IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.01.2019

DELIVERED ON : 24.01.2019

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.M.A.Nos.2364, 1789 and 2646 of 2018

and

CMP.Nos.13780, 18003 and 19974 of 2018

1.S.Thiagarajan
2.Shanthi Thiagarajan
3.T.L.Prashanth
4.T.Preethi
5.M/s.Prashanthi Entertainers Pvt. Ltd.,
rep. by its Director Shanthi Thiagarajan,
No.40, North Usman Road,
T.Nagar, Chennai-17. ... Appellants in all appeals

vs

M/s.Real Value Promoters Pvt. Ltd.,
rep. by its Managing Director V.S.Suresh,
Ambojini, No.17, Poes Road Second Street,
Teynampet, Chennai-18. .. Respondent in all appeals

Common Prayer: Civil Miscellaneous Appeals filed under Section 37(2) (b) of the Arbitration and Conciliation Act, 1996 against the common order dated 29.5.2018 passed in M.P.Nos.3, 4 and 5 of 2017 in Arb.O.P.Case No.417 of 2012 on the file of the Arbitral Tribunal.

For Appellants : Mr.K.Suresh Babu
For Respondent : Mr.Adinarayana Rao

COMMON JUDGMENT

These Civil Miscellaneous Appeals have been filed by the appellants against the order dated 29.05.2018 passed by the learned Arbitrator in M.P.Nos.3, 4 and 5 of 2017 in Arbitration O.P. Case No.417 of 2012, dismissing the petitions filed by the appellants.

2. Arbitration O.P. Case No.417 of 2012 has been filed by

the respondent against the appellants. The prayer in Arbitration O.P. Case No.417 of 2012 reads thus:

> "1.Directing the respondent to jointly and severally pay a sum of Rs.16,81,07,651/- towards the claims stated above with interest @ 18% from 18.6.2012 till the date of payment.
>
> 2.Declaring the unilateral revocation of Power of Attorney deed dated 27.4.2012 registered as Document No.111/2012 executed by respondents as null and void and consequently direct the respondents to restore the GPA dated 22.09.2003 bearing document number 536/2003.
> 3.Directing the respondents to pay the cost of the arbitration proceedings."

3. Resisting the claim of the respondent, the appellants have filed counter affidavit, wherein the appellants have also made counter-claim.

4. Pending Arbitration O.P. Case No.417 of 2012, the appellants have filed M.P.Nos.3, 4 and 5 of 2017 before the Sole Arbitrator seeking the following reliefs:

> "M.P.No.3 of 2017 filed by the appellants seeking to complete the construction of the staircase on both sides in the stilt floor, staircase in the first level basement floor, staircase in the second level basement floor with respective gates and also Architectural treatment-Dome in the terrace floor as per the specific dimension in conformity to the approved plan issued by the CMDA dated 7.10.2004 and the Corporation dated 11.4.2005 pending disposal of the Arbitration Claim Petition.
>
> M.P.No.4 of 2017 filed by the appellants seeking to direct the respondent/claimant to furnish security for the claim of Rs.13,41,03,026/-, failing which, to attach the properties in Schedule-A, B and C pending disposal of the Arbitration Claim Petition.
> M.P.No.5 of 2017 filed by the appellants seeking to direct the respondent/claimant to furnish correct records for the payment of service tax in respect of UDS and commercial built-up area sold to 16 buyers pending disposal of Arbitral proceedings."

5. The respondent refuted all the allegations levelled against it and prayed for dismissal of the petitions filed by the appellants. He submitted that the appellants tried to illegally take over the property of the respondent and hence, the respondent filed O.A.No.2378 of 2012 before this Court and

the appellants herein filed O.P.No.417 of 2012 to vacate the order passed in O.A.No.2378 of 2012, but the same was dismissed vide order dated 21.1.2013 and, therefore, the appellants had suppressed all these facts. The respondent further contended that the appellants had also suppressed the receipt of Rs.4.15 Crores as security deposit.

Qua the plea in M.P.No.3 of 2017 (Subject matter of C.M.A.No.2364 of 2018):

6. The learned Arbitrator held that the appellants are estopped from raising the issue that stair cases had not been constructed by the respondent/claimant after the issuance of completion certificate dated 14.8.2007, after a long gap of 10 years of taking over possession. The learned Arbitrator further held that the lease agreement dated 24.1.2007 executed between the appellants and M/s.Joyalaukkas confirms the common area maintenance service, lobby area and the stair cases and that all amenities including stair cases are very much in existence.

