IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.09.2020

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.P.No.933 of 2016

S.Mathan Nath ... Petitioner

Vs.

1. N.Balaji
2. R.Ashok ...Respondents

PRAYER : Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator under Section 11(5) r/w Section 11 (4) of the Arbitration and Conciliation Act, 1996, to set aside the impugned award, dt.8.9.2016 passed by the Arbitrator and for costs.

For Petitioner : Mr.A.Thirumaran
For Respondent No.1 : Mr.Ashokapathy for M/s.Pan Associates

******

ORDER

Challenging the award, dated 8.9.2016 passed by the sole arbitrator, the present Original petition has been filed.

2. The learned Arbitrator passed an award holding that the claimant/ first respondent is entitled to get from the respondents/petitioner and the second respondent herein, a total sum of Rs.4,27,927.68 together with interest at the rate of 18% from 6.6.2013 till the date of realisation.

3. Brief facts of the claimant's case are as follows:

The claimant/first respondent herein and the respondent/petitioner herein and the second respondent had constituted a registered Partnership firm under the name and style of "DIGIFRESH SYSTEMS" vide Partnership deed, dated 1.4.2012. The firm was carrying on business in the sales and service of computers, computer accessories and in specific Computers, Laptops, CCTV, Printers, Cameras, Fire alarm, Generators, Video Door Phone and its accessories. It is agreed that the capital investment of the firm shall be Rs.16,00,000/- and the claimant/first respondent shall bring in Rs.3,00,000/-, first respondent/petitioner herein shall bring in Rs.8,00,000/-, and the second respondent shall bring in Rs.5,00,000/-. It is stated by the claimant that the first respondent/petitioner herein did not bring any share of the capital. The claimant and the second respondent have brought in their respective shares of the capital. The profit and loss was agreed to be shared in the ratio of 3 : 4 :

3 between the claimant, 1st and second respondents. All the partners agreed to draw a salary of Rs.5,000/- each per month. The firm started to have roaring business after the end of the 1st financial year of the firm. On 31.3.2013, the claimant called for a meeting of the partners to discuss further strategies and ascertain the profit to be shared. However, the first respondent/petitioner herein was not cooperative, meeting was finally arranged in the last week of 2013. As the dispute arose, the claimant issued legal notice, dated 5.6.2013 for dissolution of the firm and also claiming 30% shares in the profits i.e. Rs.7,29,150.96. The claimant also seeks return of his capital investment of Rs.3,00,000/- together with interest at the rate of 18% for 462 days i.e. Rs.68,350.68 and the claimant claims total sum of Rs.10,97,501.64.

4. The first respondent/petitioner herein denied allegations of the claimant and states that the shares of the capital brought in by the claimant, the respondents 1 and 2 are Rs.3 lakhs, Rs.8 lakhs and Rs.5 lakhs respectively and the profit and loss sharing ratio was 3 : 4 : 3. The first respondent/ petitioner herein has further stated that his proprietary concern had a closing stock of Rs.18,35,000/- and refuting the allegations of the claimant. It is

further contended by the first respondent/ petitioner herein that during the financial year 1.4.2012 to 31.3.2013, the firm had posted a profit of Rs.2,69,695/- but after deduction, it posted a loss of Rs.3,96,505/- and after further deducting the interest and depreciation, the loss stood at Rs.6,29,640/-. The accounts given by the claimant is also disputed by the first respondent/petitioner herein. Rejoinder also filed by the claimant. The sole Arbitrator has framed the following issues:

(a) Whether the claimant was solely running the day-to-day affairs / business of the partnership firm ?

(b) Whether the 1st respondent was solely running the day-to-day affairs/ business of the partnership firm ?

(c) Whether the claimant volunteered to resign from the partnership firm or was the claimant forced to exit the partnership firm by respondents ?

(d) Whether the claimant is entitled to Rs.10,97,501.64 with interest from 1.4.2013 ?

(e) Whether the 1st respondent is liable to produce the accounts of the firm including the documents touching upon fiscal transaction of the firm ?

