IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 02.04.2019

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THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.624 of 2015 and A.No.5445 of 2015
AND
O.P.No.560 of 2017

O.P.No.624 of 2015

T.G.Satish Kumar ... Petitioner

Vs.

1.D.Satyanarayana

2.N.Ravindra Kumar Reddy

3.Hon'ble Justice (retd.) Chitra Venkatraman,
17B (new no.31), 4th Main Road,
R.A.Puram, Chennai-28. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to

a) set aside the arbitration award dated 27.04.2015 issued by the learned third respondent Arbitrator insofar as it directs the petitioner to refund the amount of Rs.61,00,000/- (Rupees sixty one lakhs only) to the 1st and 2nd respondents and dismisses the counter claims raised by the petitioner;
b) direct the 1st and 2nd respondent to pay Rs.2,85,00,000/- (Rupees two crores and eighty five lakhs only) to the petitioner being losses suffered by the petitioner as a result of loss of rental income, losses suffered due to the inability of the 1st and 2nd respondent to execute the Joint Development Agreement dated 23.01.2009 and mental agony.

For Petitioner : Mr.J.Abishek
For R1 and R2 : Mr.Srenik.S.Jain

O.P.No.560 of 2017

1.D.Satyanarayana
2.N.Ravindra Kumar Reddy ... Petitioners

Vs.

T.G.Satish Kumar ... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award of the Arbitrator dated 27.04.2015 passed by the learned Arbitrator Mrs.Chitra Venkataraman in the matter and consequently allow all the claims made by this petitioners in the claim petition filed in the arbitration proceedings.

For Petitioners : Mr.Srenik.S.Jain
For Respondent : Ms.J.Abishek

COMMON ORDER

Instant 'Original Petitions' ('OPs' for brevity) are directed against an arbitral award dated 27.04.2015 (hereinafter 'impugned award' for the sake of convenience and clarity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator appointed by this Court in and by order dated 25.06.2014 made in OP.No.297 of 2013. Obviously OP.No.297 of 2013 is under Section 11 of 'The Arbitration and Conciliation Act, 1996' (A & C Act' for brevity).

2.This common order will dispose of both the OPs. Wherever there is a reference to 'Original Petition' in singular, the short from 'OP' will be used. Both the OPs assailing the impugned award are under Section 34 of A & C Act.

3.In the scheme of A & C Act, Section 34 is slotted under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 also reveals that recourse to a Court against an arbitral award under Section 34 of A & C Act may be made by an 'application'. Also to be noted, caption to Section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, with regard to legal proceedings which are in the nature of recourse against arbitral awards, are being assigned the nomenclature 'Original Petitions' in the Registry of this Court and therefore, instant proceedings are being referred to as 'OP', for the sake of convenience and clarity.

4.The factual matrix turns on a very narrow compass. Fulcrum of the instant OPs is a Memorandum of Understanding dated 23.07.2008 between T.G.Sathish Kumar (hereinafter 'land owner' for brevity) as one party and (1) D.Satyanarayana and (2) N.Ravindra Kumar Reddy as another party (hereinafter collectively 'builder' for brevity). It is not in dispute that land owner owned 1.277 acres of land and considering the scope of the controversy, it is not necessary to go in to description of the land. Suffice to say that land is situate in Singanallur village in

Coimbatore South Taluk in Coimbatore District in survey Nos.107 and 108 (hereinafter 'said land' for the sake of convenience and clarity).

5.Aforesaid Memorandum of Understanding dated 23.07.2008 shall be referred to as 'said MOU' and the said MOU was between land owner and builders for the purpose of developing said land by putting apartments therein. This Court is informed that after entering into the said MOU, parties to the said MOU viz., land owner and builder realised that the said land is not perfectly rectangular in the geometric sense of the term and therefore, the land owner entered into an Exchange Deed dated 31.12.2008 with the adjacent land owner so as to make the said land a perfect rectangular piece of land. It may not be necessary to advert to those details as it is not germane to the disposal of instant OPs.

