IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.01.2018

PROUNOUNCED ON : 29.01.2018

CORAM

THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

Original Petitions Nos.473 of 2016 and 434 of 2016

Berggruen Estate Projects Pvt. Ltd.,
having their office at Span Centre, 6th Floor,
South Avenue, Santa Cruz (West),
Mumbai 400 054, India and also at
Notan, 6th Floor, 898 Turner Road,
Bandra West, Mumbai - 400 050, INDIA ... Petitioner in O.P. No.473 of 2016

1.ChillaraKalyan
2. Kamal Singh
3. Arjun Singh
4. Soni Bai
5. Choti Bai ... Petitioners in O.P. No.434 of 2016

Versus

1.ChillaraKalyan
2. Kamal Singh
3. Arjun Singh
4. Soni Bai
5. Choti Bai ... Respondents in O.P. No.473 of 2016

Berggruen Estate Projects Pvt. Ltd.,
having their office at Span Centre, 6th Floor,
South Avenue, Santa Cruz (West),
Mumbai 400 054, India ... Respondent in O.P. No.434 of 2016

Prayer in O.P. No.473 of 2016 : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996

(i) to quash and set aside the Impugned Award dated November 9, 2015, passed by the Hon'ble Tribunal so far it holds / directs that, "(vii) That the Claimant shall return to Respondent No.1 - Agreement for sale-cum General Power of Attorney dated 14-08-2006 executed by Respondents No.2 to 5 in favour of respondent No.1

The Respondent No.1 is also held entitled to receive back from the Claimant - Agreement for sale-cum General Power of Attorney dated 23-01-2008....." and also the consequential portions of the Impugned Award so far as it holds / directs that the title documents were handed overby respondent No.1 to the petitioner;

(ii) To appropriately modify the Impugned Award dated November 9, 2015, passed by the Hon'ble Tribunal and pass appropriate orders / directions permitting petitioner to provide to Respondent No. 1 copies of said Agreements viz; Agreement for sale-cum General Power of Attorney dated 14-08-2006 and Agreement for sale-cum General Power of Attorney dated 23-01-2008 as provided by Respondent No.1 simultaneously while receiving the refund of interest free security deposit of Rs.7,00,00,000/- (Rupees Seven Crores) with interest from Respondent No.1 as mentioned in paragraph (i) of Impugned Award.

(iii) To direct the Respondent No.1, at petitioner's cost, to apply to the Registrar for duplicate copies of the Agreement for sale-cum General Power of Attorney dated 23-01-2008 and to issue appropriate public notices in this regard and upon receipt of duplicate copies of aforesaid agreements by Respondent No.1, consequently Respondent No.1 be directed to simultaneously refund to the Petitioner refund of interest free security deposit of Rs.7,00,00,000/- (Rupees Seven Crores) with interest from Respondent No.1 as mentioned in paragraph (i) of Impugned Award;

(iv) for the costs of the petition be provided for

Prayer in O.P. No.434 of 2016 : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 09.11.2015 passed by the Hon'ble Arbitral Tribunal by setting aside awarding for payment of interest by the petitioners @ 9% per annum on the security deposit amount of Rs.7,00,00,000/- w.e.f. 02.06.2010 till the payment is made to the claimant and further Award reasonable compensation to the petitioners.

For Petitioner in O.P. No.473 of 2016 : Mr.M.S.Krishnan,
and respondents in Senior Counsel
O.P. No.434 of 2016 for
Mr.M.Sricharan Rangarajan

For Petitioners in O.P. No.434 of 2016 : Mr.A.R.L.Sundaresan
and respondent in Senior Counsel
O.P. No.473 of 2016 : for
Mr.R.Sagadevan

COMMON ORDER

As both the petitions challenge the very same award passed by the Tribunal, they are taken up together and disposed of by a common order. For the sake of brevity, the petitioner in O.P. No.473 of 2016 being the claimant is arrayed as such and thus the petitioner in O.P. No.434 of 2016 is to be noted as the respondent.

