

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.08.2019

Delivered on : 19.08.2019

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P.No.615 of 2017
and
A.No.4456 of 2017

1.K.Lathaa
2.K.Ramya
3.K.Sangeetha

... Petitioners

Vs.

P.Ravichandran

... Respondent

Prayer : Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 28.06.2017 passed by the Arbitrator and to direct the claimant to complete the project in full and handover 60% of super built-up area and thereafter, to pass orders with regard to the question of payment of refundable Security Deposit and in the event of any delay, a fourth floor flat allotted to the share of petitioners/owners, a lien may be created and to pass suitable orders on other claims by setting aside the exorbitant interest and also to order damages at the rate of Rs.12 per sq.ft for the delay in handing over the 60% of the shares to petitioners/owners after 22.12.2014 till possession is handed over.

For Petitioners : Mr.R.Thiagarajan

For Respondent : Mr.Arun Karthik Mohan

ORDER

This Original Petition has been filed, assailing the impugned award dated 28.06.2017, passed by an Arbitral Tribunal, constituted of sole Arbitrator.

2.The brief facts of the claimant/respondent's case are as follows :

2.1.The respondent is engaged in Real Estate development. The petitioners are owners of the property in question and they entered into negotiations with the respondent for development of their property. It was agreed between the parties that, inasmuch as the property is developed by the respondent, 40% of the developed property would be owned by the respondent or his nominees and the balance 60% would be owned by the petitioners/owners. On 21.02.2012, a 'Development Agreement' ('agreement' for brevity) came into existence. While the construction works were going on, one Mr.Kamalanathan, a representative of the petitioners, caused interference and insisted on performing certain works, which were contrary to or outside the scope of specifications for construction. Such interference and stoppage of work at the instance of Mr.Kamalanathan caused delay in execution and loss to the respondent. With a view to complete the project, the respondent agreed for certain balance works in respect of the owners' share of constructed area, to be completed by the petitioners themselves. The

petitioners required some alterations outside the scope of specifications and undertook to supply certain items and to complete certain balance works in Flat-2, in the Fourth Floor by themselves.

2.2.At the stage of completion of work, except the works undertaken to be completed by the petitioners, the respondent requested the petitioners to make necessary arrangements for refund of Security Deposit of Rs.3,00,00,000/- (Rupees three Crores only) together with other amounts, due from the petitioners to the respondent, under the terms of the agreement viz., Property Tax arrears, charges paid towards Premium FSI and excess super built-up area allocated to the petitioners over and above their share of 60%. Pending the said payments, the petitioners entered into an agreement to sell one of the flats, earmarked for them on the Fourth Floor. As the respondent refused to cooperate with the petitioners in this regard, the petitioners forced the respondent to stop the work on-site. In a letter dated 16.07.2015, the respondent once again requested the petitioners to cooperate with him to complete the work and for payment of the amounts payable to him, so as to enable him to hand over the shares of the petitioners. However, in a letter dated 17.07.2015, the petitioners threatened the respondent to cancel the Power of Attorney.

2.3.Thereafter, the respondent vide letter dated 28.07.2015, invoking the Arbitration Clause, nominated an Arbitrator to resolve the issue. The petitioners refused to nominate Arbitrator(s). Hence, an application was

filed under Section 11 of the 'Arbitration and Conciliation Act, 1996' ('the Act' for brevity) and a sole Arbitrator was appointed. The following claims were made by the respondent/claimant in his claim petition before the Arbitral Tribunal.

"(A) (1) To direct the Respondents to pay the Claimant a sum of Rs.88,35,120/- being the Respondents' share of the costs incurred towards obtaining clearance for Premium FSI and for construction of additional built up area together with interest at the rate of 18% per annum on the above said amount from 05-04-2015 to 23-01-2016 and further interest at the same rate, till the date of payment.

(A) (2) Alternatively to declare that the Claimant is entitled to the Additional built up area to the extent of premium FSI of 194.145 Sq.Mts availed and relatable undivided share in land.

(B) To direct the Respondents to pay the Claimant a sum of Rs.50,03,100/- towards the excess area, over and above 60% of the Super Built up area, falling within the purview of flats, sought to be earmarked for allotment to the Respondents, together with interest at the rate of 18% per annum on the above said amount from 05-04-2015 to 23-01-2016 and further interest at the same rate, till the date of payment.

