IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 29.10.2018

DELIVERED ON: 29.03.2019

CORAM

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

Original Petition No.282 of 2017
and A.No.6895 of 2018

1.M/s.Happy Home Promoters India Pvt.Ltd.,
Rep. by its Director Mr.T.Karthikeyan
Old Door No.7, New No.13, Ameerjan Street
Anurithi Apartments, Thiruvalluvapuram
Choolaimedu, Chennai-600 094

2.J.Loganathan
Son of Mr.S.Jayaraman-represented by his
Power of Attorney Agent Mr.T.Karthikeyan
Old Door No.7, New No.13, Ameerjan Street
Anurithi Apartments, Thiruvalluvapuram
Choolaimedu, Chennai-600 094 .. Petitioners

Vs.

Mr.Vijay M.Jain
S/o.Mangilal C.Jain
No.59/2, Govindappa Naicken Street
Chennai-600 001 .. Respondent

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 20.06.2014.

For Petitioners : Mr.Jesus Moris Ravi

For Respondent : Mr.S.R.Rajagopal, Senior Counsel
for Ms.Preethi S.Arasu & Mr.S.R.Ragunathan

ORDER

Challenging the award dated 07.03.2016 and corrected award dated 15.03.2016 passed by the Sole Arbitrator, the Petitioners have come up with the present Original Petition.

2. The Petitioners are the Respondents in the Award and the Respondent in this O.P., is the Claimant before the Arbitrator.

3. The case of the claimant/Respondent is that he had approached the Respondents/Petitioners herein-Builder to enter into three Construction agreements in the Project "Green Jade". The following are the details of agreements:-

Sl. No	*Registered Agreement for sale of UDS of land*	*Value of undivided share of land (Rs)*	*Agreement for construction of flats*	*Cost of Construction of flat (Rs)*	*Total Price (Rs)*	*Advance Amount paid (Rs)*
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	16.07.2013 451.98 sq.ft	3,15,769/-	16.07.2013	30,24,000/-	33,39,769/-	14,00,000/-
2.	16.07.2013 460.76 sq.ft	3,22,532/-	16.07.2013 Flat No.18 in III Floor measuring 1029 sq.ft	30,87,000/-	34,09,532/-	14,00,000/-
3.	16.07.2013 451.98 sq.ft	3,15,769/-	16.07.2013 Flat No.25 in IV Floor measuring 1008 sq.ft	30,24,000/-	33,39,769/-	14,00,000/-
					Total	42,00,000/-

The 2nd Petitioner/J.Loganathan executed three sale agreements dated 16.07.2013 by receiving an advance of Rs.1,00,000/- for each sale agreement for sale consideration for the UDS as mentioned above. The 1st Petitioner-Builder also entered into construction agreement on 16.07.2013 apart from the sale agreement for a sum as mentioned in Column (5) of the above tabular column.

4. The contention of the claimant is that the respondents shall have to complete the execution of the deed of sale of undivided share of land and the construction of flats within one year from the date of the agreements. As the respondents/Petitioners herein/Builder failed to construct and hand over possession of the flats despite repeated demands, the claimant sent a notice dated 21.07.2014 calling upon the respondents/Petitioners herein to complete the execution and registration of sale of undivided share of land and put the plaintiff in possession of the respective flats.

5. The contention of the claimant is that he is always ready and willing to pay the balance amount in respect of the construction of flats and sale of undivided share of land and perform his part of the obligation.

6. The respondents in the Award/Petitioners herein(Builder) have also sent reply notice dated 04.08.2014 and had assured the claimant that the agreements would be honoured by the respondents (Builder). But the flat was not handed over to the respondent herein/claimant even after expiry of one year. Therefore, the claimant/respondent sent a notice on 27.11.2014 by informing the petitioners/Builder to forthwith complete the registration of the land and put the claimant in possession and to register the undivided share of the land and to inform the date of the registration of the sale deed, so as to enable him to pay the balance sale consideration.

7. It is the contention of the claimant in his Claim Petition that instead of complying with the above said notice, the respondents/Petitioners herein (Builder), had stated that the said amount paid by the claimant is only for the loan borrowed by the respondents for the purpose of construction of multi storeyed building.

