

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2019

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P.No.241 of 2018

1.M/s.Royale Chennai Realtors,
LVR Centre, New No.7,
Old No.4, Seshadri Road,
Alwarpet, Chennai-600 018.

2.B.Sathyanarayana

3.B.Kumaravel Pandian

... Petitioners

vs.

1.M/s.VGN Developers Pvt. Ltd.,
Rep. By its Authorized Signatory
K.Manivanna,
No.15, Wallace Garden, II Street,
Nungambakkam,
Chennai-600 006.

2.Vanjulavalli

3.S.Narasimhan

4.S.Rajkumar

... Respondents

PRAYER: This Original petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 prayed to set aside the impugned Award dated 04.01.2017 passed by the Arbitrator.

For Petitioners : Mr.Samir S.Shah for
M/s.D.Sai Kumaran & S.John

For Respondents : Mr.P.R.Raman, Senior Counsel for
M/s.C.Seethapathy for R1

ORDER

This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) to set aside the Arbitral Award dated 04.01.2017 (the Award).

2. The dispute arises out of an Agreement of Sale dated 25.06.2010 (the Agreement), which was executed by the parties to this petition. After the execution of the Agreement, the vendors were unable to clear the defects in title that were specified in the Agreement and therefore, supplementary agreements were executed on 24.08.2010, 25.10.2010, 24.03.2011 and 25.06.2011. However, the said defects in title/encumbrances could not be removed. In these circumstances, by letter dated 21.08.2012, the Petitioners confirmed that the advance sale consideration would be refunded as per the schedule of repayment set out in the said letter.

3. This assurance was admittedly not complied with. Therefore, a police complaint was given by the first Respondent on 26.11.2012 and a FIR was registered on 24.12.2012. Subsequently, in proceedings before this Court in Crl.O.P.No.30114 of 2012, the dispute was referred to the Mediation Centre annexed to this Court and this resulted in a Mediation Interim Agreement dated 16.04.2013 (the Mediation Agreement), whereby the Petitioner agreed to repay a sum of Rs.14.50 crores as per the schedule of repayment set out in clause I thereto. Once again, this undertaking was not complied with. Meanwhile, by notice dated 05.03.2013, the first Respondent, through its lawyer, terminated the Agreement and invoked the arbitration clause contained therein. In the arbitration proceedings, the first Respondent prayed for an award for a sum of Rs.29,01,57,261/- with interest thereon at 24% p.a.

4. Upon consideration of the pleadings, the learned Arbitrator framed four issues, which are set out in paragraph - 6 of the Award. Both the parties adduced oral evidence in the said proceedings through one witness each and the first Respondent herein exhibited 15 documents as Exhibits C1 to C15 but no documentary evidence was adduced by the Petitioners herein.

5. Upon consideration of the pleadings, the evidence and the oral arguments, the learned Arbitrator pronounced the Award, whereby a sum of Rs.12,50,000/- was awarded to the first Respondent with interest thereon at 18% p.a. from 26.12.2011 till the date of payment and a sum of Rs.10 lakhs as costs. The Award is challenged in this petition.

6. The learned counsel for the Petitioners raised five grounds to challenge the Award. The first contention is that no dispute arose out of the Agreement. In specific, his submission is that both by the assurance letter dated 21.08.2012 and by the Mediation Agreement, the Petitioners agreed and undertook to pay a sum of Rs.14.50 crores as per the schedule specified therein. Consequently, according to the learned counsel for the Petitioners, no dispute arose under the Agreement and in the absence of a dispute, there cannot be an arbitration. The second submission is that there is no arbitration agreement in respect of the dispute raised by the first Respondent. In order to substantiate this submission, the learned counsel referred to the assurance letter dated 21.08.2012 and the Mediation Agreement and contended that both these documents superseded the Agreement. As a consequence, the arbitration clause in the Agreement perished and the only option that is available to the

first Respondent is to institute civil or criminal proceedings as specified in the Mediation Agreement.

7. In order to emphasize this contention, the learned counsel pointed out as to how in each of the supplementary agreements that were executed pursuant to the Agreement, it was expressly mentioned that all the terms and conditions of the Agreement would continue to be binding and that the relevant supplementary agreement should be read as part and parcel of the Agreement. By contrast, he submitted that no such stipulation is contained either in assurance letter or in the Mediation Agreement.