(C) To direct the Respondents to pay the Claimant a sum of Rs.5,72,058/- towards reimbursement of Property Tax Arrears paid by the Claimant for and on behalf of the

Respondents, together with interest at the rate of 18% per annum, on the above said amount, from 05-04-2015 to 23-01-2016 and further interest, at the same rate till the date of payment.

(D) To direct the Respondents to the Claimant a sum of Rs.5,92,552/- for additional/alteration work undertaken by the Claimant for the Respondents beyond the Scope of Specifications, together with interest at the rate of 18% per annum, on the above said amount from 05-04-2015 to 23-01-2016 and further interest at the same rate till the date of payment.

(E) to direct the Respondents to refund the Security Deposit of Rs.3,00,00,000/- together with interest at the rate of 18% per annum on the above said amount from 05-04-2015 to 23-01-2016 and further interest at the same rate, till the date of payment.

(F) To direct the Respondents to pay the Claimant a sum of Rs. 14,74,473/- towards VAT, and Service Tax, payable towards Development of the Owners Constructed Area.

(G) To direct the Respondents to pay the Claimant a sum of Rs.5,17,702/- towards the loss suffered, together with interest at 18% per annum from the date the date of the institution of the present proceedings, till the date of payment.

(G-1) To direct the Respondents to pay the Claimant a

sum of Rs.2,89,799/- towards the reimbursement of arrears due to CMWSSB paid by the Claimant for and on behalf of the Respondents, together with interest at 18% from 22.03.2016 till the date of payment.

(G-2) To direct the Respondents to pay the Claimant, a sum of Rs.1,65,391/-towards reimbursement of charges paid by the Claimant to CMWSSB and TNEB for and on behalf of the Respondents, together with interest at 18%, on the said amount till the date of payment.

(H) To direct the Respondents to pay the Claimant the costs of the Arbitral Proceedings."

3.The brief facts of the petitioners' case are as follows :

3.1.The respondent obtained planning permission to construct the flats only on 22.05.2013. As per Clause 14 of the agreement, the respondent should have commenced construction activities before 22.06.2013. But, he did not commence the construction, as per the agreed schedule, despite many reminders from the petitioners. Even on the date of filing the claim petition, the respondent had not completed the project and had not handed over possession of the flats to the owners/petitioners. It was agreed that, two apartments in the First floor, one in the Third Floor, two in the Fourth Floor, would be allotted towards the share of the petitioners and two apartments in the Second Floor and one apartment in the Third Floor would

be allotted to the respondent, but, the same was not reduced to writing by way of supplemental agreement. The petitioners agreed for sale of two flats under the share of the respondent, which were even sold on 12.02.2014, but, the respondent did not cooperate with the petitioners to sell their one flat in the Fourth Floor.

3.2.Though, the respondent executed the main structure of the building as per the agreed norms, there were certain deviations and defaults, viz., deviations in providing sewage pipelines, non-provision of Teak-wood windows and non-usage of standard quality materials for inferior and finishing works. The respondent agreed to execute minor changes inside the flats, but, they were not additional works requiring additional time and costs and the petitioners had agreed to pay the additional costs for the changes suggested by them. There was no communication from the respondent, about the progress of the work and only from 06.02.2015, the respondent started to send letters to the petitioners with baseless allegations.

3.3.On 06.07.2015, the respondent sent a communication, stating that, the project is nearing its completion and he was taking action to obtain 'Completion Certificate' from CMDA and that, the petitioners could take possession of their flats in the third week of August, 2015, provided, the petitioners refund the Security Deposit of Rs.3,00,00,000/- and a sum of Rs.1,42,53,295/- towards other charges. The respondent did not obtain any consent from the petitioners for obtaining Premium FSI and the Security

Deposit has to be refunded only when the respondent hands over possession of the Schedule-D property to the petitioners in a completed condition. As the work had not been completed even as on 06.07.2015, the respondent was not entitled to demand refund of the amounts, as claimed. The market rate of Rs.12,000/- per sq.ft., as claimed by the respondent, is without any reason and the respondent can claim only the construction costs. The petitioners were living in a rental premises, paying monthly rent of Rs.30,000/-, hence, they were entitled to get Rs.3,30,000/- towards 11 months' rent and claimed further period. Having regard to the above, the petitioners made the following counter claim before the Arbitral Tribunal.

"A.To direct the Claimant to complete as agreed and hand over the possession of Schedule-D property along with Completion Certificate.

B.To direct the Claimant to pay a sum of Rs.10,56,000/- towards penalty for delay and direct the Claimant further payments till handing over the possession of their share.

