

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :03.04.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.254 of 2017

DLF Southern Houses Private Limited
Old No.828, New No.268, Poonamallee High Road
Next to KKR ENT Hospital
Kilpauk, Chennai- 600 010

... Petitioner

vs.

1.Ravi Gupta

2.Sarala Gupta

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 23.11.2016 made in A.F.No.69 of 2016 passed by the Arbitral Tribunal insofar as it relates to Claims Nos.2 to 9 made by the Respondents and consequently allow the counter claim of the petitioner with interest till payment in full and to award costs to the petitioner.

For Petitioner : Mr.V.Kalyanaraman
of M/s.Aiyar and Dolia

For Respondents : Mr.S.Kalyanaraman

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ORDER

Instant 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 23.11.2016' (hereinafter 'impugned award' for

brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator, who was appointed by this Court vide an order dated 21.08.2015 made in O.P.No.88 of 2015 being a petition under Section 11 of A & C Act.

2. Sole Arbitrator, who constituted the AT, was appointed by this Court in the aforesaid manner, entered upon reference and the arbitral dispute between the parties was taken up.

3. A thumbnail sketch of facts would suffice.

4. The fulcrum of the entire lis is an agreement dated 01.03.2011 between the petitioner company in instant OP and the two respondents. To be noted, petitioner company is a builder, which had promoted a project, wherein and whereby apartments were built and two respondents whom this Court is informed, are son and mother in that order, had entered into the aforesaid agreement dated 01.03.2011 for purchase of one apartment bearing No.2 in floor No.12 in Tower No.37 situate at "Garden City DLF OMR" with a tentative area of 1505 sq.ft, which shall hereinafter be referred to as 'said apartment'. The consideration is also set out therein and the details as can be culled out from the case file placed before this Court are as follows:

The respondents agreed to pay Rs.2750/- per sq.ft as

basic sale price, Rs.30/- per sq.ft per floor towards Floor Raise Charges from the Fourth Floor onwards, Rs.1,25,000/- towards car parking in the stilt floor, corpus fund of Rs.50/- per sq.ft, a sum of Rs.1,00,000/- towards installation/connection of electricity/water/sewer services and for other incidental charges, club charges of Rs.57,000/- (which includes two years club membership fee of Rs.30,000/- annul club charges of Rs.7000/- and security deposit of Rs.20,000/- along with applicable taxes and also agreed to bear stamp duty and Registration Fees at applicable rates.

5. Prior to the said agreement, there was correspondence exchanged between the petitioner builder and the respondents. It may not be necessary to advert to those in great detail considering the limited scope of the lis and the narrow compass on which the instant OP turns.

6. Suffice to say that respondents addressed a letter dated 28.06.2010 to the petitioner builder seeking benefit of rebate of Rs.200/- per sq.ft. Petitioner builder sent a reply dated 21.07.2010 rejecting the said request. In the interregnum, respondents sent a letter dated 06.07.2010 stating that they inadvertently omitted to enclose the cheque and ultimately sent a cheque to the petitioner company i.e., the builder.

7. There is no dispute or disagreement that the said apartment was conveyed to the respondents vide documentation dated 10.10.2012. Obviously the documentation qua the said apartment was for conveyance along with proportionate undivided share in the land. Said apartment was ultimately handed over to the respondents on 06.11.2012. In other words, respondents were put in possession of said apartment on 06.11.2012. Post taking possession, the respondent raised certain disputes and invoked the arbitration clause. The disputes crystallized as claims are eleven in number and the same, as can be culled out from the claim statement, are as follows:

Sl.No.	Description	Amount Rs.
Claim No.1	Credit & Return of Timely payment Rebate	3,11,800/-
Claim No.2	Incidence of higher rate of service tax	10,274/-
Claim No.3	Refund of taxes and levies	3,75,953/-
Claim No.4	Registration in names of my wife and myself	Stamp duty Registration fees applicable
Claim No.5	Compensation for delay in flat handing over	2,21,940/-
Claim No.6	Shoddy Workmanship to be rectified	May be redone by the respondents
Claim No.7	Rejection of Contingent liability	Demand of Rs.95099/- to be rejected
Claim No.8	Release of IBMS to Association	Deposit Rs. 77,950 unjustly held by Respondent to be released
Claim No.9	Re-reimbursement litigation expenses	Respondent to bear Rs.40,000/-