Qua the plea in M.P.No.4 of 2017 (Subject matter of C.M.A.No.2646 of 2018)

7. The learned Arbitrator held the construction of building was completed and parties have taken possession of their respective shares as early as way back in 2007 itself. Further, the respondent had completed his obligations under the agreement and that being the case the loan of Rs.22 Crores raised by the respondent to complete the construction on his definite share cannot be questioned by the appellants and also cannot demand loss of interest on the said loan raised by the respondent. It was further held that the appellants nowhere claimed that the building was incomplete or not constructed as per plan and they cannot seek security for the claim of Rs.13,41,03,026/-, failing which attachment of the properties described in Schedule-A, B and C pending disposal of the arbitration proceedings.

Qua the plea in M.P.No.5 of 2017 (Subject matter of C.M.A.No.1789 of 2018):

8. The learned Arbitrator held that the appellants are not aggrieved by any action of the Service Tax authorities and in fact, the respondent had furnished details required and the same has been received by the appellants' counsel in respect of proof of payment of Service Tax pertaining to UDS and thus, there is no earthly reason to entertain the petition.

9. Thus, the learned Arbitrator dismissed M.P.Nos.3 and 4 of 2017 and disposed of M.P.No.5 of 2017. Aggrieved by the common order of the learned Arbitrator, the appellants have preferred these Civil Miscellaneous Appeals.

10. C.M.A.No.2364 of 2018 arises out of the order in M.P.No.3 of 2017; C.M.A.No.2646 of 2018 arises out of the order in M.P.No.4 of 2017 and C.M.A.No.1789 of 2018 arises out of the order in M.P.No.5 of 2018. Since all the claims and counter claims arise of the same set of agreements entered to between the very same parties, it is apposite to give a short narration of the claim in each of the appeals:

C.M.A.No.2364 of 2018:

11. According to the appellants, they are absolute owners of the land measuring an extent of 12 grounds and 1280 Sq.Ft. in R.S.No.5089/1, 5089/2, 5090/1, 5090/2 in Rajachar Street, R.S.No.5088 in Hanumantha Rao Street, R.S.No.5088/2 in Usman Road, and were in the process of putting up a multi-storied commercial complex in the aforesaid land.

12. It is stated the respondent herein approached the appellants evincing interest in constructing the same and accordingly, the appellants entered into a Development Agreement dated 28.5.2003 with the respondent for developing the aforesaid land and putting up the multi-storied commercial complex. Subsequently, the parties are stated to have entered into a Supplementary Agreement on 2.9.2004. It is stated that another Supplementary Agreement was entered into between the parties on 30.9.2005 to construct and handover 67200 sq.ft. in the building. It is averred that the appellants had also executed a Power of Attorney on 22.9.2003 in favour of the Directors of the respondent, authorizing them to carry out the obligations under the Development Agreement.

13. It is stated that pursuant to the agreements, referred supra, entered into between the parties, the plan was approved vide MMDA No.43/41155/03, dated 7.10.2004 and Chennai Corporation No.189/05, dated 11.4.2005 for the construction of multi-storied commercial complex. It is stated that as per the approved plan the following constructions were to be made with specific dimensions stated in the approved plan:

(i) the First Level Basement Floor includes stair-case on both sides;
(ii) the Second Level Basement Floor includes stair-case on both sides;
(iii) the Stilt Floor includes stair-case on both sides; and
(iv) the Terrace Floor Plan includes an architectural treatment - a dome.

14. It is the case of the appellants that the respondent had not made the above four constructions as per the specific dimensions stated in the approved plan and without even

venturing into the said construction as per the approved plan had left the premises under the guise of having completed the construction.

15. It is the plea of the appellants that the respondent should be directed to complete the construction, referred supra, as per the dimensions specified in the approved plan at their cost in order to fulfil their part of the contract as per the agreements.