6.After the aforesaid Exchange Deed, land owner and builders entered into a Joint Development Agreement dated 23.01.2009 (hereinafter 'said JDA' for brevity) to develop the said land into apartments. The land owner was to get 43% of the built up area and the builder was to get 57% of the built up area and of course proportionate land. It is not in dispute that the said land was classified as commercial land. It is not in dispute that originally, a textile mill was functioning in the said land and the shed alone remained.

7.In the aforesaid circumstances, sometime in January 2010, builders applied to the local planning authority for building plan approval for development of said land by putting up apartments therein and it was rejected on 26.05.2010, solely on the ground that classification of said land is industrial land and necessary conversion qua land use had not taken place.

8.This is the genesis and trigger of the dispute between land owner and builder.

9.It is the land owner's stated position that the builder is a reputed builder and before entering into the said JDA, builder ought to have taken steps to convert the said land into appropriate classification so as to enable development of the same into apartments. In other words, it is the stated position of the land owner that the entire *onus* of getting planning permission and necessary approvals was on the builder. It is also the stated position of the land owner that the rejection of application for planning approval on 26.05.2010 by the local planning authority is owing to the negligence on the part of the builder. This Court is informed that there is no dispute or disagreement that the parties opted for arbitration and as already mentioned *supra*, a Hon'ble retired Judge of this Court was appointed as Sole Arbitrator by this Court on 25.06.2014 in OP.No.297 of 2013 and the Sole Arbitrator so appointed constituted AT as already mentioned supra.

10.AT entered upon reference and arbitration commenced. There was oral hearing.

11.Before this Court adverts to the counter and counter claim before AT, this Court is informed that a sum of Rs.61,00,000/- had been paid by the builder to the land owner as Security Deposit (hereinafter 'SD' for brevity). Refund of this SD is one of the important claims and the award which has been called in question viz., impugned award turns heavily on refund of SD.

12.Before AT, the builder was the claimant and the land owner was the sole respondent.

13.The claim of the builder as can be culled out from the claim statement is as follows :

I. <u>PRINCIPAL AND INTEREST</u>

a) Principal : Rs. 61,00,000/-

b) Interest at the rate of 24% p.a. from 28.7.2006 till 28.08.2014 : Rs.1,18,34,000/- (plus till the date of receipt of payment)

Sub Total - I	:	Rs.1,79,34,000/-

II. MISCELLANEOUS

a) Towards the Architect, and Arien design	:	Rs.	4,00,000/-
b) Expenses incurred in on the local body corporation	:	Rs.	45,000/-
d) For getting the fire safety certificate	:	Rs.	60,000/-
e) Further expenses for getting the necessary clearances with the corporation	:	Rs.	5,00,000/-
h) Towards the application form to the corporation	:	Rs.	5,00,000/-
Sub Total - II	:	Rs.	15,05,000/-

III. DAMAGES, LOSS & MENTAL AGONY

a) If the principle was invested in some other purpose then I would have at least fetch Rs.1Crore apart from interest	:	Rs.1,00,00,000/-
b) Mental agony	:	Rs. 10,00,000/-
c) Appreciation of value of value of both the parties of the respondent	:	Rs. 50,00,000/-
Sub Total - III	:	Rs.1,60,00,000/-
GRAND TOTAL (Sub Total I + II + III)	:	Rs.3,54,39,000/-

The counter claim made by the land owner as can be culled out from the statement of defence before AT reads as follows :

COUNTER CLAIM RAISED BY THE RESPONDENT

S.No.	Nature of claim	Amount
1.	Loss of rental income from the subject property from 23.1.2009 to 23.1.2011 (24 months) calculated as the existing extent of the factory (25,000 sq.ft.) building multiplied by Rs.30/- per month	Rs.1,80,00,000/-
2.	Loss suffered due to the inability of the Claimants to execute the JDA dated 23.1.2009	Rs.1,00,00,000/-
3.	Mental Agony	Rs. 5,000/-
	TOTAL	Rs.2,85,00,000/-

14.On the aforesaid pleadings, AT framed issues. A perusal of the impugned award reveals that after framing four issues, separate set of five issues have been framed under the caption 'issues framed on the counter claim made by the respondent' i.e., by the land owner.

