IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.06.2021

Delivered on : 22.07.2021

CORAM :

THE HONOURABLE MR. JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MS. JUSTICE R.N.MANJULA

O.S.A.Nos.146 & 147 of 2015 and 89, 90 95 & 96 of 2016
& M.P.Nos.1 and 1 of 2015

O.S.A.Nos.146 & 147 of 2015 and 89 & 90 of 2016

M/s TVS Finance and Services Ltd.,
Rep., by its Authorised Signatory G.Saikumar,
Having Office at Jayalakshmi Estate,
8, Haddows Road, Chennai-600 006.
.. Appellant in O.S.A.Nos.146 & 147 of 2015 and 89 & 90 of 2016

Vs.

M/s T.T.G. Industries Limited,
Rep., by its Managing Director Ravi Srinivasan,
TTG House, 36, College Road,
Chennai-600 006.
.. Respondents in O.S.A. Nos.146 of 2015 & 89 of 2016

Ravi Srinivasan,
Managing Director,
M/s TTG Industries Limited,
TTG House, 36, College Road,
Chennai-600 006.
.. Respondent in O.S.A.Nos.147 of 2015 & 90 of 2016

O.S.A.Nos.95 & 96 of 2016

M/s T.T.G. Industries Limited,
Rep., by its Director Ravi Srinivasan,
TTG House, 36, College Road,
Chennai-600 006.
Now at No.5, T.V. Street,
Chetpet, Chennai-600 031.
.. Appellant in OSA No.95/2016

Ravi Srinivasan, Director,
TTG Industries Limited,
36, College Road,
Chennai-600 006.
Now at No.5, T.V. Street,
Chetpet, Chennai-600 031.
.. Appellant in OSA No.96/2016

Vs

1.M/s TVS Finance and Services Ltd.,
(Formerly known as M/s Harita Finance Limited),
Rep., by its Authorised Signatory,
Jayalakshmi Estate, 8, Haddows Road,
Chennai-600 006.

2.Y.K.Rajagopal,
Sole Arbitrator,
No.A-2, J Block, Plot No.1579,
Silver Oak Apartments,
13th Main Road, Anna Nagar,
Chennai-600 040.
.. Respondents in both O.S.A.95 & 96/2016

Prayer: Original Side Appeals filed under Order XXXVI of Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent against the common order dated 20.08.2014 passed in O.P.Nos.116 and 382 of 2005.

For Appellants in OSA Nos.146 & 147 of 2015 & 89 & 90 of 2016 and Respondent in OSA Nos. 95 & 96 of 2016	:	Mr.Abdul Hameed
For Appellants in OSA Nos.95 & 96 of 2016 and Respondents in OSA Nos.146 & 147 of 2015 and 89, 90 of 2016	:	Mr.K.RAvi for M/s Rugan & Arya

COMMON JUDGMENT

M.M.SUNDRESH, J.

O.S.A.Nos.146 and 147 of 2015 and 89 and 90 of 2016 are filed by the claimant and O.S.A.Nos.95 and 96 of 2016 are filed by the respondents/counter claimants, laying a challenge to the common award passed by the learned single Judge in the purported exercise of the power conferred under Section 36 of the

Arbitration and Conciliation Act, 1996. Of these appeals, O.S.A.Nos.146 and 147 of 2015 have been filed prior to the modification in one of the cases in O.S.A.No.147 of 2015 and to get over the possible technical objection, the other two appeals in O.S.A.Nos.89 and 90 of 2016 have been filed. The modification was sought for and allowed in O.P.No.116 of 2005 since the learned single Judge felt that the question of moratorium or restriction for a company under Board for Industrial and Financial Reconstruction(BIFR) would not apply to an individual.

2.Before venturing into the issues involved, the background facts require a narration.

3.For brevity, we would refer the appellant in O.S.A.Nos.146 and 147 of 2015 and 80 and 90 of 2016 as the appellant and the appellants in O.S.A.Nos.95 and 96 of 2016 as respondents 1 and 2, though they are distinct and different to the extent of two separate claims with the adjudication being governing the facts which are overlapping.

4.The appellant is a non-banking financial institution governed by the provisions of the Reserve Bank of India Act. A sanction letter dated 20.05.1995 was issued by the appellant in favour of the first respondent for the purpose of manufacturing Rotor Blades for Wind Electric Generators. This sanction letter indicates the interest payable for the advance amount as well as delayed remittal of instalments attracting 28% per annum as well as 36 % per annum respectively towards additional service charges as the case may be. It also postulates post dated cheques. The second respondent is the Managing Director. The following are the relevant clauses to substantiate the abovesaid facts.