16. It is submitted that the stand of the respondent that they had obtained Completion Certificate on 14.8.2007 and, therefore, they had completed the construction of the building as per the norms of the CMDA cannot be accepted for the reason that as per the guidelines issued for the purpose of treating the building as completed for issuance of Completion Certificate, the non-completion of the stair-case in the basement floors and stilt floors and non completion of the architectural treatment - a Dome in the terrace floor would not be an impediment.

17. It is also submitted that the stand of the respondent that from 2005-2006 no person was authorized to put up any construction in the terrace above the parapet wall and the roof shall not be covered with any concrete structure like dome and, therefore, the same could not be completed also cannot be countenanced in the absence of any Rule to the said effect governing the Chennai Metropolitan Development Authority.

18. In such backdrop, the appellants seek to set aside the order passed by the learned Arbitrator and seek issuance of a direction to the respondent to complete the following works:

(i) the stair-case on both sides in First Level Basement Floor;
(ii) the stair-case on both sides in the Second Level Basement Floor;
(iii) the stair-case on both sides in the Stilt Floor with respective gates; and
(iv) the architectural treatment - a dome in the terrace floor,

as per the specific dimension strictly in conformity with the approved plan vide MMDA No.43/41155/03, dated 7.10.2004 and Chennai Corporation No.189/05, dated 11.4.2005.

C.M.A.No.2646 of 2018:

19. In this appeal, it is the plea of the appellants that the respondent taking advantage of Clause (7) of the Development Agreement dated 28.5.2003 executed a simple mortgage with Indian Overseas Bank on 30.11.2004 and had mortgaged 50% of the

undivided share being the right, title and interest in the said property and had borrowed a sum of Rs.6,90,00,000/- and on 29.9.2006 discharged the said mortgage.

20. It is further stated that the respondent once again executed a simple mortgage with Oriental Bank of Commerce on 16.10.2006 and had mortgaged 50% of the undivided share being the right, title and interest in the said property and had borrowed a sum of Rs.22,00,00,000/- and this mortgage was discharged only on 7.11.2011. It is the say of the appellants that though Completion Certificate was obtained by the respondent way back on 14.8.2007, the respondent had not chosen to discharge the mortgage till 7.11.2011.

21. He further submitted that though the respondent had availed a loan of Rs.22,00,00,000/- from Oriental Bank of Commerce on 16.10.2006, he had utilized only Rs.7,34,39,315/- (even as per the declaration made by the respondent to the Income Tax Department) and had thus unjustly enriched Rs.14,65,60,685/-.

22. It is the plea of the appellants that the respondent had completed the construction of the entire project by utilizing only a small portion of the loan amount in contravention of the terms of Clause (7) of the Development Agreement dated 28.5.2003. He also submitted that the respondent without investing any amount in the project had not only enriched themselves of getting 67144 sq.ft. of constructed area with proportionate undivided share free of cost, but had also sold the entire 67144 sq.ft. of constructed area with proportionate undivided share enjoying multi-fold profits. In effect, it is submitted that the respondent had made a total sum of Rs.35,94,64,598/- by the sale of the undivided share and built up area way back in 2007-2008, but had not chosen to discharge the mortgage with the Oriental Bank of Commerce till 7.9.2011.

23. The plea of the appellants is that for the amount illegally enriched by the respondent, i.e., to the tune of Rs.14,65,60,685/- (Rs.22,00,00,000.00 - Rs.7,34,39,315.00), the respondent is duty bound to return at least interest at the rate of 18% per annum for the period from 16.10.2006 to 7.11.2011 (from the date of loan till the date of discharge) amounting to Rs.13,41,03,026/- with interest at the rate of 18% per annum.

24. In this backdrop, the appellants seek to set aside the order of the learned Arbitrator and direct the respondent to furnish security for the claim of Rs.13,41,03,026/-, failing which to attach the properties more fully described in Schedules 'A', 'B' and 'C' to the appeal.

C.M.A.No.1789 of 2018:

25. In this appeal, t is averred that while acting on the basis of the Power of Attorney, the respondent had collected service tax from 16 individuals/companies while selling the multi-storied commercial constructed area with the respective undivided share (UDS) to the said 16 individual/companies.

