

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	10.07.2019
Orders pronounced on	17.07.2019

CORAM

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

O.P.No.762 of 2018

Vijayashanthi Builders Ltd.
Rep. by its Director,
20/43, Kasthuri Rangan Road,
Alwarpet, Chennai 600 018.

... Petitioner

Vs.

Lotus Pond Residents welfare Association
Rep. by its President,
NO.46, I.T.Highway,
Thaiyur B Village,
Kelambakkam,
Kancheepuram District 603 103.

... Respondent

Prayer:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 for setting aside a portion of the Arbitration award, dated 1.12.2017 and order, dated 9.4.2018 passed under Sec.33 of Arbitration and Conciliation Act, 1996.

For Petitioner : Mr.R.Parthasarathy

For Respondent No.1 : Mr.Mahesh Kumar

ORDER

This petition has been filed challenging the award of the learned sole Arbitrator granting the following reliefs:

(i) The respondent is directed to pay to the claimant association a

sum of Rs.29,65,734/- being the balance amount from the maintenance charges

within one month from the date of award, failing which to pay the said amount with interest @ 12% p.a. from the date of award till the date of payment;

(ii) The respondent is directed to pay to the claimant association a sum of Rs.1,00,00,000/- (Rupees one Crore only) within three months from the date of award, failing which to pay the said amount with interest @ 12% p.a. from the date of award till the date of payment;

(iii) The respondent is directed to pay to the claimant association a sum of Rs.1,87,60,000/- being the balance of corpus fund with interest @ 12% from 9.9.2016 till the date of payment;

(iv) The respondent is directed to reimburse to the claimant association a sum of Rs.14,95,000/- towards the reimbursement amount of cost of one lift and towards expenses of another lift within one month from the date of award, failing which to pay the said amount with interest @ 12% p.a. from the date of award till the date of payment;

(v) The parties are to bear their own cost of the arbitral proceedings including the fee of the Arbitrator.

2. Counterclaim of the respondent was rejected.

3. The brief facts leading to filing of this petition is as follows:

The claimant is the Residents Welfare Association of the Residential Complex named "Lotus Pond". The respondent therein is a builder of the said apartments.

The respondent company promised amenities like Library, Jogging track, Swimming

Pool, etc. and specifically promised to install "Desalination Plant and Water Treatment Plant". The respondent also assured to provide 24 x 7 Electricity. They also assured to provide Sewerage Treatment Plant (STP) and they collected a sum of Rs.4,14,00,000/- towards maintenance from all the purchasers and out of this amount, they have spent more than a Crore of rupees towards water supply, which they are not entitled to spend. Similarly, they have not provided STP despite they have collected a sum of Rs.75,000/- from each purchasers and a total of Rs.9,96,00,000/- for setting up Sewerage Treatment Plant. Hence, the claimant preferred a claim petition before the learned Arbitrator.

4. The main contention of the respondent/petitioner herein is that they have provided facilities in the apartments and they have also collected maintenance charges for the purpose of maintaining all the common amenities and facilities including Lifts, Common lights, Housekeeping, Generator, Security, provision of water, etc. They handed over possession from December 2011 onwards and the flat owners did not form themselves to a registered Association till September, 2013. The maintenance charges were adjusted over two years till 31.8.2015. Further contention of the respondent/petitioner herein is that various common amenities and facilities provided by the respondent have been damaged by the residents, by students who have been let-in as tenants in large numbers. As on December, 2013, only 215 flats were occupied by owners and around 660 flats were given on rent to students who were using the same as bachelor

accommodation. Instead of Sewerage Treatment Plant, the respondent provided a Bio-Gas Plant which is far better than the normal Sewerage treatment plant and the same was installed at a cost of Rs.87.00 lakhs. The entire maintenance fund of Rs.4,14,00,000/- collected by them stood as on April 2015 and thereafter, the respondent has spent Rs.79,00,000/- in excess. Hence, they denied their liability.

5. The learned Arbitrator/Retired Judge, of this Court was appointed by this Court by order, dated 11.9.2015. Before adjudicating the issues between the parties, the learned Arbitrator has initiated conciliation proceedings between the parties and most of the disputes between the parties have been settled amicably. The few issues which could not be settled went for adjudication i.e. particularly Issue No.2, 5, 6 and 7 and the same were allowed by the Arbitrator in favour of the claimant/respondent herein, against which the present original petition has been filed.

6. Though various grounds have been raised in the petition under Sec.34 of the Act, the main challenge made by the petitioner is with regard to Issue No.2 and 6 and also return of Corpus fund viz., issue No.7. According to the learned counsel for the petitioner, the award passed by the Arbitrator suffers from patent illegality and violation of public policy. It is the contention of the learned counsel for the petitioner that the learned Arbitrator ignored the vital evidence produced by the petitioner viz., expert evidence with regard to the Bio-gas plant

which was installed instead of STP. It is contended by the learned counsel for the petitioner that the expert evidence produced by the petitioner has not been taken note of by the learned Arbitrator. The learned Arbitrator ignored the vital evidence produced by the petitioner and thereby violated public policy. As such, the award passed by the Arbitrator is patent illegality. Similarly, when Bio-gas plant has been put up by the petitioner instead of STP, it cannot be said that the amount collected by the petitioner has not been put in use, no plant whatsoever constructed in the apartment blocks. Hence, the award is liable to be set aside. Similarly, when the learned Arbitrator found that the petitioner herein is liable to pay only Rs.91,25,000/-, the learned Arbitrator without any evidence rounded off to Rs.1 Crore without any basis which is against law. In support of his contention, the learned counsel for the respondent relying on the decision of the Hon'ble Supreme Court in **ASSOCIATE BUILDERS VS. DELHI DEVELOPMENT AUTHORITY [(2015) 3 SCC 49]** to contend that an award is said to be in conflict with the public policy of India, it can be set aside.