15.This is articulated in paragraph 8 of the impugned award and the same reads as follows :

> "8.On the facts thus stated above, with the consent of the parties following issues were framed for consideration :
>
> 1. Whether the claimant is entitled to get back Rs.61,00,000 (Rupees sixty one lakhs) being the advance paid on 23.7.2008 along with interest at the rate of 24% PA from the date 1.8.2008 to the date of payment ?
> 2. Whether the claimant is entitled to get back a sum of Rs.17,65,000 being the amount spent

as additional expenditure towards architecture fee and other expenses as indicated in Para 17 of the claim petition till the date of payment ?

3. Whether the claimant is entitled to damages on account of loss and the mental agony suffered and quantified at Rs.1,60,00,000 ?
4. Whether the claimant is entitled to interest at the rate of 24% on Rs.3,27,71,000 being the total claim made in the claim petition from the date of filing the claim petition till the date of receipt of the same ?

Issues framed on the counter claim made by the respondent :

1. Whether the claimants are liable to pay a sum of Rs.1,80,000/- being the loss of rental income from the subject property from 23.1.2009 to 23.1.2011 (24 months) calculated on the extent of the factory building of 25,000 sq.ft. Multiplied by Rs.30 per month ?
2. Whether the respondent is entitled to claim loss to the extent of Rs.1,00,00,000/- arising on account of the inability of the claimant to execute the Joint Development Agreement dt.23.1.2009 ?

3. Whether the respondent is entitled to a sum of Rs.5,00,000/- towards damages it being related to the mental agony suffered by the respondent ?

4. Whether the respondent is entitled to interest on the sum of Rs.2,85,00,000/- on

the above said three claims at the rate of 24% p.a. from the date of the Joint Development Agreement dt.23.1.2009 ?

5. Whether the respondent is entitled to claim cost of the arbitration proceedings ?”

16.When issues are framed on pleadings, one set of issues from rival pleadings will serve the purpose well as the objective of framing issues is to eliminate unnecessary pleadings which could clog the trial and gain focus. When a counter claim is made, no doubt the counter claim becomes a plaint by itself and the rejoinder completes the pleadings which collectively constitute rival pleadings. Therefore 'issues' arise out of these pleadings post framing of issues (though issues can be recast at any stage and recasting include framing additional issues) separate set of issues on counter claim may not arise. Therefore the four 'issues' and five 'issues' that have been described as 'issues framed on the counter claim' are collectively treated as nine 'issues'.

17.This Court reminds itself that AT is not bound by 'The Code of Civil Procedure, 1908' ('CPC' for brevity) which govern a trial but principles apply and it is desirable to have one set of issues, rather than having 'issues' followed by separate set of issues that has been described as issues framed on the counter claim is part of the pleadings in a lis notwithstanding the obtaining position that counter claim becomes a plaint by itself. It may not be necessary to delve any further into this aspect of the matter as this does not impact the decision which is to be made in the instant OPs. Be that as it may, as this has been brought to the notice of this Court, it has become necessary to make the aforesaid observations with regard to framing of issues.

18.After a detailed discussion on the aforesaid nine issues, AT passed the impugned award wherein and whereby, the first claim made by the land owner viz., refund of SD of Rs.61,00,000/- alone was acceded to with interest at the rate of 18% per annum and this 18% per annum interest is to operate, if the builder does not refund the SD within six weeks from the date of impugned award.

19.It is brought to the notice of this Court that the impugned award was made on 27.04.2015 and therefore six weeks elapsed on 08.06.2015. It is also not in dispute before this Court that the SD was not refunded within six weeks and therefore, interest at the rate of 18% p.a. on Rs.61,00,000/-, payable by the land owner to the builder is now operating.

