IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGEMENT RESERVED ON	**30.01.2019**
JUDGMENT PRONOUNCED ON	**21.03.2019**

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

ORIGINAL PETITION No.661 OF 2018

M/s.Fomra Housing and Infrastructure,
250, Govindappa Naicken Street,
Chennai 600 001. ... Petitioner

vs.

M/s.Raahul Foundations Private Limited,
rep. By its Managing Director,
Ravi Krishna Kumar,
No.37, Old No.17, Third Main Road,
Kasturibai Nagar, Adyar,
Chennai 600 020. ... Respondent

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 20.04.2018 passed by the Sole Arbitrator in respect of Agreement dated 04.09.2009.

For Petitioner : Mr.A.Abdul Hameed,
for M/s.AAV Partners

For Respondent : Mr.K.V.Babu

O R D E R

Challenging the Arbitral Award dated 20.04.2018 passed by the sole Arbitrator, the Petitioner is before this Court by way of the above Original Petition.

2. The Respondent herein, who is a reputed Building Contractor, is the

Claimant before the Arbitrator. According to the Respondent/Claimant, the Petitioner herein, who was desirous of constructing a 'Residential Apartment Complex' at Nolambur, Ambattur, Chennai, issued a tender. To such a tender, the Respondent/Claimant made an offer for civil construction work with specific list of rates and prices and the same was accepted by the Petitioner. Pursuant thereto, a letter of intent dated 18.05.2009 was issued. Later, an Agreement was entered into between the Petitioner and the Respondent/Claimant on 04.09.2009, whereby, the contract was agreed to be completed by 28.01.2010 and the probable contract value was fixed at Rs.6,47,92,572/-.

3. It is the case of the Respondent/Claimant that they could not carry out the construction work within the stipulated time, as requisite materials were not supplied by the Petitioner in time, despite repeated requests. Further, the Petitioner, in terms of clause 12 of the Articles of Agreement dated 04.09.2009, has been holding the retention money to the tune of Rs.23,29,899/- and that the total amount due and payable by the Petitioner runs to Rs.30,30,670/-. In spite of repeated requests vide e-mail and correspondence apart from oral representations, no reply was forthcoming from the Petitioner. But, one and a half year after the final Running Account Bill was raised, the Petitioner sent notices dated 05.03.2012 and 07.03.2012 to the Respondent/Claimant, pointing out alleged defects in the construction work and denying any outstanding dues payable to them. Further, the

Petitioner made a counter-claim of Rs.10,00,000/- towards the cost of the alleged rectification works and a sum of Rs.1 crore towards damages.

4. It is further stated by the Respondent/Claimant that, to the said notices sent by the Petitioner, they sent a legal notice dated 17.04.2012, categorically denying all the allegations set out therein. But, the said reply notice was returned 'unclaimed', though the same was sent only to the address given in the letter dated 07.03.2012 sent by the Petitioner. As nothing was forthcoming, yet another notice dated 20.08.2012 was sent to the Petitioner by Registered Post Acknowledgment Due, to invoke Arbitration Proceedings against them, as per Clause 42 of the Articles of Agreement. The same was also returned with the endorsement 'left'. However, when the same was resent, it was delivered, but, no reply was sent by the Petitioner.

5. Before the Arbitrator, it is the case of the Petitioner that as per the Agreement dated 04.09.2009, the Respondent/Claimant had to complete civil works for the Residential Apartment Complex at Nolambur, named as 'Tribhuvan' in all respects, before 28.01.2010. It is further stated by the Petitioner that they made payments for the works to the Respondent/Claimant from time to time as per the Running Account Bills (R.A. Bills) raised by the Respondent/Claimant and upon certification by the Petitioner's Project Management Consultant (PMC), i.e.

M/s.Builtec Engineers and Consultants for the period upto July 2009, and later by one Jeevanantham for the period upto December 2010.

6. According to the Petitioner, the Respondent/Claimant failed to complete the civil works before 28.01.2010 and abandoned the site in May 2010, without any notice to them. However, the civil works which were left over by the Respondent/Claimant were carried out by the Petitioner through other contractors, viz. M/s.MSM India Engineers & Contractors, and others. The Petitioner herein claimed a sum of Rs.42,57,738/- under the following heads, as damages for the loss sustained by them.

S.No.	***Heads***	***Rs.***
1	Excessive payments	11,57,738.00
2	Damages for the loss sustained	1,00,000.00
3	Rectification work	10,00,000.00
4	Compensation paid to Customers	10,00,000.00
5	Loss of business, profit and goodwill	10,00,000.00
	Total	**42,57,738.00**

7. The case of the Petitioner herein before the Arbitrator was that in view of the specific contract between the parties, the Arbitration proceedings should have been filed within three years therefrom and that the present claim is filed beyond the period of limitation.

