

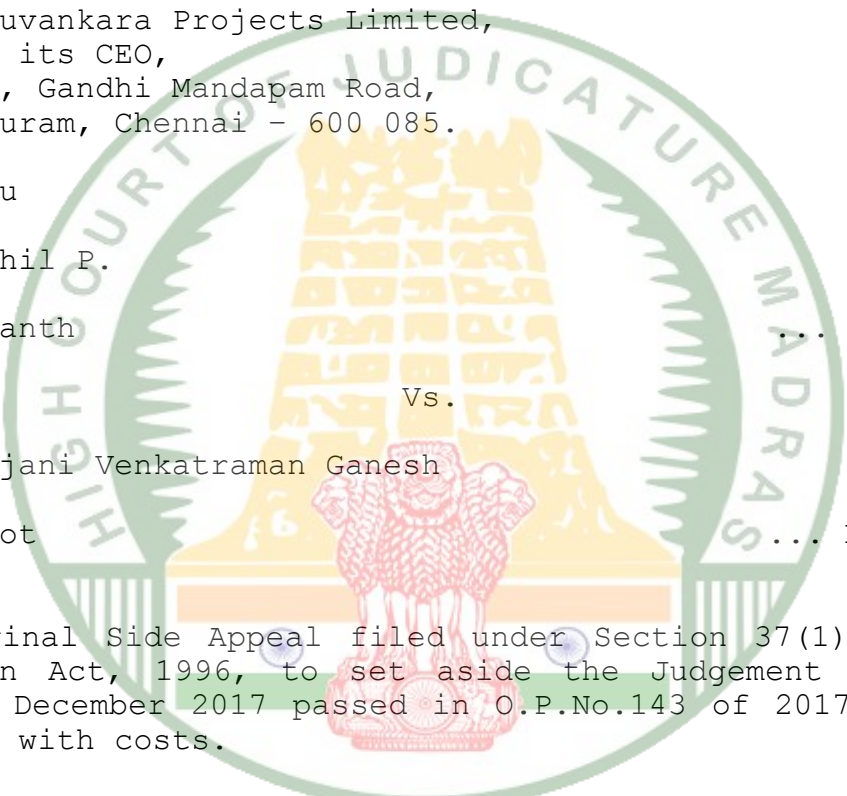
IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2018

CORAM:

THE HON'BLE Ms.INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE Mr.JUSTICE ABDUL QUDDHOSE

O.S.A.No.84 of 2018

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1. M/s.Puruvankara Projects Limited,
Rep. by its CEO,
No.36/2, Gandhi Mandapam Road,
Kotturpuram, Chennai - 600 085.
2. Mr.Naidu
3. Mr.Senthil P.
4. K.Nishaanth ... Appellants
- Vs.
1. Mrs.Ranjani Venkatraman Ganesh
2. K.D.Arcot Respondents

PRAYER:-

Original Side Appeal filed under Section 37(1)(C) of the Arbitration Act, 1996, to set aside the Judgement and decree dated 22nd December 2017 passed in O.P.No.143 of 2017 and allow the appeal with costs.

For Appellants ... Mr.R.Sathish Kumar

For Respondents ... Mr.N.L.Rajah
Senior Counsel
for MR.E.Jayasankar for R1
No appearance for R2

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JUDGEMENT

ABDUL QUDDHOSE, J.

This instant appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996, against the order dated 22.12.2017 passed in O.P.No.143 of 2017 by the learned Single

Judge of this Court under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the Arbitration Act").

2.The first Appellant is a builder and the remaining Appellants are its employees. The first respondent was one of the purchasers of a residential flat from the first Appellant in the Apartment Complex known as Purva Swanlake at Padur, Kelambakkam Village, Chengalpet Taluk, Kancheepuram District. The first Appellant and the first Respondent entered into a sale agreement and construction agreement both dated 20.02.2014, by which, the first Appellant agreed to sell and construct an Apartment for the first Respondent as per the specifications mentioned therein. There arose disputes between the first Appellant and the first Respondent under the aforesaid agreement. The first Respondent made a claim against the first Appellant, on account of

- (a) Delay in delivery of apartment,
- (b) Defective quality of the lift,
- (c) Providing insufficient electricity load much less than what was agreed upon under the agreement,
- (d) Not providing covered car parking,
- (e) Seepage and leakages found in the apartment,
- (f) Non-disclosure at the time of initial inspection that the apartment will over look a cemetery.
- (g) The club house and other facilities were not provided as per the agreement.
- (h) General backup of electricity and balcony enclosure cover not provided.

