

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2017

CORAM

THE HONOURABLE Dr. JUSTICE S.VIMALA

Original Petition No.143 of 2017
and Application No.984 of 2017

1. M/s. Puruvankara Projects Limited,
Rep. by its CEO,
No.36/2 Gandhi Mandapam Road,
Kotturpuram, Chennai 600 085
 2. Mr. Naidu, Senior Vice President,
Pruvankara Projects Limited,
No.36/2 Gandhi Mandapam Road,
Kotturpuram, Chennai 600 085
 3. Mr. Senthil P, Senior Manager – International Sales,
Puruvankara Projects Limited,
No.36/2 Gandhi Mandapam Road,
Kotturpuram, Chennai 600 085
 4. Mr. K.Nishaanth, Relationship Manager – Sales,
Puruvankara Projects Limited,
No.36/2 Gandhi Mandapam Road,
Kotturpuram, Chennai 600 085
(Since left the 1st petitioner company and
is only a proforma party)
- ... Petitioners

Vs.

1. Mrs. Ranjani Vekatraman Ganesh,
W/o. Mr. Venkatraman Ganesh,
J 1403 Purva Swanlake,
Kelambakkam, Chennai 603 103
 2. K.D.Arcot,
House No.U-46, Plot No.4185,
8th Street, Anna Nagar,
Chennai 600 040
- ... Respondents

Prayer:- Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, against the award, dated 02.11.2016 passed by the second respondent in favour of the first respondent.

For Petitioners : Mr. Satish Parasaran, Sr. Counsel, for,
M/s. R.Sathish Kumar

For Respondents : Mr. N.L.Rajah, Sr. Counsel, for,
Mr. E.Jayasankar, for R-1

ORDER

The petitioners seek to challenge the award, dated 02.11.2016 passed by the second respondent herein / Arbitrator, under which the second respondent has ordered the payment of Rs.11,03,507/- and also allotment of car park to the first respondent herein (claimant before the Arbitral Tribunal), by the petitioners herein (respondents before the Arbitral Tribunal) within 10 days of the award, and further to attend to the leakages in the building till an association is formed, as per Clause 13 of the sale agreement between the parties.

2. The first respondent herein is hereinafter referred to as purchaser and the petitioners herein are referred to as vendors.

Brief facts:-

3. The vendors are the builders, who have developed a residential apartment complex by name, Purva Swanlake, in about 10.32 acres in Padur and Kelambakkam Villages, Chengalpattu Taluk, Kancheepuram District. The first respondent herein was one of the purchasers of a residential flat from the vendors. The purchaser alleged deficiencies in the construction of flats and had raised several allegations including delayed construction, with the vendors. The vendors and the purchaser had several correspondence on the above issues.

3.1. According to the vendors, the purchaser and her husband have acted against them by making scurrilous and defamatory allegations. These acts resulted in institution of a Civil Suit by the vendors seeking to restrain the purchaser and others from preventing, stopping or blocking workers or prospective customers from visiting the site or stop them from doing their routine work, etc., The learned District Munsif, Chengalpattu, was pleased to grant an ad-interim injunction restraining the purchaser, her husband and others, in terms of the above prayer, which is still in force.

3.2. Thereafter, the purchaser had filed the Arbitration Claim, as per Clause 33 of the Construction Agreement dated 20.02.2014. The parties, thereafter, appointed the second respondent as a sole

arbitrator to decide the reference and the proceedings thereof have culminated in the impugned order, dated 02.11.2016.

4. The learned counsel appearing for the vendors submitted that as per clauses V(1) and V(9) of the Construction Agreement, dated 20.02.2014, the vendors had to deliver the apartment on or before 31.10.2014, however, the apartment was delivered and possession was taken by the purchaser on 28.11.2014 (with a delay of 28 days).

4.1. The learned counsel for the vendors further submitted that the award passed by the learned Arbitrator is clearly outside the purview of the contract and the rejection of the terms of the contract is against the public policy, as laid down by the decisions of the Hon'ble Apex Court; hence, the award deserves to be set-aside and the above petition has to be allowed with costs.

