In the High Court of Judicature at Madras

Dated: 20.03.2018

Coram

The Honourable Dr.JUSTICE ANITA SUMANTH

O.P.No.1052 of 2017

and O.A.No.1222 of 2017

and A.Nos.8335 and 8336 of 2017

1. Savithri Naidu
2. Rajiv Naidu
3. Vikram Naidu
4. Matchpoint Tennis Academy Pvt.

Represented by Managing Director

Mr.Rajiv Naidu

.... Petitioners

Vs.

Landmark Housing Projects Chennai Pvt.Ltd.

Represented by its Managing Director

Mr.T.Udayakumar

.... Respondent

PETITION under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator to resolve the disputes arising out of Memorandum of Understanding dated 23.07.2014 between the petitioner and respondent.

For Petitioners : Mr.P.S.Raman, SC

For Mr.Nithyesh & Vaibhav

For Respondents: Mr.R.Balachanderan – R1

Mr.V.Balakrishnan – R2 & R3

(in Applications)

Mr.Aditya S.

For M/s.Ojas Law Firm – R4

(in Applications)

ORDER

This common order disposes O.P.No.1052 of 2017, O.A.No.1222 of 2017 and A.Nos.8335 and 8336 of 2017.

2. The Original Petition filed by Mrs.Savithri Naidu and three others, petitioners 2 and 3, her sons and petitioner 4, a limited company, prays in terms of section 11(6) of the Arbitration and Conciliation Act 1996 (in short 'Act') for the appointment of an Arbitrator to resolve disputes that have arisen between the parties from and out of Memorandum of Understanding (MOU) dated 23.7.2014.

3. The Original Applications have been filed in terms of section 9 of the Act seeking various interim reliefs. A.Nos.8335 and 8336 of 2017 pray for a direction to respondents 2 and 3 to deposit before the Registrar General of this Court, the complete Original MOU dated 23.7.2014 and original supplementary MOU dated 20.10.2014 to be retained in safe custody by the Court and thereafter by the Arbitrator till the disposal of the matter before him.

4. A.No.1222 of 2017 prays for an order of interim injunction restraining respondents 1 and 4 from alienating, transferring, or in any manner creating third party interest in the schedule property.

5.Interim injunction as prayed for in A.No.1222 of 2017 was granted on 15.12.2017, which is current.

6. Along with the injunction, notice was issued whereupon Mr.Balachanderan learned counsel has entered appearance for R1, Mr.V.Balakrishnan, learned counsel for R2 and R3 and Mr.Aditya S for Ojas Law Firm, for R4.

7. Mr. P.S.Raman, learned Senior Counsel appearing for Nithyaesh and Vaibhav, learned counsel for the petitioners/applicants and the aforesaid learned counsel for the respondents/respondents have been heard in detail.

8. For convenience, the parties are referred to as per their status in the application.

9. The brief facts in relation to the Original Petition and Applications are set out below:

(i) The four applicants are Mrs.Savithri Naidu (A1), her two sons, Rajiv Naidu (A2) and Vikram Naidu (A3) and a private limited company, Match Point Tennis Academy Pvt. Ltd. (A4) of which A2 is Managing Director.

(ii) They are the absolute owners of a property admeasuring 9 acres 80 cents situate at Sholinganallur, Kancheepuram District.

(iii) The parties entered into a Memorandum of Understanding dated 23.7.2014 with Landmark Housing Projects Chennai Pvt. Ltd. (R1) for the sale of 7.71 acres of the land (subject property) for a total sum of 73,50,00,000/-.

(iv) The consideration was to be paid in the following manner as set out in Clause 3 of the MOU.

