MIN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 15th DAY OF JULY 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P.No.183 of 2017
and
A.No.1404 of 2017

In the Matter of Arbitration and Conciliation Act, 1996
And
In the matter of Loan Agreements dated 18.08.2009 & 20.08.2009 and disputes, differences and claims between

M/s.Cosmopolis Properties Private Limited,
Represented by its Directors,
No.5/37-A, Salem Automech Buildings,
Jagir Ammapalayam, Salem Bangalore NH Road,
Salem-636 302.

..Applicant/Petitioner

Vs

1. M/s.Loyal Credit and Investments Limited,
Represented by its Authorized signatory
Having office at "Kothari Buildings"
IV Floor, 114, M.G.Road,
Nungambakkam, Chennai 600 034 ...Respondent/Respondent

<u>O.P.No.183 of 2017</u>

Original Petition praying that this Hon'ble Court be pleased to set aside the Arbitral Award dated 28.06.2016 passed by the learned Arbitral Tribunal consist of sole arbitrator Shri.T.Srinivasa Ragavan in Arbitration

Case No.TSR/1/2012

A.No.1404 of 2017

Application praying that this Hon'ble Court be pleased to pass an order to stay the execution of the Arbitral Award dated 28.06.2016 passed by the Learned arbitral Tribunal Consist of sole arbitrator Shri.T.Srinivasa Ragavan in arbitration Case No.TSR/1/2012.

This Original Petition and the application having been heard on 09.07.2021 in the presence of Mr.N.L.Rajah, Senior Counsel for Mr.N.Murali, Advocates for Petitioner in O.P.No.183 of 2017 and for the Applicant in A.No.1404 of 2017 and Mr.E.Om Prakash Senior Counsel Assisted by Mr.P.Ellayarajkumar for M/s.Ramalingam Associates Advocates for the Respondent in O.P.No.183 of 2017 and A.No.1404 of 2017 and upon reading the petition and the award dated 28.06.2016 filed in O.P.NO.183 of 2017 and the order herein dated 07.11.2017 and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of the said advocates for the parties hereto and this Court having observed that when the parties have entered into a contract particularly in respect of the interest, learned Arbitrator going beyond the scope of the agreement and accepting the claim petition without any discussion and reason and passing award such award is nothing but beyond the scope of dispute and beyond the scope of the very agreement itself, when the interest rate has been specifically agreed upon between the parties, Arbitral Tribunal awarding the amount adopting the interest on the monthly rests is beyond the scope of the agreement, in such a view of the matter, this Court is of the view that such award suffers from the perversity particularly when the huge amount has been accepted without any reasons, the interest has been awarded contrary to the contract, leading to unjust enrichment of the respondents herein,

It is ordered as follows:-

That the award passed by the learned Arbitrator in A.C.P.No.TSR/1 of 2012 dated 28/06/2016 be and is hereby set aside.

2. That the respondent herein shall be at liberty to go for a fresh arbitration by consent of parties and if no consensus, seeks for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, to enter into the dispute only with regard to the payment of money.

3. That the reference shall be only with regard to the payment of money as per the contract after giving proper credit to the payment made

towards the principal amount.

4. That the A.No.1404 of 2017 do stand closed.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 15th DAY OF JULY 2021.

Sd./-

ASSISTANT REGISTRAR(O.S.II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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Ky

27.08.2021

O.P.No.183 of 2017
and
A.No.1404 of 2017

ORDER:-

DATED :15.07.2021

THE HON'BLE MR.JUSTICE
N.SATHISH KUMAR

FOR APPROVAL:09.09.2021

APPROVED ON :14.09.2021

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
09~07~2021	15-07~2021

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THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.183 of 2017
and A.No.1404 of 2017

M/s. Cosmopolis Properties Private Limited,
Rep. By its Directors,
No.5/37-A, Salem Automech Buildings,
Jagir Ammapalayam, Salem Bangalore NH Road,
Salem 636 302. .. Petitioner

.Vs.