4.2. Apart from the above, the learned counsel for the vendors also raised contentions challenging the award with regard to: (i) discarding of contract clauses; (ii) failure to consider evidence presented; (iii) failure to consider the pleadings; (iv) failure to consider material documents; (v) misapplication of law; (vi) placing reliance on the post reference correspondences; (vii) rewriting of the contract; and (viii) awarding damages when there is no proof of

actual loss.

4.3. In support of the said contentions, the learned counsel for the vendors relied upon the following decisions:-

(i) If the arbitrator ignores the terms of the contract and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction **(1998) (8) SCC 122 (Steel Authority of India v. J.C.Budharaja)**.

(ii) While it is true that the Courts show deference to the findings of fact recorded by the arbitrators and even opinions, if any, expressed, yet it is equally true that the arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties **(2010) 8 SCC 563 (Rashtriya Chemicals v. Chowgule Brothers and others)**.

(iii) An award which is against the terms of the respective contract is open for interference by the Court under Section 34 (2) of the Act. It is open to the Court to consider whether the award is against the specific terms of the contract and if so, interfere with it on the ground that it is patently illegal and opposed to public policy in India **(AIR 2009 SC (Suppl.) 717 (DDA v. R.S.Sharma))**.

(iv) In the absence of any actual loss, the grant of compensation

was clearly a fundamental error in law (**Kailash Nath Associates v. DDA (2015) 4 SCC 136**)).

5. The main issue to be considered is, whether the second respondent / Arbitrator had rewritten the contract and whether the sum awarded by him was in derogation of the contract dated 20.02.2014.

6. It is the contention of the vendors that the agreement (the contract) dated 20.02.2014 was rewritten and that it is evident, when one refer to the decision of the learned Arbitrator in awarding interest for a sum of Rs.77,00,000/- @ 24% on 21.11.2014 to the purchaser amounting to a sum of Rs.1,81,500/-, calculated for a period of 11 months from November 2014 to October 2015, during which period, the flat construction was not yet completed. In the light of the provisions under clause 9 of the contract, the amount to be awarded is, no doubt, Rs.7,000/- per month, in case of the delay. But the delay did not end with a period of 11 months, but it continued even thereafter. Therefore, on the basis of the actuals, the amount of Rs.1,81,500/- has been arrived at.

6.1. The learned Arbitrator has also considered various other

factors which has driven the purchaser to seek the recourse to Arbitral Tribunal which culminated in the award. It is not only the delay but any claim, dispute or difference relating to or arising under the Construction Agreement is also referable to the learned Arbitrator vide clause 33 of the agreement. Therefore, the learned Arbitrator cannot be termed to be travelling beyond the terms of the contract, ignoring the specific terms. In fact, the learned Arbitrator has based his decision relying upon the judgment of the Hon'ble Supreme Court in the case of **Mayadevi v. Laita Prasad (CMA No.2458 of 2014)** and as such, the contention that the learned Arbitrator has rewritten the contract is baseless.

7. Yet another contention raised by the learned counsel for the vendors is that the exercise of the power by the learned Arbitrator stands opposed to public policy.

7.1. This contention drives this Court to consider the definition of public policy and then to find out whether the decision stands opposed to public policy.

7.2. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, the Hon'ble Supreme Court in the case of **ONGC v. Saw Pipes**

MANU/SC/0314/2003 : 2003 (5) SCC 705, held-

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [MANU/SC/0195/1994 : 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

- (a) Fundamental policy of Indian law; or
- (b) The interest of India; or
- (c) Justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is

required to be adjudged void.”

7.3. From the dictum laid down it is clear that the award cannot be set-aside if it is slightly unfair or unreasonable, but it should be unfair or unreasonable to the extent of shocking the conscience of the court. Only then, the court has the power to set-aside the award as oppose to public policy and the award can be adjudged void. No finding has been pointed out which can be said to shock the conscience of the Court. Therefore, the contention that the award is oppose to public policy cannot be accepted. Instead it is clear that the award stands in perfect harmony with public policy and incongruous with patent illegality.

8. The learned counsel appearing for the purchaser submitted that there have been some deficiencies in the apartment and the other facilities provided and several correspondences have been made between 2015 and 2016, when the same was finally sought to be arbitrated; by virtue of the provisions of the agreement, the arbitration was held and the impugned award was passed on 02.11.2016.

