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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.02.2019

Judgment Delivered on : 04.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Original Side Appeal Nos. 61 and 117 of 2012

O.S.A. No. 61 of 2012

Arun Kapur

.. Appellant

Versus

1. Mrs. Sujatha Hariharan
Partner
M/s. Sukrit Constructons
No.48, Balaji Nagar
1st Street, Royapettah
Chennai - 600 014

2. Mr. T. Amarlal
Sole Arbitrator
No.45/12, Pleasant Apartments
Taylors Road
Chennai - 600 010

.. Respondents

O.S.A. No. 117 of 2012

Mrs. Sujatha Hariharan
Partner
M/s. Sukrit Constructons
Royapettah, Chennai - 600 014

.. Appellant

Versus

1. Arun Kapur
2. Mr. T. Amarlal
Sole Arbitrator
Chennai - 600 010

.. Respondents

Original Side Appeals filed under Order 36 Rule 1 of the
Original Side Rules of this Court read with Clause 15 of the
Letters Patent, against the judgment and decree dated 24.01.2012



passed in O.P. No. 588 of 2004 on the file of this Court as against Original Petition praying this Court be pleased to pass a decree and judgment setting aside the award passed by the 2nd Respondent dated 05.10.2004 in claim petition No.1 of 2004

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O.S.A. No. 61 of 2012

For appellant : Mr. A. Ramesh Kumar
For respondent : Mr. T. Velumani for R1

O.S.A. No. 117 of 2012

For Appellant : Mr. T. Velumani
For Respondent : Mr. A. Ramesh Kumar for R1

COMMON JUDGMENT

R.SUBBIAH, J

Both these Original Side Appeals are filed against the Order dated 24.01.2012 passed by the learned single Judge in O.P. No. 588 of 2004.

By the said Order dated 24.01.2012, the learned single Judge, while setting aside the award passed by the learned Arbitrator, issued certain directions for completion of the arbitral proceedings. For clarity, the penultimate paragraph of the order dated 24.01.2012 reads as follows:-

"16. In view of all the above, in order to meet the ends of justice, the learned Senior counsel for the first respondent is directed to issue a copy of the Account Books to the petitioner within ten days from the date of receipt of a copy of this order. If the Account Books are in voluminous, the petitioner herself can take the xerox copy of the Account Books viz., Exs. A19 to A22 at her own costs during the working hours at the office of the arbitrator, or, the petitioner is at liberty to take the assistance of the Auditor to recurrent the Account Books on three working days between 10.00 am and 1.00 pm in the presence of the Arbitrator or before the staff of the Second respondent. The Registry is directed to send the documents to the Arbitrator at once. The second respondent is directed to conclude the proceedings within three weeks and he is directed to pass award within a short time.

17. With the above observation, this petition is disposed of. The parties are directed to appear before the Arbitrator on 15.02.2012."

2. While O.S.A. No. 61 of 2012 has been filed questioning



the correctness and/or validity of the order passed by the learned single Judge, O.S.A. No. 117 of 2012 has been filed contending that the learned single Judge ought not to have remanded the matter back to the Arbitrator. Thus, the appeals have been filed as against the same order dated 24.01.2012 of the learned single Judge and therefore, both the appeals are taken up for hearing together.

3. For the sake of disposal of these appeals, the parties herein are referred to as per their rank in O.S.A. No. 61 of 2012 as appellant and first respondent.

4. The first respondent Sujatha Hariharan has filed a claim petition before the Arbitrator/second respondent on 08.04.2004 seeking to recover a sum of Rs.2,06,21,144/- from the appellant herein. According to the claimant/first respondent, the appellant's father by name Ved Prakash Kapur owned 11.5 grounds of land and building at No.52, Taylors Road, Kilpauk, Chennai and he mortgaged the said property with M/s. Indian Overseas Bank, Chintadripet Branch. In this regard, the appellant's father incurred a debt of Rs.2.50 crores and the creditors pressurised him for repayment. At this stage, the appellant's father died. The appellant and other family members thereafter approached the father in law of the first respondent, by name C.H. Subramaniam, an Auditor, for assistance and after deliberations, it was decided to develop the said property into a multi-storeyed apartment and to discharge the debts to the bank from the sale of apartments to be constructed. In order to achieve such object, an unregistered partnership firm by name Sukrit Constructions was constituted by executing a Partnership Deed dated 22.04.1999 in which the first respondent Sujatha Hariharan, appellant's son Rishi Kapur and appellant's brother's wife Mrs. Rita Kapur were appointed as Partners. Further, on the same day, a joint venture agreement was entered into between the partnership firm represented by one of the partners Rishi Kapur, son of the appellant with (i) Mrs. Vinay Kumari, wife of late. Ved Prakash (ii) appellant and (iii) Atul Kapur, brother of the appellant by which the firm agreed to give 55% of the constructed area to Mrs. Vinay Kumari and others. Accordingly, with the help and assistance provided by the father in law of the first respondent namely C.H. Subramaniam, permits, licence and all statutory approvals from the competent authority have been obtained for the proposed construction. An agreement was also entered into with Indian Overseas Bank for selling undivided share of land and a sum of Rs.52,50,000/- was also paid to the bank.