Sl.No.	Description	Amount Rs.
Claim No.10	Award of Damages	Respondent to bear Rs.1,00,00/-
Claim No.11	Interest	On financial claim to be computed till date of payment

Total 10,59,967 excluding claims Nos.4,6,7,8 and 11.

8. The petitioner company, as sole respondent before AT, filed its Statement of Defence and in the Statement of Defence, it made a counter claim. The counter claim made by the petitioner builder company, as can be culled from the Statement of Defence, reads as follows:

'1.directing the claimants to pay the balance in VAT which amounts Rs.95099/- to the Respondent Company and direct the claimants not to seek transfer of IBMS amount of Rs.77,950/- together with interest, till the time the Claimants settle the balance in VAT amount to the respondent.

2.directing the Claimants to pay a compensation of Rs.2,00,000/- towards damages for initiating frivolous litigations and wasting the manpower source of the respondent company.

9. A perusal of the counter claim would reveal that it is virtually the reverse claims qua Claim Nos.7 and 8 of the respondents in instant OP (claimants before AT), which have been extracted and set out supra.

10. On the rival pleadings, arbitration was conducted, oral hearings

were held, oral and documentary evidence was before the AT.

11. A perusal of the impugned award reveals that on the side of the respondents in the instant OP (claimants before AT), first respondent in instant OP, namely Ravi Gupta was examined as CW1 and on the side of the petitioner builder company in the instant OP (sole respondent before AT), one Gita Krishnan, Senior Officer (Legal) of the company was examined as the lone witness. On the side of the claimants (Respondents 1 and 2 in instant OP), 25 documents were marked as Exs.A1 to A25. On the side of the sole respondent before AT (petitioner builder company), 22 documents were marked as Exs.B1 to B22.

12. Ultimately, the impugned award came to be passed wherein and whereby, claim Nos.1, 9 and 10 were rejected. Claim No.2 and 5 were partly allowed. Claim No.3 was neither allowed nor rejected, but left to the outcome of a pending writ petition, but interest was awarded (subject of course to outcome of the writ petition). With regard to Claim Nos.4, 7 and 8, they were allowed in full. With regard to Claim No.6, the relief was moulded, wherein and whereby necessary repair work had to be carried out albeit at a cost.

13. From the narrative thus far, it will be clear that Claim Nos.7 and 8

of the claimants (respondents in instant OP) were allowed in full. Therefore, axiomatically, that part of the counter claim of the petitioner company, which is reverse of Claim Nos.7 and 8 of claimants before AT were rejected. Petitioner company's another limb of counter claim, being a sum of Rs.2 lakhs towards damages for initiating frivolous and vexatious litigation and wasting manpower resource of the respondent was fully rejected. In the instant OP, notwithstanding the grounds set out therein, Mr.V.Kalyanaraman of M/s.Aiyar and Dolia, submit that the submissions with regard to grounds of challenge qua impugned award are restricted to two grounds. The two grounds raised by him are as follows:

- a) The AT has travelled beyond the scope of said agreement; and
- b) AT has given contradictory reasons with regard to the agreement while dealing with different claims.

14. In support of his contention, learned counsel for petitioner builder company adverted to a portion of the impugned award dealing with Claim No.1, which reads as follows:

'It is significant to note here that in the e-mail dated 27.03.2010 (Ex.A-4(a) as well as the letter dated 28.06.2010 (Ex.A5), the First Claimant has admitted that he had received

the allotment letter dated 30.01.2010 along with two copies of agreement for execution from the Respondent.