C.To direct the Claimant a sum of Rs.3,30,000/- towards rental charges till Feb, 2016 and further payments till handing over the possession of their share.

D.To direct the Claimant to pay a sum of Rs.1,92,00,000/- towards loss suffered due to Market Trends.

E.To direct the Claimant to pay interest @ 18% per

annum to the above said amounts from the date of cause of action till the date of payment.

F.To award the Arbitration Costs."

4.With the consent of both parties, the learned Arbitrator framed the following issues :

"1.Whether the Claimant is entitled for the Claims 'A' to 'B' as claimed in the Amended Claim Petition ?

2.Who is responsible for the delay in completing the project ?

3.Whether the Respondents are entitled for Counter Claims as claimed in the Defence Statement ?

4.Whether the Parties are entitled for interest ? If so, on what amount, at what rate and for what period ?

5.To what other relief/s, including the costs of this Proceedings, the parties are entitled ?"

5.After hearing both parties and on considering the oral and documentary evidence on record, the learned Arbitrator passed the following award on 28.06.2017, allowing the claim of the respondent/claimant and rejecting the counter claim of the petitioners.

AWARD

"1.The Claimant is entitled to recover from the Respondents and the Respondents are liable to pay to the Claimant, under Claim No. I, a sum of Rs.88,35,120/- with

interest at 15% from the date of this Award till the date of payment of the entire or portion of the amount.

2.The Claimant is entitled under claim No.2., to recover a sum of Rs.8,37,552/- from the Respondents with interest at 12% from the date of Award till 15-08-2017 and thereafter at 18% from 16-08-2017 till the date of payment of the entire or portion of the amount or till the circumstances arise as mentioned in Para 16.3 of the Award.

3.The Claimant is entitled to recover from the Respondents and the Respondents are liable to pay to the Claimant under Claim No.3, a sum of Rs.5,72,058/- with interest at the rate of 12% per annum from 25.01.2016, the date of filing the claim statement, till the date of Award and further interest at 15% per annum from the date of this Award till the date of payment of the entire or portion of the amount.

4.The Claimant is entitled to recover from the Respondents and the Respondents are liable to pay to the Claimant under Claim No.4, a sum of Rs.5,92,552/-with interest at 15% from the date of this Award till the date of payment of the entire or portion of the amount.

5.The Respondents are liable to refund a sum of Rs.2,96,47,625/- on handing over of the possession of Owners Developed Area (Schedule-'D') by the Claimant to the Respondents, which should be carried out simultaneously. The Respondents are liable to pay interest on the said sum of Rs.2,96,47,625/- at 12% from the date of Award till 15-08-

2017 and thereafter at 18% from 16-08-2017 till the date of payment of the said amount or till the circumstances arise as mentioned in Para 16.3 of this Award.

6.The Claimant is entitled to recover from the Respondents and the Respondents are liable to pay to the Claimant under Claim No.6., a sum of Rs.14,74,473/- with interest at 15% from the date Award till the date payment of the entire or portion of the amount.

7.The Claimant is entitled to recover from the Respondents and the Respondents are liable to pay to the Claimant under Claim No.8, a sum of Rs.2,89,799/- with interest at the rate of 12% per annum from 22-03-2016, till the date of Award and further interest at 15% per annum from the date of this Award till the date of payment of the entire or portion of the amount.

8.The Claimant is entitled to recover from the Respondents and the Respondents are liable to pay to the Claimant under Claim No.9, a sum of Rs.1,65,391/-with interest at 15% from the date of this Award till the date of payment of the entire or portion of the amount.

9.The parties are directed to produce the Title Deeds as directed in Para 22.2 of this Award.

10.The Claim No.7.of the Claimant and Counter Claims claimed by the Respondents, other than relief granted above,

are rejected.

11.No order as to costs. The parties are directed to incur their own costs."

6.Aggrieved by the above award, the petitioners have approached this Court by way of the instant Original Petition.

7.The main contention of the learned counsel appearing for the petitioners is that, Sub-clause (d) of Clause 5 of the agreement indicates that, both sides should decide upon the built-up areas falling under their respective shares by mutual discussions and should reduce the same to writing in the form of a supplementary agreement, after the sanction of construction plans and after commencement of construction. However, admittedly, such a supplementary agreement has not been executed. It is the further contention of the learned counsel that, only after the construction works are completed and possession is handed over to the owners of the building, the question of refund of Security Deposit arises. The agreement clearly contains a penalty clause in the event of delay in handing over the developed building to its owners, however, the learned Arbitrator has ignored the penalty clause.