> *`(a) Rs.2,00,00,000/- (Rupees Two crores only) at the time of executing this MOU.*
>
> *(b) Rs.10,00,00,000/- (Rupees Ten crores only) within a week from the date of signing this MOU vis., by 29.7.2014.*
>
> *(c) Rs.5,00,00,000/- (Rupees five crores only) within a period of 1 month from the date of receipt of payment stipulate in clause 3(b).*
>
> *(d) Rs.8,00,00,000 /- (Rupees Eight crores only) within a period 2 months from the date of receipt of payment stipulated in clause 3(c).*
>
> *(e) Balance sum of Rs.48,50,00,000/- (Rupees forty eight crores and fifty lakhs only) which includes the compensation amount to be paid by the vendors to the Third party (as stipulated above) on confirmation of the clearance o cloud on the schedule "B" property title deeds pertaining to the schedule "B" property to the Purchaser and Possession of the schedule "B" property has to be handed over to the purchaser.'*

(v) The terms of the MOU are said to have been amended by MOU dated 20.10.2014. However, a copy of the MOU dated 20.10.2014 placed before me is unsigned and contains several blank fields.

(vi).According to Mr.Raman, a sum of Rs.43 crores has been received by the applicants and what remains unpaid is a sum of Rs.30.5 crores.

(vii).The MOU notices, at clauses 9 and 10 thereof that a dispute exists in respect over the title for the property and a suit has been filed in 2010 for declaration of title and recovery of possession of the land from the present applicants. An I.A. had been filed seeking rejection of the plaint and the suit had been dismissed on 17.7.2014 by the Principal District Court, Chengalput. No appeal was filed against the aforesaid order and as on date the title undisputedly vests in favour of the applicants. However, the applicants agree to indemnify the respondents in the event there is any further difficulty noticed or claim to the title and agree to provide a property, encumbrance free, to the purchaser.

(viii) A blank, undated cheque for an amount of Rs.30,23,34,000/-, duly signed by the authorised signatory of R1 was handed over to the applicants as security against the sale consideration.

(ix) The MOUs executed have been are handed over to R2 by the applicants for safe keeping till the conclusion of the transaction.

(x) Vide Sale Deed dated 10.11.2014, A1 conveys her share of the subject property to R1. Thereafter sale deeds dated 12.11.2014 have been executed by A2, A3 and A4 transferring their respective shares of the subject property to R1.

(xi)The sale deeds record collectively, the consideration of a sum of Rs.25 crores over and above which consideration of sum of Rs.18 crores has been received, according to the learned counsel for the applicants.

10.The argument of Mr.Balachanderan objecting to the maintainability of the OP as well as Applications is very simple. He would state that the consideration mentioned in the sale deed is the only consideration that was agreed upon and the same stands fully satisfied as recorded in the registered sale deeds itself. As such there is no dispute, much less an arbitral dispute as between the parties.

11.The flaw in the argument, however is revealed in the counter filed by R1, wherein at paragraph 6, R1 confirms that sale consideration of an amount of Rs.7 crores is still outstanding. The relevant portion of the counter is as follows:

> *'After entering into the memorandum of understanding dated 23.07.2014 clarifying the transactions under the memorandum of understanding dated 23.7.2014 and also altering the portions of the memorandum of understanding dated 23.7.2014, the petitioners and the respondents entered into the supplemental agreement dated 25.07.2014 and as such as per the memorandum of understanding dated 23.7.2014 and the supplemental memorandum of understanding dated 25.07.2014 the respondents has so far paid entire sale consideration except for retaining a sum of Rs.7,00,00,000/- (Rupees seven crores only) which was retained by the respondent in accordance to clause 3(d) of the memorandum of understanding dated 23.4.2017 since the cloud over the title of the petitioner was not yet cleared and confirmed and the suit in*

OS.No.554 of 2016 is pending before the Principal District Munsiff at Alandur.'

12. There is thus no substance in the argument of Mr. Balachanderan to the effect that there is no dispute as between the parties and that the transaction has been concluded on the basis of the consideration mentioned in the sale deeds. As confirmed by R1, a sum of Rs.7 crores is still due to the applicants from R1.