"12.Post dated cheques	:	You will be required to provide with us post dated cheque for all the hire purchase instalments payable by you under the hire purchase agreement. Any delay in remittance of instalments will attract additional service charges for the delayed payment at the rate of 36% p.a., or part thereof.
13.Sales Tax Indemnity	:	Any Sales tax applicable on this transaction in the

state of Tamil Nadu or in any other state will be payable by you extra.

You should execute a sales tax indemnity bond to this effect in a format acceptable to us.

14.Advance payment : Any advance paid to the supplier of machinery under your instruction) will carry additional finance charges at the rate of 28% p.a. This will be calculated from the date of advance till the date of final payment & lease agreement and will be payable by you at the beginning of the contract."

5.On 02.06.1995, a Hire Purchase Agreement was entered into between the appellant and the first respondent. By a letter dated 11.01.1997, the first respondent made a request to the appellant for re-schedulement of the hire purchase instalments due to its inability to pay the instalments. In the said letter, the first respondent has indicated that the Additional Finance Charges (AFC) may be calculated at 28% per annum. On receipt of the said communication, by a letter dated 25.01.1997, the appellant informed the first respondent that a credit committee has approved the re-schedulement as per the schedule mentioned therein. It was followed by another communication dated 09.12.1997 asking the first respondent to clear the overdues as the account was slipping into a non performing category. A Memorandum of Understanding dated 25.09.1999 was entered into between the appellant and M/s Harita Finance Limited transferring the rights of the transferor to transferees viz., from the appellant to M/s Harita Finance Limited. On 31.03.2000, a sanction letter was issued in favour of the second respondent financing a sum of Rs.12 lakhs with the clear indication of penal interest by way of additional finance charges at 33%. Thus, the agreement indicates authorisation by the second respondent to adjust the loan proceeds against the Hire Purchase Agreement entered into between the appellant and the first respondent. The following is the exact content of the aforesaid sanction letter.

"I also hereby authorise Harita Finance Ltd., to adjust the loan proceeds against HP agreement No.710001 entered into between TTG

Industries Ltd and TVS Finance Ltd (now Harita Finance Ltd).”

6.This was followed by a Loan Agreement executed on the very same day i.e., on 30.03.2000 between the appellant and the second respondent. Needless to state that the sanction letter and the agreement show the name of M/s Harita Finance Limited as the lending company. Incidentally, the second appellant issued a promissory note on the very same date. In this connection, we may note that it was clearly admitted by the second respondent in the written arguments filed before the learned Arbitrator that the aforesaid arrangement was made by way of an adjustment with a liability of the first respondent for the purpose of reviving the limitation. The signature in the sanction letter, agreement and blank promissory notes is admitted.

7.Having found that there was a continued non payment and after issuing notices, which were not replied to, the appellant invoked the arbitration clause. The following is the arbitration clause governing both the agreements viz., between the appellant on the one hand and respondents 1 and 2 on the other hand.

> “ARBITRATION: 10.10. Except where it has been provided otherwise any dispute or difference arising out or in connection with the present agreement between the parties including any dispute or difference relating to the interpretation of the agreement or any clause thereof shall be referred to sole arbitration of, an arbitrator nominated by the authorised representative of the Owner and the provisions of the Arbitration Act, 1940, and rules thereunder and any amendment thereto from time to time shall apply. No objection shall be taken on the ground that the arbitrator so appointed is an employee of the owner or is in any way associated with the Owner. The award of the arbitrator shall be final, conclusive and binding on all the parties. The arbitrator shall be competent to decide whether any matter of dispute or difference referred to decide whether any matter of dispute or difference referred to him falls within purview of arbitration as provided for above and/or for any matter relating to arbitration under the Arbitration Act, 1940.”

8.Before the learned Arbitrator, the respondents contended that there was no arbitration agreement, no proceeding can be initiated in view of the first respondent being governed by the provisions of Sick Industrial Companies (Special Provisions Act) 1985 and the amounts demanded were paid in excess. In the written arguments, the question of interest being excessive and contrary to the provisions of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003 has been raised.

9.Upon considering the issues raised, the learned Arbitrator in Arbitration Case Nos.2 of 2002 and 3 of 2002 framed the following issues respectively.