8. Since the dispute arose between the claimant/respondent herein and the respondents/Petitioners herein(Builder), with regard to Agreement for sale and construction Agreement, the claimant invoked the Arbitration clause in the aforesaid agreement and the claim has been taken before the

Arbitrator. Accordingly, notice of the first meeting of the Arbitral Tribunal was fixed on 24.12.2014.

9. The claimant filed a claim Petition under Section 23 of the Arbitration and Conciliation Act, 1996, before the Sole Arbitrator for the following reliefs:-

> "(A) For specific performance of the 3 agreement for sale all dated 16.07.2013 registered as documents No.7299, 7300 and 7301 of 2013 in Sub Registrar Office by registering the 3 deeds of sale after receiving the balance sale consideration.
>
> (B) For handing over possession of Flats No.9, 18 and 25 after receiving the balance construction cost.
>
> (C) In the alternative, shall the Hon'ble Tribunal, feel that the award for specific performance is not feasible to pass an award for refund of all the payments in respect of 3 Agreement for construction and 3 agreements for sale to the tune of Rs.42,00,000/- together with interest at the rate 24% p.a., from the day of payment till realisation as compensation or damages for failure of the respondents to perform their part of the contract and create charge over the said 3 flats Nos.9, 18 and 25 subject matter of the Agreement for sale and construction Agreement.
>
> (D) Pass such further or other orders as this Honourable Court may deem fit and proper and thus render justice. "

10. In the common counter affidavit filed by the respondents/Builder and another, the petitioners herein had specifically denied the allegations made in the Claim Petition and submitted that the issues involved in the claim petition could not be resolved through arbitral proceedings and the same has to be tried before the competent civil court. In paragraph 6 of the said counter, it is stated that the claimant has expressed his willingness to pay the loan for the sum of Rs.42,00,000/- with the terms and conditions and that the 1st Petitioner/Director of M/s.Happy Homes Ltd., has to repay the said sum by way of paying 20% of the said sum on every 10 days in 10 installments. Accordingly, the claimant had paid Rs.37,80,000/- after deducting the interest amount on 19.07.2013 and therefore 1st Petitioner has to pay 5% of the sum of Rs.42,00,000/- as commission to Mr.Subramaniam for introducing the claimant.

11. In the counter affidavit, the Petitioners herein submitted that there are lot of triable issues involved in the matter which could be tried only by the competent Civil Court and hence, the claim petition is not maintainable.

12. Before the Arbitrator, proceedings was commenced on 21.11.2015. Thereafter, Proof Affidavit was filed by Claimant stating that he has paid a total sum of Rs.42,00,000/- in respect of the above 3 flats and its

respective undivided share of land. It is further stated that it was agreed that the respondents(Builder) would complete the construction and hand over the possession of the flats within one year from the date of agreement, failing which, agreed to return the entire advance together with interest at 24% p.a., from the date of agreement till payment to the claimant, as mentioned in clause (6) of the construction agreement.

13. On the side of the claimant, documents Ex.P.1 to Ex.P.16 were marked. Thereafter Arbitral Proceedings was held on 05.12.2015, 09.01.2016 and none appeared for the respondents on 24.01.2016. When the evidence of the claimant as CW-1 was in progress, the 1st respondent T.Karthikeyan appeared in person and filed a memo to decide the preliminary issue before trial. Since the preliminary issue has already been framed as Issue No.1, it is observed by the Tribunal that it will be taken up for consideration at the time of final disposal and there is no need to take it up as preliminary issue before trial.

14. By considering the Pleadings, documents and the evidence adduced by both parties, the Arbitrator, in his Award dated 07.03.2016, has framed the following issues:-

"(1) Whether the Sole Arbitrator is not competent to deal with the subject matter of the disputes between the Claimant and the Respondents?

(2) Whether the three Agreements for sale of undivided shares of and whether the three agreements for construction of flats are intended only as security for the loans advanced by the claimant to the respondents?

(3) What is the total amount paid by the claimant to the respondents?

(4) Whether the Claimant is entitled to alternative relief claimed in the Claim Petition?