9. The learned counsel appearing for the purchaser contended that the complaints which were referred to the arbitrator and which are discussed in the award are: (i) delay in delivery of apartment; (ii) defects in lifts; (iii) insufficient electricity loads, i.e., far lesser than that promised; (iv) covered car parking; (v) seepages and leakages in the apartment; (vi) non-disclosure of the fact that the apartment overlooks a cemetery; (vii) club house and sauna inadequate; and (viii) generator backup and balcony enclosure cover not provided. The learned counsel for the purchaser further submitted that each of the said defects have been examined in detail by the learned Arbitrator and an award has been passed; thus, the purchaser submits that no legal grounds have been made out to set-aside any of the findings.

9.1. In support of the said contentions, the learned counsel appearing for the purchaser relied upon the following decisions:-

(i) The Court cannot reassess the evidence taken into consideration by the learned Arbitrator (**Eastern and Northern Frontier Railway Cooperative Bank Ltd., v. B.Guha and Company AIR 1986 Cal. 146**).

(ii) The Court has no jurisdiction to substitute its own valuation of conclusion on law / fact. **(Francis Klien Private Limited v. Union of India 1995 2 Arb. L.R. 298).**

(iii) The Court cannot sit in Appeal over the conclusions of the arbitrator and re-examine or re-appraise evidence which had been already considered by the learned Arbitrator **(R.S.Builders v. Delhi Development Authority, AIR 1995 Del. 10).**

(iv) The learned Arbitrator is the judge of the facts as well as law and has jurisdiction and authority to decide wrong as well as right and thus, if he/she reaches a decision fairly after hearing both the parties, his/her award cannot be attacked **(Yeshwantganpatrao v. Dattarayao Ramchandran rao, AIR 1948 Nag. 162 (DB)).**

(v) However erroneous, the decision of the learned arbitrator may be, it cannot be interfered with by any Court **(Bharu Kure Jat v. Tara Lal, AIR 1962 Punjab 173).**

(vi) The appraisalment of the evidence by the learned arbitrator is not a matter that the Court can question or consider **(State of Rajasthan v. Puri Construction Company Ltd., 1994 6 SCC 485).**

(vii) The award is not liable to be set-aside on the ground that the law/fact is erroneous **(Laxmi Mathur v. Chief General Manager, MTNL 2000 (2) Arb.L.R. 684 (Bom)).**

(viii) The Hon'ble Supreme Court has clearly held that the learned Arbitrator has gone into the detail of the dispute raised by the appellant and rightly came to the conclusion that the responsibility on the appellant is to abide by the terms and conditions of the Work Order **(Swan Gold Mining Ltd., v. Hindustan Copper Limited (2015) 5 SCC 739)**.

(ix) The High Court of Delhi held that it is well settled that the arbitral Tribunal is competent to interpret the terms and conditions of a contract and the interpretation cannot be interfered with by the Court in an application for setting-aside only because some other interpretation might have been possible **(National Highways Authority of India v. Progressive Constructions Ltd., (2017) SCC Online Del. 7867)**. These decisions are applicable to the facts of this case and in the light of these decisions, it is not possible to set aside the award.

9.2. The incapacity of party, invalidity of the arbitration agreement, improper notice of proceedings, ***proceedings not in accordance with agreement*** are the few grounds on which the Award can be challenged and it will be appropriate to quote Section 34 of the Act, to have the grasp of the complete grounds on which, Award

can be challenged:-

"Section 34 - Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if —

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or ***not falling within the terms of the submission*** to arbitration, or it contains decisions on ***matter beyond the scope of the submission*** to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration

may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.-- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review

on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an ***award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.***

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by **sufficient** cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

10. Now it is for this Court to find out, whether the award is liable to be set-aside in terms of Section 34 of the Act.

11. Admittedly, the learned second respondent / Arbitrator appointed, in this case, is an Engineer and does not have the facility of a legally trained brain. Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you

can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".

12. It is very important to bear this in mind, when awards of lay arbitrators are challenged. However, the discussions in paragraphs 126 to 132 of the Award would reveal that the learned Arbitrator has applied his mind to the terms of the contract and has found the arguments of the vendors to be unacceptable.