3.The dispute raised by the first Respondent was referred to Arbitration in accordance with the Arbitration clause contained in the agreement. The second Respondent was appointed as a sole Arbitrator by consent of parties.

4.The first Respondent made the following claim against the Appellants before the Sole Arbitrator which reads as follows:

"a. Interest at the rate of 24% for a sum of Rs.77,00,000/- from December 2014 to 31.10.2015 paid by the Claimant on 21.11.2014 for purchase of the flat which was not complete till October 2015 and there were elevator, water, club house issues and the tower was looking like a construction site only. The sum

of which amounts to Rs.16,94,000/-. As per agreement was to be handed over on November 2014 after payment of last due amount which has to be paid at the time of completion and handing over of the flat.

b. Loss of rental income at the rate of Rs.30,000/- per month from February 2015 (date when as per agreement possession was to be handed over after completion) to 31.10.2015 (when finally the construction came to an end) which amounts to a sum of Rs.3,90,000/- and interest on the said amounts at 24% from the date they were due for payment. It may be noted that the flat was finished with furnishing from UK including five air conditioners.

c. Loss of carpets, cabinets, furniture worth Rs.3,60,000/- due to seepage and leakage of water into the flat.

d. Air tickets for a sum of Rs.2,80,000/- as the Claimants had to come down suddenly from London after hearing that windows had opened and water was leaking.

e. A sum of Rs.10,00,000/- for mental trauma as the Claimants had to climb 14 floors many times due to non functioning of elevators, for poor quality of water, poor club house without proper facilities etc.

f. A sum of Rs.10,00,000/- for the unfair trade practices adopted by the first respondent by not revealing that the balcony had cemetery view, club house had only four tread mills for seven hundred families, for providing false information that 7 KW power will be provided in their advertisements whereas actually TNEB site showed only 4KW, Spa and Sauna could accomodate only two adults at a time.

g. to indemnify the claimant from any further reoccurrences of water seepages or leakages during the rains for a further period of two years.

h. To pay the costs of this proceedings; and

i. To pass such further or other orders as this Hon'ble Sole Arbitrator may deem fit and proper in the circumstances of the case and thus render justice."

5.The Appellant filed a counter statement to the claim made by the first Respondent before the Sole Arbitrator, denying its liability. Written submissions were also filed by both the parties before the Sole Arbitrator. During the course of Arbitral proceedings, the Sole Arbitrator also inspected the flat to note down the deficiencies, said to have been committed by the Appellants.

6.After perusing the materials available on record and after hearing the submissions of the learned counsels on both sides, the Sole Arbitrator passed an Award dated 02.11.2016 in favour of the first Respondent. The details of the award passed in favour of the first Respondent are as follows:

“(248) Summary of award

S.No.	Issue No.	Claimed Amount	Award Amount
1	Delayed delivery of apartment including non-delivery of car shed	Rs. 16,94,000	Rs. 4,21,500
2	Loss due to rental income	Rs. 3,90,000	Nil
3	Loss of carpet	Rs. 3,60,000	Nil
4	Cost of Air Ticket	Rs. 2,80,000	Nil
5	Defective quality and return of club house membership fee	10,00,000	Rs. 2,79,116
6	Unfair practice 7KW Power	10,00,000	Rs. 1,29,047
7	Cost of Arbitration		Rs. 2,73,844
	Total		Rs.11,03,507

7.The Arbitrator directed the first Appellant to pay the above said sum of Rs.11,03,507/- to the first respondent within a month from the date of receipt of the Award failing which the awarded sum shall attract further interest at 16.5% per annum from the date of the Award till realisation.

8.Apart from payment of money by the first Appellant, the sole Arbitrator also directed the Appellants to allot a covered car park within ten days from the date of the Award and also directed the Appellants to attend to the repairs/leakages till an Association is formed as per clause 13 of the Sale Agreement.