26. It is the case of the appellants that they are currently the absolute owners of five out of the 16 properties and, therefore, they are well within their rights to file this appeal praying for a direction to set aside the order of the learned Arbitrator in M.P.No.5 of 2017, thus directing the respondent to furnish the correct records for the payment of service tax to the Service Tax Department in respect of the UDS and the commercial built up area sold to the 16 buyers.

27. It is further stated that the respondent, as per the direction of the learned Arbitrator, had produced proof of payment of service tax collected from 16 buyers in respect of the UDS and built-up area sold to them and accordingly, the respondent produced the proof of payment of service tax on 7.6.2017. It is the specific case of the appellants that the proof as produced by the respondent, on strict scrutiny, was found to be in respect of service tax received towards rental of immovable property; construction of residential complex, construction of commercial building; construction of residential building; construction of residential building, etc. All the receipts, according to the appellants, do not pertain to the service tax paid to the Union Service Tax Department in respect of the commercial built-up area sold to the 16 buyers.

28. Therefore, according to the appellants, the order of the learned Tribunal has to be set aside and the respondent to be directed to furnish the correct records for the payment of service tax in respect of the UDS and commercial built-up area sold to the 16 buyers duly collected from the 16 buyers.

29. In effect, the gist of arguments of the learned counsel for the appellants is as under:

- The respondent without even venturing into the construction as per the approved plan had left the premises in the guise of having completed the construction.
- The guidelines issued clearly reveal that non-completion of the stair case in the basement floor and stilt floors and non-completion of the Architectural treatment - a Dome in the terrace floor would not be an impediment for

issuance of the completion certificate as the CMDA only insists on the stair case head room for issuance of completion certificate.

- The respondent had violated the contractual agreement viz., Development Agreement dated 28.5.2003, Supplementary Agreements dated 02.9.2004 and 30.9.2005, upon which the approved plan was obtained.
- Apart from various flaws and lacunae in the construction, the respondent failed to construct (i) first level basement floor, stair case on both sides; (ii) second level basement floor, stair case on both sides; (iii) stilt floor, stair case on both sides and (iv) terrace floor Architectural treatment - a Dome as per the specific dimensions.
- The respondent after availing a loan of Rs.22 Crores from Oriental Bank of Commerce by mortgaging the property to construct 50% area in the property in question had only utilised Rs.7.34 Crore, which was evident from their own declaration made to the Income Tax Officer, Media Ward-III, Chennai dated 22.12.2011 and the said declaration also confirm that only 55,851 sq. ft. of the constructed area pertaining to the appellants share was done out of 67,200 sq. ft. initially agreed upon.
- The respondent had only utilised a small portion of the loan amount to incur all expenses in the entire construction of the property in the said land.
- It is clear that the respondent by virtue of utilising only a small portion of the amount obtained by mortgaging the property belonging to the appellants had declared to have completed the construction of not only the appellants share of 50% of the entire property, but also the respondent 50% of constructed area with the same funds.
- The respondent had in the process of acting on the basis of the Power of Attorney dated 22.9.2003 had collected service tax from 16 buyers while selling the multi-storied commercially constructed area with the respective UDS and that the respondent had collected service tax from 16 buyers.
- Now the appellants are absolute owners of 5 out of 16 properties and therefore, they are entitle to seek direction on the respondent to

furnish correct records for payment of service tax in respect of UDS and the commercial built-up area sold to 16 buyers.

- The learned Arbitrator has gone beyond the scope of the case and without verifying materials had dismissed M.P.Nos.3 and 4 of 2017.
- The learned Arbitrator erred in not granting the interim order directing the respondent to furnish security for the claim of Rs.13,41,03,026/-.
- The learned Arbitrator erred to appreciate the submissions of the appellants that by virtue of Supplementary Agreement dated 30.09.2005, the respondent had agreed to construct and handover 67,200 sq. ft. in the building in the manner mentioned therein apart from the other terms and conditions contained therein.
- The learned Arbitrator erred to take note of the letter dated 02.12.2011 of the respondent to the Income Tax Officer, wherein the respondent declared that the estimated value of construction of 67,200 sq. ft. pertaining to the respondent share to be Rs.7,39,20,000/- inclusive of provisions of services like RWH, lifts etc., while taking into consideration the need and necessity of the respondent to mortgage the property of the appellants for a huge sum of Rs.22 Crores.
- The learned Arbitrator failed to appreciate that huge loan of Rs.22 Crores availed by the respondent through the appellants' property on 16.10.2006 from Oriental Bank of Commerce was discharged only on 07.11.2011 even though the completion certificate was obtained on 14.8.2007 by the respondent.
- The learned Arbitrator erred to note that the respondent by their own declaration to the Income Tax authorities had not only substantiated that they had illegally enriched themselves in various manners on the sum of Rs.14,65,60,685/- but had also confirmed that only 55,851 sq. ft. was constructed out of 67,200 sq. ft. as agreed upon.
- The learned Arbitrator failed to take into consideration that the respondent's own records reveal that they have utilised a small portion of loan amount to incur all the expenses in the entire construction of the property in the said land.