(5) To what rate of interest is the claimant entitled if the alternative relief is given ? and

(6) To what relief ?

15. The Arbitrator had discussed all the above said issues in his award and rejected the contention of the 1st Petitioner-T.Karthikeyan and pointed out that T.Karthikeyan has executed three registered agreements for sale of undivided shares of land and three agreements for construction of flats with full knowledge of the nature of the documents and of being fully apprised of the contents of the documents. Taking into consideration of all these facts, it was held that three agreements for sale of undivided shares of land and the three agreements for construction of flats were real and they were not

intended to serve as security for the alleged loan transaction.

16. Conclusively, in the Award, the Arbitrator/Arbitral Tribunal has passed the following Award:-

> "(1) The Respondents represented by Mr.T.Karthikeyan, are directed to pay to the claimant Mr.Vijay M.Jain a sum of Rs.42,00,000/- [Rupees Forty two lakhs only] with interest thereon at 24% per annum from 16.7.2013 till the date of this Award viz., 7.3.2016 and subsequent interest at 24% per annum from the date of this Award till payment with a charge over the flats in question viz., flat No.9 in the second floor, Flat No.18 in the third floor and Flat No.25 in the fourth floor in the project "Green Jade" developed by the respondents represented by Mr.T.Karthikeyan, in Chettiyaragram Village, Ambattur Taluk, Thiruvallur District;
> (2) The Respondents represented by Mr.T.Karthikeyan, are directed to pay to the claimant Mr.Vijay M.Jain a sum of Rs.5,45,000/- [Rupees Five lakhs forty five thousand only] being the cost of the proceedings as per the cost memo filed by the claimant."

17. Assailing the said award, the Petitioners herein, who are the respondents before the Arbitrator has preferred the present Original Petition before this court.

18. The learned counsel for the Petitioners raised various grounds and among other grounds, it is stated that the Order of the Sole Arbitrator is not

maintainable; Arbitration Proceedings initiated by the claimant is unlawful and not according to statutory provisions of Arbitration and Conciliation Act, 1996; the Award has been passed without accounting the payments made by the Petitioners to the respondent during Arbitration proceedings. Arbitration proceedings was not sent to the Petitioner as per the statutory requirements; the alleged debt is disputed by the Petitioners and the respondent/claimant is put to strict proof of the same since the charges imposed, rate of interest applied are outside the purview and beyond the scope of the loan agreement; the Petitioners have already paid more than the actual amount payable to the respondent/claimant; the learned Arbitrator has failed to appreciate the fact and the principles of law governing the Negotiable Instruments Act.

19. It is the contention of the learned counsel for the Petitioners that award passed by the Arbitrator is erroneous and not sustainable. It is contended that as per the Construction Agreement entered into with the 1st petitioner, any dispute under the Construction Agreement can be referred to the Arbitrator and the Agreement also consists of a default clause on the part of the 1st Petitioner alone and the construction agreement is not binding the 2nd Petitioner since the 2nd Petitioner is not a party to the construction agreement. It is also submitted that as per the Arbitration

clause in the Sale Agreement entered with the 2nd Petitioner, the Agreement is specifically enforceable through an Arbitrator appointed by the Purchaser at Chennai and there is no default clause or refund clause available in the Sale agreement. It is also submitted that combining the default clause between the Parties as a single issue under a single claim petition filed by the respondent and combining both the issues without differentiating the performance between the parties and the nature of claim made by the respondent and as such, the Award passed by the Arbitrator is not maintainable.

20. The learned counsel for the Petitioners further argued that the dispute between the parties is purely civil in nature, therefore, the proceedings cannot be decided under the Arbitration Act. It is further stated by the Petitioners counsel in their written submission that the Sole Arbitrator has abused the process of law and has caused injustice to the Petitioners however the ground is not raised in the Original Petition.

21. On going through the Award and the evidence adduced by the Petitioner, the ground raised by the Petitioners herein that the agreements were intended to serve as security for the alleged loan transaction, cannot be entertained and accordingly, the contention of the Petitioners is rejected.