7.1.It is the contention of the learned counsel with regard to the liability of the petitioners to pay property tax that, the agreement stipulates that, all the taxes, including VAT, Service Tax, have to be paid by the

developer/respondent. But, the relevant clause of the agreement has not been considered by the learned Arbitrator. It is his contention that, even on 06.07.2015, the building was not completed, as per the terms of the contract. Learned counsel further contended that the Premium FSI has to be borne by the developer/respondent. The order of this Court dated 28.04.2018 also indicates that the building had not been completed even as on that date. Therefore, it is his contention that, the learned Arbitrator has not carefully considered the evidence and materials on record and the findings of the learned Arbitrator are erroneous, hence, the entire award is perverse and the same is liable to be set aside.

7.2. In support of his contentions, the learned counsel mainly relied upon the following judgments *inter alia* of the Hon'ble Supreme Court of India.

(i) *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* [(2003) 5 SCC 705]

(ii) *Associated Cement Companies Ltd. v. P.N.Sharma* [1965 AIR 1595]

(iii) *Ircon Ltd. v. Vinay Heavy & Equipments* [2015 (13) SCC 680]

(iv) *Associate Builders v. Delhi Development Authority* [2015 (3) SCC 49]

(v) *Venture Global Engineering v. Satyam Computer Services Ltd.* [2008 (4) SCC 190]

(vi) *O.N.G.C. Ltd. v. Garware Shipping Corporation Ltd.* [AIR 2008 SC 456]

(vii) *O.N.G.C. Ltd. v. Western Geco International Ltd.* [**2014 (9) SCC 263**]

8.Learned counsel appearing for the respondent contended that the learned Arbitrator has decided all the issues on the basis of facts placed before the Arbitral Tribunal and has concluded that, only the petitioners are responsible for causing the delay. The learned Arbitrator has carefully considered the terms of the agreement and also the conduct of the parties and has arrived at such a factual finding that, the entire delay is attributable to the petitioners. The learned counsel further contended that the learned Arbitrator has considered the entire pleadings and evidence and has answered the issues on the basis of facts. Therefore, this Court cannot re-appreciate the entire evidence. He further contended that, Clause 21 of the agreement clearly indicates that, except capital gain, other taxes have to be borne by the owners/petitioners. This aspect has also been taken note of by the learned Arbitrator. He submitted that there were no pleadings as to the Service Tax liability and the claim Nos.8 and 9 also were not seriously disputed. By and large, it is the contention of the learned counsel that, the award is a result of factual findings made by the learned Arbitrator, considering the entire evidence before him. The learned counsel concluded his arguments praying for dismissal of this Original Petition.

9.Heard the learned counsel on either side and perused the award

and other materials available on record.

10. On a perusal of the entire award, it is seen that, the learned Arbitrator has framed as many as six issues in this case. Before dealing with the issues, the learned Arbitrator, in Para No.10 of the award, has extracted the relevant terms/clauses of the agreement between the parties. In Issue No.2, learned Arbitrator, on facts, has found that, the delay is attributable to the petitioners and the time for completion of work was extended by six months. Similarly, in other issues, the learned Arbitrator has factually found that the delay in handing over possession of owners' share of constructed area is attributable both to the petitioners as well as to the respondent. This finding of the learned Arbitrator is also based on factual aspects, placed before him. With regard to the claim No.1, the learned Arbitrator, based on the evidence, came to a conclusion that the cost of construction of building has to be arrived at Rs.2259.99 per sq.ft. and on that basis, petitioners' share on the premium FSI area was arrived at Rs.28,34,040/- i.e., 60% of Rs.47,23,400/-. The learned Arbitrator also held that the respondent is entitled to be paid a sum of Rs.88,35,120/- towards statutory charges, amount paid towards premium FSI area and costs of construction of building on the petitioners' share of premium FSI area. The above figures have been arrived at by the learned Arbitrator on considering the evidence on record, i.e. based on facts.