It is further noticed that the Respondent by letter dated 24.09.2010 (Ex.B5) had again sent two sets of the Apartment Buyers Agreement for execution by the Claimants, which was returned leisurely by the Claimants with their signatures vide letter dated 23.12.2010 (Ex.A-9) under protest reserving the rights to protect their interest on two aspects, one of which was regarding rebates promised to be offered, but denied, and the Respondent received the same on 31.12.2010 as noticed from the endorsement of acknowledgement made therein.'

Thereafter learned counsel took this Court through, another portion of the impugned award dealing with Claim No.5, wherein AT has held as follows:

'Moreover, the first part of that preamble does not speak about the date from which the agreement shall be binding, but only emphasizes that the said agreement shall be binding on the Respondent only after it is executed by the Respondent through its authorized signatory, meaning thereby that when that agreement is accepted by the Respondent, it would relate back to the date of its receipt with the signature of the Claimants.'

15. Adverting to the aforesaid two portions of the impugned award, it was submitted that AT has travelled beyond the scope of said agreement and AT has also given different interpretations with regard to covenants in same agreement while dealing with two different claims, namely Claim No.1 and

Claim No.5. In other words, it was the specific say of learned counsel for petitioner builder company that while dealing with Claim No.1, AT has taken a view that petitioner builder company very leisurely responded with regard to the agreement whereas while dealing with Claim No.5 with regard to same said agreement, AT has taken a view that the preamble does not speak about the date from which the agreement shall be binding, but only emphasizes that the said agreement shall be binding on the respondent only after it is executed by the respondent. Learned counsel submitted that two interpretations run into each other and are contradictory to one another.

16. Responding to the aforesaid submission, Mr.S.Kalyanaraman, learned counsel for respondents in the instant OP advertent to the manner in which Claim No.5 has been dealt with by the AT and taking this Court through relevant portions of the impugned award, submitted that AT has specifically referred to the clauses and covenants in the said agreement, which read as follows:

The relevant portions of the preamble to the Apartment Buyers Agreement (Ex.A-1) are in the following two parts:

- (i) The agreement shall not be binding on the company until executed by the Company through its authorized signatory.
- (ii) The Company will have the option in its sole discretion, to either accept or reject the signed agreement within

30 days after receiving the agreement of the intending allottee.'

In other words, it is not in dispute that AT has taken into consideration the clauses and covenants in the said agreement, relevant clauses and covenants therein have been extracted and the same have been referred to as reasons for arriving at the conclusions with regard to the claims with regard to the interpretation as to when the agreement kicks in, is learned counsel's say.

17. Be that as it may, in the considered view of this court, these are all in the nature of generic grounds, which can be raised in regular first appeals under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) and no elucidation or elaboration is required to say that such grounds cannot be raised in a challenge to an arbitral award under Section 34 of A & C Act. Challenge to an arbitral award under Section 34 is not an appeal and this obtaining legal position is now clear as daylight and therefore this Court refrains from attempting to illumine on this aspect any further. It is a review, but a limited review within the contours and confines of Section 34 of A & C Act. Not being an appeal, besides being a limited review perambulating within the contours and confines of Section 34 of A & C Act, Hon'ble Supreme Court in the oft-quoted judgment being Fiza Developers case [**Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in (2009) 17 SCC 796], held

that Section 34 proceedings are summary procedures. To be noted, Fiza Developers has been reiterated by Hon'ble Supreme Court in **Emkay Global Financial Services Limited Vs. Girdhar Sondhi** reported in **(2018) 9 SCC 49**. Relevant paragraph is Paragraph 21 and the same reads as follows:

'21. It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments [*Sandeep Kumar v. Ashok Hans*, 2004 SCC OnLine Del 106 : (2004) 3 Arab LR 306] , [*Sial Bioenergie v. SBEC Systems*, 2004 SCC OnLine Del 863 : AIR 2005 Del 95] , cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(a). So does the Calcutta High Court judgment [*WEB Techniques & Net Solutions (P) Ltd. v. Gati Ltd.*, 2012 SCC OnLine Cal 4271] . We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment [*Punjab SIDC Ltd. v. Sunil K. Kansal*, 2012 SCC OnLine P&H 19641] is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that *Fiza Developers*[*Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd.*, (2009) 17 SCC 796 : (2011) 2 SCC (Civ) 637] was a step in the right direction as its ultimate ratio is that issues need not be

struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment [*Girdhar Sondhi v. Emkay Global Financial Services Ltd.*, 2017 SCC OnLine Del 12758] of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs.