(f) Whether the 1st respondent is liable to produce documents relevant to the merger of his proprietary concern (particularly assets) with the partnership firm ?

(g) Which party is entitled to costs of this Arbitration ?

(h) To what other reliefs are the parties entitled to ?

The learned Arbitrator also framed Additional Issue is as follows:

i. Has the first respondent brought into the firm his share of capital of Rs.8 lakhs ?

5. The Claimant was examined as C.W.1 and Exhibits C1 to C12 were marked by the claimant. Respondents 1 and 2 were examined as R.W.1 and R.W.2 respectively and Exhibits R1 to R6 were marked on the side of the respondents.

6. Taking note of the oral and documentary evidence, the learned Arbitrator has passed the following Award :

"Claim of the claimant is allowed partly holding that claimant is entitled to get from the respondents a total sum of Rs.4,27,927.68 together with interest at the rate of 18% from 6.6.2013 to the date of realization."

7. The above award is put in challenge before this Court in the present Original petition.

8. The learned counsel appearing for the petitioner submitted that the learned Arbitrator has categorically held that merely because returns have

been admitted by the authorities concerned in Ex.R1 to R5 the entries therein by itself do not create any liability qua anyone. Similarly, Ex.C6 also not wholly and fully accepted by the Tribunal. Having held so, Tribunal has relied upon Ex.R1, the evidence of R.W.1 & R.W.2. Therefore, having rejected the documents, the learned Arbitrator merely based on the oral submissions and preponderance of probabilities, passed such award which is not in accordance with law. The learned Arbitrator also granted 18% of interest which is also not as per law. In support of his submission, he relied upon the decision of the Hon'ble Supreme Court reported in **[(2009) 12 SCC 1 [STATE OF RAJASTHAN AND ANOTHER VS. FERRO CONCRETE CONSTRUCTION PVT. LTD.]**, wherein the Apex Court held as under:

> "**67.** *In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (the Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by Reserve Bank of India under the Banking Regulation Act, 1949. Therefore, we are of the view that pre-reference interest should be only at the rate of*

9% per annum. It is appropriate to award the same rate of interest even by way of pendente lite interest and future interest up to the date of payment.

9. In the above judgment, the Apex Court has held that in an award governed by the old Act (the Arbitration Act, 1940), was an error apparent on the face of the award. Therefore, the above judgment is not applicable to the present case. The Statute itself provided granted of interest under the Arbitration and Conciliation Act, 1996.

10. The learned counsel appearing for the respondents submitted that the learned Arbitrator not only considered Ex.R1 but also the evidence of R.W.1, admissions and analysed oral and documentary evidence. Such view of the matter, this Court cannot re-appreciate the entire evidence as an appellate Court. Therefore, the award is well balanced and does not require any interference of this Court. It is further contended that interest awarded by the Arbitrator is also well within the purview of the law. The Award is prior to the amendment of the Arbitration and Conciliation Act, 1996. Therefore, interest is also permitted under the statute, cannot be interfered with. In support of his submission, he relied on the decision of the Hon'ble Supreme Court reported

in **(2019) 15 SCC 131 [SSANGYONG ENGINEERING AND CONSTRUCTION COMPANY LIMITED VS. NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)].**

11. Perused the entire award. The dispute is primarily with regard to the sharing of the income of the partnership firm constituted between the parties. It is not disputed that the claimant has brought in Rs.3 lakhs in the partnership business which has been clearly accepted by the parties. Though it is contended that Ex.R1 is relied upon to arrive 30% of the profit, the entire documents were not looked into by the Arbitrator. The learned Arbitrator has not given much importance to the documents. However, relied upon the oral evidence of the parties and appreciated the evidence in paragraphs 29, 31, 32, 33 and 35. The learned Arbitrator discussed the reasons for awarding such amount based on the admissions of the parties. Such conclusion is also based on the preponderance of probabilities and inference also drawn by the learned Arbitrator. Such conclusion also taken in addition to the oral evidence. As the dispute primarily with regard to the money claim, the learned Arbitrator taking note of the preponderance of probabilities, has considered the entire background of the parties, nature of business and analysed oral evidence of the parties. Though the learned Arbitrator has rejected Ex.R1 to R5, Ex.C6, but