5. It is the further case of the claimant/first respondent that when the construction was in progress, the appellant's son Rishi Kapur, in collusion with the family members of the



appellant, wrote a letter in September 2001 stating that the partnership firm could not continue as promoters and that the land owners could deal with the development of the land on their own. At this stage, the claimant/first respondent herein had borrowed substantial money from her father in law viz., Mr. C.H. Subramaniam to the tune of Rs.1.47 crores and also collected monies from allottees of 12 flats already sold. In the meantime, monies have also been withdrawn by the appellant and his family members to the tune of Rs.41.07 lakhs. Besides this amount, the appellant and his family members have also drawn a sum of Rs.77.64 lakhs realised through sale of plot Nos. 3E and 4E. As there was huge arrears payable to the construction contractors and the construction work had come to a grinding halt and hence a fresh memorandum of understanding was entered into on 14.12.2001 in which it was agreed that in case of any dispute, such dispute can be referred to an arbitrator. The Memorandum of Understanding also authorised the builders to sell flats in the 1st to 6th floor except three flats E3, E4 and E5 for sale of which the appellant and other vendors have collected monies. Subsequent to this arrangement, the vendor Vinay Kumari and Mr. Atul Kapur have released their rights by way of release deeds dated 28.02.2003 and 01.04.2002 respectively and thus the appellant became the absolute owner. Thereafter, the firm Sukrit Construction was also re-constituted on 01.04.2002 leaving the first respondent and Mr. Rishi Kapur as partners. According to the claimant/first respondent, inspite of various hardship, she made payments on behalf of the appellant and other vendors and the entire loan due to Indian Overseas Bank was settled during March 2003 at Rs.2.87 crores. When once the entire liability due to Indian Overseas Bank was settled during March 2003 by the first respondent, there was a sea of change in the attitude of the appellant and he started creating problem. In fact, before settlement of the dues to the bank, the appellant sold three flats in 7th floor being Flat Nos. 7B, 7C and 8E jointly. Thus, the appellant began to sell the flats clandestinely, without the knowledge of the first respondent by actively colluding with Mr. Rishi Kapur, one of the partners of the firm. It is in these circumstances, the first respondent filed the claim petition before the Arbitrator invoking the clause contained in the Memorandum of Understanding. In the arbitral proceedings, being Claim Petition No. 1 of 2003, inspite of service of notice, the appellant did not turn up and therefore, on 07.11.2003 an exparte award was passed by the second respondent/arbitrator. Challenging the exparte award dated 07.11.2003, the appellant filed OP No. 823 of 2003 before this Court under Section 28 and 34 (2) (ii) (iii) (iv) of The Arbitration and Conciliation Act, 1996 mainly on the ground that he was not given sufficient opportunity to contest the Claim Petition. The first respondent also filed a counter affidavit in OP No. 823 of 2003 opposing



the relief sought for by the appellant. Ultimately, by order dated 05.04.2004, this Court allowed the Original Petition and remanded the matter to the second respondent/arbitrator. After remand, the second respondent/Arbitrator passed an award dated 05.10.2004 holding that the claimant/first respondent herein is entitled to a sum of Rs.1,98,62,311/- out of the claim amount of Rs.2,06,21,144/-. Challenging the award dated 05.10.2004, the appellant herein has filed the aforesaid O.P. No. 588 of 2004 before the learned single Judge.

6. In the Original Petition No. 588 of 2004, the appellant would vehemently contend that as per Clause 9 of the Memorandum of Understanding, only if there is a dispute or difference between the parties with respect to expenses incurred for construction of the flats, reference can be made to the arbitrator. In the claim petition made by the first respondent, there is no such dispute with respect to the expenses incurred for construction of the flats and therefore, the claim petition itself is not maintainable. Above all, the appellant had mainly contended that the arbitrator himself is a party interested in the project and he is holding cheque signing authority, power of attorney etc., in respect of the project in question. While so, he cannot act as an arbitrator to adjudicate a dispute in which he himself has an interest. According to the appellant, when the arbitrator/second respondent himself has a role to play in the dispute, he cannot be expected to adjudicate the dispute between him and the first respondent and the entire proceedings initiated and pending before the arbitrator are vitiated by bias.

7. Notwithstanding such objections, the second respondent/arbitrator passed an interim order on 30.04.2004 restraining the appellant from alienating or encumbering or delivering possession of the properties constructed in the 7th to 8th floors of the building. Ultimately an award dated 05.10.2004 was passed by the second respondent/arbitrator directing the appellant to pay to the first respondent a sum of Rs.1,98,62,311/- with interest at the rate of 15% per annum from 08.04.2004. By the same order, the second respondent/arbitrator also passed an order of attachment of the flat in the 7th and 8th floor and 3 pent house apartments above the 8th floor for the awarded amount.