M/s Loyal Credit and Investments Limited
Rep.by its Authorised Signatory,
Having office at "Kothari Buildings"
IV Floor, 114, M.G.Road,
Nungambakkam, Chennai 600034. .. Respondent

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 28.06.2016 passed by the Learned Arbitral Tribunal consist of sole Arbitrator Shri.T.Srinivasa Ragavan in Arbitration Case No.TSR/1/2012.

For Petitioner : Mr. N.L. Rajah,
Senior Counsel for
Mr.N. Murali

For Respondent : Mr. E.Om.Prakash
Senior Counsel Assisted by
Mr.P.Ellayarajkumar for
M/s. Ramalingam Associates

O R D E R

Aggrieved over the Award of the Sole Arbitrator dated 28.06.2016 the Petitioner has filed the present Petition for setting aside the same.

2. The brief facts leading to file this Petition is as follows:

2.a. The Respondent herein is the claimant, a non banking financial institution and the Petitioner is also a company. Both the Petitioner and Respondent companies are registered under the Companies Act. Mr.K. Saravanan and Sidesh Kumar are the Directors of the Petitioners' company, vested with the powers of administration of the company by resolution dated 27.07.2009. The Petitioner have availed loan of Rs.2 Crores i.e., Rs.55 lakhs and Rs.145 lakhs as per loan agreements dated 18.08.2009 and 20.08.2009 respectively and executed promissory notes agreeing to repay the amount with interest at the rate of 24% per annum. Though the Petitioner has received another Rs.1.60 Crores as the said loan was not covered arbitration clause suit has been filed and pending against the Petitioner. Loan availed is to be repaid by the Petitioner within a period of six months. As the Petitioner committed default, the Respondent/Claimant issued notice. It was replied by the Petitioner. However, in the reply the Petitioner have admitted the liability to the tune of Rs.3.60 Crores. Rejoinder also sent by the Respondent/claimant. As the dispute arose between the parties, matter has been referred to the sole Arbitrator. At that

time one of the Directors Mr. Saravanan approached the

Respondent/Claimant for settling the dues and requested to release the property on payment of Rs.75 lakhs. So that he will clear the entire loan covered under two documents. However, the undertaking given by the said Mr.Saravanan was not complied. As the amount was not paid the Respondent/claimant has claimed a sum of Rs.4,34,60,134/- along with interest at the rate of 24% p.a.

2.b. Admitted the borrowal, it is the contention of the Petitioner herein that when the dispute arose between the parties a Memorandum of Undertaking dated 28.01.2013 was entered into between 1) Respondent/Claimant Company 2) Bakae Properties Pvt. Ltd., 3) the Petitioner company 4) Mr.Sidesh Kumar and 5) Mr.K. Saravanan. In that MoU the payments of Rs.2.20 Crores by Mr.Sidesh Kumar was admitted and acknowledged. All the dues payable by the Petitioner Company was recorded as fully discharged and no dues whatsoever is payable by the Petitioner company and the subject matter of the arbitration (Rs.55 lakhs and Rs.145 lakhs) was assigned to Mr.Saravanan and a sum of Rs.160 lakhs was assigned to Sidesh Kumar. In view of such assignments the dues from the Petitioner company was fully discharged and the Respondent company also issued No dues Certificate. The same has been properly recorded before the Registrar of Companies. Once the entire liability was discharged

and assignment has completed, the claimant has not entitled to claim any amount from the Respondent/Petitioner herein. It is also contended that the Claimant/Respondent herein has not produced any evidence of fund transfer through RTGS and therefore the claim is not maintainable.

3. On the side of the claimant P.W.1 Executive Vice President was examined and Ex.A.1 to A.15 were marked. P.W.2 Mr.K.K.Govindamoorthy was examined as P.W.2 and Exs.A.16 and 17 were marked through him. On the side of the Respondent/Petitioner herein Mr.Sidesh Kumar and Mr.Krishna Sharan Misra were examined as R.W.1 and 2 and Exs.B1 to B-16 were marked through them. Learned Sole Arbitrator after considering the rival submissions found that the Respondent/Petitioner herein, are liable to pay to the claimant a sum of Rs.4,34,60,134/- together with interest at the rate of 24% p.a.with cost. Challenging the same the present Original Petition has been filed.