22. Insofar as Issue No.1 as to Whether the Sole Arbitrator is not competent to deal with the subject matter of disputes between the claimant and the respondents is concerned, the contention of the learned counsel for the Petitioners is that for the notice sent by the Claimant/respondent herein that the Petitioners herein/respondents have not fulfilled the contract as agreed by them and handed over the possession of flat within one year, reply has been given by the petitioners herein. It is also stated that the Arbitral Tribunal is not competent to deal with the matter. However, the Arbitrator has held that the said contention is only an after-thought and therefore, the Tribunal is competent to deal with the matter and answered Issue No.1 accordingly, which in my considered opinion, holds good.

23. It is contended by the claimant before the Arbitrator that three registered agreements are for sale of undivided shares of land and the three agreements are for construction of flats. An advance of Rs.14,00,000/- towards each transaction, totalling to Rs.42,00,000/- has been paid by the claimant to the respondents/petitioners herein. Exhibit C-2 is an agreement for sale of undivided share of land of 451.98 sq.ft for a sum of Rs.3,15,769/- corresponding to construction of Flat No.9 in the second floor in the Project "Green Jade" covered under Exhibit C-5. Exhibit C-3 is an agreement for sale of undivided share of land of 451.98 sq.ft for a sum of Rs.3,15,769/-

corresponding to construction of Flat No.25 in the fourth floor under Exhibit C-6. Exhibit C-4 is an agreement for sale of undivided share of land of 460.76 sq.ft. for a sum of Rs.3,22,532/- corresponding to construction of Flat No.18 in the third floor under Exhibit C-7.

24. The Claimant before the Arbitrator viz., Respondent herein sought for alternative relief for refund of Rs.42,00,000/- paid by him as advance, with interest thereon at 24%. The Arbitrator, finding that absolutely there is no evidence on record to substantiate the contention raised by the respondents/Petitioners herein viz., the Builder, passed the Award directing the respondents therein/T.Karthikeyan to pay to the claimant Rs.42,00,000/- with interest at 24% per annum and other relief as noted in the preceding Paragraph. In this regard, the learned Arbitrator cited the decision of this court in the case of ***K.Nirmala V. Sellamuthu [2014-4-LW-72]*** and pointed out that having executed voluntarily fully well the agreement of sale, contending that it was not an agreement for sale and it was something else, cannot be accepted.

25. Admittedly, the 2nd Petitioner-J.Loganathan, who is the son of one Mr.S.Jayaraman, and represented by his Power of Attorney Agent Mr.T.Karthikeyan, entered into sale agreement for the sale of undivided

share of land for the property belonging to him. In pursuant to the sale agreement, a consideration was fixed and a part of consideration was paid to the 2nd petitioner and the Sale Agreement entered into between him and the respondent/claimant is by and through a registered Sale Agreement dated 16.07.2013 registered before Joint I Sub-Registrar, Saidapet, South Chennai. The details of the sale agreement entered into between the Parties are shortly tabulated as hereunder:-

Sl. No.	***Registered Agreement for sale of UDS of land***	***Value of undivided share of land (Rs)***	***Agreement for construction of flats***	***Cost of Construction of flat (Rs)***	***Total Price (Rs)***	***Advance Amount paid (Rs)***
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	16.07.2013 451.98 sq.ft	3,15,769/-	16.07.2013	30,24,000/-	33,39,769/-	14,00,000/-
2.	16.07.2013 460.76 sq.ft	3,22,532/-	16.07.2013 Flat No.18 in III Floor measuring 1029 sq.ft	30,87,000/-	34,09,532/-	14,00,000/-
3.	16.07.2013 451.98 sq.ft	3,15,769/-	16.07.2013 Flat No.25 in IV Floor measuring 1008 sq.ft	30,24,000/-	33,39,769/-	14,00,000/-
					Total	42,00,000/-

26. In the construction agreement dated 16.07.2013, Clause 2, 4, 5 and 6 state as follows:

"2. The Purchaser has paid a sum of Rs.13,00,000/-

(Rupees Thirteen Lakhs only) by various cheques and cash to the Builder as token advance at the time of execution of this agreement.