8. The Original Petition was resisted by the first respondent by contending that the preliminary objection raised by the appellant with respect to bias has been properly considered and over ruled by the second respondent and prayed for dismissal of the Original Petition.

9. By order dated 12.06.2008 passed in OP No. 588 of 2004, this Court concluded that all the dispute pertaining to the



project can be raised before the second respondent/arbitrator and it cannot be said that only those dispute pertaining to the expenses incurred for construction of the flats can be referred to the arbitrator for adjudication. It was further concluded that the arbitrator/second respondent is having the authority to sign the cheques besides holding power of attorney in respect of the lands which is the subject matter of the dispute, and therefore, he is disqualified from being appointed as an arbitrator. Above all, the relationship between the appellant and the second respondent/arbitrator had strained and the appellant hurled abuse towards the arbitrator by referring to fraud and collusion, even though they were denied by the second respondent. In such circumstances, the learned single Judge, in the order dated 12.06.2008 observed that it is desirable to appoint an independent arbitrator. For more clarity, para No. 41 to 45 of the order passed by the learned single Judge reads as follows:-

41. In the light of the above two letters, I am of the considered view that it is not in the interest of justice for the second respondent to act as an Arbitrator. Even assuming that the second respondent is independent and impartial, still there exists a doubt as to his impartiality and therefore, he ought to have rescued himself from the arbitration proceedings. After all, justice should not only be done but also seem to be done. Thus, I find merits in the preliminary objection as raised by the petitioner and therefore, the award is vitiated on this score alone.

42. The decision relied on by the learned counsel for the first respondent with regard to the preliminary objections are not helpful to the case of the first respondent, as all these decisions were rendered under the Arbitration Act, 1940. The scheme of the Act, 1940 and the facts in these cases are also different from the facts of the present case.

43. Hence, I am inclined to interfere with the award dated 05.10.2004 by setting aside the same.

44. However, in the interest of justice and in the interest of the first respondent, it is desirable to remit the entire matter before an Independent Arbitrator if the parties agree in this aspect. Failing which, it is open to the first respondent to approach the appropriate forum for appointment of an independent arbitrator.

45. Further, it is also necessary to protect



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the interest of the first respondent till the matter is re-heard and decided by an independent arbitrator.

46. As already mentioned by me, an affidavit of undertaking has been filed by the petitioner on 13.06.2007 before this Court wherein he has given an undertaking that he shall not encumber either one of the Pent Houses No.9C or Pent House No.9E, pending disposal of the OP No. 588 of 2004 or until such time as this Court may direct. This affidavit of undertaking is recorded and the petitioner is directed not to alienate or encumber either Pent House No.9C or Pent House No.9# till the entire dispute is finally re-heard and decided by an independent arbitrator.

47. In the result, the Original Petition is allowed in the above terms.

10. Aggrieved by the above said order dated 12.06.2008 passed in O.P. No. 588 of 2004, the first respondent filed O.S.A. No. 260 of 2008. By Judgment dated 04.12.2008, the Division Bench of this Court remanded the matter back to the learned single Judge for fresh consideration. The Judgment dated 04.12.2008 reads as follows:-

"2. Heard both sides. The first respondent herein has challenged the Award that was passed by the second respondent/Arbitrator on 05.10.2004 on several grounds including the ground of bias. The learned Judge decided the issue of bias alone and set aside the award, which is challenged in this Original Side Appeal.

3. Considering the facts and circumstances that the first respondent has challenged the award on several grounds including bias, we are of the view that it is proper to remand the matter to the learned single Judge, after setting aside the order, which is impugned in the original side appeal, so that all the issues including bias can be considered on merits, and in accordance with law, afresh.

4. Accordingly, we set aside the order, which is impugned in the original side appeal, and remand the matter to the learned single Judge, requesting to decide all the issues including bias and pass orders, afresh on merits and in accordance with law. We also further request the learned single Judge to dispose of the matter on or before 31.01.2009.

5. Learned Senior counsel appearing for both



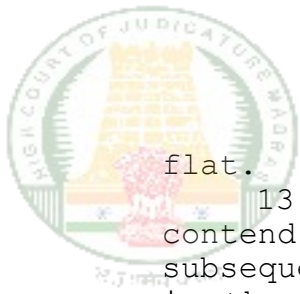
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sides state that they will extend their full cooperation in early disposal of the matter before the learned single Judge, before the said date. Till the disposal of the original petition, the Pent House Nos. 9C and 9E shall not be encumbered or alienated by the first respondent herein. The affidavit filed to that effect by the first respondent and his wife are kept on record.

Original side appeal is disposed of accordingly. No costs. Consequently, connected MP is closed."

