade discount and trade incentives, the respondents are not aggrieved. Therefore, the challenge of the respondents to the impugned award is to this extent with regard to the claims set out herein. With regard to junior OP, prayer is for modification of the award and it is with regard to claims made by the claimant in Paragraph 22(b)(i), 22(b)(ii) and 22(c) to (i) of the claim statement. In other words, the claimant is not aggrieved by rejection of counter claim. The claimant is also not aggrieved by the award, which directs refund of security deposit.

11. In this backdrop, the case law that assumes significance is ***J.G. Engineers Pvt. Ltd. v. Union of India (UOI) and Ors.*** *reported in* ***2011 5 SCC 758.*** This ***J.G. Engineers case law*** is for the principle that when there are several heads of claims, some can be upheld and some can be dismissed by segregating heads of claim. Relevant Paragraphs in ***J.G. Engineers*** case law is paragraph 25 and most relevant portion of paragraph 25 reads as follows:

*'**25.** It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent....'*

12. This takes us to the several heads of claim before AT. To be noted, the counter claim made by the respondents before AT is also a head of claim. The heads of claim made by the claimant before AT are as follows:

'a. Towards Security Deposit Claim:
i) Security Deposit : Rs.15.00 Lakhs
ii) at the rate of 24% interest from the date of 1.4.2005 till 15.07.2013 on Rs.15.00 Lakhs : Rs.29,85,000/-
put together it comes to Rs.44,85,000/-
b. Towards service charges, trade discount, trade incentives for the periods 2003-2004 and 2004-2005:
i) Service charges plus trade discount plus trade incentives for the periods 2003-2004 and 2004-2005 : Rs.6,61,649.00
ii) interest at the rate of 24% on Rs.6,61,649/- from 1.4.2005 to 15.7.2013 : Rs.13,49,772/-
put together it comes to Rs.20,11,421/-

c) Towards income tax expenses : Rs.2,10,000/-

d) Towards excise and miscellaneous expenses : Rs.15,000

e) Towards new brand launch expenses: pertaining to Empee Nepolian, VSOP Brandy and All Gold Whisy : Rs.25,000/-

f) Towards old collection expenses and commission charges at the rate of 10% on Rs.24,69,784 : Rs.2,46,978

g) travelling expenses for the period 5.12.2001 to 24.3.2005 : Rs.80,000/-

h) legal expenses incurred for constitution of arbitration proceedings : Rs.50,000/-

i) Economic loss incurred by reason of repayment of amount of loan with interest of Rs.3,40,000/- to the City Union Bank, Pondicherry.

In total, the respondents are due and liable to make payment to the petitioner to the tune of Rs.74,63,399/-.'

13. The counter claim made by respondents is as follows:

'It is further prayed that this Hon'ble Tribunal may be pleased to allow the counter claim for Rs.17,03,063/- with interest at 24% p.a. from this date till realization with cost and thus render justice.'

14. To be noted, the counter claim is what according to respondents

is towards pending collection qua over due invoices from customers as on 30.03.2005.

15. Vide the impugned award claim (a) of the claimant towards refund of security deposit together with interest was acceded to. To be noted, interest claimed by the claimant is 24% p.a. but the impugned award has granted 12% from date of impugned award and 18% future interest**.** With regard to head (b) of claimant's claim, it has been negatived in its entirety. With regard to the counter claim of the respondents before AT, the same has been negatived in its entirety primarily on the ground that it is barred by limitation.

16. Therefore, three heads of claim, two by the claimant and one by respondents can be segregated. As a consequence, this Court will now proceed to segregate the heads of claim as per ***J.G. Engineers*** principles and deal with the captioned OPs on the basis of scope of challenge to the impugned award in the captioned OPs, the details of which have been set out supra.

17. Learned counsel for respondents before AT, being petitioners in senior OP, opened their submissions and the submissions of learned counsel are as follows:

(a) AT ought not to have awarded interest while directing refund of security deposit as said contract explicitly mentions vide covenants therein that security deposit will not bear interest.