13.The second argument raised by Mr.Balachanderan is a novel one. According to him, the parties had agreed that out of a total consideration of Rs.73,50,00,000/- agreed upon, a sum of 25 crores would be paid through normal banking channels, and the balance of the consideration of Rs.48.5 crores would be paid by way of cash, unaccounted and undisclosed to statutory authorities including income tax. To this end, he would produce various documents in connection with proceedings initiated by the Income Tax Department for search and seizure under the provisions of the Income Tax Act, 1961.

14. Since this issue has serious ramifications on the admissibility of the matter, both parties were directed to circulate copies of statements recorded by the Income Tax authorities as well as returns of income and assessment orders passed under the provisions of the Income Tax Act.

15. Mr.Nithyaesh has filed a copy of the Income tax return of A1 for assessment year 2017-18 and sworn statements recorded from A2 by the Deputy Director of Income Tax (Inv.) Unit – 2(3), Chennai.

16.Statement dated 15.12.2017 discloses receipt of on-money by the applicants. Question No.15 specifically seeks a clarification from A2 as to whether the on-money has been offered to tax and A2 confirms that it has not. Question No.15 and the answer thereto are as follows:

> *15. Have you disclosed the sale consideration received by you in cash/through cheque in the return of income filed for the AY:2015-16?*
>
> *Ans. I have disclosed the sale proceeds received through cheque only in my return of income.*

17. Question No.16 and answer thereto relating to the receipt of entire consideration is extracted below:

> 16.*'You were supposed to receive the remaining balance of Rs.30,23,34,000/- on or before 31.3.2015 as per your mutual understanding. Did you receive the same?*
>
> *Ans:Madam we have not received the balance amount of Rs.30,23,34,000/- till 24.9.2017, even after several negotiations. Hence I deposited the cheque in my Axis Bank personal account (42301010052818) in consultation with my mother and brother. However it got bounced and we were shocked to know that the account was closed in 2016 itself.'*

18. Question No.14 relates to the consideration recieved by all four applicants and the bifurcation thereof as cheque and cash components. A2 replies as follows:

> *'14. What was the mode of payment? Till now how much you have received?*
>
> *Ans: The total amount received is Rs.43,26,66,000/- out of which cheque payment was totalling to Rs.31,26,66,000/- and cash payment was Rs.12,00,00,000/-. For the remaining balance of Rs.30,23,34,000/- Mr.Uday Kumar gave a collateral cheque (No.004730) of Axis Bank, Teynampet Branch.*
>
> *I am herewith submitting the copy of collateral cheque given by Shri.Uday Kumar (Annexure-A-Enclosed)'.*

19. Thereafter an assessment appears to have been made upon A1 on 29.12.2017 and the Income Tax Department has brought to tax the entire amount of Rs.33,70,91,817/- as Income under the head 'capital gain'.

20.A Writ Petition appears to have been filed by A1 challenging the aforesaid order and a learned Single Judge of this Court has granted an order of stay of all further proceedings pursuant to order of assessment dated 29.12.2017.

21.As far as R1 is concerned, the learned counsel confirms that no assessment has been completed thus far. He circulates a statement recorded from the Managing Director of R1 on 15.12.2017 and 16.12.2017. Question No.5 and the answer thereto are relevant.

'Q.No.5 : I am showing you page No.247 of the loose sheet seized vide annexure ANN/RM/LMPH/LS/S and page no.1 to 125 of the loose sheet seized vide annexure ANN/VK/LMPH/LS/S1 from the Business premises of M/s.Landmark Housing Projects Private Limited at No.27, Saravana Street, T.Nagar, Chennai-17, please go through these pages and explain its contents.