2. On 25.10.2017, a Memorandum of Understanding was entered into between the petitioner and the respondents to create a special purpose vehicle (SPV)

to develop the property belonging to the respondent. Accordingly a Joint Development Agreement was signed by the parties on 24.01.2008.

3. The following Clauses of the aforesaid agreement would be apposite

Clause (4) *SECURITY DEPOSIT :*

> *The DEVELOPER has today deposited with the OWNERS a sum of Rs.7,00,00,000/- (Rupees Seven Crores only) vide., Pay Order No.259999, dated 23.01.2008, drawn on HSBC Bank, Chennai Office favouring Sri C.Kalyan i.e., the representative of Owners 1 to 4 and Owner No.5 in the manner set out in Annexure 5 as interest free refundable security deposit ("Security Deposit") which shall be paid on the compliance of the Conditions Precedent as set out in Clause 6 (1) to the satisfaction of the DEVELOPER. The OWNERS shall be liable to refund the interest free Security Deposit to the DEVELOPER on the completion of the Project. The DEVELOPER shall have a lien on the Schedule Property till the Security Depsoit is refunded / adjusted by the OWNERS.*
>
> *CLAUSE 6. OBLIGATIONS OF THE OWNERS :*
>
> *a. The OWNERS shall at their cost and expenses perform the following obligations :*
>
> *(i) To satisfy all the conditions precedent as listed herein below within 60 (sixty) days of this AGreement ("Conditions Precedent")*

1. The Landowner shall furnish all documents as may be required by the Developer and / or by the legal counsel of the Developer as may be required by them to fully satisfy and assure the Developer and the legal counsel of the Developer that the Landowner is the absolute owner of the Property with uninhibited / unrestricted rights of alienation over the same and the legal counsel of the Developer issues a title report ("Report") to the satisfaction of the Developer. Such compliance is including but not limited to obtaining the Orders, passed by the concerned Tahsildar, permitting Ayesha Begum to alienate of the Property in favour of Madari Singh.

2. The Landowner shall obtain all clearances / approvals / letters / no objections certificates from District Revenue Officer or Urban Land Ceiling Authorities and / or any other concerned authority as may be required by the legal counsel of the Developer as to the identification of the Property and delivery of Possession by the present owners of the same;

3. The Landowner shall obtain the permission of the assessing officer for the transaction under Section 281 of the Income Tax Act, 1961 as prescribed under the relevant statute.

4. The Landowner shall furnish copy of an affidavit filed the legal heirs of the protected Tenants surrendering the rights if any vested with them in respect of the property, before the Tahsildar under acknowledgement (evidencing the inward number).

5. Obtaining the Registered Agreement of sale cum General Power of Attorney executed in favour of Sri C.Kalyan in respect of Acres 1-24 Guntas (covered under the Development Agreement cum Power of Attorney) and cancel the Development Agreement cum Power of Attorney registered as document No.16630 of 2006, dated 14.08.2006.

6. The Order of the Revenue Divisional Officer granting conversion over the Property from

Agriculture to Non- Agriculture.

7. The Landowner shall permit the Developer to conduct a site and topographical survey to ascertain the exact dimensions of the Property including but not limited to determine and establish the exact areas, which have been given up fo road widening. The final physical areas measured shall be the basis for the calculation of the saleable super built up area.

(xiv) Simultaneous with the execution of this agreement, the OWNERS shall deposit all the title documents relating to the Project in original with the DEVELOPER and such original documents shall be kept in the custody of the Developer and shall not be passed with by the Developer and no encumbrance or charge or mortgage shall be created by deposit of such title deeds and such documents will be in the custody of the developer only for the purpose of enabling the Bankers to verify the said documents for advancing loan facility to the prospective purchasers of the constructed areas in the Complex.

