IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 14.02.2023

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb.O.P.(Com.Div).No.347 of 2022
and A.No.3133 of 2022

1. M/s.Trrans Granites,
rep. by its Partner Mr.M.Sathiamurthy

2. Mr.M.Santhamurthy ...Petitioners

Versus

M/s.Hinduja Leyland Finance Ltd.,
rep. by its Authorized representative,
Ms.Muthulakshmi Jayaraman,
having its Corporate Office,
No.27A, Developed Industrial Estate,
Guindy, Chennai-600 032. ...Respondent

PRAYER :

Arbitration Original Petition is filed under Section 34(2)(a)(ii) of the Arbitration and Conciliation Act, 1996, praying to set aside the *ex parte* award passed by the learned sole Arbitrator, dated 07.06.2022.

For Petitioners : Mr.M.Velmurugan
For Respondent : Mr.M.Veerabathiran Prasanth

O R D E R

This Arbitration Original petition has been filed by the petitioner under Section 34(2)(a)(ii) of the Arbitration and Conciliation Act, 1996 (in short, 'the Act'), praying to set aside the award passed by the learned Sole Arbitrator, dated 07.06.2022 in HLF/SRR/ACP No.16 of 2021.

2. The brief facts, which are necessary for disposal of the present Original Petition, can be stated as under:

3. The petitioners herein had approached the Respondent, requesting for a loan facility to purchase 250 TPH 3 STAGE SKID MOUNTED CRUSHING PLANT MACHINERIES vehicle, which was granted by the respondent upon entering a loan agreement dated 03.02.2019 by the petitioners. As per the said agreement, the Petitioners are liable to repay the amount of Rs.6,18,38,782/- in 46 equated monthly installments (Rs. 13,44,321/- per month between 15.04.2019 and 15.01.2023). Since the petitioners were very irregular in making payments towards installments and

had committed defaults, having no other option, the Respondent was forced to invoke the Arbitration proceedings as per the terms of the loan agreement. The same was communicated to the Petitioners vide letter dated 04.03.2021. Subsequently, the matter was referred to the Sole Arbitrator, who in turn, after following the modalities, since the petitioners failed to appear, set them *ex parte* and passed the *ex parte* award on 07.06.2022. Challenging the said *ex parte* award, the petitioners have come forward with the present Original Petition.

4. The petitioners admitted the fact to the extent that they borrowed money from the respondent by virtue of loan agreement dated 03.02.2019 and also admitted the fact that the termination of the contract by the respondent through letter dated 04.03.2021 and a sole Arbitrator was appointed by letter dated 09.03.2021 and the matter was referred to the Arbitrator.

5. Subsequent to the matter referred to the Arbitrator, the petitioners

sent a letter through e-mail dated 23.03.2021, requesting the respondent to restructure the loan and to drop the legal proceedings. The petitioners also sent a reminder in this regard by letter dated 27.03.2021.

6. After receipt of the letter of requisition for restructuring the loan from the petitioners, the respondent has approved to restructure the loan through e-mail dated 10.04.2021 and EMIs were also revised with effect from 15.06.2021, granting the petitioners three months time to regularize the payments. Therefore, according to the petitioners, as there is novation of contract, no proceedings can be continued based on the defaults committed by the petitioners before restructuring of the loan. The defaults committed by the petitioners were ratified by the respondent while restructuring the loan and thereby, the EMIs were revised, commencing from 15.06.2021.

7. According to the learned counsel for the petitioners, all the above facts have not been brought to the knowledge of the Arbitrator and when once the respondent accepted and approved the restructure of the loan and consequently, the defaults committed by the petitioners were ratified, the

respondent cannot proceed with the arbitral proceedings and they ought to have brought to the knowledge of the Arbitrator to withdraw the proceedings. The main request of the petitioners is that after re-structuring the loan, the respondent has to drop the legal proceedings against the petitioners. The learned counsel would submit that the petitioners was under the honest impression that after restructuring the loan and regularizing the EMIs, the respondent might have dropped the legal proceedings and also withdrawn the arbitral proceedings after bringing the subsequent developments to the knowledge of the learned Arbitrator. But the respondent has failed to do so. In this regard, the petitioners also sent letter dated 06.05.2021 and 14.06.2021 to the respondent, requesting to inform the status of the arbitration, but the respondent has not given any response. Therefore, the learned counsel would submit that the award passed by the learned Arbitrator is not sustainable. He pointed out that the dispute has come to an end immediately when the respondent approved the restructure of the loan and without providing any opportunity to participate in the legal proceedings and based on the previous defaults which were ratified by the respondent, the arbitral proceedings were initiated and obtained award, which is liable to be set aside.

8. Per contra, the learned counsel appearing for the respondent would submit that even subsequent to the restructuring of the loan, the petitioners have committed default in making the payments and therefore, they proceeded with the arbitral proceedings. However, the learned counsel has fairly admitted about the restructuring of the loan by ratifying the defaults committed by the petitioners and regularized the EMIs commencing with effect from 15.6.2021. He referred to paragraphs 6 to 9 contained in the written submissions filed by him, which are extracted as under:

> "6. *Inter alia*, pursuant to the initiation of the arbitration, the Petitioners have approached this Respondent requesting adequate time to settle off the loan. Acceding to their request, this Respondent had executed an agreement dated 25.03.2021 for the pending amount of Rs.4,45,66,867/- The only intent of the present agreement is to extend the time of paying the amount, granting an additional 24 months. The agreement also stipulated that an amount of Rs.4,33,453/- is payable for months between 1 and 6 and Rs. 12,92,784/- payable between months 7 to 49.

