IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 15.02.2023

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb.O.P.(Com.Div).No.17 of 2022

Mr.V.Ramachandran ...Petitioner

Versus

Mr.Sankaran P.Raghunathan ...Respondent

PRAYER :

Arbitration Original Petition is filed under Section 34(2A) of the Arbitration and Conciliation Act, 1996, praying to set aside the award passed by the learned Arbitrator, dated 20.09.2021.

For Petitioner : Mr.P.R.Raman, SC
for M/s.C.Seethapathy

For Respondent : Mr.V.Kuberan
for M/s.Rank Associates

O R D E R

This Arbitration Original petition has been filed by the petitioner under Section 34(2A) of the Arbitration and Conciliation Act, 1996 (in short, 'the Act'), praying to set aside the award passed by the learned Arbitrator, dated 20.09.2021.

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

3. The Petitioner bought 20 units in a company known as National School of Business & Management Pvt. Ltd. Each units consists of Rs. 2500 shares of Rs. 10/- each and 4,250 shares of 15% Compulsory Convertible Cumulative Preference Shares (herein after called CCCP) of Rs.100/-each. Consequently, Put Option Agreement was entered into by the petitioner and respondent dated 10.10.2011 with regard to the aforesaid 20 units at Rs.8,00,000 per unit because the petitioner invested money with the respondent. The Put option was to be exercised by the Petitioner through prior written notice i.e. put exercise notice not later than 01.11.2015 and

01.01.2016 was fixed as put option date. The respondent in addition to the agreement with petitioner, entered into similar Put Option Agreements with two other shareholders namely Mrs. Mythili Venkataraman and Mrs. Rajalakshmi McKenna. In order to secure the interest of the petitioner, the respondent entered into a memorandum of Second Charge dated 19.08.2011 and a corrected version of the Memorandum of second Charge was registered on 23.11.2011 in favour of M/s.Paterson & Co. represented by the power agent of the petitioner, who is also the power agent for two other investors at Chennai. Then the respondent had some pressing necessity with reference to the afore said mortgaged land and as a consequence, he requested M/s.Paterson & Co. to substitute the said security with another immovable property situated at Padur. The petitioner reiterated his concern for his interest for which the respondent promised to buy back the shares by 2016. Accordingly, a Memorandum of deposit of title deeds was executed on 06.04.2015 by the respondent in favour of the Mortgagee in respect of the property located in Padur village. As per the Memorandum, the Equitable Mortgage created by the respondent in favour of the Mortgagee shall hold good until such time the respondent discharged the obligation to the Mortgagee upto a sum of Rs. 1.48 crores. According to the Petitioner, the Mortgagee sent a notice dated 28.10.2015 to the respondent by courier in accordance with Clause 9 of the Agreement on behalf of the investors in his capacity as Power of Attorney Holder, requesting for buyback of the shares from the petitioner valued at Rs. 48 lakh. The said notice was sent to the specified address of the respondent , through "Sankara Enterprises", an internationally recognised courier company and was returned to the Mortgagee with the endorsement ‘Party not available.’

4. But according to the respondent , the petitioner did not exercise the Put option by sending the necessary notice i.e. Put Option notice to the respondent on or before 01.01.2016 and subsequently, the respondent sent an email dated 03.02.2016 to M/s.Paterson & Co. requesting for the release of charge on the land and to return the original documents, since the time frame as per Put Option Agreement had lapsed and consequently the

respondent s obligation to purchase the shares petitioner did not exist after a specified date. The respondent states that he came to know of the alleged notice 28.10.2015 only through the E-mail of Mr. Amarnath dated 15.02.2016. 5. However, according to the petitioner, when the petitioner asked for payment by email dated 10.03.2016, the respondent offered the mortgaged property to the Petitioner for outright purchase and the same is fortified by the email dated 06.05.2016, sent by the respondent. The petitioner states that the Mortgagee/ Power of Attorney Holder by email dated 13.07.2016 also gave certain opinions about the proposal of the respondent for sale of the land. Thereafter, there have been emails dated 04.10.2016, 18.11.2016, 16.01.2017 demanding sale of land for which the respondent reverted to initial stand that the put option was never exercised appropriately. Therefore, the respondent initiated arbitration proceedings before the learned Arbitrator in demand of returning documents and declaring that the respondent is not obligated to buy back the shares of M/s.National Schools of Business and Management Pvt. Ltd. in terms of the Put Option Agreement.