8. After hearing both sides and on examining the oral and documentary evidence available on record, the Arbitrator held that the Respondent/Claimant is entitled to a sum of Rs.30,30,670/- with interest at 12% per annum from the date of Ex.C7, i.e. from 30.11.2010 till the date of payment. Aggrieved by the same, the Petitioner has filed the present Original Petition.

9. The main plea taken by the Petitioner herein is that 'time is the essence of the contract'. Learned counsel for the Petitioner drew the attention of this Court to clause 7 of the Agreement dated 04.09.2009, which expressly stipulates that the Respondent/Claimant shall complete the civil works relating to all Blocks of the Residential Apartments Complex at Nolambur, within 28.01.2010. In view of the said clause, learned counsel contended that time is the essence of the contract and that the Respondent/Claimant ought to have adhered to the time schedule.

10. Learned counsel for the Petitioner further contended that there is no pleading by the Respondent/Claimant in their Affidavit that time is not the essence of the contract and that Clause 14(b)(iii) of Special Conditions of Contract has no application to the facts of the present case and in any event, no case has been made out by the Respondent/Claimant under the said Clause. In support of the said contention, learned counsel for the Petitioner has relied on a Full Bench decision of this Court in the case of **B.Suresh Chand vs. State of Tamil Nadu reported in 2006**

(4) L.W. 409, wherein, it is held that in the absence of specific pleadings in the plaint, the Plaintiffs are precluded from letting in any oral evidence. Relevant portion of the said decision is extracted hereunder:

> "35. The learned counsel for the second respondent relied upon the following decisions viz.:-
>
> (i) In A.I.R. 1928 Patna 587 (referred to supra), the Division Bench of the Patna High Court has held as follows:-
>
> "If the defendants wished to avail themselves of the defence that they were purchasers for value without notice, they should have pleaded it".
>
> In the said decision, it is further observed that the defence of a purchase without notice is one which ought to be specifically alleged as well as proved by one who relies upon it.
>
> (ii) In A.I.R.1939 Nagpur 132 (referred to supra) it has been laid down as follows:-
>
> "Whether the matter falls squarely within Section 100 or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is the bonafide transferee for value without notice."
>
> (iii) In A.I.R. 1940 Nagpur 163 (referred to supra) the Division Bench affirmed the law laid down in A.I.R. 1939 Nagpur 132 (referred to supra).
>
> On the basis of the law laid down in the above said three decisions the learned counsel for the respondents submitted that in the plaint the plaintiffs have not specifically alleged with material particulars that the plaintiffs were bonafide purchasers without notice and he further submitted that as per Section 101 of the Evidence Act, burden of proving the same is on the plaintiffs but they have not discharged that burden. The said submissions of the learned counsel merit acceptance and as pointed out already by us, the plaint does not contain the primary facts which must be proved at the trial by the plaintiffs to establish their case that they are bonafide purchasers for value without notice. In the absence of specific pleadings in the plaint the plaintiffs are precluded from letting in any oral evidence on this aspect."

11. According to the learned counsel for the Petitioner, though the Respondent/Claimant has claimed that their Running Account Bill No.13, marked as Ex.C-5, has been certified by Project Management Consultant (PMC), and on that basis, they claim that the civil works have been completed by 30.11.2010, factually and truly, there is no certification issued by PMC as claimed by the Respondent/Claimant. Learned counsel further stated that though the Respondent/Claimant claims to have rectified the defects pointed out by the Petitioner vide Exs.C-6 and C-7, there is no proof to that effect and that the Respondent/Claimant had not completed the civil works entrusted to them even by 30.11.2010.

12. In reply, learned counsel appearing for the Respondent/Claimant submitted that at every stage of work, the Respondent/Claimant was dependent on the completion of work by the Petitioner's various other Agents, who were engaged by for doing other jobs. Thus, whenever, there was a delay on the part of the Petitioner, it consequently led to delay on the part of the Respondent/Claimant also. Further, as per the agreed terms, purchase request was made by the Respondent/Claimant to the Petitioner and pursuant to every such request, the Petitioner supplied the required materials only after a long delay. According to the learned counsel, as there was delay in processing the materials through the prescribed channels, it is the fault on the part of the Petitioner and that the

Respondent/Claimant's part of the contract ended with plastering and weather coursing.

13. Learned counsel appearing for the Respondent/Claimant went on to contend that a formal bill was raised well within the period of contract and that the Petitioner raised objections only after 15 months from the submission of the final bill. Also, the defect liability started from the date of completion of the project. Thus, according to the learned counsel, the Petitioner is not entitled to retain the retention money and the same is liable to be returned to the Respondent/Claimant.

14. Heard the learned counsel on either side and perused the material documents available on record.

15. The issue for consideration before this Court is whether the Arbitrator is justified in holding in favour of the Respondent/Claimant, when the agreed work was not completed by the Respondent/Claimant within the time stipulated, i.e. before 28.01.2010.