11. Pursuant to the directions issued by the Division Bench of this Court, the Original Petition was taken up by the learned single Judge and by the order dated 24.01.2012, the Original Petition was disposed of by the learned single Judge, which is challenged in the present Original Appeals.

12. When the appeals were taken up for hearing, learned counsel for the appellant would contend that the property in question was owned by the father of the appellant and he died by leaving a debt of Rs.2.5 crores to the Indian Overseas Bank. To clear the debt it was decided to develop the property for which, as suggested by the father in law of the first respondent Tr. C.H. Subramaniam, Auditor, a partnership firm was constituted in the name of Sukrit Constructions. Subsequently, on 22.04.1999, a Joint Venture Agreement was also executed for alienating the property between Vinay Kumari, Wife of Late Ved Prakash Kapur, appellant and appellant's brother Atul Kapur with Sukrit Constructions in which the appellant's brother's son Rishi Kumar was a partner. It was agreed in the said agreement that upon development of the property, the vendors will get 45% and the partnership firm/promoters will be allotted the remaining 55% of the developed property. When the project was in progress, a dispute arose between the vendor and the first respondent herein which resulted in cancellation of the Joint Venture agreement. Subsequently, a compromise was reached on 14.12.2001 as per which the Joint Venture Agreement was revived and a Memorandum of Understanding was executed. While so, on 28.02.2003, the vendor Mrs. Vinay Kumari settled all her rights in favour of the appellant by executing a settlement deed registered as document No.447 of 2003, whereby the appellant became the absolute and sole vendor of the property. Further, as per the agreement between the vendors and the promoters, a power of attorney deed was executed appointing Tr. T. Amarlal, the second respondent/Arbitrator, as a Power of Attorney agent. As per the terms and conditions of the Memorandum of Understanding, after approval of the sale of a flat by the appellant through his nominee and his son Rishi Kapur, the power of attorney holder could register the undivided share of land pertaining to the



flat.

13. The learned counsel for the appellant would further contend that it is evident that the second respondent, who was subsequently appointed as an arbitrator, is a party interested in the subject matter of the property as he is holding a power of attorney in his favour. While so, when a dispute arose, the first respondent wrote a letter dated 10.10.2003 requesting the second respondent to take up the issue for mediation, notwithstanding the fact that the second respondent is a person who is very much interested in the project. Though the first respondent requested the second respondent to mediate the matter and to bring about a settlement among the parties, the second respondent clandestinely converted it into an arbitration proceedings and issued notice to the appellant for his appearance on 13.10.2003 at 9.00 am by treating the letter sent by the first respondent as a claim petition and also passed an exparte award on 07.11.2003 since the appellant did not turn up. But the exparte award dated 07.11.2003 was subsequently set aside by this Court by order dated 05.04.2004 passed in OP No. 823 of 2003 at the instance of the appellant herein. Even before the order dated 05.04.2004 was passed, the second respondent executed a sale deed dated 23.01.2004 relating to undivided share of land in the property in question in favour of one Mr. Sunil. Immediately, the appellant wrote a letter dated 08.03.2004 to the arbitrator/second respondent informing him that he had exceeded the area of the undivided share of land and acted contrary to the power of attorney deed executed in his favour. In spite of the above letter dated 08.03.2004, the second respondent executed a sale agreement along with the first respondent on 12.03.2004 in favour of one Mr. P.V. Subramani and his wife Savitri Subramani and acted contrary to the terms of the power of attorney. Thereafter, the second respondent also executed a sale deed in favour of Mr. P.V. Subramani and his wife. Immediately, the appellant has filed a suit in C.S. No. 655 of 2005 against the second respondent/arbitrator herein (arrayed as first defendant in C.S. No. 655 of 2005) and the purchaser by name Mr. P.V. Subramani to declare the sale deed registered as document No. 753 of 2004 as null and void. The said suit was subsequently converted as O.S. No. 6218 of 2011 and it is pending.

14. While the facts are so as stated above, as per the order dated 05.04.2004 passed in OP No. 823 of 2003 the first respondent filed a Claim Petition No. 1 of 2004 before the second respondent/arbitrator. The appellant raised preliminary objections on 21.04.2004 and questioned the jurisdiction of the arbitrator to adjudicate the claim petition especially when the arbitrator is holding cheque signing power as well as power of attorney. The appellant has specifically questioned the independence or impartiality of the arbitrator to adjudicate the