(b) The counter claim ought not to have been rejected as it is not barred by limitation. The specific say of learned counsel is, AT itself was constituted only on 01.03.2013, claim statement was filed by the claimant on 10.07.2013 and the respondents had filed statement of defence with counter claim dated 18.09.2013 and therefore, it cannot be gainsaid that the counter claim of respondents is barred by limitation.

18. The submissions made by learned counsel for petitioner in junior

OP (Claimant before AT) who is being referred to as claimant in this order are as follows:

(a) Rejection of head (b) of claimant pertaining to service charges, trade discounts and trade incentives is liable to be set aside as it is primarily on the basis that evidence has not been produced whereas it is the case of the claimant that evidence has been forcibly taken away by the respondents.

(b) The award of interest is justifiable.

(c) The rejection of counter claim made by the respondents before AT is correct, as there is no basis for the same besides the same being time barred.

19. This Court now proceeds to examine the rival submissions, discuss the rival submissions and give its dispositive reasoning for the purpose of arriving at a conclusion in the captioned OPs.

20. With regard to the submission that interest cannot be awarded when the said contract explicitly covenants that security deposit will not

bear interest, the same turns on sub-section (7) of Section 31 of A and C Act. Be that as it may, relevant clauses qua said contract with regard to interest on security deposit are clauses 5 & 6 in 01.12.2001 Dealership Agreement and renewal agreement. These two clauses read as follows :

> *'5. That Agent shall deposit a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) as Security Deposit and which shall not bear any interest. This Security Deposit shall be returned on termination of contract after adjusting any outstanding dues.'*
>
> *'6. That Agent has deposited a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) as Security Deposit which shall not bear any interest. This Security Deposit shall be returned on termination of contract after adjusting any outstanding dues at the time of such termination.'*
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> ***(underlining made by this Court to supply emphasis, highlight and for ease of reference.)***

21. As it has been explicitly covenanted in the said contract that security deposit will not bear any interest, the award of interest for return of security deposit at the rate of 12% p.a. from 14.12.2005 to the date of the impugned award i.e., 21.05.2015, is clearly against terms of the contract and

it is not permissible, but the same cannot be said about the award of future interest, as the contract prohibits interest on refund of security deposit if repaid on termination. In the instant case, this termination and the subsequent disputes itself ran into rough weather. Therefore, what has been prohibited by the contract is payment of interest if the security deposit is returned on termination. To that extent, award of interest from 14.12.2005 to 21.05.2015 at the rate of 12% p.a. deserves to be set aside.

22. With regard to counter claim of respondents before AT, 'Limitation Act, 1963' (hereinafter 'Limitation Act' for the sake of brevity) is applicable to arbitral proceedings vide Section 43 of A and C Act. When Limitation Act is made applicable to arbitral proceedings, limitation has to be reckoned from the date of commencement of arbitral proceedings. Regarding/for date of commencement of arbitral proceedings one has to turn to Section 21 of A and C Act, which reads as follows:

> *'21.Commencement of arbitral proceedings: Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which*

a request for that dispute to be referred to arbitration is received by the respondent.'

23. As the date of commencement of arbitral proceedings is the reckoning date, respondents not having triggered the arbitration clause, respondents not having initiated the arbitration (to be noted even Section 11 OP was filed only by the claimant and not by the respondents) cannot now be heard to contend that limitation has to be reckoned only from 01.03.2013 when this Court appointed the Arbitrator and constituted AT in O.P.No.841 of 2007. The discussions and basis regarding rejection of counter claim have been articulated in Paragraph Nos.24 & 25 in the impugned award which read as follows:

'24. There is another formidable objection to the counter claim of Rs.17,03,063/-. The claim is clearly barred by limitation. According to the respondents the cause of action is the letter dt.30.3.2005 written by the claimant and from that date time starts running and unless it is stopped by any statutory bar the claim gets barred after three years from 30.3.2005. I will discuss the decisions cited by both parties at a later stage. Suffice it hold that issue No.4 is found against

the respondents.