> “1.Whether the evidence of P.W.1 can be relied?
> 2.Whether the present claimant is entitled to file the claim petition since the loan has been taken from TVS Finance Limited?
> 3.Whether the Claim Petition is barred by Limitation?
> 4.Whether Board's approval is necessary for sanctioning of the loan?
> 5.Whether the claimant has waived the AFC charges?
> 6.Whether the claimant has given proper credit of all the amounts paid by the respondent?
> 7.Whether the claimant has suppressed the Bill Discounting Facility extended to M/s Bellary Steels and Alloys Limited?
> 8.Whether the sale of the machineries is properly advertised?
> 9.Whether the respondent is due any amount to the claimant in view of the adjustment with M/s Bellary Steels and Alloys Limited?
> 10.Whether the claimant is entitled for any amount?
> 11.To what relief the claimant is entitled to ?
> ”

> “1.Whether the evidence of P.W.1 can be relied?
> 2.Whether the present claimant is entitled to file the claim petition since the loan has been taken from M/s Haritha Finance Limited?
> 3.Whether the claimant has obtained Board's approval for sanctioning the loan?
> 4.Whether the claimant has tampered Ex.C1?
> 5.Whether the respondent has given consent to adjust the Loan amount towards TTG Account?
> 6.Whether the adjustment of the loan amount reflects in the statement of accounts?
> 7.Whether the evidence of P.W.2 and P.W.3 can be relied?

8.Whether the present company has taken the assets and liabilities of the erstwhile company?
9.Whether the demand notice is necessary for the repayment of the loan amount?
10.Whether the claimant is entitled for the claim amount?
11.To what relief the claimant is entitled to ?
”

10.As the issue of Exorbitant interest has not been raised, but such an issue has been framed, it was accordingly done only by way of written arguments. The learned Arbitrator answered the issues framed and held that the discussions are true and accordingly passed an award in favour of the appellant while rejecting the case of the respondents. Award No.2 of 2002 has been passed against the first appellant and Award No.3 has been passed against the second appellant. In the meanwhile, during the pendency of the proceedings, an order was passed by this Court invoking Section 9 of the Arbitration and Conciliation Act, 1996, to attach and sell the machineries of the first appellant on an application filed prior to the initiation. Though a sum of Rs.60 lakhs was gathered by the sale of machineries during the pendency of the proceedings, no credit has been given in the final award pertaining to the first appellant in Award No.2 of 2002.

11.Respondents 1 and 2 have filed two separate Original Petitions in O.P.Nos.116 and 382 of 2005 before this Court. The learned single Judge, during the course of the arguments, asked the appellant to give its statement of accounts with varied interest. Placing reliance upon one of the said calculations, the learned single Judge, passed the order, modifying the awards passed by the learned Arbitrator. Though the learned single Judge confirmed the findings of the learned Arbitrator, the amount was fixed without any basis with reduced interest contrary to the terms of the agreement. Without doing adequate discussion on the applicability of the provisions of the Tamil Nadu Money-Lenders Act, 1957, the interest component was reduced. With respect to the contention raised in O.P.No.116 of 2005 by the first respondent in this appeal qua the applicability of Sick Industrial Companies (Special Provisions) Act 1985, the learned single Judge directed the award to be kept in abeyance till the completion of the proceedings by BIFR was done without adequate discussion. Challenging the common order passed by the learned single Judge, both the parties have filed these Original Side Appeals.

12.Heard the learned counsel appearing for the parties and perused the records.

13.We have also kept in mind consciously the scope and applicability of Sections 34 and 37 of the Arbitration and Conciliation Act, 1996.

14.Submissions of the learned counsel for the appellants:-

The learned counsel for the appellants submitted that contractual liability cannot be valid under Section 31 (7) of the Arbitration and Conciliation Act, 1996 as the Tribunal has got discretion to fix the interest pending the proceedings and till the realisation of the award. The provision under Sick Industrial Companies (Special Provisions Act) 1985 will not apply and in any case, the Act is no longer in force. The three enactments sought to be pressed into service do not have any application. We are dealing with the case of hire purchase and the transaction between the company and the borrower. The learned Arbitrator considered all the materials and passed the award. Even before the learned Arbitrator, the plea regarding exorbitant interest was not raised but mentioned only during the written submissions which were filed after conclusion of the arguments. Even before the learned single Judge, the learned Senior counsel appearing for the respondents questioned only the interest component. The statement of accounts was wrongly taken into consideration as many statements were filed with the combination of different percentage of the interest. The learned Arbitrator had given his factual finding on the agreement between the parties including the adjustment with the first respondent in the loan agreement with the second respondent. The learned single Judge has totally misconstrued Section 35 of the Arbitration of Conciliation Act, 1996.