9. Aggrieved by the Arbitration Award dated 02.11.2016, passed by the second Respondent in favour of the first Respondent, the Appellants filed O.P.No.143 of 2017 before the learned Single Judge of this Court under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Arbitration Award. The learned Single Judge of this Court, after perusing the materials available on record and after hearing the submissions of the learned Counsels on both sides, dismissed the petition on 22.12.2017. While dismissing the petition filed by the Appellants under Section 34 of the Arbitration Act, the learned Single Judge has observed the following:

(a) Eventhough the liquidated damages for delay in delivery of possession was fixed at Rs.7,000/- p.m. under the agreement, the delay did not end within a period of 11 months, but it continued even thereafter. The award passed by the Sole Arbitrator for a sum of Rs.1,81,500/- for delayed delivery is on the basis of the actual loss suffered by the first respondent.

(b) 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.

(c) The scope of public policy in the light of Judgement of the Hon'ble Supreme Court in the case of ONGC vs. Saw Pipes MANU/SC/0314/2003 : 2003 (5) SCC 705 was discussed and the learned Single Judge held 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. According to the learned Single Judge, no other findings of the Sole Arbitrator can be said to shock the conscience of the Court. Therefore, the contention that the award is opposed to public policy cannot be accepted.

(d) After considering the scope of the Section 34 of the Arbitration Act and the various authorities relied upon by the learned Counsels namely (i) Eastern and Northern Frontier Railway Cooperative Bank Ltd., v. B.Guha and Company reported in AIR 1986 Cal. 146 (ii) Francis Klian Private Limited v. Union of India reported in 1995 2 Arb. L.R. 298 (iii) R.S.Builders v. Delhi Development Authority reported in AIR 1995 Del. 10 (iv) Yeshwantganpatrao v. Dattarayarao Ramchandran rao reported in AIR 1948 Nag. 162 (DB) (v) Bharu Kure Jat v. Tara Lal reported in AIR 1962 Punjab 173 (vi) State of Rajasthan v. Puri Construction Company Lts., reported in 1994 6 SCC 485 (vii) Laxmi Mathur v. Chief General Manager, MTNL reported in 2000 (2) Arb.L.R. 684 (Bom) (viii) Swan Gold Mining Ltd., v. Hindustan Copper Limited reported in (2015) 5 SCC 739 (ix) National Highways Authority of India v. Progressive Constructions Ltd.,

reported in (2017) SCC Online Del. 7867) did not find any scope for interference to the Arbitration Award. The learned Single Judge in her Order has observed that "The Sole Arbitrator 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". The learned Single Judge has also considered the discussions made by the Arbitrator in paragraphs 126 to 132 of the Award with respect to the defences raised by the Appellants and after considering the same, has given a clear finding that the learned Arbitrator has applied his mind to the terms of the contract and has found the arguments of the Appellants to be unacceptable.

(e) With reference to the claim for provision of covered car park, the learned Single Judge after referring to the observation made by the Sole Arbitrator in the Award that the allotment of car park is a part and parcel of the Construction Agreement and failure to allot the car park for reasons extraneous to the agreement has accepted the said findings of the Arbitrator that non-provision of the covered car park would amount to breach of the terms of the contract.

10. The learned Single Judge has also recorded the fact that the Sole Arbitrator had inspected the building in the presence of the Appellants, even though the Appellants had initially objected to the inspection, by the Sole Arbitrator. The learned Single Judge under the impugned order, has given a categorical finding that the Appellants have committed the breach of terms of the Construction Agreement. After considering the contentions raised by the Appellants, by giving reasons, the learned Single Judge dismissed O.P.No.143 of 2017 filed by the Appellant under Section 34 of the Arbitration Act.

11. Mr. Sathish Kumar, learned Counsel for the Appellants submitted that the Arbitrator has re-written the contract by awarding damages for delayed delivery of flat at Rs.16,500 per month, though the agreement stipulated only Rs.7,000/- per month. Therefore, according to him, the Arbitrator has acted beyond the scope of the reference and on this ground, the Award has to be set aside.

12. The learned Counsel for the Appellants drew the attention of this Court as to how the Arbitrator has arrived at the figure of Rs.16,500/- towards the compensation payable per month for the delayed delivery of the flat and submitted that the Arbitrator has arbitrarily fixed the amount. The learned Counsel referred to paragraphs 134, 135, 136 & 137 of the Arbitration Award, which are extracted below:

"(134) By accepting that there was a delay on their part, but by not crediting the claimant with compensation of Rs.7,000/- per month, Respondents have given a go by to this clause.

Further.

(135) Compensation of Rs.7,000/- per month works out to Rs.84,000/- per year Over an investment of over Rs.77,00,000/- this amount to a paltry 1% of return.