5. The learned Arbitrator, on consideration of the claim statement and rival claim statements made by both the parties *vis-a-vis* documentary evidence let in by the parties, on 20.09.2021 passed the award in favour of the respondent herein. Aggrieved by the same, the petitioner has come forward with the present Original Petition.

6. Mr.P.R.Raman, learned Senior Counsel appearing for the petitioner would primarily contend that the petitioner had invested in the company, wherein the respondent is the Promoter and got 20 units and consequently, the petitoiner entered into a 'Put Option Agreement' with the respondent dated 10.10.2011, as per which Put Optiion has to be exercised by the petitioner by way of written notice not later than 01.11.2015 and 01.01.2016 was fixed as the Put Option Date. The learned Senior counsel would point out that as per Clause 9 of the Put Option Agreement, the petitioner had exercised his put option by way of prior notice dated 28.10.2015 sent by Courier thgouh his Power of Agent, however, the said notice was returned

with an endorsement 'party not available'. While so, the resondent, on 03.02.2016 insisted the petitioner to return the original deeds and release the charge on the property since the petitoiner was not duly exercised Put Option.

7. The learned Senior counsel would submit that though while denying the exercise of Put Option by the petitioner, the respondent assured the petitioner that the payment would be made in full and also by way of e-mail, dated 06.05.2016, the respondent offered the petitioner for outrright purchase of the mortgaged property, for which, the petitioner, through email dated 13.07.2016, informed the respondent that the price quoted by him was substatially on the higher side. Therefore, the learned Senior counsel would submit that ignoring these subsequent developments, the respondent took a U turn and contend that the petitioner had never exercised Put Option and started avoiding to fulfill his obligation by making frivoous allegations.

8. The learned Senior counsel also would submit that the learned

Arbitrator has not dealt with the issues in proper perspective and passed the award in violation of the statutory provisions of the Act and it is against public policy of India. He pointed out that the learned Arbitrator had erroneously shifted the burden on the petitioner to prove the service of notice on the respondent regarding invoking the Put Option by the petitioner despite the petitioner established the fact that the postal cover containing the Put Optiion notice dated 28.10.2015 was returned with endorsement 'party not available'. Therefore, he pointed out that as per Clause 9.1, the act of sending the notice dated 28.10.2015 exercising Put Option by the pettioner, would amount to 'deemed service' and therefore, the finding of the learned Arbitrator, stating that ***'leave alone Ex.R13, no approach was made on 01.01.2016 for continuing the obligation under Ex.C2 and once the letter sent under Ex.R13 by the petitioner, has been admittedly returned, the deeming provision, will not come into play***' is erroneous and it cannot stand to logic and technicalities and thereby, the award passed by the learned Arbitrator holding that the petitioner had not exercised the Put Option within the prescribed date, the question of liability of the respondent to buy the shares from the petitioner does not arise, is liable to be set aside.

9. On the other hand, Mr.V.Kuberan, learned counsel appearing for the respondent, would submit that as per the Put Option Agreement entered by the parties, the Put Option shall be exercisable on 01.01.2016 and the same would automatically expre by the end of the business day on 01.01.2016 if not exercised by the petitioner and therefore, the petitioner has to necessarily exercise the Put Option by prior written notice on or before 01.11.2015, but the petitioner has not excercised the Put Option and even on 01.01.2016, the petitioner had not contacted the respondent. Therefore, the obligation of the respondent to purchase the shares from the petitioner did not exist after the Put Option date, i.e. 01.01.2016. As regards the execution of Put Option notice dated 28.10.2015 Ex.R13 is concerned, the learned counsel would submit that it was sent to the respondent's company address, whereas, even in the Put Option Agreement, the residential address of the respondent has been clrealy mentioned and the

petitioner has not sent a copy of the alleged letter dated 28.10.2015. The learned counsel also submitted that the respondent is still in occupation and possession of the premises mentioned in the Put Option Agreement and continues to receive correspondence and the petitioner had not contacted by e-mail or over phone as was done on previous occasions.