“7. A specific clause has been included in the agreement whereby it has been mentioned that all other terms and conditions as in the main loan agreement would follow. As such, this would also include the arbitration clause which was already invoked by this Respondent. It would also be clear that the restructuring had only facilitated the Petitioners to pay the loan amount in additional installments and therefore there is no new contract in lieu of the agreement dated 25.03.2021.

“8. It is submitted that despite the earnest effort of this Respondent, the Petitioners once again started defaulting making payments from November 2021. The Petitioners conveniently paid the installments of Rs.4.33.453/- payable for six months until December 2021 and subsequently paid only 2 dues of EMIs of Rs. 12,92,784/- during February 2022 and May 2022, much later than the stipulated time.

“9. Left with no other option, this Respondent had to proceed with the arbitration and an was passed on 07.06.2022. It is pertinent to point out that the Petitioners have not made a single payment post May 2022 and the loan amount payable by the Petitioners stands at Rs.5.30 Crores excluding the interest payable.

9. The learned counsel would also refer to the judgment of the Hon'ble Supreme Court in ***'M/s.Chrisomar Corporation versus MJR Steels Pvt.Limited and another***" reported in (2018) 10 SCC 117 in support of his contention that even for the default made subsequent to the restructuring of the loan, based on the original contract, the petitioners can be proceeded with. Therefore, he would urge this Court to dismiss the present Petition.

10. Heard the learned counsel appearing for the parties and perused the entire materials placed on record.

11. Upon hearing the learned counsel for the parties and on consideration of the materials available on record, this Court finds that after availing the loan amount, since the petitioners have committed default in making repayment of the loan amount, the respondent invoked the arbitration clause contained in the loan agreement dated 03.02.2019 and initiated the arbitral proceedings against the petitioners. The petitioners also received notices of the arbitral proceedings. While so, during the course of

arbitral proceedings, by letter dated 15.03.2021, the petitioners sent a proposal for restructuring of the loan and for regularization of the payments. By virtue of email, dated 10.04.2021, the respondent has approved the restructure of the loan and revised the EMIs, which would commence from 15.06.2021 onwards. It seems that subsequent to the restructuring of the loan, the petitioners made some of the EMIs. It is pertinent to note that while sending the letter dated 15.03.2021 seeking restructuring of the loan, the petitioners also requested the respondent to drop the legal proceedings and therefore, the petitioners were under the honest belief that while restructuring the loan, the respondent would drop the legal proceedings as well. In this regard, the petitioners sent letters dated 06.05.2021 and 14.06.2021 to the respondent, seeking clarification regarding the arbitration proceedings, but the respondent has not provided any information about the status of the arbitral proceedings. Admittedly, the respondent, by virtue of e-mail, dated 10.04.2021 approved the restructuring of the loan and revised the EMIs which clearly amounts to ratifying the earlier defaults committed by the petitioners. While so, based on the earlier defaults which were already ratified by the respondent, there is no justification on the part of the respondent to proceed with the arbitral proceedings. The moment when the respondent approved the restructure of the loan and revised the EMIs, the respondent ought to have dropped the legal proceedings as there was no dispute was persisting as the dispute has already been settled, but strangely, proceeded with the arbitral proceedings and obtained *ex parte* award, which, in the opinion of this Court, cannot be sustained.

12. Ofcourse, in the event of any default committed by the petitioners subsequent to the restructuring of the loan and if there is no novation of the previous contract, as laid down by the Hon'ble Supreme Court in the case of 'M/s.Chrisomar Corporation' (cited supra), the arbitral proceedings can be proceeded with based on the arbitral clause contained in the original agreement. By virtue of the ratification of the defaults by the respondent, it would not amount to arising the earlier original contract itself, certainly, the respondent can proceed against the petitioners by invoking arbitral clause contained in the original agreement in the event of committing default by the petitioners subsequent to the restructuring of the loan. But in the present case, unfortunately, the respondent proceeded with the arbitral proceedings

based on the previous defaults which were already settled among the parties In fact, it is incumbent upon the respondent to act fairly and bring the subsequent events to the knowledge of the Arbitrator and seek for withdrawal of the arbitral proceedings. However, it was not brought to the knowledge of the Arbitrator and as stated above, since the petitioners were under the honest belief that the proceedings would be dropped, the petitioners have not participated in the arbitral proceedings, which ended in passing the *ex parte* award by the learned Arbitrator, which, in the opinion of this Court is clearly in violation of principles of justice and contrary to the basic notions of justice. That apart, this Court is also of the view that the petitioner was unable to present his case due to the mis-information on the part of the respondent/claimant.

13. For the reasons stated above the award passed by the learned Arbitrator is vitiated on the ground of violation of principles of natural justice as the petitioners were unable to present their case before the Arbitrator and also patent illegality appeared on the face of the award.

14. Accordingly, the Original Petition is allowed and the award dated 07.06.2022 passed by the learned Arbitrator is set aside. No costs. Consequently, the connected application is closed.

Suk 14.02.2023

KRISHNAN RAMASAMY, J.

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