THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
06~06~2019	12~06~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.Nos.347, 542 and 581 of 2018

O.P.No.347 of 2018
K.K. Krishnan Kutty
Plot No.7, Door No.2/260
Natesan Colony,
Kottivakkam,
Chennai 600041. .. Petitioner

.Vs.

1. M/s. Green Tree Homes and Ventures Pvt.Ltd.,
   Represented by its Managing Director,
   Mr.Sathya Murthy
   No.13, Sriman Srinivasan Road,
   Alwarpet, Chennai 600018.

2. Green 201 Owners Welfare Association
   Rep by its Secretary
   Green - 201, Mr.Radha Garden Road,
   Pudupakkam, Siruseri, Chennai. .. Respondents

O.P.No.542 of 2018
Green 201 Owners Welfare Association
Rep by its Secretary
Residing at Plot No.69,
Radha Nagar 2nd Main Road,
Perumbakkam,

Chennai 600100. .. Petitioner

.Vs.

1. K.K. Krishnan Kutty
   Plot No.7, Door No.2/260
   Natesan Colony,
   Kottivakkam,
   Chennai 600041.

2. M/s. Green Tree Homes and Ventures Pvt.Ltd.,
   Represented by its Managing Director,
   Mr.Sathya Murthy
   No.13, Sriman Srinivasan Road,
   Alwarpet, Chennai 600018. .. Respondents

O.P.No.581 of 2018

M/s. Green Tree Homes and Ventures Pvt.Ltd.,
Represented by its Managing Director,
Mr.Sathya moorthy
No.13, Sriman Srinivasan Road,
Alwarpet, Chennai 600018. .. Petitioner

vs

1. K.K. Krishnan Kutty
   Plot No.7, Door No.2/260
   Natesan Colony,
   Kottivakkam,
   Chennai 600041.
2. Green 201 Owners Welfare Association
   Rep by its Secretary
   Green - 201, Mr.Radha Garden Road,
   Pudupakkam, Siruseri, Chennai. .. Respondents

* * *

Prayer in O.P.No.347 of 2018: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 15.01.2018 passed by the learned Arbitrator in respect of erroneous direction to set aside the order of termination of the Joint Development Agreement dated 08.11.2010.

Prayer in O.P.No.542 of 2018: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 15.01.2018 passed by the learned Arbitrator in respect of dispute arising out of the said Joint Development Agreement dated 08.11.2010.

Prayer in O.P.No.581 of 2018: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 15.01.2018 passed by the learned Arbitrator and allow the claims of the petitioner in respect of dispute arising out of the said Joint Development Agreement dated 08.11.2010 and Award an amount of Rs.14,81,05,618 as loss of profit to the Petitioner.

* * *

O.P.No.347 of 2018

For Petitioner	:	Mr. S. Suresh
For Respondent	:	Mr. Anirudh Krishnan[for R1] Mr.V. Ramesh for Mr.T.Thiyagarajan [for R2]

O.P.No.542 of 2018

For Petitioner : Mr.V. Ramesh for
Mr.T.Thiyagarajan

For Respondent : Mr. S. Suresh [for R1]
Mr.Anirudh Krishnan [for R2]

O.P.No.581 of 2018

For Petitioner : Mr.Anirudh Krishnan

For Respondent : Mr. S. Suresh [for R1]
Mr.V.Ramesh
for Mr.T.Thiyagarajan[for R2]

COMMON ORDER

These three Original Petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the Award passed by the Arbitrator appointed by this Court by order dated 15.01.2018.

2. O.P.No.581 of 2018 is filed by First Respondent in the Arbitration proceedings. This O.P.has been filed mainly challenged the Award as the Arbitrator has gone beyond the terms of contract and terminated the Joint Development Agreement dated 08.11.2010 on the

ground that the findings of the Arbitrator is perverse, patently illegal, against the fundamental policy of Indian Law.

3. O.P.No.542 of 2018 is filed by the Second Respondent in the Arbitral proceedings, as against the Award rejecting claim for damages and compensation.

4. O.P.No.347 of 2018 is filed by the Claimant himself challenging the Award negatived his claim in respect of 37% of sale consideration in 11 flats sold by the first respondent.