While reiterating Fiza Developers, Hon'ble Supreme Court held that Fiza principle is a step in the right direction.

18. In other words, it has been time and again held by Hon'ble Supreme Court that Section 34 proceedings are summary procedures and grounds of generic nature cannot be countenanced within the contours and confines of Section 34 of A & C Act. This Court also reminds itself that review on merits is impermissible in a challenge to an arbitral award under Section 34.

19. There is no other specific material regarding the ground that AT travelled beyond the agreement.

20. In the light of the narrative supra and in the light of all that have been set out above, this Court finds that no case has been made out for any kind of judicial intervention qua impugned award under Section 34 of A & C Act. This Court also reminds itself that minimum judicial intervention is one of the pillars on which the edifice of Alternate Dispute Resolution mechanism is built. It follows as a sequitur that the instant OP fails and the same is therefore dismissed.

Considering the nature of the matter and the kind of submissions made i.e., trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs.

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03.04.2019

Speaking order/ Non-Speaking order

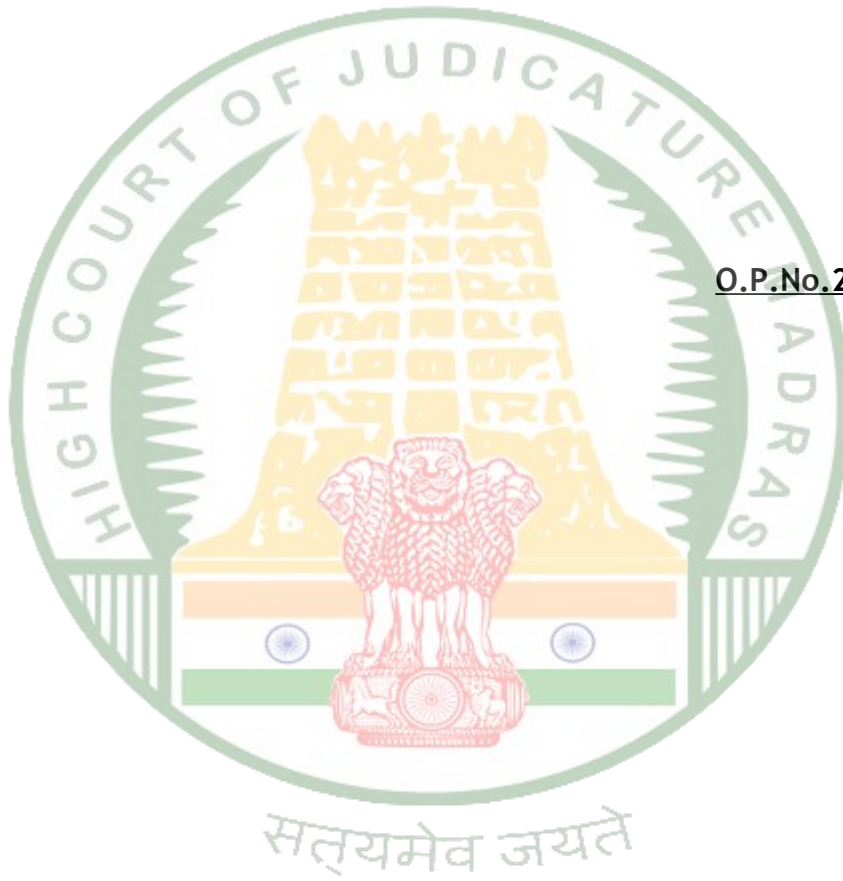
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