This when compared to 18% leviable by respondent vide clause 11(c) and 24% interest leviable by the respondent vide clause 7 of the agreement is nothing short of unfair trade practice.

(136) For all above reasons I state that clause 9 of the agreement cannot be applicable to present case.

Next question to be analysed is to ascertain what is reasonable compensation for delay in the project.

(137) Compensation for delay in handing over apartment with all amenities fit for use.

Depreciation of building

as per IT rules 5% per annum

Cost of construction as per
construction agreement

Rs.39,59,375/-

Hence depreciation

cost of apartment per year Rs. 1,97,968/-

Monthly depreciation Rs. 16,497/-

Say Rs. 16,500/-

Hence compensation payable for non delivery of apartment from 01.12.2014 to 31.10.2015 i.e., 11 months = Rs.1,81,500/-

Analysis of item 123(b) viz. Delay/non allotment of covered parking space.

Respondents have linked issue of balcony covering with non allotment of covered car parking."

13.The learned Counsel for the Appellants relied upon the decision of Hon'ble Supreme Court in the case of Kailash Nath Associates vs. Delhi Development Authority and Another reported in (2015) 4 SCC 136 and another decision of the Hon'ble Supreme Court in the case of Delhi Development Authority vs. R.S.Sharma and Co., New Delhi reported in AIR 2009 SC (Supp) 717. He relied on paragraphs 43 and 43.1 of the Judgement reported in 2015 (4) SCC 136 which are extracted hereunder:

"43.On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1.Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation."

14.The learned Counsel for the Appellant also submitted that it is open for the Court to consider whether the award is against the specific terms of the contract and if it so, the Court can interfere on the ground that the Award is patently illegal and opposed to public policy of India. In support of this proposition, he relied upon AIR 2009 SC (Supp) 717 referred supra. Paragraph 12 of the said Judgement which was relied upon by the learned Counsel for the Appellant is extracted hereunder:

"12. From the above decisions, the following principles emerge:

- (a) An Award, which is
 - (i) contrary to substantive provisions of law; or
 - (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
 - (iii) against the terms of the respective contract; or

(iv) patently illegal, or
(v) prejudicial to the rights of the parties, it is open to interference by the Court under Section 34(2) of the Act.

(b) 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 of morality;

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court

(d) 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 the public policy of India."

15. According to the learned Counsel, the Arbitrator has not passed the Arbitration Award in accordance with the terms and conditions of the contract, but arbitrarily based upon his own reasoning has awarded the compensation. The learned Counsel for the Appellant drew the attention of this Court to paragraphs 248, 249 & 250 of the Award, which deals with (a) Summary of the Award, (b) Interest payable by the Appellants and (c) Allotment of covered car parking and the direction to attend to repairs/leakages and submitted that the Award is patently illegal and not in accordance with the contract.

16. The learned Counsel further submitted that the Award of Rs.2,79,116/- towards refund of club house membership fee and Rs.1,29,047/- towards the cost of arbitration is also arbitrary, patently illegal and not in accordance with the terms and conditions of the contract. According to the learned Counsel, the entire Award is opposed to public policy, attracting Section 34 of the Arbitration Act. The learned counsel for the appellants further submitted that the learned Single Judge has not appreciated the contentions of the Appellants in accordance with the provisions of Section 34 of the Arbitration Act in the light of the well settled principle that the Arbitrator cannot go beyond the terms of the contract.

17. Per contra, Mr.N.L.Rajah, learned Senior Counsel for the first Respondent would submit that the Award passed by the Sole Arbitrator does not call for any interference, since the Award

has been passed only in terms of the contract. According to the learned Senior Counsel, the Sole Arbitrator has given valid and acceptable reasons for awarding damages at Rs.16,500/- per month for the delayed delivery of the flat. According to him, the reasons given by the Arbitrator found in paragraphs 134, 135 & 136 are valid, acceptable and hence, the learned Single Judge has rightly dismissed the petition under Section 34 of the Arbitration Act. According to him, the Court cannot substitute the valid and acceptable reasons of the Arbitrator by a view which may also be valid and acceptable.