5. Since all the three Original Petitions are filed against the Award passed by the Sole Arbitrator appointed by this Court, all the Original Petitions are disposed of in a Common Order.

6. The brief facts leading to file these petitions are as follows:

6.(a) The Claimant is the land owner. He acquired land to an extent of 3.91 Acres in Pududpakkam Village, Kancheepuram District.

He entered into a Joint Development Agreement dated 8.11.2010 with the First Respondent company. He has also executed two General Power of Attorneys in favour of the First Respondent on 11.11.2010 and 22.07.2011. Several persons have booked for their respective flats in that area. In one of the clause in the Joint Development Agreement in para 3.5, it is stipulated as under:

> "3.5 : the amounts on such sale of Saleable Area shall be collected by the developer and deposited in a designated bank account in any Bank/Financial Institution to be operated in the name of Developer. The account shall be operated only for this project."

6 (b) In pursuant to the above terms, First Respondent opened a Current Account in HDFC Bank, Alwarpet Branch on 12.08.2011 in the name of the Company (M/s.Green Tree Homes and Ventures Pvt. Ltd.,) bearing Account No.193986400018 so as to facilitate the deposit of the cheques issued by the flat buyers towards sale consideration and also to transfer 37% share of the claimant. As on 31.12.2014 the First Respondent had sold and registered 263 flats together proportionate

Undivided Share (UDS) of the land. The buyers of the flats are members of the Second Respondent Association. Even from March 2014 the First Respondent become irregular in paying the 37% share of the Claimant and subsequently have even stopped in paying the amounts due to the claimant. The First Respondent had misused 37% share of the Claimant for their personal gains and in total violation of the Joint Development Agreement. The First Respondent did not make any improvement in the project by proceeding with the construction even after receiving monies from the buyers. The buyers started questioning about their not getting possession over the flats. The Director of the company Mr.Sathyamoorthy apprehending legal action left the country and there was no other authorised person to represent the company. Thus the project came to a standstill and all the buyers have lost their confidence with the First Respondent. He abandoned the project and had cheated the buyers. Despite the Order passed by the High Court in a contempt application he did not appear before the High Court. Therefore, it becomes necessary that the Joint Development Agreement dated 8.11.2010 shall be terminated and the Claimant should be permitted to enter into development agreements with the members of the Second Respondent Association and also with third parties in order to complete the construction on mutually agreed terms and conditions.

7. The Second Respondent is also made claim pursuant to the Joint Development Agreement between the Claimant and the First Respondent. The members of the Second Respondent association had entered into Builder Agreement with the First Respondent company. They also got their share of undivided land which were also registered. As per the agreement with the First Respondent Builder they had promised to deliver possession of the completed flats to the members of the Second Respondent Association by March 2014 with all the above mentioned amenities and common facilities. However, First Respondent has completed only skeleton structures of two towers viz., 'A' & 'E' towers and the basement in tower 'B' comprising 15 Floors and 9 Floors respectively and constructed basement only in tower 'B'. The First Respondent did not even start construction of tower 'C' and they have not maintained the skeleton structure of 'A' & 'E' towers and the basement in tower 'B'. It has been exposed to all weather conditions

and this Claimant fears and members of the Second Respondent Association have mostly made payment without any delay and have paid the amounts by obtaining bank loans and paying the monthly instalments regularly. As on today they are facing untold miseries. Hence they have to pay calculation payment of agreement and also to permit the Second Respondent Association to complete the construction of flats to a contractor to be nominated by the Second Respondent and also compensation and damages to the members of the Second Respondent Association in view of the delay in handing over the flats.

8. First Respondent filed reply contending that the reasons for delay was customer collections lag time by 3 to 6 months even after completion of the relevant building. During the early 2014 the construction was going on in full sing and funds were required to make payments to the contractors and suppliers. The cash crunch went into a stressful situation due to the collapse of a high rise building at Mugalivakkam in which 11 workers died on the spot. Due to this incident, the banks which were advancing housing loans froze the

disbursement of loans for high rise building. This lasted for several months resulting in severe payment difficulties. Further the additional problem of drying up market credit from suppliers, financiers and contractors resulted in rising short term loans from the market. Some customers wanted full repayment and were pressurizing and denying the allegation of the Claimant.