Ans: Sir, I have gone through the loose sheets seized. The contents indicate the payments made for the purchase of property at Sholinganallur from Smt.Savithri Naidu, Shri Rajeev Naidu, Shri Vikram Naidu and M/s.Match Point Tennis Academy India Pvt. Ltd. The payments shown in page no.247 of the loose sheets seized vide annexure ANN/RM/LMPH/LS/S contain the deails of cheque payments made. The payments shown in page no 1 of the loose sheets seized vid annxure ANN/VK/LMPH/LS/S1 contain the details of cash payments made. Hence, the total amount paid for the purchase of the said property is Rs.65,96,66,000/- out of which Rs.32,01,66,000/- was paid in cheque and Rs.33,95,00,000/- was paid in cash.'

22. Learned counsel also circulates an order of attachment of the subject properties dated 2.3.2018 by the Income Tax Department.

23. The parties are now at issue with the Income Tax Department in proceedings for bringing to tax the on-money received by the applicants from R1. No doubt, they are duty bound to explain to the department as to why the aforesaid amounts were not offered to tax. However that is besides the point as far as the present applications are concerned and the receipt of on money by the applicants thus far has no impact on the ambit of the matter as pending before me.

24. The argument appears to be that the entire transaction is tainted by virtue of the on-money paid, seeing as the transaction is one that is contrary to public policy.

25. R1 relies on a judgment of the Supreme Court in the case of *S.P.Chengalvaraya Naidu (Dead) by Lrs Vs. Jagannath (Dead) by Lrs and others* (CDJ 1993 SC 657), and decisions of the Delhi and Allahabad High Courts in *Abhey Dewan and others Vs. Manoj Sethi and other* (CDJ 2013 DHC 637) and *Ram Sewak Vs. Ram Charan (deceased by L.Rs.) and another* (CDJ 1981 AH HC 063), all to the effect that no relief could be sought by a party and no relief granted by a Court where the transaction is an unclean one or one that is, as in the present case, contrary to public policy.

26. However, as noted earlier, the present applications only touch upon the dispute in relation to balance of sale consideration payable.

27. The events leading to the dispute in question unfold as under:

(i) Communication from the Managing Director of R1 dated 14.09.2015 is to the effect that the commitment in regard to the outstanding would stand resolved at an early date.

(ii) A1 thereafter implores R1, vide e-mail dated 03.12.2015 to settle the amount outstanding immediately or in the alternative return 4.5 acres of the land with sufficient road access to her.

(iii) Mr. Balachanderan, for his part places considerable reliance on e-mail dated 18.3.2016 wherein the Manager (Legal) of R1 states '*since* *the sale has now been completed in entirety, we kindly request your goodself to return the blank cheque*'.

(iv) A reply has been issued by A3 on 21.3.2016 expressing his shock at the aforesaid e-mail and pointing out that there were, in fact, substantial dues that remain unpaid.

(v) The applicants demand on 23.08.2016 that R2 return the original documents in relation to the schedule property since the sale has not been completed as originally agreed. The demand is reiterated by a detailed letter dated 15.09.2017.

(vi) Thereafter, since no response was forthcoming, the applicants had proceeded to deposit the blank cheque in September, 2017 and the same was returned by the Bank under Memo dated 25.09.2017 stating that the account had been closed. Proceedings under section 138 of Negotiable Instruments Act are stated to be pending in this regard.

(vii) R1 executes a Memorandum of Deposit of Title deeds on 27.09.2016 mortgaging the schedule property to R4 for a sum of Rs.50,00,000/-.

(viii) R2 replies on 30.09.2017 denying all allegations.

28. I am, in the present Original Petition and Applications, however concerned only with the transaction inter se the applicants and R1, R2 to R4 not being parties to the agreement.

29. Had it not been for the statement in the counter to the effect that a sum of Rs.7 crores was remaining unpaid, the applicants might have been hard put to establish that any amount was, in fact, outstanding. However, the counter reveals that, admittedly, an amount of Rs.7 crores is payable to the applicants. This, seen in the light of the assertion of the respondents to the effect that a sum of Rs.30.5 crores is outstanding from R1 is, in effect, the dispute and both parties are thus seen to be ad idem on the aspect of outstanding sale consideration. The only question is whether the balance remaining unpaid is an amount of Rs.7 crores, Rs.30.5 crores or any amount in between the two amounts.