18. Insofar as the award of refund of club membership charges and compensation for providing lesser kilo watt of power supply than what was agreed upon under the agreement, the Arbitrator has given detailed reasons in the Award for awarding compensation to the first Respondent under the two heads. The learned Senior Counsel finally submitted that though the first Respondent had made a claim for a much higher sum, the Arbitrator has awarded a meagre amount when compared to the actual claim. According to the learned Senior Counsel, the Appellant ought to have settled the awarded sum instead of challenging the Award. According to the learned Senior Counsel, the learned Single Judge has rightly dismissed the petition filed by the Appellants under Section 34 of the Arbitration Act.

19. We shall now consider as to whether the findings of the Arbitral Tribunal which resulted in the Award being passed in favour of the first respondent can be challenged under Section 34 of the Arbitration and Conciliation Act.

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 decisions 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 an 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.

(b) McDermott International Tnc., Vs Burn Standard Co., Ltd and others reported in (2006) 11 SCC 181, which followed the decision in Oil & Natural Gas Corporation Ltd., vs Saw Pipes Limited referred to supra and the Hon'ble Supreme Court explained the term patent illegality and observed that patent illegality must go to the root of the matter. Public policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc. If the Arbitrator has gone contrary to or beyond the express law of the contract or granted relief in the matter not in dispute, that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

22. In the light of the said decisions, what would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the Court to judge what is in public good or public interest or otherwise would be injurious to the public good at the relevant point. The Supreme Court in its latest decision in the case of Associated Builders vs. DDA (2015) 3 SCC 49 has also followed the decision rendered in Oil & Natural Gas Corporation Ltd., vs Saw Pipes Limited reported in (2003) 5 SCC 705 and McDermott International Tnc., Vs Burn Standard Co., Ltd and others reported in (2006) 11 SCC 181.

23. 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 Online DL 11136 delineated the following propositions after considering all the decisions of the Hon'ble Supreme Court relating to the scope of Section 34 of the Arbitration and Conciliation Act right from Renusagar Power Company Ltd vs. General Electric 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 process.

(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, or

(b) it is contrary to the interests of India,

(c) it is contrary to justice or morality,

(d) it is patently illegal, or

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

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a judicial approach, i.e. has not acted in a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The patent illegality has to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law,

Or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) Perversity, as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as perverse,

(b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) Morality would imply enforceability, of the agreement, given the prevailing mores of the day. Immorality, however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

24. In the instant case, the Arbitrator has passed a reasoned Award. We need to now examine whether (a) the Arbitrator has gone beyond the scope of the contract, (b) he has given perverse, irrational, unfair or unreasonable reasons while passing the Award that shocks the conscience of the Court to entitle the Appellant to set aside the Award under Section 34 of the Arbitration Act.

25. In the case on hand, the Arbitrator has passed a detailed and reasoned award, even though the first respondent had made a much higher claim, the Arbitrator has passed the award only for a sum of Rs.11,03,507/- which is almost 1/4th of the claim amount. Admittedly, there was a delay in the delivery of apartment and there were also deficiencies in the quality of construction. It is duty of the Appellants to rectify and repair the defects as per the terms of the contract. According to the Appellant, the delay in delivery of the apartment if at all would be only 28 days, whereas according to the first Respondent the delay was much more and even as on date, the flat has not been constructed in accordance with terms of the contract. The Arbitrator in his detailed and reasoned Award, has considered all the materials and documents placed before him and in fact, has also drawn inferences after his personal inspection of the flat and only thereafter, has awarded Rs.2,79,116/- as compensation to the first Respondent for the defective quality of the flat and for return of club house membership fee. We cannot substitute the findings of the Arbitrator, since the reasons given by the Arbitrator for awarding the said sum are plausible reasons. The sum of Rs.1,29,047/- awarded for providing lesser kilo watt of power supply than what was agreed upon under the contract, is also supported by reasons under the Arbitration Award. The sum of Rs.2,73,844/- towards the cost of arbitration cannot also be disturbed as the Arbitrator has conducted several sittings and has also personally inspected the apartment. The estimate of the Arbitration cost fixed by the Arbitrator is also supported by reasons. Therefore, we cannot substitute the view taken by the arbitrator to Award a sum of Rs.2,73,844/- towards the cost payable to the first respondent i.e., 50% share in payment of the arbitration cost. The factual findings of the Arbitrator which are based on plausible reasons cannot be disturbed in a proceedings under Section 34 of the Arbitration Act. This Court is not a Court of appeal and cannot re-appreciate evidence under Section 34 of the Arbitration Act.