claim petition. However, the preliminary objections were simply brushed aside and overruled by the arbitrator/second respondent on 30.04.2004. Further, on the same day on 30.04.2004, the second respondent passed an interim order of attachment, attaching the entire property consisting of seven apartments. Subsequently, on 02.06.2004, the appellant has filed a counter affidavit before the second respondent/arbitrator. Thereafter, when the claim petition was taken up for hearing on 14.06.2004, the arbitrator passed an order stating that "Mr. Subramaniam (representative of first respondent) has presented voluminous documents, copies to be served to Mr. Arun Kapur" (appellant herein) and posted the matter on 26.07.2004. Thereafter, as there was no progress in the arbitration case and it was adjourned from time to time, the appellant filed Application No. 2665 of 2004 and by order dated 30.09.2004, this Court directed the Arbitrator to pass an award before 05.10.2004. As directed, the Arbitrator has passed an award on 05.10.2004. In the award dated 05.10.2004, it was stated that 25 documents were marked, however, along with the claim petition, only 21 exhibits were shown. Further, in the award at page No.8, the second respondent has observed that "books of accounts have been called for to verify the statement of accounts and the claim made by the claimant/first respondent herein to the tune of Rs.2,06,21,144/- under Exs. 19 to 22. However, there is no mention to these exhibits either in the claim petition or arbitration proceedings. Further, in the claim petition, it was stated that amount is due to the firm M/s. Sukrit Constructions, whereas, the award has been passed in favour of the claimant, who happened to be one of the partners of the said firm. Thus, throughout the arbitration proceedings, the second respondent/arbitrator acted with bias against the appellant and it vitiates the award passed by the arbitrator/second respondent.

15. The learned counsel for the appellant further submitted that challenging the award dated 05.10.2004 passed in Claim Petition No. 1 of 2004, the appellant filed O.P. No. 588 of 2004 before this Court in which an order dated 12.06.2008 stating that the preliminary objections raised by the appellant herein were not properly considered by the first respondent and therefore it is desirable to remit the matter back to an independent arbitrator, if the parties agree on this aspect, failing which it is open to the first respondent to approach the appropriate forum for appointment of an independent auditor. However, without taking steps to appoint an independent auditor, the first respondent filed O.S.A. No. 260 of 2008 before the Division Bench of this Court. The Division Bench of this Court, by Judgment dated 04.12.2008 remitted the matter back to the single Judge. After remand, the order dated 24.01.2012, which is impugned in this appeals, has been passed by the learned single Judge.



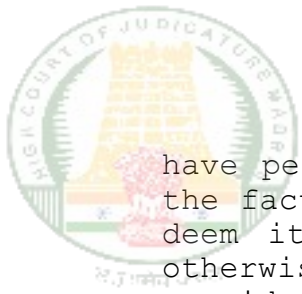
16. The learned counsel for the appellant would further contend that the second respondent cannot be permitted to act as an arbitrator inasmuch as he himself has an interest in the subject matter of the property. Even before the Arbitrator, the appellant has raised the ground of bias at the first instance by raising preliminary objection. However, the arbitrator proceeded to decide the case in which he has substantial interest and therefore it cannot be said that the arbitrator had acted impartially and independently. When the plea of bias is raised and proved, all the proceedings emanated thereof are vitiated and this was lost sight of by the learned single Judge. Therefore, the learned counsel would pray for setting aside the impugned order and to allow Original Side Appeal No. 61 and to dismiss O.S.A No. 117 of 2012 filed by the first respondent.

17. Per contra, the learned counsel for the first respondent would contend that as per the letter of arrangement dated 14.12.2001, the appellant is liable to pay Rs.65 lakhs towards minimum guarantee amount plus the sale consideration from the 7 flats. Since the appellant defaulted in payment of the minimum guaranteed amount as well as balance sale consideration of sale proceeds of Rs.7 lakhs, the claim petition was filed before the Arbitrator. The Arbitrator, taking note of the nature of claim issued notice for hearing on 15.10.2003 but the appellant did not turn up. Therefore, a further notice was sent to the appellant for the hearing on 20.10.2003, on which date also he did not appear. Therefore, the second respondent/Arbitrator was constrained to pass an exparte award on 07.11.2003 for a sum of Rs.1,70,00,000/- and other reliefs. The award dated 07.11.2003 was challenged in OP No. 823 of 2003 and this Court by order dated 05.04.2004 set aside the exparte award and remanded the matter back to the second respondent with an observation that the claimant/first respondent shall file a separate claim petition supported by material evidence. Accordingly, the first respondent filed a Claim Petition No. 1 of 2004 on 16.04.2004. On notice, the appellant raised a preliminary objection on 21.04.2004 stating that the second respondent is having an interest in the dispute as a cheque signing authority and that he had sold excess undivided portion of the land in his capacity as power of attorney. Such objections were overruled by the Arbitrator on 30.04.2004 by stating that he is empowered to function as an arbitrator and decide the issue independently. After the objections were overruled, the appellant participated in the arbitration proceedings on various dates and filed his counter statement to the claim petition. Even the voluminous documents presented by Tr.C.H. Subramaniam in the arbitration proceedings were served on the appellant. Above all, the appellant himself approached this Court by filing Application No. 2665 of 2004 to direct the