30.The Supreme Court, in the case of *Duro Felguera, S.A. Vs.M/s.Gangavaram Port Limited* (2017 SCC OnLine SC 1233) holds that this Court under section 11 of the Act is to convince itself solely about the existence of an arbitration clause, and that, in this case, is not disputed.

31.I have already held that the dispute in question is not established to be in the realm of an illegal transaction as it concerns payments which are yet to be made as between the parties. To this end it has been established without doubt before me that a dispute exists as between the parties in regard to the quantification of the outstanding amount. Moreover, I note that clause 3(e) of the MOU quantifying a portion of the sale consideration does not anywhere stipulate the mode of payment, and I thus proceed on the clear premise that the transaction in respect of the balance of sale consideration remaining unpaid, is a valid and legitimate one to be conducted through normal banking channels and duly disclosed to all statutory authorities.

32. The appointment of an arbitrator is sought in terms of clause 16 of MOU dated 23.7.2014 between the parties. Though clause 16 provides for a named arbitrator, one Mr.R.Venkataraman arrayed as R2 in the application, both learned counsel concur on the position that R2 has a conflict of interest as regards the present matter. They jointly suggest and concur on the appointment of Mr. Justice S.Nagamuthu, Former Judge of this Court as sole arbitrator. The concurrence expressed by Mr.Balachanderan, under instructions from R1, is without prejudice to the objection raised on maintainability of these applications.

33. I thus appoint, by consent of parties, Mr. Justice S.Nagamuthu, Former Judge of this Court as the Arbitrator to hear and adjudicate upon the disputes arose between the parties. The learned Judge is at liberty to fix his fee as well as schedule of expenses and both parties shall bear the same equally.

34.An injunction has been granted by this Court on 15.12.2017 restraining the respondents from transferring/alienating the subject property. However, as the Income tax Department has thereafter issued an order of attachment dated 02.03.2018 in terms of section 132(9B) of the Income Tax Act, 1961 no further orders are passed as regards this aspect of the matter and A.No.1222 of 2017 stands closed.

35. Application Nos.8335 and 8336 of 2017 stand transferred to the learned Arbitrator who is requested to dispose the same in accordance with law.

36. As regards R2, the named Arbitrator in the Arbitration Agreements between the parties, various allegations have been made to the effect that the original MOUs had been handed over to R2 in a 'black bag', and thereafter passed on to R3 for safe keeping. The specific allegation against R2 and R3 is that they have induced the applicants into parting with the original documents and have tampered with the same.

37. As far as R4 is concerned, it is stated that the directors of R4 and R1 are close associates. A change has been created by R1 by executing a Memorandum of Deposit of Title Deeds in respect of the schedule property favouring R4 for a paltry sum of Rs.50.00 lakhs. In all, the applicants level a series of allegations against the acts of omission and commission by R2, R3 and R4, both independently and in collusion with R1.

38. I refrain from adverting to the allegations or the facts in relation to the involvement of R2 to R4 since they are not parties to the arbitration agreement. I leave it at that, granting liberty to the parties to seek impleadment of the parties in the proceedings for arbitration, if desired. The learned Arbitrator is requested to consider such request, if made, in accordance with law.

39. In fine, O.P.No.1052 of 2017 is allowed; O.A.No.1222 of 2017 is closed and A.Nos.8335 and 8336 of 2017 are transferred as interim applications to the file of the learned Arbitrator for disposal in line with section 17 of the Act in accordance with law.

msr/sl 20.03.2018
Index:Yes/No

Speaking order/non-speaking order

Dr.ANITA SUMANTH,J.

Msr/sl

O.P.No.1052 of 2017

and O.A.No.1222 of 2017

and A.Nos.8335 and 8336 of 2017

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