CLAUSE 23 SPECIFIC PERFORMANCE :

Either party shall be entitled to sue for specific performance of the terms and conditions hereof without prejudice to any other rights. The OWNERS shall not be entitled to terminate this Agreement except when the DEVELOPER is not able to complete the project for any reason whatsoever after the grace period fixed for the completion of the projects.

4. The project fell apart. The petitioner in terms of Clause 4 made the deposit of Rupees Seven Crores. This amount was forfeited by the respondents. After exchange of notice, the petitioner invoked the arbitration clause. The Tribunal was constituted with the inclusion of three eminent personalities. The respondent also made a counter claim. Before the Tribunal, several issues were framed. Ultimately, the Tribunal passed the following award :-

(i) The Claimant shall receive from Respondent No.1, the refund of the interest free secuirty deposit amount to Rs.7,00,00,000/- (Rupees Seven Crores), with interest at the rate of 9% per annum w.e.f. 2nd June, 2010 till the payment is made to the Claimant;

(ii) The claim of the Claiamnt for payment of Rs.96 crores towards damages / compensation by the respondent No.1 is dismissed;

(iii) The claim of the Claimant for payment of Rs.4 crores towards expenses said to have been incurred by the Respondent No.1 is dismissed;

(iv) So far as the counter claim is concerned, the Joint Development Agreement dated 24-1-2008 stall stand terminated and cancelled and the Claimant shall execute the necessary deed of cancellation of the JDA simultaneously with and as a condition for the refund of the interest free security deposit by the Respondent No.1;

(v) The claim of the Respondent No.1 for adjustment of interest free security deposit towards part liquidation of loss said to have been incurred by them shall stand dismissed;

(vi) The claim of the Respondent No.1 for an award for a sum of Rs.1,23,75,00,000/- after deducting the seven crores lying with the Respondent by way of interest free security deposit with the interest from the date of counter claim at 18% per annum shall stands dismissed;

(vii) The Claimant is directed to cancel and terminate the registered facilitation agreements both dated 24-1-2008 as a consequence of cancellation of JDA executed by the claimant in favour of a) Sagi Durga Prasada Raju and b) A. Venkata Ramana Reddy simultaneously with the cancellation of the JDA dated 24-1-2008;

(viii) That the Claimant shall return to Respondent No.1 - Agreement for Sale-Cum-General Power of Attorney dated 14-08-2006 executed by Respondents No.2 to 5 in favour of Respondent No.1. The Respondent No.1 is also held entitled to receive back from the Claimant - Agreement for Sale-Cum-General Power of Attorney dated 23-01-2008, simultaneously with receiving the refund of interest free security deposit of Rs.7,00,00,000/- (Rupees Seven Crores) with interest from Respondent No.1, as mentioned in Paragraph (i);

(ix) Having regard to the facts and circumstances of the case we are of the view that the interest of justice would be better served by directing both parties to bear their respective costs of this Arbitration Proceedings.

5. Now, being aggrieved over the award passed, both the parties have approached this Court, invoking Section 34 of the Arbitration and Conciliation Act, 1996.

6. The Tribunal, after reading the covenants in the Joint Development Agreement (JDA), dated 24.01.2008, was pleased to hold that the Security Deposit of Rupees Seven Crores was only pending construction with no power of forfeiture to the respondents. Thus, the respondent No.1 was directed to refund Rupees Seven Crores with effect from 02.06.2010, which was the date on which lawyer's reply notice was given by the petitioner. This sum was directed to be repaid with 9% interest per annum, with effect from 02.06.2010. The other claims of the petitioner were rejected. As against the petitioner, the Tribunal directed it to terminate and cancel the Joint Development Agreement dated 24.01.2008 and the registered Facilitation Agreement entered on the very same date. These agreements were entered into with third parties, who were not parties to the Joint Development Agreement and Arbitral Agreement. The Tribunal felt that cancellation of Facilitation Agreement is a consequential act, emanating from the cancellation of Joint Development Agreement. The petitioner was further directed to return the original documents of the property being the subject matter of the Joint Development Agreement, though it is contended that he did not receive them. A further direction was issued to return the agreement for sale cum General Power of Attorney, dated 14.08.2006, simultaneously, while receiving a sum of Rs.7 Crores with interest.