20.Under the aforesaid circumstances, it is noticed that OP.No.624 of 2015 filed by the land owner has been presented in this Court on 01.04.2015 and this OP.No.624 of 2015 shall be referred to as senior OP. Thereafter, the builder has filed OP.No.560 of 2017 which has been presented in this Court on 04.09.2015. To be noted, though the date of presentation is 04.09.2015, it was ultimately processed and numbered only in 2017. Therefore, the OP filed by the land owner assailing the impugned award shall be referred to as senior OP and the OP filed by the builders shall be referred to as junior OP.

21.Senior and junior OPs are essentially in the nature of cross OPs and it may be appropriate and apposite to refer the same as cross OPs. Today, Mr.J.Abishek, learned counsel on record for the land owner, who is petitioner in senior OP and Mr.Srenik.S.Jain, learned counsel for the builder, who are petitioners in junior OP are before this Court.

22.In the senior OP, the learned sole Arbitrator who constituted the AT has been arrayed as third respondent and in the considered opinion of this Court, it is not necessary for so arraying the sole Arbitrator, considering the nature of the grounds of attack qua impugned award. As the main OPs are itself now being heard out and disposed

of, for the purpose of avoiding further delay, this Court (at this stage) is not embarking upon the exercise of deleting third respondent in senior OP as the same will result in consumption of time and cause procedural delay.

23.Be that as it may, both the learned counsel attacked/assailed impugned award on the sole ground of patent illegality.

24.There is no dispute or disagreement before me that patent illegality as a ground to attack an arbitral award under Section 34 of A & C Act was available even prior to amendment to Section 34 of A & C Act on 23.10.2015, owing to the decision of Hon'ble Supreme Court in *ONGC Ltd. Vs. Saw Pipes Ltd. reported in (2003) 5 SCC 705.* To be noted, both counsel submitted that instant OPs are being argued on the basis of Section 34 of A & C Act, as it existed prior to 23.10.2015.

25.To be noted, in instant OPs the question as to whether it is necessary to take recourse to Section 34 of A & C Act as amended post to 23.10.2015, is left open to be decided in an appropriate case where there is serious contest in this regard.

26.Adverting to these grounds of attack, learned counsel for land owner, drew the attention of this Court to three clauses in the said JDA and the same are as follows :

i. One is clause 3 which reads as follows :

"3.REFUNDABLE SECURITY DEPOSIT : The Developer has deposited with the owner, a sum of Rs.61,00,000/- (Rupees sixty one lakhs only) as refundable security deposit which sum shall be refunded by the Owner at the time of delivery of the Owner's Constructed Area of apartments without any interest thereon. The Developer has paid the Security Deposit to the Owner as stated in the Memorandum of Understanding on 23rd July 2008 the receipt of which the Owners hereby admit and acknowledge."

ii.The other is clause 4(e) which reads as follows :

"4.OBLIGATIONS OF THE OWNERS : The Owners shall perform the following obligations : ...

(e) To execute a Power of Attorney in favour of the Developer, empowering them to apply for and obtain Licenses and Plans, conversion of land use, consents with regard to the buildings to be constructed on the Schedule Property, to represent the Owner before the Municipal authorities, Coimbatore City Municipal Corporation and Urban Development Authority, State and Central Government, Urban Arts Commission, Fire Force Departments, Tamil Nadu Power Transmission Corporation Ltd., Tamil Nadu Power Transmission Corporation Ltd., Tamil Nadu Water Supply and Sewerage Board, Coimbatore - Telephones, Airport authorities, and Telecommunication Authorities, and other Statutory Authorities, which power shall not revoked during the term of this agreement." ...

iii.The third clause is clause 14 which reads as follows :

"14.FAILURE TO REPAY THE SECURITY DEPOSIT : In the event of the Owner not refunding the amounts stated herein, the Developer will not be bound to deliver the Owner Constructed Area, Equivalent to the value of the deposit, till such time the amounts are received. If the delay exceeds more than Sixty (60) days after the written notice by the Developer to the Owner of their readiness to deliver the Owner Constructed Area, the Developer on its own accord will be entitled to sell the said area and recover the amounts due by the Owner. Likewise in the event of the delay in completing the project, the developer has to pay the rental and interest compensation to the owner as stated above. In the event of developer not disbursing the amount, the owner on his own accord will be entitled to hold the area form the developer's share of 57% and recover the amounts due by the developer."