10. The learned counsel would also contend that untill the resondent sent an e-mail on 03.02.2016 to the petitioner, there was no whisper from the petitioner and once the petitioner failed to exercise Put Option, the petitioner ought to have returned the original deeds to the respondent in respect of the property mortgaged with the petitioner towards security of the investment made by the petitioner. Since the petitioner had not complied with his obligation as per the agreement, the respondent referred the matter to the arbitration and the learned Arbitrator, having dealt with all the issues, has rightly passed the award, which requires no interference. He also contended that arbitral award shoud not be interfered with a casual and cavalier manner unless the Court comes to a conclusion that the perversity

or the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award and the plausible view taken by the learned Arbitrator supported by reasoning, cannot be interfered with. In support of his contentions, the learned counsel relied upon a decision reported in "(2020) 5 SCC 164 (***South East Asia Marine Engineering and Constructions Limited (Seamec Ltd.) versus Oil India Limited",*** wherein, the Hon'ble Apex Court has held in para 12 and 13 as under:

> "12. It is a settled position that a Court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the Courts. Recently, this Court in *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd*. [2019 SCC Online SC 1656] laid down the scope of such interference. This Court observed as follows-
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>> "26. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award."

Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated." (emphasis supplied)

"13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies (supra) observed as under:

> "27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act." (emphasis supplied)"

With the above contentions, the learned counsel for the respondent sought for dismissal of the present Original Petition.

11. Heard the learned counsel appearing for the parties and perused the entire materials available on record.

12. The issue involved in the present dispute revolves around the exercise of the Put Option by the petitioner, i.e., whether the petitioner has exercised Put Option on or before 1.1.2016 in terms of the Put Option Agreement dated 10.10.2011?

13. It is not in dispute that the petitioner entered into a Put Option Agreement with the respondent dated 10.10.2011, whereunder, the petitioner bought 20 Units (combination of shares) in a company known as National School of Business & Management Private Limited, on various terms and conditions as to the price, time frame, the reciprocal obligation as well as the manner and mode of exercising the option. In order to secure the interest of the petitioner, the respondent offered immovable property by executing a Memorandum of Second Charge dated 23.11.2011 in favour of M/s.Paterson & Co.Pvt.Limited represented by the Power Agent of the

petitioner.

14. It is the specific case of the petitioner that the petitioner has exercised his Put Option by providing a prior notice dated 28.10.2015 by Courier through Sankara Enterprises, the Franchiesee of On-dot Couriers & Cargo Services, in terms of Clause 9 of the Put Option Agreement through his duly constituted Power Agent to the address of the respondent as provided in the Put Option Agreement, but the said notice was returned with endorsment 'party not available'. On the other hand, it is the case of the respondent that the petitioner has not choosen to exercise the Put Option by sending necessary notice to the respondent or or before 01.11.2015 in terms of the Put Option Agreement and even on 01.01.2016, the petitioner had not contacted the respondent either over phone or through e-mail. Even by letter dated 26.03.2016, the respondent demanded the proof for having sent the notice of invocation of Put Option by the petitioner, but the petitioner without giving any proof, insisted the respondent to discharge his obligation by purchasing the shares.

15. It would be worthwhile to extract relevant Clauses contained in the Put Option Agreement, dated 10.10.2011 as under:

> "3: PUT OPTION DATE
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> 3.1 Unless this Agreement is mutally terminaed by the Parties or the INVESTOR is no more the Shareholder of the Company, the Put Option shall be exercisable on 1st January 2016 (the *Put Option Date*). This Put Option shall automatically expire by the end of the business day on Jan.1, 2016, if it is not exercised by the INVESTOR.
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> ....
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> 5. OPTION NOTICE
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> 5.1 The Put Option may be exercised by INVESTOR by prior written notice not later than November 1, 2015 to PROMOTER (the *Option Notice*).
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> 5.2 Option closing shall occur on the Put Option Date.
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> 5.3 At Option Closing, INVESTOR shall deliver all the original Units (including the Shares attched to the Units) to the PROMOTER and PROMOTER shall pay the Option Price to INVESTOR.
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> ....