25. Several decisions have been cited at the bar in support of the respective cases of claimant and the respondent. But I find only two decisions remotely relevant to the issues in this case. The first is Jaga Industries, rep. by its Managing Partner M.Jeganathan, Tirupur Taluk and another - vs. Sulochana Cotton Spinning Mills P. Ltd., rep. by its Managing Director S.Krishnakumar, Tirupur (2009) 1 MLJ 1067. It was laid down in that case that failure to issue a reply to a legal notice issued by one party it was well open to the Court to draw an adverse inference against the party not responding to legal notice. The Court distinguished an earlier decision reported in 1955 MWN pg.485 wherein it was held that the failure to issue a reply would not amount to admission of the guilt on the part of accused. In the present case, I have already pointed out that the several letters and even a lawyer's notice were ignored by the respondents and according to the claimant the Court can draw an adverse inference against the respondent. For instance the appointment of another agent/distributor was specifically alleged in the letters and no objection was taken by way of reply. May be, one can take an adverse inference in such a case. But I do not agree that where a person claims large amounts under different heads and the *person who receives such a demand fails to reply the Court cannot assume that the amounts claimed stand proved. In my opinion there should be independent evidence to prove the claims under the different heads. The second decision is Voltas Ltd., Vs. Rolta India Ltd., (2014) 4 Supreme Court Cases 510. It is necessary to state the facts of the said case. An agreement for civil construction was culminated into termination of the contract on 3.12.2004. The appellant by letter dt.29.3.2006 invoked the arbitration clause. The respondent also issued a notice on 17.4.2006 making certain counter claims. The appellant alone filed an application under Section 11 of the Arbitration and Conciliation Act 1996 for appointment of an Arbitrator and a Sole Arbitrator was appointed on 19.11.2010. The Appellant filed their claim statement on 13.4.2011. The respondents filed their defence statement on 24.8.2011 and also made a counter claim, referring to their notice dt.17.4.2006. On a decision on the preliminary issues the Arbitrator held that though the counter claim was maintainable it was barred by limitation because it was filed on 26.9.2011 which was beyond the period of limitation of 3 years from the date of cause of action which arose on 29.3.2008. This decision was reversed by the High Court who held that the counter claim was within time. On appeal to*

Supreme Court, the Supreme Court allowed in the appeal and observed that the General Rule is that the date on which the counter claim is made by the respondent before the Arbitrator will be its date of institution. It is with reference to this date that it has to be determined whether the counter claim is made within time. The plea of the respondent is that the counter claim raised before the Arbitrator are also within time because they had reserved the right to quantify the damages in the notice dt. 17.4.2006, was rejected since time barred claims cannot be asserted after the period of limitation. In my opinion this decision squarely applies to the counter claim of the respondents in the present case and their claim for Rs.17,03,063/- is clearly barred by limitation, especially because there was not even a notice claiming the amount before the Arbitration as in the case of Supreme Court. Thus, my factual findings on the various issues are clearly supported by the decisions of the Courts cited above.'

24. Likewise, for the sake of clarity, the interest aspects are set out in Paragraph Nos. 28 and 29 of the impugned award, which read as follows:

'28. On Issues No.6 relating to reliefs. In fine there will be an award in favour of the claimant directing the

respondents 1 to 5 to pay the claimant a sum of Rs.15,00,000/- with interest at 12% p.a. from 14.12.2005 till the date of award. All other claims of the claimant and the counter claim of the respondents are dismissed.

29. The award amount to carry interest at 18% p.a. from the date of award till the date of realization.'

25. To be noted, now Paragraph No. 28 of the impugned award will stand set aside as that pertains to heads of claim regarding interest from 14.05.2005 till the date of award, whereas Paragraph No.29 of the impugned award will stand sustained. Paragraph Nos.24 & 25 of the impugned award which rejects the counter claim will also stand sustained as there is no ground for intervention much less under Section 34 of A and C Act and this Court is of the view that the counter claim is clearly barred by limitation.

26. This takes us to the submissions made by the claimant, who is the petitioner in junior OP. With regard to prayer (a) which pertains to refund of security deposit together with interest, the same turns on evidence before the Arbitrator i.e., AT and nothing has been pointed out in the senior

OP to demonstrate that refund of security deposit deserves to be set aside under Section 34 of A and C Act. As far as the interest component is concerned, the same has already been discussed supra. Therefore, with regard to claim (a) of the claimant refund of security deposit together with future interest as in Paragraph No.29 of the impugned award is sustained.