13. The contention that the award is beyond the terms of the agreement, with reference to car park (as raised by the learned counsel appearing for the vendors) is not correct, as it is stated in the correspondence between the parties that the purchaser still owes a substantial sum of money to the vendors and as such the car park is not yet allotted only on that count and that the vendors are ready and willing to allot the car park immediately upon realization of the said sum from the purchaser. The learned Arbitrator has analysed the maintainability of such claim and it has been pointed out that the purchaser owes a sum of Rs.2,93,863/-, not to the vendors, but to the sister concern of the vendors. In fact, the award speaks about the list

of issues submitted by the claimant and in S.No.7, there is a prayer seeking direction to the vendors to allot a covered car park as per the agreement. It is suffice to point out that the learned Arbitrator has made a special mention that the allotment of car park is a part and parcel of the construction agreement and that the failure to allot the car park for reasons extraneous to the agreement would amount to breach of the terms of the contract. Thus, it is clear that the car park was an issue covered under the agreement and that it is also lawfully referred to the Arbitrator.

14. Though the vendors opposed the spot inspection by the learned Arbitrator when the learned Arbitrator proposed the same, they subsequently participated in the inspection significantly and even in their written submission before the learned Arbitrator, they have not objected to the inspection. Therefore, the ground raised on this issue by the vendors is unsustainable and is merely an afterthought.

15. Further, Clause V (1) and Schedule B (A) of the Construction Agreement, dated 20.02.2014, would demonstrate that there has been breach of the construction agreement and the dispute has arisen between the vendors and the purchaser, based on which

arbitration proceedings were invoked.

16. In view of the above, the award, dated 02.11.2016 is confirmed and Original Petition No.143 of 2017, challenging the Award, is hereby dismissed. No costs. Consequently, the connected Application is also closed.

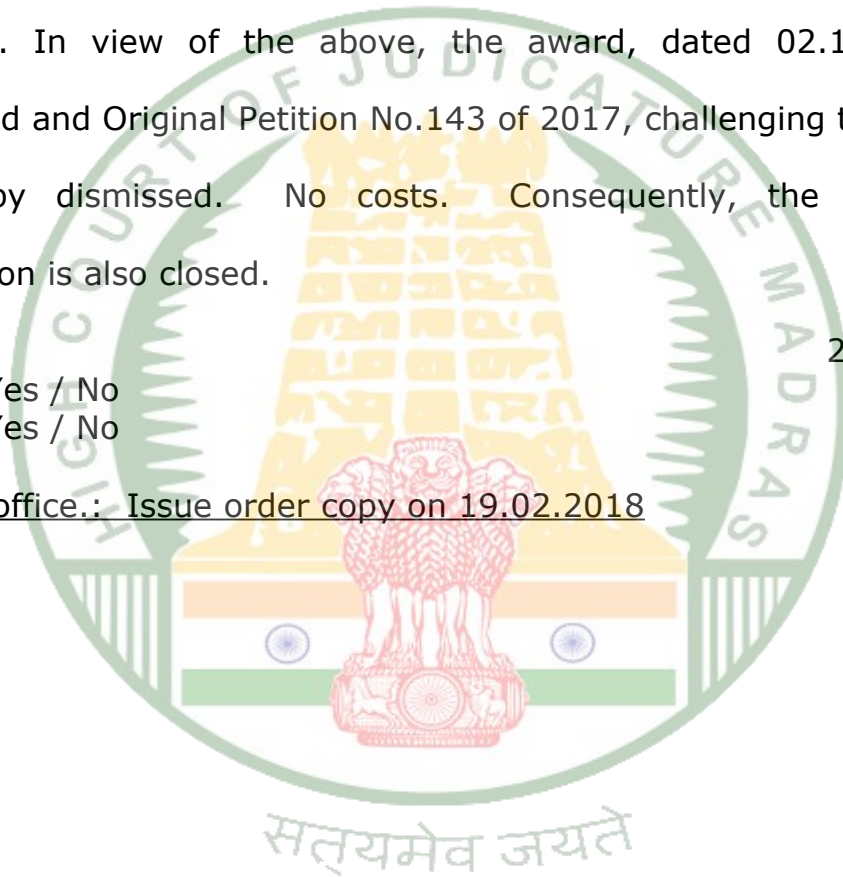
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Dr. S.VIMALA, J.,

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