arbitrator to dispose of the claim petition within a stipulated time. Accordingly, this Court by order dated 30.09.2004 directed the Arbitrator to pass an order on or before 05.10.2004. Pursuant to such direction, the appellant appeared along with his advocate and he was served with all the document. The appellant has also filed an affidavit stating that he has no other evidence to refute the claim made by the first respondent and that he has no further arguments or evidence to be adduced. Thus, the appellant participated in the arbitral proceedings without any objection. After hearing the counsel for both sides, the second respondent/Arbitrator has passed an award on 05.10.2004 awarding a sum of Rs.1,98,32,311/- in favour of the first respondent which is payable with interest at 15% per annum. Challenging the award passed on 05.10.2004, O.P. No. 588 of 2004 was filed and by order dated 12.06.2008, this Court observed that the dispute has to be adjudicated by an independent arbitrator, if the parties agree in this aspect, failing which it is open to the first respondent to approach the appropriate forum for appointment of an independent arbitrator. This order dated 12.06.2008 was challenged by the first respondent and the Division Bench of this Court, by Judgment dated 04.12.2008, remanded the matter back to the learned single Judge. Pursuant to the Judgment dated 04.12.2008, the order dated 24.01.2012 has been passed by the learned single Judge, which is challenged in these appeals. According to the learned counsel for the first respondent, the appellant has not raised the ground of bias in OP No. 823 of 2003. Even though he raised preliminary objections before the Arbitrator, it was over ruled and thereafter he fully participated in the arbitration proceedings. The appellant himself approached this Court for a direction to the Arbitrator to dispose of the Claim Petition No. 1 of 2004 filed by the first respondent. The appellant also stated that he has no documentary evidence to be filed before the arbitrator and only thereafter, the second respondent has passed the award. The appellant was also represented by his counsel before the Arbitrator. Thus, according to the counsel for the first respondent, the plea of bias raised in these appeals is certainly an after-thought and the award passed by the arbitrator need not be interfered with on the ground of bias. The appellant, only to circumvent the proceedings has filed the present appeals. Further, the appellant has filed the appeal only to protract the proceedings and to pay the legitimate amount spent by the first respondent. The learned single Judge also, having accepted the plea of the first respondent, has remanded the matter back to the arbitrator/second respondent, which is not warranted. Therefore, the learned counsel for the first respondent prayed for dismissal of O.S.A No. 61 of 2012.

18. Keeping the submissions of counsel for both sides, we



have perused the materials placed on record. We have discussed the factual matrix of the case at great length and therefore, we deem it unnecessary to reproduce the same any further. Even otherwise, the important point which arises for our consideration in these appeals is whether the award passed by the arbitrator is tainted with bias and on that ground it has to be set aside. If we come to the conclusion that the award passed by the arbitrator/second respondent herein is liable to be interfered with on the ground of bias, we need not dwell with the merits or otherwise of the contentions urged on behalf of both sides.

19. It is vehemently contended that the second respondent/arbitrator is a person who has a role to play in the dispute between the appellant and the first respondent. The arbitration proceedings emanated out of a dispute between the appellant and the first respondent with respect to certain clauses contained in the Memorandum of Understanding dated 14.12.2001. Even on 14.12.2001, the second respondent was an agreement holder for purchase of two flats in the project in question. For better appreciation, Clause Nos. 2 and 3 of the Memorandum of Understanding reads as follows:-

"2. It is hereby agreed that by all, that the builders M/s. Sukrit Constructions, No.48 (Old No.17), Balaji Nagar 1st Street, Royapettah, Chennai - 600 014 that the firm shall sell the flats which are under the control of an agreed minimum rate of Rs.2,000/- per square feet plus Rs.2,00,000/- for covered car park and Rs.75,000/- for open car park. However, with the consent of Mr. T. Amarlal, the Car parks can be sold at lesser price.

3. The entire area from the 1st to 6th floor together with proportionate car park allocated to M/s. Sukrit Constructions (except C-6) shall be supported by power of attorney in favour of Mr. T. Amarlal of No.49/12, Taylors Road, Chennai - 600 010, covering proportionate share of undivided share of property to the flats in 1st to 6th floor except flat C-6 to be registered to the nominee of the vendors and Flats A-1 and A-4 already registered.

20. Therefore, it is evident that the second respondent/Arbitrator himself was a party to the Memorandum of Understanding and therefore, he cannot be competent to adjudicate a dispute to which he himself is a party.

21. It is seen from the records that the second respondent has passed an exparte award on 07.11.2003 which the appellant challenged in OP No. 823 of 2003 before this Court. During the pendency of OP No. 823 of 2003, the appellant, claiming that the



second respondent/arbitrator, as power of attorney, executed a sale deed dated 23.01.2004 to one Mr. R. Sunil whereby he had conveyed excess land than he is empowered to execute as a power of attorney, had sent a letter dated 08.03.2004 to the second respondent/arbitrator. In the letter dated 08.03.2004, the appellant called upon the second respondent to repay a sum of Rs.12,87,300/- which he had assessed as the price of the proportionate excess land conveyed by the second respondent/arbitrator. The relevant portion of the letter dated 08.03.2004 reads as under:-

"It is unfortunate and to my utter shock and surprise when I came to know that you have executed a document bearing No.155 of 2004 on 23.01.2004 to one Mr. R. Sunil residing at No.3, Kummalamman Koil Street, Kilpauk, Chennai - 600 010.