appreciated the oral evidence particularly and the first respondent has not given any statement of account to the claimant. Further, based on the admission as indicated above, the learned Arbitrator has passed the award. It is to be noted that the award can be interfered with only on the ground mentioned under Sec.34 of the Arbitration and Conciliation Act. It is not the case of the petitioner herein that the award is suffered by any of the ground as stated in Sec.34 (2) of the Act. Similarly, none of the grounds provided under Section 34 of the Act is made out to interfere with the well reasoned award. It is contention of the learned counsel appearing for the petitioner that as far as the interest portion is concerned, he relied upon the judgment of the Hon'ble Supreme Court, reported in **(2011) 10 SCC 573 [MSK PROJECTS INDIA (JV) LTD. VS. STATE OF RAJASTHAN AND ANOTHER]** wherein it has been held as follows:

> "**24.** *Furthermore, it is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. [Vide Thawardas Pherumal [AIR 1955 SC 468] , Union of India v. Bungo Steel Furniture (P) Ltd. [AIR 1967*

SC 1032] , Deptt. of Irrigation v. Abhaduta Jena [(1988) 1 SCC 418 : AIR 1988 SC 1520] , Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. [(1989) 1 SCC 532 : AIR 1989 SC 973] , Irrigation Deptt., Govt. of Orissa v. G.C. Roy [(1992) 1 SCC 508 : AIR 1992 SC 732] , Hindustan Construction Co. Ltd. v. State of J&K [(1992) 4 SCC 217 : AIR 1992 SC 2192] , Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721 : AIR 2001 SC 626] , Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. [(2005) 6 SCC 462 : AIR 2005 SC 2071] and Indian Hume Pipe Co. Ltd. v. State of Rajasthan [(2009) 10 SCC 187 : (2009) 4 SCC (Civ) 115] .]

25. *So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act, 1978, the relevant part of which reads as under:*

*"**3.Power of court to allow interest**. – (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest…."*

(emphasis added)

Thus, it is evident that the aforesaid provisions empower the court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties.

26. *This Court in Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy [(2007) 2 SCC 720 : AIR 2007 SC 817] ,* *while dealing with the similar issue held as under: (SCC p. 724, para 11)*

"11. … after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%."

***27.** In HUDA v. Raj Singh Rana [(2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136 : AIR 2008 SC 3035] this Court considered various earlier judgments of this Court including GDA v. Balbir Singh [(2004) 5 SCC 65 : AIR 2004 SC 2141] , Bihar State Housing Board v. Arun Dakshy [(2005) 7 SCC 103] , HUDA v. Manoj Kumar [(2005) 9 SCC 541] , HUDA v. Prem Kumar Agarwal [(2008) 17 SCC 607 : JT (2008) 1 SC 590] and came to the conclusion: (Raj Singh Rana case [(2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136 : AIR 2008 SC 3035] , SCC p. 206, para 22)*

"22. … the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation was required to be paid."

***28.** Be that as it may, the High Court while dealing with the rate of interest has relied upon the judgment of this Court in Krishna Bhagya Jala Nigam Ltd. [(2007) 2 SCC 720 : AIR 2007 SC 817] and thus, there is no scope for us to interfere with the rate of interest fixed by the courts below.''*

12 The fact remains that the award is prior to the amendment. Sec.31(7) (b) of the Act before amendment is as follows:

> *"(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."*

13 However, having regard to the above judgment of the Hon'ble Supreme Court in the case of **MSK PROJECTS INDIA (JV) LTD.**, cited supra, this Court taking note of the change in the interest rate, the interest awarded by the tribunal is reduced from 18% p.a. to 12% p.a. Except the above, the award passed by the Arbitrator is confirmed.

Consequently, the original petition is partly allowed. No costs.

22.09.2020

Index : Yes/No.
Speaking Order/Non-Speaking Order
vaan

O.P.No.933 of 2016

N.SATHISH KUMAR, J.

vaan

O.P.No.933 of 2016

Dated: 22.09.2020