

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	06.11.2019
Judgment pronounced on	13.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.479 of 2018

Mrs. N.B. Thenmozhi
w/o Mr. N. Ramesh,
Plot No.22, 6th Cross Street,
Thiru-vi-ka Nagar,
Thundalam, Karambakkam
Chennai - 600 077.

.... Petitioner

vs

M/s D.K. Builders,
rep. by its Proprietor, Mr.P.G.Duraiya,
s/o. Mr. Govindarajalu,
No.25, Chokkattan Road,
Nungambakkam,
Chennai - 600 034.

.... Respondent

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the Sole Arbitrator dated 15.12.2017 made in relation to disputes arising under Joint Venture Agreement, entered on 5th May 2013 between

M/s.D.K.Builders represented by its Proprietor Mr.P.G.Duraiya and Mrs.N.B.Thenmozhi.

For Petitioner : M/s.V.Balaji
Mr.Sermaraj

For Respondent : Mr.M.B.Venkateswaran

ORDER

The respondent in the arbitration is the Petitioner before this Court. The dispute arises out of a Joint Venture Agreement entered into between the parties on the 5 May 2013 (the JVA). As per the terms of the JVA, the Respondent paid the Petitioner a refundable advance of Rs. 25 lakhs. The JVA is for the purpose of constructing residential apartments on the land owned by the Petitioner and for sharing the apartments and the undivided share of land corresponding thereto in the ratio of 55:45 as between the Respondent and the Petitioner respectively. After entering into the JVA, the Respondent obtained a lawyer's opinion that there could be a defect in the title of the Petitioner in as much as it rests on an unprobated Will and, on the basis of the said advice, the Respondent decided not to proceed with the joint development as per the JVA. Instead, the parties entered into a Memorandum of Understanding on 17 January 2014 (the MoU)

whereby the Respondent was engaged as a contractor to build a house for the Petitioner on the Petitioner's land, i.e. the same land on which the joint development of residential apartments was to be carried out as per the JVA. While the construction of the house was under way, a dispute arose between the parties with regard to the refund of the advance of Rs. 25 lakhs under the JVA. On account of the inability of the parties to resolve this dispute amicably, the dispute was referred to arbitration. In the arbitration proceedings, the Respondent prayed for a direction to the Petitioner herein to pay the Respondent a sum of Rs.41,12,500/- comprising the advance of Rs.25 lakhs and interest thereon at 18% per annum from 20 June 2013 until the date of the claim statement, which aggregates to an interest claim of Rs.16,12,500/-. Upon completion of pleadings, the Arbitral Tribunal framed six issues. In substance, the main issue was whether the Respondent herein is entitled to a refund of the advance of Rs.25 lakhs with interest thereon. Both parties adduced oral and documentary evidence: the Respondent exhibited 12 documents as Exhibits A-1 to A-12 and the Petitioner herein exhibited five documents as Exhibits R-1 to R-5. Upon examining the pleadings, evidence and on considering the oral arguments, the Arbitral Tribunal by Arbitral Award dated 15

December 2017(the Award) held that the Respondent herein is entitled to a refund of the sum of Rs. 25 lakhs. As regards interest, that the respondent is entitled to pre-reference interest of a sum of Rs.2,87,260.30 and pendent lite interest of Rs.2,99,178.10 and interest on the aggregate of principal and interest up to the date of Award, namely, on Rs.30,46,438/-, at 18% per annum from the date of Award until payment. This Award is impugned herein.

2.I heard the learned counsel for the Petitioner and the learned counsel for the Respondent. The main contention of the learned counsel for the Petitioner was that the Petitioner had filed an application to receive additional documents, including the MOU. However, the said application was rejected by the Arbitral Tribunal by order dated 11 November 2017. By adverting to the aforesaid order, the learned counsel pointed out that the reasons cited by the Arbitral Tribunal to reject the document are clearly erroneous inasmuch as the Arbitral Tribunal proceeded on the basis that the MOU does not contain an arbitration clause and is an independent agreement. By referring to the Award and, in particular, paragraph 4 thereof, the learned counsel pointed out that the Arbitral Tribunal concluded that there was a

novation of the JVA and that, consequently, neither party was under an obligation to perform its obligations under the JVA. According to the learned counsel, once the Arbitral Tribunal concluded that there was a novation of the JVA, the Arbitral Tribunal should have permitted the Petitioner to exhibit the MOU, which is a vital document because it replaced the JVA. Instead, by rejecting the said application, the Arbitral Tribunal did not take into consideration vital and material evidence relating to the dispute.

3.The second contention of the learned counsel for the Petitioner was that once the Arbitral Tribunal concluded that there was a novation of the JVA, the arbitration clause perishes and the Arbitral Tribunal did not have jurisdiction to adjudicate the dispute. In support of this proposition, the learned counsel referred to and relied upon an order of the Bombay High Court in **Jayantilal Khandwala & Sons Ltd. vs. Iffat Ahmedi and the Bombay Stock Exchange Ltd., Arbitration Petition No. 914 of 2011, Order dated 24th March 2015**, (the Jayantilal Khandwala case) wherein, it was held, at paragraph 18, that "if the parties have put an end to a contract, as if it had never subsisted and have substituted it with a new contract

governing their rights and obligations, in such a case, the arbitration clause in the original contract perishes."