15.The learned counsel, however, fairly submitted that a sum of Rs.3,00,000/- realised during the pendency of the proceedings before the learned Arbitrator requires to be deducted from that of the liability of the first respondent. On the question of interest, it is submitted that though the appellant is entitled to interest at the rate of 36% per annum, it is agreeable to accept 25% as sought for even by the first respondent.

16.Submission of the learned counsel for the respondent:

The learned counsel appearing for the respondent submitted that the copy of the sanction letter dated 31.03.2000 does not include the alleged adjustment. Therefore, the finding of the learned Arbitrator as confirmed by the learned single Judge does not require interference. The provisions of the enactments pertaining to the interest would apply. It is not correct to state that the respondents have given up all the arguments as in the written arguments they have raised. There is no evidence to show that the amount was indeed received by the second respondent. But there is no basis for relying upon the statement of accounts filed by the appellant. Under those circumstances, the awards are required to be interfered with.

17.The learned Arbitrator has considered all the factual aspects including the liability of the respondents making the payment. We are dealing with the case where the respondents expressed stony silence till they come before the learned Arbitrator. If no amount has been received, nothing prevented the respondents to take appropriate action. No step was taken either to cancel the Hire Purchase Agreement or the loan agreement, if the amount has been satisfied or the due payments have been made. Similarly, no attempt was made to take back the promissory notes and cheques issued. There was indeed earlier Hire Purchase Agreement with the first respondent and the appellant preceded by a sanction letter. It is the first respondent who sought for reduction of interest at the time of re-schedulement.

18.The learned single Judge has not found as to how the Tamil Nadu Money-Lenders Act, 1957 governed the case with the first respondent. The agreement of Hire Purchase with the second respondent was a loan agreement. The appellant is a non banking financial institution governed by the provisions of the Reserve Bank of India Act. The terms of the agreement would clearly show the interest payable including the penal interest. Having agreed to the terms, right from the year 1995, it is not open to the respondents to contend to the contrary as rightly held by the learned Arbitrator. In such view of the matter, the learned Arbitrator gave sufficient opportunities and passed adequately a reasoned award. The learned single Judge has committed an error in applying Section 22 of the Sick Industrial Companies (Special Provisions Act) 1985, which, in any case, has become repealed and therefore, no longer in the statute book.

19.The learned single Judge has not applied her mind to the scope and ambit of Section 34 of the Act. Instead the petitions filed having been treated like first appeal, we do not find any rationale or logic for placing reliance upon the document filed before the Court though pursuant to the oral direction or in reducing the contractual interest. It has not been stated as to how the enactments would be applicable to the case. We have already noted that such a plea was not taken in the counter statement filed before the learned Arbitrator. But a reference was made during written argument given after conclusion of the argument. It is not open to the respondents to question the memorandum of the understanding in view of the subsequent transaction between the transferee and the respondents. In the light of the above said discussion, we are of the view that the order passed by the learned single Judge requires to be interfered with. We find that the learned Arbitrator has considered the relevant materials including the statement of Account filed by the claimant dated 24.03.2013. However, we have already noted that the learned Arbitrator has not given credit for a sum of Rs.60 lakhs realised by the sale of the movable machineries belonging to the first respondent. The learned Arbitrator has given due deduction to the amounts paid. Taking into consideration of the aforesaid aspects, we reduce the interest calculated at 36% per annum by the learned Arbitrator to 28% per annum for the amount payable till date of initiation of the arbitral proceedings. Taking into consideration the fact that the transaction is commercial, we fix the interest pendente lite at 12% per annum and at 6% from the date of this order till the realisation.

