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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 8.7.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

O.S.A.No.151 of 2019

and

C.M.P.No.13557 of 2019

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

..Appellant/Petitioner

Vs.

M/s.Raagul Foundations Pvt. Ltd.
rep. by its Managing Director,
Mr.Ravi Krishna Kumar,
No.37, Old No.17, Third Main Road,
Kasturibai Nagar, Adyar,
Chennai 600 020.

..Respondent/Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of O.S. rules read with Section 15 of Letters Patent against the order of this court dated 21.3.2019 in O.P.No.661 of 2018.

Prayer in O.P.No.661/2018 : Petition filed under section 34 of the Arbitration 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 appellant	: Mr.A.Abdul Hameed for M/s.AAV Partners
For Respondent	: Mr.K.V.Babu

JUDGMENT

(Judgment of the court was made by Dr.VINEET KOTHARI, J.)

The Developer-Respondent before the learned Arbitral Tribunal viz., M/s.Fomra Housing and Infrastructure, Chennai has filed the present Appeal under Section 37 of the Arbitration and Conciliation Act 1996 aggrieved by the order passed by the learned Single Judge dated 21.3.2019 rejecting the Application under Section 34 of the Act in O.P.No.661 of 2018 (M/s.Fomra Housing and Infrastructure, Chennai v. M/s.Raagul Foundations Private Limited-Contractor).



2. The dispute between the Contractor and the Developer was taken to the learned Arbitrator and the Award in question was passed by the learned Arbitrator on 20th April 2018 allowing the claim of the Contractor to the extent of Rs.30,30,670/- with interest at 12% per annum from 30.11.2010 till the date of payment was passed in favour of the Claimant/Contractor. Aggrieved by the said Award, the Developer-M/s.Fomra Housing Infrastructure, Chennai approached the learned Single Judge by way of Petition under Section 34 of the Act for setting aside the Arbitral Award but, the said petition came to be dismissed confirming the findings of the learned Arbitrator with the following observation:-

"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 31.3.2009 and various vouchers would make it clear that compensation has been paid to the allottees 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 28.1.2010, 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., 28.1.2010, 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



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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 2019 is closed."

3. The present Appeal under Section 37 of the Act has been filed by the Developer, M/s.Fomra Housing and Infrastructure, Chennai aggrieved by the said order passed by the learned Single Judge.

4. The learned counsel for the Appellant-Developer has urged before us that the Arbitral Award passed by the learned Arbitrator fell within the mischief of Section 34(2)(a)(iv) of the Act and Explanation 1 of sub-clause (b)(ii) thereof. Elaborating the same, he submitted that the learned Arbitrator, while appreciating the evidence of the Claimant/Respondent herein, viz., photocopies of the documents produced by them viz., C6 and C7, despite the objections raised against those documents as false and untrue, the said documents were relied as true document merely because the learned Arbitrator found that R4 series produced by the Developer-Respondent were typed photocopies of the documents for the period from 10.5.2010 to 28.9.2010. He read before the court the observation of the learned Arbitral Tribunal to the following extent:-

"c) Two documents are produced, signed by Mr.Khaja. The Respondent has not denied that Mr.Khaja was employed by the Respondent in his PMC. Though the witness claimed that he would verify and come back, he has not come back again regarding Mr.Khaja. It is no doubt true that the originals were not filed but only Xerox copies were filed. Except a suggestion that the documents are forged, there is no specific allegation regarding the contents of the documents Ex.C-6 and C-7. On behalf of the Respondent it was submitted in Para 10 of the Proof Affidavit that 11 job items were left over by the Claimant and they were subsequently carried out by the Respondent through MSM India Engineers Contractors and others. This is in



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Para 11 of Proof Affidavit. But, in the evidence of RW1 in cross-examination, there is no proof given in respect of the above work. The Engineers whose name is referred to in Para 11 of the Proof Affidavit has not been examined to prove that the work was carried out by the engineer. It is admitted that Ex.C-6 which points out the defects were given by the Respondent. The Respondent denies only Ex.C-7.

d) Ex.R-4 series are filed by the Respondent to show allotment of pending work to other persons and corresponding payment, between May 2010 to March 2011. Firstly, originals of these documents were not produced excepting typed copies. These typed copies between 10.5.2010 to 28.9.2010 are only Xerox copies, even the signature shows that they are only Xerox copies. It has not been proved that between 19.5.2010 and 28.9.2010, the work referred to is one left over by the Claimant. The balance of Ex.R-4 series, copies of the ledger account from 1.4.2010 to 31.3.2012 has been filed and signed by the partner. Without the originals, these documents are not taken into evidence. There is no explanation for these documents, also in the evidence of RW-1. In the correspondence that were exchanged between the parties, and in the e-mails, there is no reference to either the payments or the above work. Consequently, I accept C-6 and C-7 as true documents. As on 30.11.2010, the defects pointed out have been rectified. The question of abandonment therefore does not arise. These issues are answered, in favour of the Claimant."

5. The learned counsel, therefore, submitted that the said method of placing reliance upon the documents produced by the Contractor and brushing aside the documents relied upon by the Respondent-Developer renders the Arbitral Award contrary to public policy of India and it falls within the scope of Section 34 of the Act and is in conflict with the basic notions of morality and justice.

6. On the other hand, the learned counsel for the Respondent-Contractor, appearing on caveat, supported the impugned order.

7. Having heard the learned counsel for the parties, we are of the considered opinion that the present appeal under Section 37 of the Act is liable to be dismissed for the following reasons.