9. NOTICES

9.1 Any notices or communications required to be given or served by any of the Parties on any other Party in respect of this Agreement, shall be given in writing in English to the other, and shall be deemed to have been duly served, if sent by hand, prepaid registered mail, fax, email, or by courier using an internationally recognised courier agency. A notice or communication (as applicable) shall be effective upon receipt and shall be deemed to have been received-(i) at the time of delivery, if delivered by hand, registered mail or by courier or (ii) at the time of transmission, if delivered by fax provided that in either case, where delivery occurs outside Working Hours, notice shall be deemed have been received at the start of the Working Hours on the next following Business Day."

16. A reading of the above Clauses, it is clear that the Put Option shall be exercisable on 01.01.2016 by the Investor by prior notice not later than November 1, 2015 and that any notices required to be given or served by any parties, shall be deemed to have been duly served by Courier using an internationally recognised courier agency and that a notice shall be

effective upon receipt and shall be deemed to have been received at the time of delivery. In the present case, in terms of Clause 9 of the Put Option Agreement, on 28.10.2015, the petitioner has sent a notice to the address of the respondent as provided in the Put Option Agreement by Courier, namely, Sankara Enterprises, which is an internationally recognised Courier Agency. However, the said notice was returned with an endorsement 'party not available'. This was disputed by respondent and by letter dated 26.3.2016, the respondent has demanded the proof of having sent the notice dated 28.10.2015 regarding the buyback and hence, the respondent denied the claim of the petitioner on the ground that the petitioner had not exercised put option.

17. In order to prove this aspect, the petitioner has filed the Original Returned cover before the Arbitral Tribunal, which is marked as Ex.R13. It is pertinent to note that both the parties have chosen not to let in oral evidence before the Arbitral Tribunal. Therefore, when the parties have chosen so, the learned Arbitrator has to necessarily rely upon the

documentary evidence let in by both parties. However, as regards Ex.R13 is concerned, the learned Arbitrator though found the endorsement contained on Ex.R13 as 'party not available' and 'party shifted', but observed that since the respondent has not received the notice, the deeming provision in Clause 9.1 would not apply.

18. A perusal of the Clause 9.1 contained in the Put Option Agreement, it reveals that any notice given in writing in English to other, shall be deemed to have been duly served, if sent by hand, prepaid registered mail, fax, email or by Courier using an internationally recognized courier agency and a notice shall be effective upon receipt and shall be deemed to have been received at the time of delivery, if delivered by hand, registered mail or by courier. In the present case, it is not the case of the respondent that Ex.R13 has been fabricated one for the purpose of case by the petitioner. The respondent has simply denied the receipt of Ex.R13 notice sent by the petitioner communicating that he exercised the Put Option. It is not in dispute that the petitioner has sent Ex.R13 to the correct

address of the respondent which was given in Ex.C2 Put Option Agreement and in fact, the respondent has admitted that subsequent legal notices sent by similarly placed persons which were marked as Exs.C17 and C18 to the same address of the respondent, were received by the respondent. Therefore, the address to which the petitioner sent Ex.R13 is correct address and there is no dispute at all and the respondent has not raised any objection that Ex.R13 was sent to wrong address.

19. Section 27 of General Clauses Act deals with the presumption of service of notice sent by post and provides that service of such notice shall be deemed to have been effected unless the contrary is proved. Section 27 reads as under:

> "27. Meaning of service by post: Where any 49 [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-

> paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

20. In the present case, in terms of Clause 9.1, the parties have agreed in respect of notices or communications to be given or served, shall be deemed to have been duly served, if sent by hand, prepaid, registered mail, fax, email, or by courier using an internationally recognized courier agency, namely, Sankara Enterprises, the Franchiesee of On-dot Couriers & Cargo Services, which is an internationally recognized courier agency. It is the specific stand of the petitioner that Ex.R13 was sent to the correct address of the respondent, which was not disputed by the respondent. Hence, as rightly contended by the learned Senior counsel for the petitioner, that as per Clause 9.1, the act of sending the notice dated 28.10.2015 exercising Put Option by the pettioner, would amount to 'deemed service'. Further, since the contrary has not been proved by the respondent, it can safely be

held that Ex.R13 is deemed to have been duly served on the respondent. In the decision reported in "2014 STPL 9253 SC [2014 (AIR (SCW) 4321] in the case of ***"Ajeet Seeds Ltd. vs. K.Gopala Krishnaiah"***, the Hon'ble Apex Court has held in para 14 as under:

> "14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or **'not available** in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed."

21. In the light of above discussion, this Court has no hesitation to hold that the petitioner has exercised Put Option well before 01.01.2016. In fact, even after coming to the knowledge about Ex.R13, while denying the receipt of the same, the respondent has assured the petitioner that the payment would be made in full and by way of e-mail, dated 06.05.2016, he offered the petitioner for outrright purchase of the mortgaged property, for which, the petitioner, through email dated 13.07.2016, informed the respondent that the price quoted by him was substatially on the higher side. Therefore, subsequently, the respondent has virtually acted upon Put Option notice dated 28.10.2015 sent by the petitioner and offered outright purchase of the mortgaged property to the petitioner and when the petitioner has not come forward to accept the price quoted by the respondent and when insisted to buy back the shares, the respondent reverted to his stand that the petitioner has not exercised Put Option within the prescribed date, which cannot be accepted. In fact, even prior to 28.10.2015, the talks were going on between the parties regarding the buy back of the shares as evident from

the e-mail, dated 12.3.2015 sent by the petitioner expressing discomfort over the substitution of mortgaged property and also by letter, dated 25.3.2015, the petitioner brought to the knowledge of the respondent that the respondent has assured him that he would arrange for a buyer for 14 units of shares held by the petitioner. Therefore, as per Put Option Agreement, unless and until the petitioner exercises his option, the process of buying back the shares by the respondent could be not initiated and accordingy, the petitioner has rightly exercised his Put Option well within the stipulated time, i.e. on 28.10.2015.

22. The learned Arbitrator has not at all considered the above aspects and he has ignored the well settled law laid down by the Hon'ble Apex Court in catena of decisions, one of such decision cited supra, i.e. ***Ajeet Seeds Limited*** case, that when a notice is sent by registered post/courier to the correct address of the addressee and if it is returned with an endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", it is deemed that due service has

been effected unless and until the contrary is proved by the addressee. In the present case, it is not the case of the respondent that the petitioner has sent the notice Ex.R13 dated 28.10.2015 to wrong address. However, the learned Arbitrator has proceeded technically that the respondent was not served with Ex.R13 and thereby committed patent error by overlooking the settled law in respect of service of notice to the correct address of the addressee. Further, the learned Arbitrator has not dealt with both the prior and the subsequent events that had taken place as discussed above, when the respondent after coming to know about the petitioner exercising Put Option by way of Ex.R13, he assured the petitioner that the payment would be made in full and also offered outright purchase of the mortgaged property and therefore, there were negotiations between the parties in respect of buy back shares of the petitioner and settlement of the payment. Therefore, this Court is of the view that non-consideration of these aspects by the learned Arbitrator would certainly cause great prejudice and injustice to the petitioner. Further, non-consideration of the well settled legal position as regards the notice sent to the correct address shall be deemed to have been served, etc. by the learned Arbitrator would be against the public policy and also amount to patent error committed by the learned Arbitrator.

23. For the foregoing reasons, this Court is of the considered view that the award passed by the learned Arbitrator, is liable to be set aside. Accordingly, the Award dated 20.09.2021 passed by the learned Arbitrator is hereby set aside.

24. In the result, the present Arb.Original Petition is allowed. The parties shall bear their own costs.

Suk 15.02.2023

KRISHNAN RAMASAMY, J.

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Arb.O.P.(Com.Div) No.17 of 2022

15.02.2023