4. That the Builder doth hereby undertake and handover possession of the premises within 12 months.

5. The Balance cost of the Flat will be paid by the Purchaser to the Builder only on completion of construction of Flat and handling over the possession of the said flat to the Purchaser within the stipulated period.

6. If not, the Builder shall return the advance money received by him from the purchaser with an interest of 24% per annum from the date of receipt of the advance upto the date of return of the same. "

The aforesaid common clauses are included in all the three agreements. Therefore, the payments made have been specifically stated in the construction agreement. In such circumstances, the claimant seeking for alternate refund claimed in the Claim Petition, is justifiable.

SCOPE OF INTERFERENCE:-

27. The scope of interference by this Court under Section 34 of the Arbitration and Conciliation Act, in the award passed by the Arbitrator is very limited. The Division Bench of this Court in the case of **"Project Director, Tamil Nadu Road Sector Project II Vs. M/s.RNS Infrastructure Ltd., GPL (JC) and Others (O.S.A.No.301 of 2017 and C.M.P.No.18730 of**

2017) held as follows:-

> *"20. The scope for interference to an Arbitration award is very limited. Unless and until the applicant satisfies the requirements of Section 34 of the Act, the Arbitration Award cannot be set aside by this Court.*
>
> *21. The scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, to an Arbitral Award is covered by the decision of Hon'ble Supreme Court in*
>
> *(a) Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Limited reported in (2003) 5 SCC 705, wherein it was held that the Court can set aside the award, if -*
>
> *1) It is contrary to:-*
>
> *(a) fundamental policy of Indian Law; (or)*
>
> *(b) Interest of India; (or)*
>
> *(c) Justice and morality.*
>
> *2) It is patently illegal*
>
> *3) It is so unfair and unreasonable that it shocks the conscience of the Court.*

28. The Division Bench of the Delhi High Court in its recent decision dated 25.09.2017 in the case of **Ogene Systems India Pvt.,Ltd Vs. Technology Development Board reported in 2017 SCC On-Line DL 11136** delineated the following propositions after considering all the decisions of the **Hon'ble Supreme Court relating to Section 34 of Arbitration and Conciliation Act right from RENUSAGAR POWER**

COMPANY 1994 SUPP (1) SCC 644 TO THE RECENT ASSOCIATED BUILDERS VS. DDA (2015) 3 SCC 49.

(i) The four reasons motivating the legislation of the Act, in 1996 were:-

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by Courts, in the arbitral processed.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if:-

(a) It is contrary to the fundamental policy of Indian Law

(b) It is contrary to interest of India

(c) It is contrary to justice or illegal, or

(d) It is patently illegal, or

(e) It is so perverse, irrational, unfair, or unreasonable that it shocks the conscience of the Court.

29. This Court does not find any illegality in the award passed by the Arbitrator. A perusal of the award would show that upon hearing both sides and upon perusal of the oral and documentary evidence, the award has been passed. Execution of the agreements and the default clauses were found to

be true by the learned Arbitrator. In fact, the petitioners did not dispute the factum of execution of the agreements and the receipt of money. In such view of the matter, there is no valid reason as laid down by the Division Bench of this Court and the Delhi High Court in the decisions cited supra, to interfere with the award passed by the Arbitrator by invoking power under Section 34 of the Arbitration and Conciliation Act, 1996.

30. However, this Court is willing to consider the submission made by the learned counsel appearing for the petitioners insofar as the interest levied and the payment made. The payment, if any, made during the interregnum period will have to be given credit to, while proceeding with the execution petition. Insofar as the interest is concerned, the learned Arbitrator fixed it at 24% per annum, from the date of award, which is excessive, as held by this Court in several cases. Accordingly, the same is reduced to 12% per annum from the date of award, till realisation of the award amount.

31. With the above modification in the rate of interest, the original petition stands Partly Allowed. No costs. Consequently, connected Application, if any, closed.

29.03.2019

Index:Yes/No
Speaking/Non Speaking
nvsri

Note:Issue order copy on 24.05.2019

D.KRISHNAKUMAR, J.

nvsri

O.P.No.282 of 2017

29.03.2019