8. The third submission is that the learned Arbitrator extensively dealt with the alleged non-fulfillment of obligations by the Petitioner, whereas the Agreement expressly stipulates at Clause 26 that the non-fulfillment of liabilities and objectives by the parties of the first part shall not be considered as a dispute. The fourth contention is that by notice of termination dated 05.03.2013, the first Respondent cancelled the Agreement and that, consequently, the arbitration clause also perishes. The fifth contention is that the Agreement does not provide for the payment of or specify the rate of interest, whereas the award grants interest at the rate of 18% p.a.

9. In response and to contrary, the learned Senior Counsel for the first Respondent submitted that the Agreement was entered into with the knowledge that there were defects in title, which were required to be rectified by the vendors, and that it was in those circumstances that the Agreement specified at clause 26 thereof that the purchasers would not be entitled to specific performance and that in the event of the inability of vendors to fulfill the liabilities and objectives of the Agreement, the vendors would immediately refund the entire advance amount. He further submitted that this does not in any manner imply that the dispute regarding the non-refund of the advance amount is not a dispute in terms of clause 24 of the said Agreement.

10. He referred, thereafter, to the order of the Collector dated 29.08.2011 whereby the patta in favour of the owner of the property was cancelled by also recording that the Will that was executed in favour of the owner is dubious and, perhaps, bogus. He referred to this document in order to emphasise that the Agreement could not be specifically performed in these facts and circumstances and that the first Respondent was entitled to the refund of advance with interest thereon.

11. As regards the contention that there is no arbitration agreement, he pointed out that this contention was not taken by the Petitioners in the Section 11 Petition before this Court as recorded by the learned Arbitrator in paragraph - 22 of the Award.

12. In response to the contention that the Agreement stands superseded by the Mediation Agreement, he pointed out that neither the assurance letter dated 21.08.2012 nor the Mediation Agreement contain any indication that the Agreement is superseded. In this connection, he further submitted that the Mediation Agreement arises out of criminal proceedings before this Court and not civil proceedings. Consequently, he submitted that it certainly cannot be said that the Mediation Agreement superseded the Agreement.

13. The records were examined and the oral submissions of both the learned counsel were carefully considered.

14. In order to test the first contention of the learned counsel for the Petitioners, it is necessary to examine the arbitration clause in the Agreement, namely, clause 24. On perusal of the above clause, it is clear that "any dispute

between the parties shall be referred to a sole arbitrator to be appointed by the parties by mutual consent". The use of the words 'any dispute' is indicative of the breadth and amplitude of the clause and I see no reason to construe its scope narrowly. The foundation of the contention of the learned counsel for the Petitioners is that there is no dispute in view of the admission of liability by the Petitioners. However, this contention cannot be countenanced because whether there is refusal, failure or inability to pay a debt, it nonetheless amounts to a dispute. For reasons aforesaid and keeping in view the wide scope of the arbitration clause, I conclude that the dispute regarding to non refunding of the advance with interest thereon qualifies as a dispute, which is within the purview of the arbitration clause.

15. With regard to the second contention that the arbitration agreement was superseded by the assurance letter and the Mediation Agreement, it is evident on perusal of the said documents that the intention to supersede the Agreement is not reflected therein. Moreover, as held by the Arbitral Tribunal, this contention was not raised in the Section 11 Petition. Notwithstanding the fact that a decision on such contention may have been relegated for consideration by the arbitral tribunal by the Court, nothing prevented the Petitioners from raising such contention in the Section 11 Petition.

16. The third contention is that the arbitration clause perishes on account of the termination of the Agreement. This contention is untenable for the reason that the termination of the Agreement does not extinguish accrued liabilities that have already arisen thereunder. Equally it is the settled position that the arbitration clause does not perish upon termination of the relevant agreement and, as per Section 16 of the Arbitration Act, survives even if the Agreement is void or invalid. Therefore, this submission is rejected.