26. The only patent illegality found in the Arbitration Award is that the Arbitrator has fixed Rs.16,500/- per month towards liquidated damages for delayed delivery of the flat, even though the contract stipulates only Rs.7,000/- per month as liquidated damages. Clause V(9) of the Construction Agreement dated 20.02.2014 which is the liquidated damages clause is extracted hereunder:

"(9) In the event the DEVELOPER delays in completing the construction of the Schedule-B Apartment, even after a grace period of six months, for reasons otherwise than set out in clauses 7 and 15 this agreement, then in that event the DEVELOPER shall pay the Second Party an

aggregate sum of Rs.7,000/- per month after the end of the grace from the due date till the date of completion. This clause will become applicable only if the Second Party has not committed any period of delay in making payments under this agreement or under the corresponding sale agreement or has not committed any breach of the terms of this Agreement as well as the Agreement for Sale."

27.As per the above mentioned clause, only Rs.7,000/- per month is payable to the first respondent in case of delayed delivery of flat by the Appellants. Section 74 of the Indian Contract Act, 1872, stipulates that penalty in excess of the amount stipulated under the contract cannot be awarded. Section 74 of the Indian Contract Act, reads as follows:

"74.Compensation for breach of contract where penalty stipulated for.-[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.-When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.-A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

28.The Hon'ble Supreme Court in the case of Kailash Nath Associates vs Delhi Development Authority and Another reported in (2015) 4 SCC 136 referred to supra has held that compensation cannot be awarded in excess of the stipulated amount under the

contract. But in the impugned Award, the Arbitrator has awarded Rs.16,500/- per month as damages for the delayed delivery of flat, even though, the contract stipulated only Rs.7,000/- per month. According to us, applying Section 74 of the Indian Contract Act and in the light of the decision of the Hon'ble Supreme Court referred to supra, the Award of compensation for the delayed delivery of the flat at Rs.16,500/- per month is patently illegal, unsustainable and will amount to shocking the conscience of this Court. The contract also does not provide for compensation for delayed allotment of covered car park. Despite there being no clause stipulating compensation for delayed allotment of covered car park, the Arbitrator has awarded a sum of Rs.1,25,000/- towards the delay in the allotment of the covered car park based on clause 13 of the Construction Agreement, which makes the first Respondent liable to pay Rs.5,000/- per month for each month's delay in taking delivery of the flat. Clause 13 of the Construction Agreement does not deal with compensation for delayed delivery of the covered car park, but, deals with a completely different issue. According to us, the Arbitrator has arbitrarily awarded compensation at Rs.5,000/- per month for the delayed delivery of the covered car park even though the contract does not provide for the same. Hence, the sum of Rs.1,25,000/- awarded towards delay in providing the covered car park is arbitrary, patently illegal and is beyond the scope of the contract. Similarly, the Arbitrator has awarded Rs.1,15,000/- towards delay in doing the repair work and for arresting the leakages in the flat. There is no clause in the contract which provides for compensation for delay in doing the repair work and arresting the seepages in the flat. Despite there being no clause in the contract, stipulating compensation for delay in doing the repair work and for arresting the seepages, the Arbitrator has arbitrarily awarded Rs.1,15,000/- as compensation for the delay in carrying out the repair and fixing the seepages in the flat, which according to us, is arbitrary, irrational and patently illegal. Therefore, the compensation awarded for the delay under various heads by the Arbitrator is excessive and not in accordance with the contract. Instead of Rs.4,21,500/- awarded towards compensation for the delayed delivery of apartment including non-delivery of car shed, for the reasons stated above, the Arbitrator ought to have awarded only Rs.77,000/- as detailed below:

(a) Compensation payable for the delayed delivery of apartment 01.12.2014 to 31.10.2015 i.e. for 11 months at Rs.7,000/- per month = Rs.77,000/- (Rs.7,000 x 11).

(b) Compensation towards delayed allotment of covered car park = Nil (not entitled).

(c) Compensation for delay in attending to repair and seepages in the flat = Nil (not entitled).

Therefore, under Sl.No.1 of the Award relating to delayed delivery of apartment including non-delivery of the car shed, the first Respondent is entitled as per the contract only to a sum of Rs.77,000/- and not Rs.4,21,500/-, which was arbitrarily awarded by the Arbitrator. Excepting for this patent illegality, the Award passed under various other heads namely defective quality and return of club house membership fee, unfair practice on account of providing lesser kilo watt of power supply and cost of arbitration is valid and enforceable and hence cannot be interfered with under Section 34 of the Arbitration Act.