9. It is the contention of the First Respondent that the claimant made an attempt to take over the project after receiving substantial sums of money for the land and he had held open and mass customer meeting at the project site in October 2015 making all attempts to push the First Respondent company out of the project and try to hood-wink the customers. Majority of the customers did not trust the Claimant, as he had attempted, as early as January 2015, to stop the construction activity by abuse of the process of law and the project was never abandoned by the First Respondent Company. There was a low level of activity and frequent stoppages, due to complete shut down of revenue pipeline.

10. Based on the respective pleadings in the claim the following issues were framed:

" 1. Whether the Joint Development Agreement dated 08.11.2010 between the Claimant and 1st Respondent is liable to be cancelled in view of the default committed by the First Respondent?

2. Whether the Claimant is entitled for his share of 37% out of the revenue from sale of land and building including car parking as per the Agreement for Joint Development Agreement dated 08.11.2010?

3. Whether the First Respondent has opened any account without the knowledge of the claimant for realizing the cheque issued by the buyers and thereby denied the share of 37% to the Claimant?

4. Whether the Claimant is entitled to take over the unsold area equivalent to his 37% sharew as per clause 3.11 of Joint Development Agreement dated 08.11.2010 since 48 months from date of obtaining plan sanction is lapsed?

5. Whether the Second Respondent Association's claim to complete the construction of flats in four towers through a contractor to be nominated by them can be sustained and whether they are entitled to obtain all

sanctioned buildings plans, permits, payment receipts, detailed working drawings, structural drawings, Architectural drawings relating to electricity, plumbing, joinery, soil test report and registered sale deeds from the First Respondent?

6. Whether the members of the Second Respondent Association are entitled for compensation and damages from the First Respondent and its directors?

7. Whether the members of the Second Respondent Association are entitled to obtain refund of the excess amount collected by the First Respondent in view of their abandoning the project?

8. Whether the members of the Second Respondent Association are entitled to obtain registration of undivided share of land from the first respondent and the Claimant?

9. Whether the agreement of sale dated 04/06/2014 bearing document numbers 7911 and 7912 of 2014, SRO Thiruporur entered into on the strength of the power of attorney given by the Claimant in favour of the Second Respondent and third parties is null and void and not binding on the members of the Second Respondent Association.

10. Whether there was any default on the part of the members of the Second Respondent Association in making payment and delayed payment of milestone bills as per construction agreement was set back in the pace of construction activity?

11. Whether there was initial expenditure from and out of the equity funds of the First Respondent Company for design and drawing costs, and marketing and whether the company had brought in additional funds by equity/loan/private financiers?

12. Whether the parties are entitled for costs of the proceedings and if so fix the liability and the quantum?

13. Whether Second Respondent (Owner Welfare Association) is justified in seeking adjudication of its claim before the Arbitrator in absence of a privity of Contract to that effect?

14. Whether the Second Respondent Association, a society registered under The T.N.Societies Registration Act, 1975 has to have recourse to T.N.Apartment Ownership Act, 1994 for enforcing the contract of sale of apartment and for getting undivided share in land?

15. Whether the Second Respondent Association has any cause of action for all the members to seek

adjudication especially when by efflux of time frame was accorded for construction?

16. Whether the claimant had caused hindrance in accomplishing Project in time?

17. Whether First Respondent Company had suffered damagers and is entitled for its Counter Claim?"

11. The learned Arbitrator considered all aspects (ruled the situation) to adjudicate the disputes referred by the Second Respondent and answered all the issues and finally cancelled the Joint Development Agreement dated 08.11.2010 entered between the Claimant and the First Respondent in view of the default committed by the First Respondent and also directed the claimant to return the amount of Rs.2.5 Crores and another 1.26 Crores to the First Respondent company and permitted the Second respondent Association to complete the construction with approved plans and the Claimant shall co-operate in redeeming the project and completing the same within a reasonable time and negatived damages claimed by the Claimant and the Second Respondent, as against which these three

petitions are filed.