- The respondent in contravention of the terms of Clause 7 of the Development Agreement dated 28.5.2003 had completed the construction of not only their share of 50% but also the appellants share of 50% with the same funds.
- The respondent had sold their share of 15,015 sq. ft. UDS in the property at Rs.18,01,80,000/- and had also sold their share of built-up area in the property to 16 buyers for a sale consideration of Rs.17,92,84,598/-. Thus, the respondent had made a total sum of Rs.35,94,64,598/- by the sale of UDS and built-up area.
- The respondent having enriched themselves crores and crores of rupees using the appellants property as their primary investment in their projects, deserve no right to make any claim against the appellants.
- The respondent is duty bound to return atleast Rs.13,41,03,026/- to the appellants apart from the interest thereon at the rate of 18% per annum.

30. The following are the submissions made by the learned counsel for the respondent:

- As per the Joint Development Agreement entered between the appellants and the respondent, the appellants have received Rs.4.15 Crores as refundable security deposit and in order to frustrate repayment of the said security deposit and to frustrate the other claims of the respondent, with an ill-motivated intentions, the appellants have filed vexatious petitions.
- The stair cases are available in the building and the competent authority after verifying all the facts had issued a completion certificate, which would prove that there is no incomplete work/deviation in the building.
- Now after 10 years, the appellants were trying to project as if the Dome was not constructed. The fact remains that the respondent made cat walk on the rear side of the building on each floor to place the air conditioning unit which was considered as a deviation by the authority and the same were removed by the respondent in order to get completion certificate and due to the stringent rules of completion certificate only the proposed Dome was not constructed.
- Further, while the building was in progress,

the subsequent Rules became a bar for construction of Dome in the terrace.

- Only to frustrate the Arbitration proceedings initiated by the respondent, the appellants have filed vexatious claims.
- The appellants have put up illegal office in the basement floor, apart from putting up illegal construction in the basement floor.
- Initially it was proposed for construction of 67,200 sq. ft. for each including deviations, however, the deviations were subsequently, abandoned due to enforcement of Rules and the values quoted to the Income Tax authorities for tax purpose were misused by the appellants to project a false picture.
- The appellants have suppressed the receipt of Rs.4.15 Crores as a security deposit, apart from whooping sum spent by the respondent for obtaining a planning permission and in fact, the respondent had officially paid a sum of Rs.12.24 lakhs toward planning permission.
- The claim of Rs.13,41,03,026/- made by the appellants is fictitious and illegal and the same is imaginary.
- The respondent had all rights to raise loan to construct the building and the said loans were raised only on the respondent's share and admittedly, the same were discharged by the respondent.
- Without making out the case, the appellants cannot seek for direction to furnish security and they have not made out a case under Order 38, Rule 5 of the Code of Civil Procedure, 1908.
- It is true that the respondent had sold his share to the persons stated by the appellants and that the claim of the appellants that the respondent has suppressed certain facts regarding bank loans and sold to purchasers are baseless. In fact, the respondent had obtained NOC from the bank prior to the sale and registration to purchasers.
- The respondent had paid applicable service tax to the Service Tax Department and the question of furnishing the same to the petitioner does not arise. Moreover, the appellants have no right to seek details of service tax payment pertaining to the purchasers of the respondent's share and that payment of service tax is an issue between the respondent and the

appropriate authority.

- In sort, the learned counsel for the respondent argued that applications seeking for relief of construction of stair case and done and to furnish security for the claim of Rs.13.41 Crores, failing which attachment and the relief of furnishing records pertaining to payment of service tax with respect of UDS and built-up area sold to 16 buyers duly collected from them are not maintainable either in law or on facts and the learned Arbitrator was right in dismissing all three applications and therefore, no interference is warranted.