27. This takes us to claim (b) of the claimant, which pertains to service charges, trade discount and trade incentives. The pivotal submission of learned counsel for petitioner in junior OP (Claimant before AT) turns on what according to learned counsel is the powers of this Court to modify the award. For this purpose, learned counsel pressed into service the celebrated ***Associate Builders*** case being ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49.*** Learned counsel drew the attention of this Court to Paragraph No.28 of ***Associate Builders*** case, wherein Hon'ble Supreme Court has extracted and reproduced Paragraphs 35 to 39 and 40 of ***Western Geco*** case law being the judgement of Hon'ble Supreme Court in ***ONGC Ltd. v. Western Geco International Ltd.,*** reported in ***(2003) 5 SCC 705.*** For the sake of convenience and

clarity, this Court deems it appropriate to extract entire Paragraph No.28 of ***Associate Builders*** case law which reads as follows:

> ***'28.****From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the Arbitral Tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India" as contended by learned Senior Counsel Mr Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court inRattan Chand Hira Chandv.Askar Nawaz Jung[(1991) 3 SCC 67] observed thus: (SCC pp. 76-77, para 17)*
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> > *"17. ... It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury*

to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society.Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society."

(emphasis supplied)'

28. Adverting to Paragraph No.40 of ***Western Geco***, learned counsel submitted that this Court would go into the question of various heads of claim set out in (b) i.e., heads of claims towards service charges, trade discounts and trade incentives and modify the award. This Court carefully examined the submission of learned counsel. The primary submission as alluded to supra is on the basis that evidence has been taken away by respondents and therefore, AT ought not to have held that evidence ought to

have been produced by the claimant with regard to an incident, which is said to have occurred on 22.02.2006. Learned counsel for claimant, drew the attention of this Court to the communication of the respondents dated 30.03.2005 and submitted that this communication read with subsequent notice and reply to the same would conclusively demonstrate that petitioner is entitled to various heads of claim. This 30.03.2005 communication was admittedly before the AT by way of Exhibit P21 and there is no disputation about this.

29. A careful perusal of the impugned award reveals that the impugned award has negatived the claims of claimant based on oral and documentary evidence before it. Relevant paragraph in impugned award is paragraph No.22, which reads as follows:

> *'22. I will now take up Issue No.3 relating to the actual claim of the claimant. I have earlier extracted all the claims of the claimant from the claim statement. I will take up the security deposit later. I will first deal with other claims commencing from the alphabet (b). I will preface my findings by a general statement that such claims arising out of a*

dealership agreement or an authorization should be proved by the production of proper accounts and account books duly audited and authenticated. That is totally lacking in this case. No doubt in some of the documents like Ex.P18 there is reference to the Income Tax Expenses, the Launching Expenses etc., Similarly the service charges, trade account and target incentives are enumerated in some of the documents. A mere demand contained in letter or notice will not prove the claims made therein. There should be some independent acknowledgement by the other side or there should be some other mode of proof. A mere demand by the claimant and the fact that such demands were not denied by the opposite side will not, in my opinion, prove the claim. Of course, the respondents should have taken care to meet these specific allegations and demands made by the claimant. Similarly the economic loss of Rs.3,40,000/- has not been linked with the dealership agreements and it is not clear how the claimant can succeed in realizing such economic losses from the respondents. In the same way the legal expenses to the tune of Rs.50,000/- has not been proved and no particulars have been given. Even oral evidence adduced on behalf of the claimant does not speak of the above claims as being due and payable by the respondents. The proof affidavit of PW1 only gives the *figures of the various claims but he does not attempt to give particulars of the claim and how the claim is proved. He has not filed any account books or other documents to prove the claim such as income tax returns. There is also no evidence as to whether the respondents disputed these amounts and in what manner objections were taken to the said claims. I therefore reject all the claims commencing from alphabet (b) to alphabet (i). What remains is only the security deposit of Rs.15 lakhs. The defence of the respondents is contained in para 20 of the defence statement. The respondents state that the security deposit amount had been adjusted towards collection of sale proceeds and bills overdue collections from the customers. Here again the respondents have not given any particulars and as to how and when the security deposit was adjusted. Of course the respondents repeat the terms of the agreement to say that the security deposit will not carry any interest. It is true and acceptable only to a limited extend because after several letters the claimant caused a legal notice to be given on 14.12.2005 (Ex.P24). In this letter the correct particulars have been given in para 6 of the notice and in para 7 it is stated how the claimant is entitled for a refund of security deposit. As already stated there was no reply to this legal notice. In my opinion atleast from this date namely,* *14.12.2005 the claimant is entitled to interest on the security deposit. So far as the rate of interest is concerned I do not agree with the claimant that he can claim 24% p.a. In my opinion the proper interest that can be allowed under the circumstances is 12% p.a. from 14.12.2005 till the date of the award. Issue No.3 is therefore ordered in the above terms.'*