16. Admittedly, the agreed work was not completed by the Respondent/Claimant by 28.01.2010. In this case, as could be seen from the documents, time was extended by the Petitioner for completing the work and

periodical payments have been made for the work done subsequently. Though, it has been stated that the Running Account Bill has not been certified, this Court is of the view that even though there are two Exhibits, showing one as certified and the other a different one, as could be seen from page 79 of Volume I and Page 190 of Volume II of the Typed Set of papers, without any certification, the amount could not have been released. When money is already lying with the Petitioner for payment, nothing prevented the Petitioner from retaining the amount and not giving it to the Respondent.

17. Though as stated supra, time is the essence of the contract, the Petitioner has given extension of time for the work to be completed. Yet another factor to be noted is that after 28.01.2010, some other defects have been pointed out by the Petitioner and the Respondent/Claimant has completed the work on 30.11.2010. If the Respondent/Claimant has not completed the work, there is no need for them to rectify the defects pointed out by the Petitioner. Even though there is no averment on the part of the Respondent/Claimant to purchase the materials, the original agreed value of Rs.6,47,92,572/- was revised to Rs.4,65,97,980/- for the purpose of construction, which has been admitted in the cross-examination by the Petitioner.

18. From Ex.R1, dated 15.04.2010 found at page 79 of Volume I of the Typed Set, it is very clear that the work was allowed to continue beyond 28.01.2010 till 20.09.2010. The Bill was processed and the amount was settled and certainly, the Respondent/Claimant could have adjusted the amount towards liquidated damages, but, the fact that the amount was released shows that time was extended, which implies extension of time.

19. The issue of extension of time was first raised on 05.03.2012, after completion of the project. As far as the present Original Petition is concerned, whether retention money is payable to the Respondent/Claimant or not, has to be considered. As all other amounts have been paid to the Respondent/Claimant and the work has been completed, this Court is of the view that the entire retention money held by the Petitioner has to be paid to the Respondent/Claimant as per the Award.

20. Further, it is seen that the document referred to in page Nos.211 and 212 in Volume II are one and the same. The document at page No.211, was given before completion of work and it was duly signed by an Engineer, viz. Kaja on 27.10.2010, as per PMC. After completion of work, in the very same document vide Page 212, yet another signature was made by the said Kaja on 30.11.2010. Hence, it cannot be stated that the two documents are different ones, as, a perusal of the

same would make it clear that the contents are one and the same. The first one is the photocopy taken prior to the second signature affixed by Kaja and the second one is the photocopy that has two signatures of the Engineer Kaja, after completion of work.

21. The contention of the Petitioner that copies of documents produced by the Petitioner herein have been rejected and copies of documents filed by the Respondent/Claimant are marked, shows that there is perversity and there is no reason given by the Arbitrator in brushing aside the documents produced by the Petitioner herein.

22. Documents produced vide Exs.R1 to R3 have been marked without any objection. Ex.R4 is a document pertaining to allotment of pending work and documents produced by the Petitioner vide Exs.C1 and C2 have no reference to Ex.R4 and hence, the same was objected to and it was not taken into account on the ground that it was introduced for the first time.

23. Allotment of work has been made as early as on 31.03.2009 and various vouchers would make it clear that compensation has been paid to the allotees and hence, this Court is of the view that the Arbitrator has not taken a partial view to accept the documents filed by the Respondent/Claimant and has not rendered a

finding only on the basis of the documents filed by the Respondent/Claimant. Further, it has to be noted that Ex.R6 did not form part of the Agreement and it does not relate to the contract of the parties, which is the subject matter of the dispute.

24. Though the Petitioner has stated that the contract was not completed on 28.01.2010, the issue of limitation was not raised by the Petitioner before the Arbitrator. From the conduct of the parties, this Court is of the view that when a implied consent was given for executing the work and the work was completed on 30.11.2010 beyond the time stipulated in the contract, i.e. 28.01.2010, the Petitioner would not be entitled to any liquidated damages.

25. That apart, the Petitioner has pointed out the defects on 27.10.2010 and the work has been completed on 30.11.2010, which amply proves that time is not the essence of the contract, as the parties have agreed to extend time till the completion of work. Having been paid the entire amount and not adjusting the amount lying with them towards liquidated damages, holding of the retention amount by the Petitioner herein, cannot be accepted. In view of the foregoing discussion, this Court is of the view that the finding of the Arbitrator is based on facts and this Court cannot re-apprise the evidence and come to a different conclusion.

In fine, **this Original Petition stands dismissed, confirming the finding of the learned Arbitrator.** No costs. Consequently, connected A.No.5776 of 2018 is closed.

21.03.2019

Index : Yes
Speaking Order : Yes

Note to Registry:

Issue copy of this order on or before 03.04.2019.

(aeb)

S.VAIDYANATHAN,J.

(aeb)

Pre-delivery Order
in
O.P.No.661 of 2018

21.03.2019