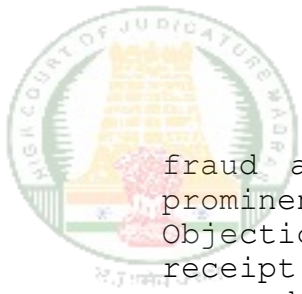
In the said sale deed you have registered an area of 684 square feet (six hundred and eighty four square feet). The power of attorney executed in your favour is to sell proportionate undivided share of land of only 15,623 square feet pertaining to the first six floors excluding the undivided area's of 565 square feet, 525 square feet, 684 square feet, 500 square feet and 517 square feet pertaining to flats B-6, A-1, D-3, B-2 and A-6.

In the said sale deed, you have exceeded the area of 15,623 square feet knowing this fact fully well you and the purchaser have fraudulently gone ahead and executed the sale deed which is completely illegal and I will have to take the necessary legal action and if necessary to declare the sale as null and void.

.....

You are required immediately to send a demand draft in my favour for the receipt of said sum of Rs.12,87,306/- after deducting the demand draft commission failing which I will be constrained to institute appropriate legal proceeding on you as well as on the purchaser for rendition of accounts and if necessary to declare the sale as null and void.

22. To this letter dated 08.03.2004, the second respondent/arbitrator had sent a reply dated 15.03.2004 denying that he is not required to pay any amount to the appellant, as demanded in the notice dated 08.03.2004. Thus, it is evident that in the letter dated 08.03.2004, the appellant had cast aspersions on the second respondent/arbitrator besides he had proposed to initiate legal action against the second respondent/arbitrator as well as the purchaser of the land for



fraud and collusion. This letter dated 08.03.2004 was also prominently mentioned by the appellant in the Preliminary Objections filed before the second respondent. In effect, on receipt of notice in the Claim Petition filed by the first respondent, the appellant has raised preliminary objections on 21.04.2004 in which he has specifically stated as follows:-

"9. It is submitted that the arbitrator failed to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Your goodself being a party interest in the project by holding cheque signing authority, power of attorney, etc., Further, I have also raised certain dispute your goodself in respect with the excess undivided portion of land executed by you by my letter dated 06.03.2004 and your reply dated 15.03.2004 on this ground your goodself have to rescue from being arbitrator. On this ground alone, the petitioner have to be dismissed."

23. It is also seen from the records that the aforesaid facts have been thoroughly appreciated by this Court in the order dated 12.06.2008 passed in OP No. 588 of 2004 by the learned single Judge, who had, eventually come to the conclusion that the award passed by the second respondent/arbitrator is smeared with bias. In fact, the learned single Judge of this Court in the order dated 12.06.2008 passed in OP No. 588 of 2004 has made reference to the fact that the relationship between the appellant and the second respondent/arbitrator has already strained to such an extent that the appellant had accused the second respondent of fraud, collusion with ulterior motive. In para No.40 of the order dated 12.06.2008, the learned single Judge recorded as follows:-

"40. Thus, from the above two letters, it is very clear that the relationship between the petitioner and the second respondent/ arbitrator was already strained to such an extent that the petitioner accused the second respondent of fraud, collusion and with ulterior motive. In his reply, the second respondent threatened that if attempts were made by the petitioner to assail his integrity and bonafide, the same would be dealt with severally in accordance with law. In fact, the second respondent informed that if any further communication is sent in this regard, he would approach the appropriate forum for exemplary reliefs. The petitioner herein also threatened that he would also approach the legal forum for rendition of accounts and also to declare the sale as null and void. Thus, the trust and confidence



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reposed on the second respondent by the petitioner has already lost as is evident from the letters dated 08.03.2004 and 15.03.2004. When these two letters were brought to the knowledge and notice of the second respondent/arbitrator to raise a doubt about his independence and impartiality, the same was simply brushed aside by the second respondent/arbitrator by simply stating that the point raised is devoid of any merits. A heavy onus was caused on the second respondent to eliminate the doubts raised by the petitioner as to his impartiality and the independence, in the light of the letters dated 08.03.2004 and 15.03.2004. But the second respondent has miserably failed to dispel the doubts as to his independence and impartiality. Atleast, he should have explained as to how this point is devoid of merits."

24. Thus, it is amply clear that the second respondent/arbitrator is a party to the dispute and he cannot be called upon to adjudicate the dispute between the appellant and the first respondent in which he has abundant interest. The portion of the letters exchanged between the appellant dated 08.03.2004 and the second respondent dated 15.03.2004 would clearly indicate that the relationship between the appellant and the second respondent had already strained and the appellant cannot expect that he will get justice at the hands of the second respondent/arbitrator in the dispute in question.