4. The learned Senior Counsel Mr.N.L. Rajah appearing for the Petitioner vehemently contended that learned Arbitrator has not considered the scope of the documents and assignment and discharge of the loan payable to the Claimant. It is his contention that when the Claims statement itself indicate that Mr. Saravanan has paid Rs.75 lakhs and also executed a document in respect of immovable properties on the strength of such arrangement the loan payable to the Claimant was discharged. It was clearly

understood by the claimant and in fact, No Dues Certificate was also executed by them which has not been properly considered by the learned Arbitrator. When a third party has agreed to pay the amount on certain understanding which has been agreed by the claimant themselves, there is substitution of new contract, same operate as novation of contract which has not been considered by the learned Arbitrator. That apart, how the amount of Rs.4,34,60,134/- has been arrived in the claim statement, there is no details available. Learned Arbitrator also not given any reasons for accepting such amount calculated by them. Besides there is not covenant between the parties for payment of interest upto 24% on monthly basis. These facts have not been considered by the learned Arbitrator. Huge amount paid by Mr.Saravanan also not given credit. Therefore claiming huge amount towards interest is not justified. It is his contention that out of Rs.2 Crores, Rs.1.25 Crores have already been paid. Only remaining Rs.75 lakhs towards principal was due. In such being the position, the claimant claiming huge amount of Rs.4,34,60,134/-without any details and accepting the same without any evidence, goes to the root of the matter which violates the fundamental policy of India. The learned Arbitrator has also applied the wrong provision of law and invoked Section 130 of the Transfer of Properties Act to contend that there is no assignment. Hence, it is his contention that such provision not applicable to the facts of the case. The

Award is nothing but vitiated by perversity, which is liable to be set aside.

5. The learned Senior Counsel Mr.E.Om Prakash appearing for the Respondent/Claimant contended that availing of loan is not disputed. Similarly execution of the documents is also not in dispute. Certain repayment also made by the Petitioner. As the default was committed, Arbitration proceedings was initiated. There was some negotiations between the parties. In the negotiations two of the Directors have agreed to clear the subject matter of the loan and also other loans availed by them. Pending arbitral proceedings certain documents came to be executed like No due Certificate, discharge of charges on the property. However, they have not discharged the very liability and No Due Certificate were issued only to discharge over the property and also remove the charge from the Registrar of companies. Therefore, at no point of time, such discharge of the charge could be construed as discharge of liability. At any event, it is his contention that on the same day the Memorandum got executed among the parties wherein the directors of the company have agreed to clear all the loans availed in terms of the main loan agreement. In such a view of the matter merely because some arrangement were negotiated after commencement of the Arbitral Proceedings, the Petitioner cannot take advantage of the same and contend that the entire loan has been discharged. No doubt there was some negotiations but same not fructified in settlement

of entire loan amount. Therefore, merely some arrangement during the arbitral proceedings entire liability can not be wiped out.

6. It is his further contention that what was sought to be discharged is only a charge. Therefore, such letters or arrangements during the arbitral proceedings con not be considered as novation of contract or total assignment of debt. Hence, submitted that the learned Arbitrator has analysed the entire facts and factually found that the loan borrowed by the Petitioner herein not repaid fully and passed an Award taking note of admitted rate of interest as per the contract. In view of that the court cannot re-appreciate the evidence. Hence, prayed for dismissal of the Petition .

7. The entire dispute referred to the sole Arbitrator on account of non-payment of loan amount; otherwise the entire dispute is pertaining to the recovery of the loan availed by the Petitioner herein. It is not in dispute that apart from Rs.2 Crores which is subject matter of the dispute, another Rs.1.6 Crores also availed by the Petitioner company. Rs.1.6 Crores loan is not subject matter of the dispute, in respect of which, it appears a suit is pending. Now it is also submitted that the suit is dismissed now.