With regard to clause 3, it was submitted that the SD has to be refunded by the land owner to the builder. With regard to clause 4(e), it was pointed out that the *onus* with regard to getting planning permission was on the builder. With regard to clause 14, reference was made to say that refund will arise only when 47% of the developed portion is handed over to the land owner. It was also argued that there is a provision for specific performance.

27.Responding to this, learned counsel for builder submitted that the entire project became a non-starter and a perusal of the said JDA will reveal that specific performance is not the only remedy available and that it is open to the parties to seek other remedies.

28.To be noted, other than refund of Rs.61,00,000/- SD, all other claims are clearly notional. This Court is also informed that there is no dispute or disagreement that the entire project became a non-starter as a railway over bridge was to be constructed therein owing to which access to said land had been entirely blocked.

29.In the aforesaid backdrop, a careful perusal of the impugned award and its findings on each of the nine issues reveals that there is discussion and AT has come to the conclusion that the question of claiming damages does not arise. Other than refund of Rs.61,00,000/- to builder with interest, all other notional claims by builder, counter claims made by land owner were rejected by giving reasons in the course of discussion of each of the issues.

30.Learned counsel for petitioner in senior OP viz., land owner pressed into service a judgment of Hon'ble

Supreme Court in *Madhya Pradesh Power Generation Company Limited and Another Vs. Ansaldo Energia Spa and another reported in (2018) 16 SCC 661.* *Ansaldo case* is Civil Appeal No.3804 of 2018. Relevant paragraph is paragraph 22 and the same reads as follows :

> *"22.It is necessary to refer to the settled law on the scope of Section 34 of the Arbitration and Conciliation Act, 1996. In this case we are concerned with the point as to whether an arbitral award can be set aside for being in conflict with the public policy of India. An arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law, or (b) the interest of India, or (c) justice or morality. (Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644]) Patent illegality was added to the above three grounds in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] Illegality must go to the root of the matter and in case the illegality is of trivial nature it cannot be held that the award is against the public policy. It was further observed in the said judgment (ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705]) that an award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court."*

31.There can be no two opinions that patent illegality should be so patent, conspicuous and obvious and it is not something which is to be detected by resorting to an inferential process.

32.With this in mind, this Court examined the impugned award of the AT.

33.This Court is unable to convince itself that there is patent illegality within the meaning of the term patent illegality as understood and as can be applied in testing an award.

34.With regard to testing an award, this Court has also reminded itself that Hon'ble Supreme Court in *Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.* reported in *(2009) 17 SCC 796* held that proceedings under Section 34 of A & C Act are summary procedures. *Fiza Developers* principle was subsequently explained by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in *(2018) 9 SCC 49* and while so explaining, held that *Fiza Developers* is a step in the right direction.

35.In other words, this Court tested impugned award qua patent illegality ground on which it is assailed within the contours and confines of Section 34 of A & C Act.

36.This Court is unable to find any patent illegality as the AT has reasoned that damages has not been established and it cannot be gainsaid that SD is liable to be returned by the land owner only at the time of 47% of the built up area being handed over to him, as the entire project became a non-starter.

37.From the narrative supra, this Court is convinced that both the petitioners i.e., petitioner in senior and junior OPs has not made out a case for judicial intervention on the ground of patent illegality. Resultantly, both the OPs fail and both the OPs are dismissed. Considering the nature of the matter and trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs. Consequently, connected application also dismissed.

Sd./-M.S.J
02.04.2019

//Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 05/07/2019

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