31. I have heard Mr.K.Suresh Babu, learned counsel for the appellants and Mr.Adinarayana Rao, learned counsel for the respondent in all the Civil Miscellaneous Appeals and also perused the materials available on record.

32. The appellants were the absolute owners of the land measuring to an extent of 12 grounds and 1280 sq. ft. in R.S.No.5089/1, 5089/2, 5090/1, 5090/2 in Rajachar street, R.S.No.5088 in Hanumantha Rao street, R.S.No.5088/2 in Usman road and they were desirous of putting up a multi-storied commercial complex in the aforesaid lands. On 28.5.2003, the appellants entered into a Development Agreement with the respondent for developing the landed properties of the appellants and putting up a multi-storied commercial complex on the terms and conditions stated therein. The appellants have executed a Power of Attorney dated 22.09.2003 in favour of the Directors of the respondent to carry out the obligations under the Development Agreement. In furtherance to the Development Agreement, on 02.9.2004, the parties have entered into a Supplementary Agreement under the terms and conditions contained therein. There is no dispute that the parties have also entered into another Supplementary Agreement dated 30.09.2005 to construct and handover 67,200 sq. ft. in the building. In furtherance to the agreement entered into between the parties, an approved plan was obtained from the CMDA and Corporation of Chennai respectively for construction of the multi-storied commercial complex.

C.M.A.No.2364 of 2018:

33. According to the appellants, as per the approved plan, the respondent has to make the following disputed constructions:

1. the First Level Basement Floor includes stair-case on both sides;
2. the Second Level Basement Floor includes stair-case on both sides;

3. the Stilt Floor includes stair-case on both sides; and
4. the Terrace Floor Plan includes an architectural treatment - a dome.

34. It is seen from the documents filed in support of these appeals that the respondent had obtained Completion Certificate way back on 14.8.2007. This, according to the respondent, is a proof to show that he had completed the construction of the building as per the norms of the CMDA. The said plea of the respondent found favour with the learned Arbitrator.

35. At this juncture, it is apposite to refer to the Office Order No.01/2010, dated 21.1.2010 of the Chennai Metropolitan Development Authority, in relation to "Issue of Completion Certificate for obtaining service connections and in compliance with Development Regulations – Revised Completion Certificate norms and procedure". In this proceedings, the following guidelines were issued for the purpose of treating the building as completed for issue of completion certificate:

(i) Terrace Floor with weathering course including parapet wall;
(ii) Lift Machine Room, OHT and Stair-case Head room;
(iii) Electrical Installations (switch boxes and fixtures not to be insisted);
(iv) Sanitary and water supply installations (fixtures not to be insisted);
(v) Sump for water storage;
(vi) Outer plastering of the building;
(vii) Frames for joinery;
(viii) No dowel rods left out in the building for vertical or horizontal expansion;
(ix) Completion of Internal Plastering and Flooring need not be insisted in case of residential building.

36. From a reading of the above said norms, it is explicitly clear that nothing has been stated about stair-case in the basement and stilt floors and about the architectural treatment – a Dome in the terrace floor. All that the authorities concerned for issuance of Completion Certificate have to insist is the compliance of the above nine norms. The said nine norms only stipulate about the stair case head room and not the stair case. Therefore, the finding of the learned Arbitrator that inasmuch as the respondent had obtained Completion Certificate, all the works as per the approved plan have been undertaken cannot be countenanced.

37. Qua the stand taken by the respondent that from 2005-2006 no person was authorized to put up any construction in the terrace above the parapet wall and, therefore, the proposed dome was abandoned, which was accepted by the learned Arbitrator, it is a matter of record that no document whatsoever has been produced by the respondent to justify the said plea. The learned Arbitrator also did not make reference to any document to accept the said plea of the respondent. The stand of the respondent on this score cannot be accepted as gospel truth in the absence of any document substantiating such plea.

38. In case the learned Arbitrator was of the opinion that the all the necessary constructions have been put in and doubted the plea taken by the appellants herein, he ought to have appointed a Commissioner to physically verify as to the existence of the above said constructions, rather than proceedings purely based on the Completion Certificate obtained by the respondent.