8. Be that as it may. The dispute in this arbitration pertaining to the loan agreements dated 18.08.2009 and 20.08.2009. It is not disputed by the Petitioner with regard to the borrowal of the said loan which is the subject matter of the dispute and executed loan agreements dated 18.08.2009 and

20.08.2009. Besides several other documents like pronote, memorandum of equitable mortgage also executed by petitioner herein. The default committed by the Petitioner is also not seriously disputed. Similarly, the notice of invocation also issued on 13.08.2012. The only contention of the Petitioner herein is that the loan payable to the claimant was fully discharged and No Dues Certificate was also issued by the Respondent/Claimant. Otherwise it is the contention of the Petittioner herein that the loan has been assigned in favour of one Mr.Saravanan and who has undertaken to clear of the loan in his individual capacity which has been agreed by the claimant and issued No Due Certificate for clearing charge over the properties. Therefore, once the claimant has agreed and accepted that there is no due from the Petitioner herein and the amount has been fully discharged such contract is nothing but substitution and earlier contract gets novated.

9. Whereas it is the contention of the Claimant/Respondent counsel that issuance of No Dues Certificate and discharge of charge over the properties are the result of the negotiations which took place after the initiation of the arbitral proceedings. In fact there was some understanding between the parties in which one of the Directors undertook to clear the entire loan of Rs.2 Crores towards that he has paid Rs.75 lakhs and agreed to execute certain documents in respect of the immovable properties

comprising of 188 Acres. However, the commitment agreed by the said person has not been honoured. Therefore, No Dues Certificate issued for mere clearance of the charge over the property may not be amount to substitution of any contract.

10. Learned Arbitrator has perused all the loan documents executed by the Petitioner herein, which was not denied. The contention of the Petitioner that the entire loans were assigned in favour of Mr.Saravanan, therefore, the liability has been discharged was not accepted by the Learned Arbitrator. The Learned Arbitrator though factually found that there is no novation of contract or assignment while holding so applied Section 130 of the Transfer of Property Act which relates to Transfer of actionable claim. However, factually found that the amount payable by the Petitioner herein is proved and the claimant is entitled for the recovery of amount. It is to be noted that Section 130 of the Transfer of Property Act deals with the transfer of actionable claim the manner in which it could be effected inter alia same indicate that such transfer should be effected only by execution of instruments in writing signed by the transferor or his duly authorised agent. It is relevant to note that “Actionable Claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of

the claimant whether such debt or beneficial interest be existent, accruing, conditional or contingent. The meaning of Actionable Claim makes it very clear that only a person have a claim to any debt other than a debt mentioned in Section 3 of the Transfer of Property Act can transfer such claim by way of intrument in writing signed by him or his agent. Therefore, learned Arbitrator applying Section 130 of the T.P.Act for assignment pleaded by the debtor may not be legally correct.

11. Though the Petitioner herein took a stand that their debt has been assigned in favour of third party, such assignment can be effective only with the consent of the person who has a claim on such debt. The bone of contention of the Petitioner in this case is that as the sum of Rs.75 lakhs was paid by the Assignee and he has also executed certain documents in respect of 188 Acres land, the debt payable to the Claimant has been completely discharged. In pursuance of the same No Due Certificate is also issued. Though Exs.B.1 and 2 No Due Certificate is executed, it is to be noted that this document came to be executed on 23.01.2013 much after the initiation of the Arbitration. On the same day Memorandum was also executed between the parties. In the Memorandum of Understanding despite the No Due Certificate issued by the Claimant, the Directors of the Petitioner company have agreed to pay the loan amount as per the original loan agreement. That itself shows that there were some arrangements between

the parties to clear the loan during the arbitral proceedings. When the arrangement not fructified, thereafter claim application has been filed. If really the entire amount has been discharged as contended by the learned counsel for the Petitioner, there was no need whatsoever for the company agreeing to pay the entire amount on the same day of entering Memorandum of Understanding dated 28.01.2013. Ex.B.1 No Due Certificate in respect of Rs.1.6 Crores issued in favour of one Mr.Sidesh Kumar on the same day. Similarly No Due Certificate was issued in respect of loan which is the subject matter of the Arbitration, wherein the claimant confirmed that the loan has been assigned to one Mr.Saravanan and the charges over the property registered with the Registrar of Companies should be released on the same day. Thereafter, the Memorandum also came to be executed on the same day wherein the parties have agreed to settle the entire money with interest as per the main loan agreement and indemnity also obtained from Mr.Saravanan, who originally agreed to pay the loan amount.