25. The second respondent/arbitrator holds a power of attorney and a cheque signing authority in the project, which is the subject matter of the present dispute. When the second respondent himself is a party to the project, which is the subject matter of dispute, he cannot take the role of an arbitrator and decide the dispute between the appellant and the first respondent. It is well settled that when the plea of bias is pleaded and established, it vitiates all the proceedings hitherto made. When bias is attributed and proved, the Court need not consider the other grounds, even if they are legal. After all, bias vitiates all the proceedings and would nullify the orders passed by the authority. In the present case, even at the time of appointment of the second respondent as an arbitrator, a preliminary objection was raised by the appellant by specifically contending that the arbitrator himself holds a power of attorney in respect of the property in dispute besides having authority to sign the cheques. Even at that point of time, in our opinion, the second respondent ought to have recused himself without proceeding to adjudicate the dispute between the appellant and the first respondent. Rather, the second respondent, without assigning any valid reasons has



simply discarded the plea of bias raised by the appellant. When impartiality and independence of the arbitrator has been questioned by the appellant at the earliest point of time, the arbitrator ought not to have proceeded with the arbitral proceedings. However, the second respondent choose to pass order much to the chagrin of the appellant. This aspect was completely lost sight of by the learned single Judge while passing the impugned order.

26. It is trite that bias means an operative prejudice, whether conscious or unconscious in relation to a party in issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in advance in a particular manner without an open mind. A biased mind can influence a decision maker to pre-determine the outcome of the dispute. If a decision-maker is a party to such dispute, he cannot be expected to render a decision much to his own disadvantage and inconvenience. In other words, such decision cannot be expected to be impartial and in accordance with the material records made available. Thus, a pre-disposition or pre-determination to decide a case in a particular manner in complete disregard to the merits of the case can be called as 'bias'. When the decision-maker himself has an interest or a role in the dispute which he adjudges, that person cannot be allowed to adjudge the case for his own cause. In such event, the principle "nemo iudex in causa sua" will come into play. In the off-quoted decision of the Honourable Supreme Court in the case of Crawford Bayley and Company versus Union of India, reported in AIR 2006 SCC 25, it was held that if it is shown that the officer concerned has a personal connection or personal interest or has personally acted in the matter concerned and/or has already taken a decision one way or the other which he may be interested, such a decision made or to be made would attract the principles of bias. Thus, in the instant case, the second respondent/arbitrator has a personal bias in passing an award in a dispute in which he is having an interest. It is needless to indicate that an arbitrator or an umpire should be neutral and he should inspire the confidence of the parties to the lis that the dispute presented before the arbitrator will be decided strictly by adhering to the established procedures contemplated under law. If it is found that the umpire so appointed is showing favouritism against one of the parties to the lis, then the other party may not be interested and participate in such proceedings conducted by the umpire. In the present case, as mentioned above, the arbitrator himself entered into a wrangle with the appellant and the appellant was made to question the independence and impartiality of the arbitrator. The appellant also filed C.S. No. 655 of 2005 against the second respondent/arbitrator to declare the sale deed dated 18.03.2004 executed by him in favour of one P.V.



Subramani as void. In such circumstances, it cannot be said that the award has been passed by the second respondent/arbitrator independently and impartially. A personal bias springs out from a relationship between the deciding authority and any of the parties to the dispute which would result in passing an unfavourable order in favour of one of the parties to the dispute and much to the chagrin of the other party. In the decision of the Honourable Supreme Court in the case of (Baidyanath Mahapatra vs. State of Orissa) reported in AIR 1989 SCC 664, the Honourable Supreme Court quashed the order of the Tribunal, confirming premature retirement, on the ground that the Chairman of the Tribunal was one of the members of the review committee which recommended such premature retirement. Therefore, applying the above decision of the Honourable Supreme Court to the facts of this case, we hold that the appointment of the second respondent and the consequential orders and/or award passed by him are vitiated by the principles of bias and on that ground, we are inclined to set aside the award of the Arbitrator. Accordingly, we are inclined to set aside the judgment and decree dated 24.01.2012 passed by the learned single in O.P. No. 588 of 2004. In such view of the matter, we are not inclined to go into the merits or otherwise of the contentions raised on behalf of both sides.

27. In the result, we set aside the judgment and decree dated 24.01.2012 made in O.P. No. 588 of 2004. Consequently, both the appeals are allowed to the extent indicated above. No costs. It is open to the appellant as well as the first respondent to appoint an independent arbitrator either by mutual consent or by filing an application under Section 11 of The Arbitration and Conciliation Act, 1996 before this Court.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

rsh

The Sub Assistant Registrar (Original Side),
Madras High Court, Chennai

+2cc to Mr.T.Velumani, Advocate SR.No.45245, 45246

+1cc to Mr A. Ramesh Kumar, Advocate SR.No.455505

OSA Nos. 61 and 117 of 2012

CNR(CO)
GMY(19/08/2019)