39. For the foregoing reasons, C.M.A.No.2364 of 2018 is allowed by setting aside the order passed in M.P.No.3 of 2017.

C.M.A.No.2646 of 2018

40. A perusal of the Simple Mortgage deed dated 16.10.2006 executed by the respondent with Oriental Bank of Commerce shows that the respondent mortgaged 50% of the undivided share being the right, title and interest in the property in question and borrowed a sum of Rs.22 Crores. This mortgage was discharged on 7.11.2011. Whereas the respondent obtained Completion Certificate on 14.8.2007. This only goes to show that even after obtaining Completion Certificate on 14.8.2007, the mortgage raised by the respondent was not discharged.

41. In this regard, it is apposite to refer to the communication of the respondent addressed to the Income Tax Officer, Media Ward III, Chennai - 600 034, wherein the respondent requested the Income Tax authorities to consider only 55,851 sq.ft. For all purposes and estimated the value of construction at Rs.7,34,39,315/-. This only goes to show that the respondent utilized only Rs.7,34,39,315/- out of the total loan availed to the tune of Rs.20 crores.

42. After referring to the said letter, the learned Arbitrator observed as under:

> "... Even assuming without admitting that the letter dated 22.12.2011 issued by the respondent to the Income Tax authorities is true the same only denotes the cost of construction of the petitioner's share and if the same is multiplied

into two the sum will be multiplied to Rs.15 crores and it is not known how the petitioner has calculated the some alleged imaginary damages to him on account of the loan borrowed and admittedly discharged by the respondent on his share and hence this application is liable to be dismissed with cost.

...

... The cost defined in the same supported by material evidence have been filed as annexure to the Claim Petition by the Claimant and the same will prove the actual cost of construction and the letter deceitfully obtained by the petitioner from the respondent to get a relief from the IT authorities, which is now used as a gun to fire back on the respondent/claimant".

43. Even though the respondent states that the letter addressed to the IT authorities has been deceitfully obtained by the appellants, the issuance of such letter to the department is not disputed. This only shows that the mortgage amount obtained by mortgaging 50% of the undivided share has not been utilized for construction as per the agreements entered into between the parties. Even according to the learned Arbitrator, if the amount of of 7.5 crores is multiplied with two, it would amount to Rs.15 Crores. Even then the amount of Rs.22 crores obtained as loan is highly excessive and in any event, having obtained Completion Certificate in 2007, there is nothing on record to show as to why the mortgage was subsisting till 2011 without being discharged by the respondent qua the 50% undivided share in the property subject matter of the agreement entered into between the appellants and the respondent.

44. Therefore, the claim of the appellants cannot be brushed aside in the manner as done by the learned Arbitrator without there being any evidence. Inasmuch as the appellants would be put to irreparable loss if the claim is not secured, in the interest of justice, till the conclusion of the arbitration proceedings, this Court feels it just and proper to direct the respondent to furnish security for the claim of Rs.13,41,03,026/- within four weeks from the date of receipt of a copy of this order, failing which the learned Arbitrator is directed to attach the properties mentioned in the petition.

45. In this view of the matter, C.M.A.No.2646 of 2018 is allowed and the order dated 29.5.2018 passed in M.P.No.4 of 2017 is set aside.

C.M.A.No.1789 of 2018:

46. It is seen from the documents that the respondent had

collected service tax from 16 individuals/companies while selling the multi-storied commercial constructed areas with respect to the undivided share. It is beyond any cavil that all the respective undivided shares together with constructed area were conveyed to the buyers by virtue of the power of attorney executed by the appellants in favour of the respondent in terms of the agreement. The respondent on a memo dated 7.6.2017 furnished proof of payment of service tax in respect of the 16 buyers from whom they had collected service tax.

47. A bare perusal of the counterfoils and receipts produced by the respondent, as seen in pages 109 to 130 of the common typed set, shows that all the receipts do not pertain to service tax in respect of undivided shares and built-up area. Some of the counterfoils, for instance show that service tax has been paid for the following purposes:

(i)Rental of immovable property;
(ii) Construction of residential complex;
(iii) Construction of residential property;
(iv) Construction of residential building;

Apart from the above, some of the receipts show the Accounting Code of Service No.00440298, which relates to Primary Education Cess and Accounting Code of Service No.00440426 which relates to Secondary Education Cess.