29.In view of our findings, the summary of the Arbitration Award should now read as follows instead of the summary of the Award found at page 248 of the impugned Award:

S.No.	Issue No.	Award Amount
1	Delayed delivery of apartment including non-delivery of car shed	Rs. 77,000
2	Loss due to rental income	Nil
3	Loss of carpet	Nil
4	Cost of Air Ticket	Nil
5	Defective quality and return of club house membership fee	Rs.2,79,116
6	Unfair practice 7KW Power	Rs.1,29,047
7	Cost of Arbitration	Rs.2,73,844
	Total	Rs.7,59,007

30.We also do not find any patent illegality in the other directions issued by the Arbitrator directing the Appellant to allot to the first Respondent a covered car park within 10 days of the Award and also directing the Appellant to attend to the repair/leakages till an Association is formed as per clause 13 of the Sale Agreement. Both the directions are within the scope of the contract and hence cannot be interfered with by this Court under Section 34 of the Act.

31.In the result, the Appeal is partly allowed by setting aside the Award dated 02.11.2016, only in respect of the

compensation awarded in Sl.No.1 of paragraph 248 by which the Arbitrator has wrongly awarded a sum of Rs.4,21,500/- instead of Rs.77,000/- which is the actual entitlement of the first Respondent under the contract and in respect of other heads of the Award, the Award is confirmed in favour of the first Respondent. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

nl/pam

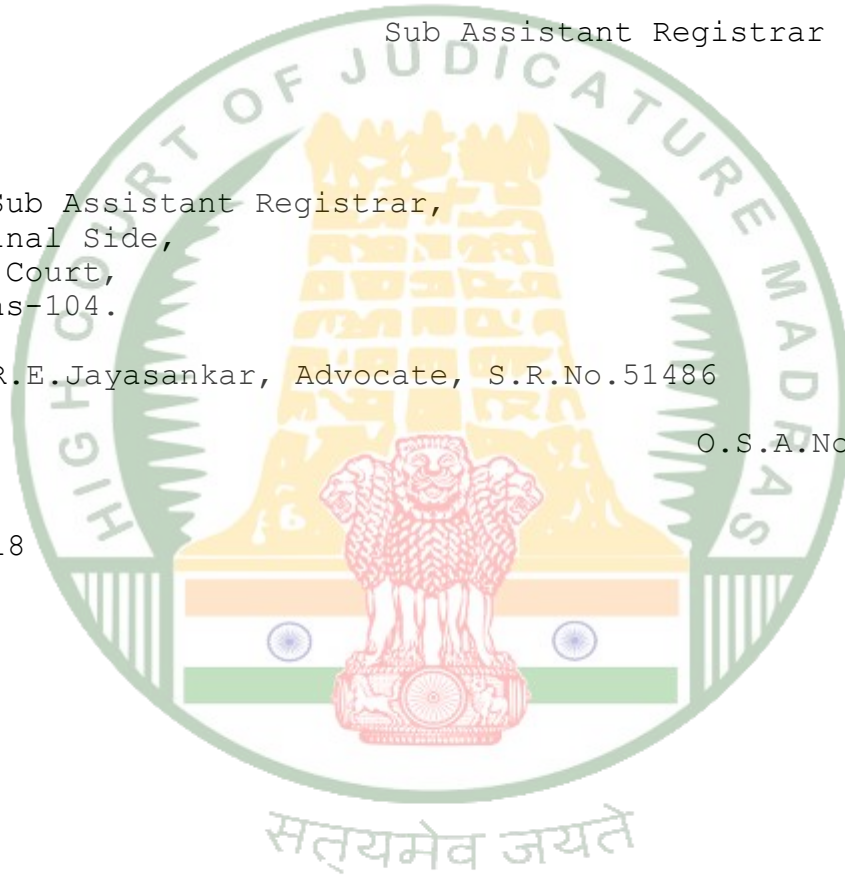
To

1. The Sub Assistant Registrar,
Original Side,
High Court,
Madras-104.

+1cc to MR.E.Jayasankar, Advocate, S.R.No.51486

O.S.A.No.84 of 2018

NM(Co)
CS/29/08/18



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