12. Mr. Anirudh Krishnan appearing for the Petitioner (Builder) in O.P.No.581 of 2018 fairly submitted that in equity he has no case, however, in Law the question of termination of Joint Development Agreement by the learned Arbitrator is against the substantial provision of law and findings of the Arbitrator is against law. It is his contention that as far as the building contract is concerned, time is not the essence of contract. Hence, his contention that mere delay in completing the building the same cannot be a ground to terminate the Joint Development Agreement, which is against Section 27 of the Specific Relief Act. In support of his submissions he has also relied upon the following judgments:

1) Hungerford Investment Trust Limited v. Haridas Mundhra and others, **(1972) 3 SCC 684**.

2) Hind Construction Contractors v. State of Maharashtra, **(1979) 2 SCC 70.**

3) Abram Steamship Company Limited and Another v.

Westville Shipping Company Limited and Another, **(1923) AC 773.**

4) Ssangyong Engineering & Construction Co.Ltd., v. National Highways Authority of India (NHAI), **2019 SCC Online SC 677.**

5) Associate Builders v. Delhi Development Authority, **(2015) 3 SCC 49.**

13. Mr.S. Suresh learned counsel appearing for the Petitioner(Claimant) in O.P.No.347 of 2018 submitted that the Arbitrator finding to refund the amount to the Builder despite the default committed by him is not correct and it is against the contract and the same is liable to be interfered.

14. Mr.V.Ramesh, learned counsel appearing for the Petitioner (Association) in O.P.No.542 of 2018 submitted that despite the First Respondent committed default is not committed as per contract. Since the first Respondent company has abandoned the project should have awarded the damages and compensation to the Second Respondent members as well.

15. Learned Arbitrator after considering the entire evidence of both sides by oral as well as documentary evidence, factually found that having entered into Joint Development Agreement, First Respondent company collected huge amounts from various persons who are the members of the Second Respondent Association and put up certain skeleton structure has abandoned the project. Taking into consideration of the entire factual scenario, the learned Arbitrator has found that the Joint Development Agreement is violated and time stipulated in the agreement was not honoured and also taken into consideration of the fact that the amount were siphoned by the erstwhile directors. However, no steps have taken by the R.W.1 that too in pursuance of agreement of sale dated 4.6.2014 either to cancel the sale or to recover the amount. The entire project should have been completed in the year 2014. Since the first respondent has failed to provide account to the land owner the land owner had initiated proceedings under Section 9 and 11 of the Arbitration Act besides land owner also cancelled the POA on account of the alleged financial irregularities committed by the First Respondent and also considered

that any person interested may sue to have a contract rescinded and the arbitrator considered the scope of Section 27 of the Specific Relief Act, factually found that various members of the Second Respondent Association were cheated, and evenafter they paid the amount, flats have not been constructed and possession has not been given to them. Learned Arbitrator has terminated the entire Joint Development Agreement as the flats were not constructed. Therefore, the contention of the learned Counsel that time is not the essence of contract, the same cannot be terminated, cannot be countenanced. When a person enters a contract and lure the public and collect huge amount in several crores cannot contend that time is not essence of contract. When the learned Arbitrator has found factually and arrived a finding. The scope of interference under section 34 of the Act is limited. Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honoruable Apex Court has held that an 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; or

d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

16. The power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. In the case on hand, considering the entire findings of the Arbitrator this court do not find any materials to show that this case requires interference under Section 34 of the Act. In ***Swan Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739*** the Honourable Apex Court has held as follows:

> "12. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised

only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."

"13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

"21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

17. The Honourable Apex Court in ***McDermott International Inc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond

the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

18. A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]*** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

19. Absolutely, there is no dispute with regard to the preposition laid down by the judgments cited by the learned counsel for the Petitioners. However, the facts in the above judgements are entirely different from the facts of this case and hence those judgments will not help the petitioner to set aside the Award.

20. In the instant case the Arbitrator has passed a reasoned Award. I do not find any patent illegality or public policy is violated in the Award and the Award passed within the scope of the Act and the

same cannot be interfered with under Section 34 of the Act.

21. In the result all the three Original Petitions are dismissed. There shall be no order as to costs.

12.06.2019

Index : Yes / No
Internet: Yes
Speaking/Non-speaking order
ggs

N. SATHISH KUMAR, J.
ggs

order in:
O.P.Nos.347, 542 and 581 of 2018

12.06.2019