7. During the pendency of the proceedings, an order was passed in Application

No.6105 of 2016, at the instance of the petitioner, directing the respondents to deposit a sum of Rs.7 Crores with interest. A consent order was passed alleging that no instruction was given to the learned counsel with respect to the interest part, an appeal was filed. The appeal was disposed of in O.S.A No.23/2017, dated 27.02.2017 in the following manner :-

> *6. In view of the statement and counter statement of the learned counsel for the parties with regard to the undertaking given by the learned Senior Counsel to pay interest, we are of the view that it would be in the interest of either side that the matter lie over once again before the learned single Judge, who heard the matter and passed the order and the party be present before the learned single Judge on the date of hearing, who shall be explained about the consequences of the undertaking given by the learned senior counsel therein and orders be passed after such an exercise is completed.*
>
> *7. Accordingly, the matter is remitted to the learned single Judge, who passed the impugned order, who shall hear the party with regard to the undertaking given by the learned senior counsel and, thereafter, pass orders in accordance with law after hearing the parties to the lis. This appeal is disposed of accordingly. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.*

8. Unfortunately, the respondent took the entire money back though the challenge before the Bench was restricted to the interest portion alone. However, both the learned Senior Counsels submitted that the main cases themselves would be taken up for final disposal. Therefore, they were accordingly taken up and the learned counsels were heard. After conclusion of the arguments, the cases were once again posted before the Court to find out the possibility of an amicable settlement. In fact, at the time of conclusion of the arguments this factum was put to the respective learned counsels. On the date on which the cases were posted, the learned Senior Counsel for the respondents has expressed his inability to accept the proposal given by the

learned Senior Counsel appearing for the petitioner. Therefore, this Court has no option, except to decide the matters on their merits.

9. The learned Senior Counsel appearing for the petitioner would submit that the documents belonging to the respondents were not handed over to the petitioner. Therefore, the award passed to at an extent requires to be interefered with. Alternatively, it is submitted that in as much as the documents are not in posession of the petitioner, it would indemnify the respondents. Publications will be made at the cost of the petitioner about the loss of documents and they would never be used by it under any circumstances. It is further submitted that it would be impossible to comply with the award which directs the petitioner to cancel the Facilitation Agreement. They do not act as clog on title which admittedly vests with the respondent No.1. The learned Senior Counsel has stated that the parties to the Facilitation Agreement are none other than the relatives of the respondent No.1. They do not intend to co-operate with the petitioner. Once the Joint Development Agreement goes, as a consequence, the Facilitation Agreement would also go with it. The petitioner as on today does not have any title. The agreements are contingent on the Joint Development Agreement.

10. The respondent No.1 has acted contrary to the order passed by this Court. Despite pendency of the order, the amount of Rupees Seven Crores was withdrawn illegally. As rightly held by the Tribunal, the respondent ought not to have forfeited the amount, as there is no such power available to the agreement. In sum and substance, the learned Senior Counsel restricting the arguments as recorded above, without going to other issues.

11. The learned Senior Counsel appearing for the respondents would submit that as per Clause 4, the respondents are entitled to forfeit the amount. The documents are only with the petitioner. If the respondents were to make the payment then correspondingly, the petitioner will have to hand over the documents, while cancelling the Facilitation Agreement. The findings regarding the return of documents, based upon Clause 6(a) (1) of the Joint Development Agreement cannot be assailed. The petitioner is duty bound to cancel the Facilitation Agreement as a consequence upon, the award with respect to the Joint Devlopment Agreement. Therefore, while

dismissing the petition filed by the petitioner, the one filed by the respondents will have to be allowed.