4.The learned counsel further submitted that the construction of the house was not completed by the Respondent and that, therefore, the Petitioner is entitled to withhold the advance until such time. On the basis of the submissions, the learned counsel concluded by stating that the Award is liable to be set aside.

5.In response and to the contrary, the learned counsel for the Respondent submitted that it is the admitted position that the JVA was not acted upon. Once an agreement is not acted upon, all benefits received under the said agreement are liable to be restituted. As regards the MOU, he pointed out that it is an independent contract for the construction of a house and is fundamentally different from the JVA. He further referred to the terms of payment under the MoU, at page 61 of Volume 1, and submitted that there is no reference at all to the JVA in the MOU and that the MoU envisages payments by the Petitioner to the Respondent and not vice versa. Consequently, he contended that the advance under the JVA cannot be withheld on

account of the MOU. For all these reasons, he submitted that there is no infirmity in the Award and that the Petitioner has failed to make out a case for interference with the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

6.The records were examined and the oral submissions of both sides were considered carefully. The first ground of challenge was on the basis of the rejection of the application to exhibit the MOU as a document in the arbitration proceedings. The Arbitral Tribunal rejected the application on the basis that the MOU does not contain an arbitration clause and is an independent agreement. Notwithstanding the fact that the MOU was not permitted to be exhibited before the Arbitral Tribunal, it was produced before this Court and was examined for the limited purpose of ascertaining whether vital evidence was not permitted to be adduced by the Arbitral Tribunal. On examining the MOU, it is evident that there is no reference therein to the JVA. In particular, it does not make reference to the advance of Rs.25 lakhs paid under the JVA and, consequently, does not permit or enable the Petitioner to retain the said sum until the completion of the house under the MOU. Therefore, the conclusion of the Arbitral Tribunal that

the MOU is an independent and unrelated contract is correct and does not warrant interference.

7.The other contention of the learned counsel for the Petitioner was that in light of the conclusion that there was a novation of the JVA, the arbitration clause perishes. In this case, the claim before the Arbitral Tribunal is for repayment of the advance paid under the JVA. The case of the Respondent is that once the parties decided not to proceed with the JVA, all benefits that either party received under the JVA should be returned by way of restitution. This is an established principle and the Petitioner herein cannot succeed unless she is able to establish that the MOU enabled the Petitioner to retain the advance notwithstanding the decision not to proceed further with the JVA. As discussed above, the MOU does not refer to the JVA and clearly does not provide for the retention of the advance received under the JVA. As regards the contention that the arbitration clause perishes with the JVA, it is the settled principle that even upon termination of a contract, parties may sue for any entitlement under that contract. In fact, as regards the arbitration clause, as per Section 16 of the Arbitration Act, by a legal fiction, it survives even if the

agreement is held to be invalid. Therefore, this contention of the learned counsel for the Petitioner is untenable and is liable to be rejected. In this connection, the judgment of the Bombay High Court in the **Jayantilal Khandwala case** is distinguishable because the MOU, in that case, provided for a settlement of the dispute that arose out of the transactions between the stock broker and its customer whereas, in this case, the MOU does not deal with the rights and obligations of parties under the JVA.

8. Nevertheless, as regards the Award in respect of interest, this is a case where there is no contractual rate of interest. Therefore, the Arbitral Tribunal was entitled to fix the rate of interest and the said rate was fixed at 18% per annum during the pre-reference period, i.e. between 27.04.2016 to 16.12.2016, and at 12% per annum during the pendente lite period, i.e. between 17.12.2016 and 15.12.2017. I find no justification in the Award for varying the rate of interest, in this manner, especially when Section 31(7)(a) of the Arbitration Act combines interest in the pre-reference and pendente lite periods. In fact, even as regards post-Award interest, Section 31(7)(b) was amended with effect from 23.10.2015; the

amended law applies to this dispute; interest rates were continually lowered after December 2017; and the award of 18% per annum is no longer the default rate of interest. In these facts and circumstances, interest at a standard rate of 12% per annum across pre-reference, pendente lite and post-Award periods would be a reasonable rate during the relevant period when benchmarked against the prevailing lending rates of nationalised banks. Except to that extent, I do not find any grounds for interference with the Award.

9. Consequently, the petition to set aside the Arbitral Award is disposed of by revising the rate of interest applicable during the pre-reference and post-Award periods to 12% per annum. As a corollary, the amount payable towards interest in the pre-reference period, as specified in the Award, should be revised downward by applying the rate of 12% per annum instead of 18% per annum. Equally, as a consequence, the aggregate sum of Rs.30,86,438/-, which is specified in the Award, i.e. principal plus interest, should also be revised downward and the revised aggregate sum would carry interest at 12% per annum. Needless to say, this Order does not preclude the Petitioner from initiating appropriate legal proceedings in respect of

disputes, if any, that have arisen or may arise out of or in relation to the Memorandum of Understanding dated 17th January 2014.

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Speaking Order
Index : Yes
Internet : Yes



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