11. Similarly, claim Nos. 2 to 9 have also been ordered only on the factual aspects. In fact, with regard to the claim No.5, the learned Arbitrator has not awarded any interest on the Security Deposit of Rs.3,00,00,000/- since, the respondent has not handed over the possession of owners' share of constructed area to the petitioners. The learned Arbitrator has stated in the award that, pending the Arbitral proceedings, a memo was filed to the effect that, the respondent had completed all the works, however, the handing over of the possession could not happen due to the inability of the petitioners to pay the amount payable to the respondent, as the handing over of the said Schedule-'D' property could be done only on payment of the amount. Thus, the learned Arbitrator awarded interest @ 12% p.a. from the date of award till 15.08.2017 and thereafter, @ 18% p.a. The learned Arbitrator has, in fact, analysed, but, negated the counter claim of the petitioners on the ground that, the delay is attributed on the part of the petitioners and therefore, penalty cannot be levied on the respondent as per the agreement. Similarly, as there was no evidence to show the rental charges claimed to be paid by the petitioners and the alleged loss suffered by them due to market trends, the learned Arbitrator rejected the corresponding counter claims of the petitioners, which, according to this Court, is a fair and just decision.

12.The scope of interference under Section 34 of the Act is very limited. Unless the ground(s) set out under Section 34 of the Act is/are met out, an Arbitral award cannot be interfered with. Similarly, when an award is based on relevant materials and evidence, such findings cannot be interfered. Similarly, in this case, the learned Arbitrator has considered all the factual aspects of the case and materials on record and has factually arrived at his findings, therefore, this Court cannot re-appreciate the evidence, merely on the contention that the view or interpretation of the Arbitrator could have been otherwise. There is no dispute as to the propositions laid down in the judgments relied upon by the learned counsel for the petitioner, the impugned award as a whole, being a result of factual findings, cannot be re-appreciated or interfered by this Court, under Section 34 of the Act. I find no perversity in the award, nor any grounds set out under Section 34 of the Act to interfere with the award.

Therefore, this Original Petition is dismissed, confirming the impugned award dated 28.06.2017, passed by sole Arbitrator. No costs. Consequently, connected application is closed.

19.08.2019

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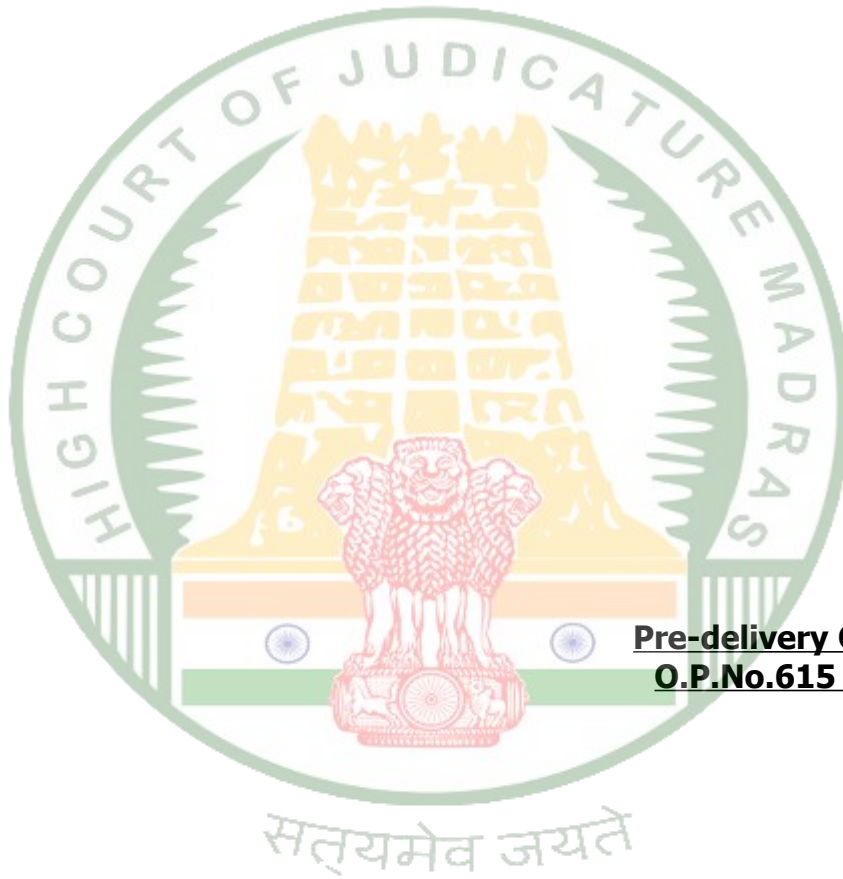
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N. SATHISH KUMAR, J.

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Pre-delivery Order in
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