8. We requested the learned counsel for the Appellant/Respondent before the Arbitral Tribunal to read his averments made in the Petition filed under Section 34 of the Act which is nothing more than that is enumerated in Section 34 of the Act itself. The relevant portion of Section 34 of the Act is extracted for ready reference:-

"34. Application for setting aside arbitral award. -(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or



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(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1 - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice."

9. When required to explain the averments in grounds, the learned counsel took us through the grounds enumerated in the Petition filed under Section 34 of the Act, which we quote below for ready reference:-

"A. The Award passed by the Learned Arbitrator is erroneous, contrary to law, and based on erroneous appreciation of facts and law. Hence, the Award passed by the learned Arbitrator is liable to be set aside.

B. The Award passed by the learned Arbitrator is vitiated by an error of law apparent on the face of the record. Hence, the Award passed by the learned Arbitrator is liable to be set aside.

C. The Award passed by the learned Arbitrator is conflict with the public policy of India. Hence, the Award passed by the learned Arbitrator is liable to be set aside.

D. The Award passed by the learned Arbitrator is in conflict with the fundamental policy of India Law. Hence the Award passed by the learned Arbitrator is liable to be set aside.

E. The Award passed by the learned Arbitrator is in conflict with the basic notions of morality and justice. Hence, the Award passed by the learned Arbitrator is liable to be set aside.

F. The learned Arbitrator failed to advert and consider the various contentions raised by the



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petitioner in the right perspective. Hence the Award passed by the learned Arbitrator is liable to be set aside.

G. The learned Arbitrator has failed/misinterpreted the contractual terms. Hence, the Award passed by the learned Arbitrator is liable to be set aside.

H. The learned Arbitrator has failed to advert/take note of the various letters/documents addressed by the petitioner, which are material and which if considered would aid in arriving at the just and correct decision.

I. The Award passed by the learned Arbitrator is not supported by pleadings and evidence. Hence the Award passed by the learned Arbitrator is liable to be set aside.

J. The findings rendered on the issues framed by the learned Arbitrator is erroneous, contrary to law and not supported by any pleadings.

K. The findings of the learned Arbitrator that, time is not the essence of Contract is erroneous, and contrary to the pleadings and overlooking Clause 7 of the Agreement, wherein it has been expressly stipulated that the Respondent shall complete the civil works relating to all blocks within 28.1.2010.

L. The learned Arbitrator ought to have seen that nowhere in the pleadings, the Respondent had taken a stand that time was not the essence of contract.

M. The learned Arbitrator erred in holding that the Petitioner had never treated time as the essence of contract just because the Petitioner entertained the bills of the Respondent beyond 28.1.10.

N. The learned Arbitrator relying upon that contention of the Respondent that the issue of the delay was never raised by the petitioner and had raised only on 5.3.12 had erroneously concluded that time was not the essence of contract, when the attendant circumstances i.e., levy of liquidated damages in case of delay and payment of bonus in case of early completion would make it clear that time was essence of contract."



10. Having heard the learned counsel for the parties, and on considering the above averments and arguments of the learned counsel for the parties, we are satisfied that no case for interference was made out before the learned Single Judge under Section 34 of the Act. We are of the considered opinion that the manner of appreciation of the evidence of the learned Arbitral Tribunal cannot be a ground to set aside the Arbitral Award. It is simply outside the parameters of Section 34 of the Act and it is not a regular Appeal provided against the Arbitral Award. It would be contrary to the letter and spirit of Section 34 of the Act itself if such petitions were to be treated as regular Appeal against the Arbitral Awards. The narrow parameters provided in Section 34 of the Act which require to be established with averments and cogent evidence. None of them is found in the present case except the reiteration of the provisions of Sections 34 of the Act. The very emphasis placed by the learned counsel for the appellant before us on the manner in which the learned Arbitrator considered the documents leads us to believe that there is nothing beyond this in the case under Section 34 of the Act, which in our opinion could not satisfy the parameters of Section 34 of the Act. It is neither against morality nor justice much less against the public policy.

11. We are rather baffled with the manner in which Petitions under Section 34 of the Act are so casually filed by invoking the court process against the very spirit to get expeditious justice through the Alternative Dispute Mechanism provided in the Act and the purpose is defeated. Mere filing of the Petition under Section 34 of the Act and pendency thereof will become an excuse for the parties not to permit the execution of the Arbitral Awards in such cases, even though there is no stay granted by High Court and that is precisely what defeats the purpose of the Act itself. Section 37 of the Act is a further remedy still on a narrower compass. The said provision is also quoted below for ready reference:-

"37. Appealable orders. -(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely: -

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from



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an order of the arbitral tribunal--

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

12. The scope of Appeal under Section 37 of the Act is only to the extent of clause (a) refusing to refer the parties to arbitration under Section 8; (b) granting or refusing to grant any measure under Section 9 and (c) setting aside or refusing to set aside an Arbitral Award under Section 34. A mere refusal of the learned Single of this Court with cogent reasons for confirming the Arbitral Award is not a ground to entertain an Appeal under Section 37 of the Act. That only further delays and defeats the very purpose for which a remedy of this nature is provided for very exceptional circumstances in the Act.

13. We are completely satisfied that these parameters are not even touched, nor established with with proper averments and evidence in the present case. Therefore, the learned Single Judge, in our opinion, was perfectly justified in rejecting the Original Petition filed under Section 34 of the Act.

14. We do not find any merit in the present Appeal and the same is liable to be dismissed. Accordingly, it is dismissed. No costs. The connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

The Sub Assistant Registrar,
Original Side Section, High Court of Madras, Chennai.

+1 cc to M/s.AAV.Partners, Sr.No. 57481
+1 cc to M/s.K.V.Babu, Advocate Sr.No.57535

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