30. This takes us to the ***Hodgkinson principle*** which was laid down by the English Courts in the famed ***Hodgkinson Vs. Fernie*** case reported in ***140 ER 712***. This English case law, which came to be known as ***Hodgkinson principle*** is to be effect that AT is the best judge of the quality and quantity of evidence before it. This ***Hodgkinson principle*** laid down by English Courts has stood the test of time and has been repeatedly referred to/consistently applied by our Courts including the ***Associate Builders*** case. Caveats to ***Hodgkinson principle*** are award being based on no evidence or being based on the evidence received behind the back of a party, besides ignoring the most relevant evidence. To be noted, these exceptions are not exhaustive but are only illustrative. This is being mentioned only to highlight that ***Hodgkinson principle*** is not an absolute

principle which needs no qualification and admits of no exception. In the instant case on hand, on the facts and circumstances of case, this Court is unable to convince itself that the case on hand falls under any of the exceptions to ***Hodgkinson principle.***

31. Therefore, if ***Hodgkinson principle*** is applied, as the captioned OPs are applications under Section 34 of A and C Act, where legal landscape and statutory perimeter is very limited, this Court finds no ground to intervene with the finding of AT in negativing head (b) of the claim of the claimant.

32. For the purpose of clarity, this Court has already set out the prayers as in the senior and junior OPs and also as regards the segregation of various heads of claim following ***J.G.Engineers*** principle**.**

33. Before concluding, there is one other submission made by learned counsel for claimant (petitioner in Junior OP) which needs to be adverted to. Learned counsel submitted that respondents before AT have not

filed a separate OP assailing the rejection of counter claim. In other words, it is the specific say of learned counsel that respondents have only challenged the impugned award which is in favour of the claimant and have not challenged the rejection of counter claim, which is a separate decree by itself. This Court is of the considered view that this submission cannot be countenanced as challenge to the impugned award vide senior OP by the respondents, is with regard to those portions of the impugned award which have gone against the respondents before AT. It is a common award. It is nobody's case that there are two separate awards. In any event, as rightly pointed out by learned counsel limitation is a matter, which has to be tested even if it is not set up as a defence and therefore, AT cannot be found fault with for having tested limitation.

34. Senior OP is partly allowed setting aside the grant of interest on Rs.15 Lakhs (refund of security deposit) at the rate of 12% p.a. from 14.12.2005 to the date of impugned award i.e., 21.05.2015 alone. In all other respects, senior OP will stand partly dismissed.

35. In junior OP, the challenge as articulated in hearing *de hors* prayer is not for modification but is with regard to claims under the heads of service charges, trade discounts and trade incentives alone namely, Paragraph Nos.22(b)(i), 22(b)(ii) and 22(c)(i). Therefore, junior OP prayer will stand dismissed leaving the impugned award to be sustained in all other aspects as set out in the conclusion in Senior OP. There shall no order as to costs.

28.10.2020

Speaking/Non-speaking order
Index : Yes / No
Internet : Yes / No
mk

M.SUNDAR.J.,

mk

O.P.No.732 of 2015

and

O.P.No.32 of 2016

28.10.2020