20.The learned Arbitrator fixed the quantum, both principal and interest as under :

> "Point No.10. Whether the claimant is entitled for any amount? The claimant in the claim statement claims that the respondent is due as on 03.12.2002 a sum of Rs.1,12,49,207.40. The respondent contends that as per the letter dated 09.12.1997 under Ex.C-5 the claimant has sent a letter to the respondent that a sum of Rs.14,91,430 is due. Therefore, the respondent contend if the sale amount from the machineries adjusted the respondent is not due for any amount. They further claim that the claimant has to pay the balance mount with marginal interest. But on the other hand the claimant contend that as on 09.12.1997 a sum is due. Thereafter, if the future principal payable is taken into account a sum of Rs.47,00,000/- is due towards the principal. Further sum of Rs.69,97,401 is due towards the interest. Therefore altogether the claimant claims a sum of Rs.1,12,49,207.40 is due with future interest at rate of 36% p.a., from 03.12.2002. A perusal of the statement of accounts under Ex.C22 shows that the respondent is due for a sum of Rs.2,31,00,730/- towards the principal as on 03.12.2002. Total instalments paid by the respondents as on 03.12.2002 is Rs.1,83,66,730/-. The balance principal is Rs.47,34,000/-. The over due interest at rate of 36% upto 03.12.2002 comes to about 64,97,401.55/-. Then another amount is due for a sum of Rs.78,700/-. This altogether comes to a sum of Rs.1,13,10,076.55. But the claimant has claimed on a sum of Rs.1,12,49,207.40. The respondent never denied the payment of future principal, which comes to about Rs.47,34,000/-. Then further sum of Rs.64,97,376.55 is added comes

to about Rs.1,12,31,377.55/-. Further sum of Rs.78,700/- added it comes to about 1,13,10,076.55. But the claimant has claimed only Rs.1,12,49,207.40. Accepting this the respondent is due only a sum of Rs.1,12,49,207.40. The claimant claims interest at rate of 36% from 03.12.2002 on the ground that the transaction is a commercial transaction. But I consider that the award of interest from that date of claim petition i.e., from 03.12.2002 till realisation at 18% per annum will be just and reasonable having regard to the market conditions and provisions of Sec.31(7) (a) and (b) of the Arbitration and Conciliation Act, 1996."

21.Taking note of the above amount which factored interest at 36%, prior to 03.12.2002 and thereafter, which is reduced to 28%, we are inclined to modify the award passed in Arbitration Case No.2 of 2002 for a lesser amount.

22.Thus, in the result, the principal amount on the date of filing of the arbitral proceeding is confirmed though a higher amount is fixed by the learned Arbitrator at Rs.94,70,517.27. The Interest is added on the aforesaid amount from 03.12.2002 to 15.01.2003 at 28%, which is quantified at Rs.3,12,397.34. Accordingly, the amount payable is arrived at Rs.94,70,517.27 + Rs.3,12,397.34 = Rs.97,82,914.61. Out of this amount, we deduct the amount of Rs.60,00,000/- realised on 16.01.2003 out of the sale of movables belonging to the first respondent. Thus, the balance amount payable is arrived at Rs.37,82,914.61 with continued interest till the date of realisation. Since, there is not much of dispute both on the principal amount and the contractual interest, we confirm the award passed by the learned Arbitrator in Arbitration Case No.3 of 2002.

23.We once again make it clear that we are confirming the award in every respect except giving due deduction, which was omitted to be done by mistake and the interest calculated at 28% as against 36% as agreed upon by the learned counsel appearing for the claimant. Hence, the award passed in Arbitration Case No.2 of 2002 is not modified on merit but only for the reasons as aforesaid and taking into consideration of the fair statement made by the learned counsel appearing for the claimant.

24.Accordingly, the award passed in Arbitration Case No.2 of 2002 stands modified for a sum of Rs.37,82,914.61 with interest at 12% per annum during the pendency of the proceedings and 6% per annum from the date of the award passed by the learned Arbitrator.

25.The Award passed in Case No.3 of 2002 is confirmed and restored with interest at 12% per annum during the pendency of the proceedings and 6% per annum from the date of the award passed by the learned Arbitrator.

26.Accordingly, O.S.A.Nos.146 and 147 of 2015 stand allowed. The order of the learned single Judge in O.P.Nos.116 and 382 of 2005 stands set aside. Consequently, O.S.A.Nos.89 and 90 of 2016 are disposed of and O.S.A.Nos.95 and 96 of 2016 are dismissed. Miscellaneous Petition Nos.1 and 1 of 2015 are closed.

Sd/-
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

raa

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+6ccs to M/s.A.A.V.Partners SR Nos.34797, 34798, 34799, 34800, 34801, 34802

+6ccs to M/s.Rugan Arya SR Nos.34886, 34887, 34882, 34883, 34884, 34885

O.S.A.Nos.146 & 147 of 2015
and 89, 90 95 & 96 of 2016

VSNII (CO)
PR (18/08/2021)