12. The Tribunal directed the respondent to pay a sum of Rupees Seven Crores with interest from 02.06.2010 on an interpretation of Clause 4 of the Joint Development Agreement. Clause 4 of the agreement speaks about the Security Deposit. We are dealing with the case where the project has not gone through. Now, the respondent has got the property back. As rightly held by the Tribunal, the Security Deposit would lie with the respondent only by way of an interim measure. There is no Clause in the Joint Venture Agreement, which provides for forfeiture. Clause 4 also speaks about a lien in favour of the petitioner on the scheduled property till the refund of the Security Deposit. Therefore, once the property goes back to the respondent, the money will have to come back to the petitioner. The Tribunal further took into consideration the market value, while rejecting the case of the respondent qua loss or damage. Thus, the contention regarding set off was rightly rejected. Further, the right

to terminate the agreement was given only to the petitioner and not to the respondent. A factual finding has been recorded that the period available to the petitioner had not expired on the date when the respondent No.1 terminated the agreement and forfeited

the Security Deposit. Thus, the above said issue of Security Deposit of Rupees Seven Crores, dealt with by the Tribunal does not warrant any interference.

13. On the other submissions made with respect to the return of the documents, it is submitted by the learned Senior Counsel appearing for the petitioner, unfortunately they are not available. While this Court does not find any error in the issue being answered against the petitioner in drawing an inference based upon Clause 6A of the Joint Development Agreement, if it is not possible to comply with the mandate of the award, then it requires an alternative methodology. The petitioner will have to be directed to make a paper publication about the loss of documents. He shall also be directed not to deal with them in any manner. After all, we are concerned with the compliance of the award passed, by the Tribunal. Suffice, it is to that the reasoning of the Tribunal does not warrant any interference.

14. On the question of cancellation and termination of the Joint Development Agreement, the learned Senior Counsel appearing for the petitioner did not seriously challenge the issue of the award. On the contrary, it is submitted that the petitioner may be permitted to terminate the registered Facilitation Agreement, on by itself. This Court is of the view that when once the Joint Development Agreement goes, there is no sanctity to the registered Facilitation Agreement. Thus, subsequent agreements would come to life only when an earlier one is given effect to. When the petitioner itself does

not have title, there is no question of Facilitation Agreement in force and given effect to. The Tribunal did not state that the petitioner will have to get the concurrence of the third parties who are not before this Court. The direction was only against the petitioner. Therefore, it is for it to show its, bonafide by executing a document of cancellation of the Facilitation Agreement, after duly cancelling the Joint Development Agreement.

15. On the other issues answered, this Court does not find any reason to interfere with. We are dealing with the well merited award passed on a consultation with the relevant materials. The respondent has not proved the factum of loss suffered by it, through the breach of contract on the part of the petitioner, entitling them to get damages of compensation as rightly held by the Tribunal on facts.

16. Accordingly, the award passed by the Tribunal stands confirmed subject to the modification, which are as under :-

(1) instead of returning the original documents, the petitioner shall issue paper publications indicating the loss of documents.

(2) the petitioner shall indemnify the respondent accordingly. The petitioner shall also give police complaint on the missing documents.

(3) the petitioner shall not deal with the documents or the properties being the subject matter of the Joint Development Agreement on 24.01.2008.

17. The petitioner shall execute the cancellation of the Facilitation Agreements, either unilaterly or adding the parties mentioned therein.

18. In the result, two Original Petitions stand disposed of with above modifications. No costs.

29.01.2018

vsi2

Index : Yes / No

Internet : Yes / No

Speaking / Non Speaking

To :

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

M.M.SUNDRESH, J.

vsi2

Pre-Delivery Orders
of
Original Petition
Nos.473 of 2016 and 434 of 2016

29.01.2018