17. The last contention relates to interest being awarded in spite of the fact that the Agreement does not provide for the payment of interest. In this regard, it may be noted that the Agreement does not prohibit the grant of interest. When the payment of interest is not prohibited under the Agreement, interest is nothing but time value of money and, therefore, it may be awarded by the Arbitral Tribunal under Section 31(7)(a) of the Arbitration Act, in respect of the pre-reference and pendente lite period and under Section 31(7)(b) in respect of the post-Award period.

18. In this case, interest was awarded at the rate of 18% p.a. from 26.12.2011 until the date of realization. Considering the fact that this is a

commercial transaction with a business entity and keeping in mind the interest rates that prevailed during the the relevant time, it cannot be said that the rate of interest awarded by the Arbitral Tribunal is unreasonable so as to warrant interference.

19. For the aforesaid reasons, I conclude that no case is made out to set aside the award. In the result, this Original Petition is dismissed.

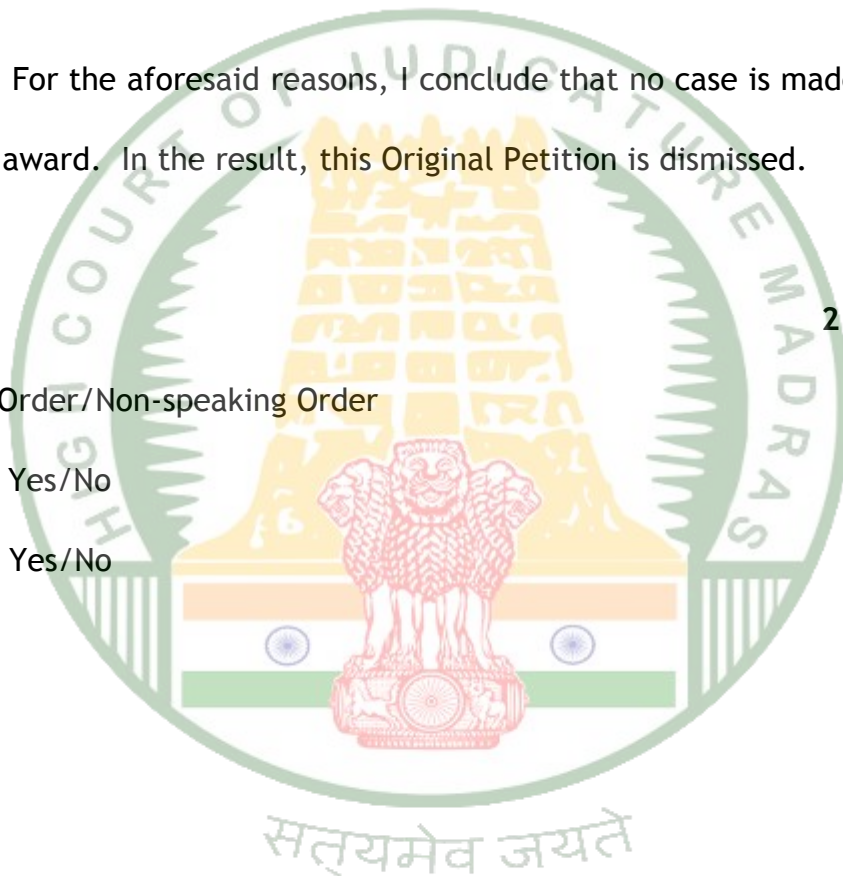
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Speaking Order/Non-speaking Order