12. It is to be noted that the amount paid by Mr.Saravanan to the tune of Rs.75 lakhs is also found in the account produced by the Petitioner herein. The learned Arbitrator has factually found that there is no discharge of entire loan amount after analysing the oral and documentary evidence. Merely because some arrangements has been agreed upon between the parties to settle the loan, based on such arrangement No Due Certificate has

been issued to discharge the charges over the property, the same cannot be taken advantage by the Petitioner without establishing that the entire loan amount has been paid. Unless and until the payment has been established the discharge of loan cannot be inferred merely on the basis of such document. The very Memorandum executed between the parties on the same day to pay the entire amount makes it very clear Ex.B.1 and Ex.B.2 is nothing but certain arrangements between the parties to clear only some charges over the property and not towards discharge of the entire loan amount.

13. Learned Arbitrator has accepted the entire claim and passed an Award merely accepting the statement of accounts indicating that a sum of Rs.1.25 Crores have been paid on various dates out of Rs.2 Crores. The nature of the interest agreed by the parties on the pronote is 24% p.a. Now, it appears that the interest has been calculated on the basis of monthly rest which is not according to the contract and in fact claiming such huge interest beyond the contract is not permissible. This aspect has not been taken note by the learned Arbitrator.

14. The award containing bereft of details as to the nature of the interest payable and there is no break up details given in the entire claim application. The learned Arbitrator has passed an Award for the entire amount of Rs.4,34,60,134/- with interest at the rate of 24% p.a. without any details as to how the said sum has arrived. The copy of statement of

Accounts filed during the Arbitral Proceedings a cursory glance of the same shows that a sum of Rs.1.25 Crores have been credited towards the principal loan amount of Rs.2 Crores which has not taken note of by the Arbitrator and the accounts also further indicate interest appears to be calculated on the basis of monthly rests which is against the contractual rate of interest agreed between the parties. In fact the Arbitral Tribunal accepted the amount claimed by the Claimants in entirety without any discussion in this regard. There was no adjudication or reasons about the huge amount claimed by the claimant. There was not even an attempt made by the Tribunal to find out how Rs.4,34,60,134/- due has been arrived despite some payment of Rs.1.25 Crores towards the loan of Rs.2 Crores were made. In the adjudication process when the award proceeds without any discussion of main issue, that award cannot be sustained in the eye of law.

15. Further on perusal of the contract, what was agreed between the parties is simple interest at the rate of 24% p.a. It has been agreed not only in the contract but also in the promissory note executed by the Petitioner. When the parties have entered into a contract particularly in respect of the interest, learned Arbitrator going beyond the scope of the agreement and accepting the claim petition without any discussion and reason and passing award such award is nothing but beyond the scope of dispute and beyond

the scope of the very agreement itself. When the interest rate has been specifically agreed upon between the parties, Arbitral Tribunal awarding the amount adopting the interest on the monthly rests is beyond the scope of the agreement. In such a view of the matter, this Court is of the view that such award suffers from the perversity particularly when the huge amount has been accepted without any reasons. The interest has been awarded contrary to the contract, leading to unjust enrichment of the respondents herein. In such a view of the matter the Award passed by the Learned Arbitrator for a sum of Rs.4,30,60,134/- is set aside. It is well open to the Respondent to go for a fresh arbitration by seeking for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, to enter into the dispute only with regard to the payment of money. The reference shall be only with regard to the payment of money as per the contract after giving proper credit to the payment made towards the principal. Discharge and other aspects cannot be a subject matter of the Arbitration, since this Court dealt those issues in this petition.

16. In the Result, the Original Petition is allowed. Award passed by the learned Arbitrator in A.C.P.No.TSR/1 of 2012 dated 28.06.2016 is set aside. It is well open to the respondent to go for a fresh arbitration by consent of parties and if no consensus, seek for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, to enter

into the dispute only with regard to the payment of money. The reference shall be only with regard to the payment of money as per the contract after giving proper credit to the payment made towards the principal amount. Consequently connected Application is closed.

Sd./-N.S.K.J.
15.07.2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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