48. When the agreements entered into between the parties is for construction of a multi-storied commercial complex, this Court is at a loss to understand as to how the respondent has furnished counterfoils/receipts pertaining to collection of service tax for construction of residential building, etc., as stated above. The proof furnished by the respondent certainly cannot be accepted as substantial proof for collection of the service tax in respect of the property in question.

49. The learned Arbitrator had observed that "if at all, if the petitioner wants to confirm the genuinety of the payments with the service tax authorities, he could have done the same. It is also not made clear by the petitioner/respondent herein, why these details are needed by him, when admittedly they have no relevance to the case on hand and there is neither any claim, nor any issue between the petitioner and the respondent, as far as service tax is concerned ". In my considered opinion, by referring to the service numbers of payment of service tax, the appellants had substantially proved that many of the service tax receipts do not pertain to multi-storied commercial complex. That apart, the learned Tribunal by order dated 19.4.2017 directed the respondent to provide details of service tax payments and now it cannot go back and say as to why the appellants are insisting on production of the same. Moreover, by furnishing the correct particulars of the service tax

collected would in no way prejudice the respondent.

50. In such view of the matter, C.M.A.No.1789 of 2018 is allowed and the order dated 29.5.2018 made in M.P.No.5 of 2017 is set aside and the respondent is directed to furnish the correct records for the payment of service tax in respect of the UDS and commercial built-up area sold to the 16 buyers duly collected from the 16 buyers within four weeks from the date of receipt of a copy of this order.

51. Before concluding, this Court is constrained to observe that a perusal of the order passed by the learned Arbitrator shows that it is a reproduction of the plea of the respondent/claimant and not even a mere reference is made to any of the contentions of the appellants and no document whatsoever is referred to arrive at any finding. This indicates a sorry state of affairs. This Court is necessitated to observe so as the findings of the Tribunal are contrary to the agreements entered into between the parties and absolutely perverse, without consideration of the evidence of the appellants or their pleadings.

52. In the result:

(a) the CMA.No.2364 of 2018 is allowed by setting aside the order in M.P.No.3 of 2017 dated 29.05.2018 passed by the learned Arbitral Tribunal;

(b) the respondent herein is directed to complete the construction of (i) the Stair-case on both sides in the First Level Basement Floor;'(ii) the Stair-case on both sides in the Second Level Basement Floor; (iii) the Stair-case on both sides in the Stilt Floor with respective gates and; (iv) the Architectural Treatment - a Dome in the Terrace Floor as per the specific dimension strictly in conformity to the Approved Plan vide MMDA No.43/41155/03 dated 07.10.2004 and Chennai Corporation No.189/05 dated 11.04.2005 forthwith;

(c) CMA.No.2646 of 2018 is allowed by setting aside the order in M.P.No.4 of 2017 dated 29.05.2018 passed by the learned Arbitral Tribunal;

(d) the respondent herein is directed to furnish security for the claim of Rs.13,41,03,026/- within a period of four weeks from the date of receipt of a copy of this order, failing which the learned Arbitrator is directed to pass appropriate orders for attaching the properties mentioned in the petition "Schedule A", "Schedule B" and "Schedule C" pending disposal of the arbitration proceedings;

(e) CMA.No.1789 of 2018 is allowed by setting aside the order in M.P.No.5 of 2017 dated 29.05.2018 passed by the learned Arbitral Tribunal;

(f) the respondent herein is directed to furnish correct records for the payment of Service Tax in respect of the

Commercial built-up area sold to the 16 buyers duly collected from the 16 buyers within a period of four weeks from the date of receipt of a copy of this order, pending disposal of the Arbitral Proceedings. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vs

To

1.The Arbitral Tribunal,
  Chennai.

+3cc to Mr.K.Suresh Babu, Advocate, S.R.No.5533, 5534, 5535
+2cc to Mr.Adinarayana Rao, Advocate, S.R.No. 5550, 5552

C.M.A.Nos.2364, 1789 and 2646 of 2018 and
CMP.Nos.13780, 18003 and 19974 of 2018

KS(CO)
GN(13/03/2019)