Index : Yes/No

Internet : Yes/No

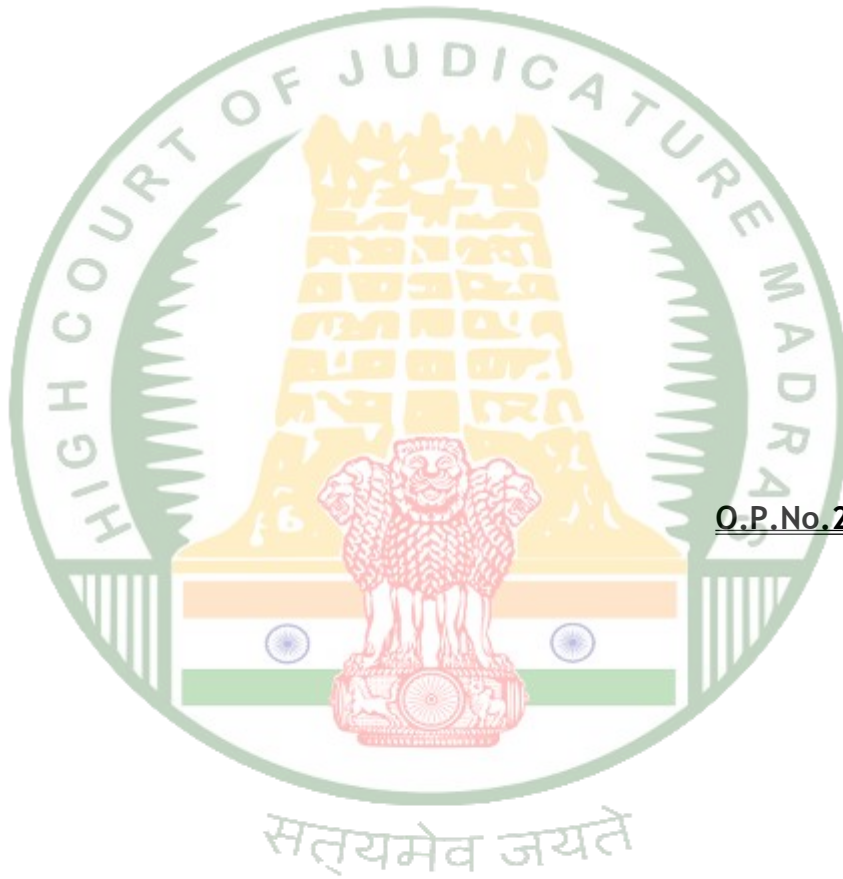
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SENTHILKUMAR RAMAMOORTHY, J

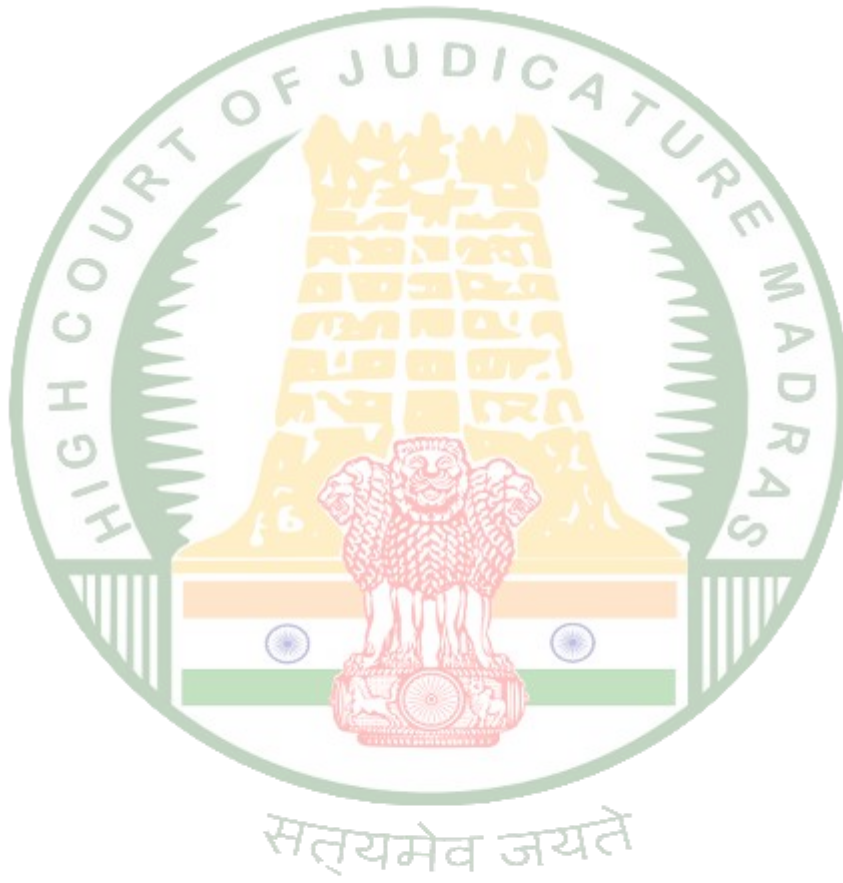
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