7. The learned counsel appearing for the respondent contended that the learned Arbitrator not only decided the issue on the basis of evidence but also taken into consideration, the expert evidence and also found that the builder has not provided STP to cover the entire building in the blocks. The alleged Bio-Gas plant put up by the petitioner does not make their requirements as per the agreement. Thus, according to the learned counsel for the respondent, the

learned Arbitrator has taken note of the entire evidence therefore it cannot not be said that the award passed by the Arbitrator is without any basis or no evidence. Therefore, the learned Arbitrator decided the issue on the basis of the admitted evidence and the same cannot be interfered with by this Court by re-appreciating the entire evidence.

8. It is well settled that the scope of interference of the award passed under Sec.34 of the Arbitration and Conciliation Act 1996 pre-amendment and post-amendment is very limited. When the award passed by the Arbitrator is violation of public policy of India and suffers from patent illegality, or contravention of the Act, such award can be interfered with. Similarly, the Apex Court is also held that when the finding is based on no evidence or the arbitral tribunal considered the irrelevant materials and ignored the vital evidence, such award also can be set aside under Sec.34 of the Act. The above decision of law is well settled now.

9. In far as issue No.7 is concerned, viz., return of corpus fund, the learned Arbitrator found factually that the respondent/petitioner herein has collected specific amount as Corpus fund from all the purchasers. The respondent/petitioner herein also admitted that the amount collected as Corpus fund is in their possession. The learned Arbitrator in para 70 to 75 has factually found that the respondent having collected the amount, is liable to return a sum

of Rs.1,87,60,000/- with interest at the rate of 12% p.a. from 9.9.2016 till the date of payment. The learned Arbitrator awarded the amount on the basis of admitted facts and this Court cannot re-appreciate the same and take a contrary view. Hence, the award passed by the Arbitrator in this regard cannot be found fault with.

10. Similarly, the learned Arbitrator in Issue No.2 has factually found that the after adjusting the expenses for maintaining the building premises finally found that out of total amount of Rs.4,14,00,000/-, the respondent spent a sum of Rs.3,81,85,365/-. Having factually found that the expenditure incurred by the respondent/petitioner herein towards maintenance charges is Rs.3,84,34,266/- the learned Arbitrator awarded a sum of Rs.29,65,734/- from the amount collected as maintenance charges, I am not able to find any materials to interfere with the finding in respect of issue No.2.

11. In so far as Issue No.6 wherein the learned Arbitrator awarded Rs.1 Crore as refund on account of non-installation of Sewerage Treatment Plant, the contention of the respondent/petitioner herein is that instead of STP, they installed Bio-gas plant. Though expert explained before the learned Arbitrator about the functioning of the Bio-gas plant and its benefits, the learned Arbitrator found that what was agreed is only STP, not Bio-gas. Similarly, the learned Arbitrator has considered the evidence of the representative of the Consultant and

his evidence to that effect that Phase I consist of 512 flats and the sewerage is discharged into a canal using a centrifugal pump in front of the residential apartment and for Phase II which consist of 816 flats, though bio-gas plant is provided, but the same is not working satisfactory and the same is not sufficient to treat the entire waste water generated in the residential apartment. The learned Arbitrator factually found that agreed STP was not put up, instead some other plant has been put up and the learned Arbitrator also given a set off towards the amount spent by the respondent. It cannot be said that such finding not based on any evidence or the award passed on irrelevant materials. In other heads also, the learned Arbitrator has considered the evidence factually and arrived a conclusion. Having considered the fact that the petitioner had spent a sum of Rs.87 lakhs and incurred around Rs.1 Crore for pipelines connected to Bio-gas plant, the learned Arbitrator held that the respondent/petitioner herein is liable to return the balance amount of Rs.91,25,000/- from the amount collected from the flat owners. Further, the learned Arbitrator has also found that though the claimant has contended that a sum of Rs.75,000/- has been collected from each flat owners for putting up STP, the learned Arbitrator factually found that the association has not produced bills to substantiate payment from the enrolled members and in fact held that the respondent had collected amount only from 371 purchasers and accordingly, set off the amount spent by the respondent/petitioner herein towards setting up of Bio-gas plant and also pipeline connected to the plant and the learned Arbitrator awarded a sum of Rs.1 Crore towards balance amount

collected for installing STP instead of Rs.91,25,000/- finding by the Arbitrator, in rounding off Rs.1 Crore is without any basis. Hence, at the most, the award can be set aside only in so far as Rs.8,75,000/- awarded excess by the Arbitrator by rounding off Rs.91,25,000/- to Rs.1 Crore. Accordingly, the award of the Arbitrator directing the respondent/petitioner herein to pay Rs.1 Crore is modified to Rs.91,25,000/- payable by the respondent/petitioner herein. In all other aspects, the award is confirmed.

12. In view of the same, except the above modification, I do not find any materials to hold that the award suffers from patent illegality and the award passed by the learned Arbitrator is violation of public policy of India. Hence, this Court does not find any merit in the petition to interfere with the reasoned award passed by the learned Arbitrator.

Accordingly, the original petition is partly allowed on the above terms. No costs.

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Speaking/Non Speaking order
Index: Yes/No
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N.SATHISH KUMAR, J.

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Pre-Delivery order in
O.P.No.762 of 2018

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Dated: .7.2019