

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.1123 of 2018

G.Arumugam,
Proprietor, Arumugam Constructions,
No.5, Sivasakthi Homes,
Parthasarathi Nagar,
2nd Street, Adambakkam,
Chennai-600 088.

.. Petitioner

Vs.

S.Kalyani

.. Respondent

* * *

Prayer : Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to decide the disputes between the parties arising out of the Construction Agreement dated 30.01.2014.

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For Petitioner : Ms.R.Ramya

For Respondents : Mr.T.V.Sureshkumar
for M/s.Genicon & Associates

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ORDER

This Original Petition is filed seeking for appointment of an Arbitrator to adjudicate upon the disputes between the petitioner and the respondent which arose out of the Construction Agreement dated 30.01.2014.

2. The petitioner and the first respondent entered into a "Construction Agreement" dated 30.01.2014. The respondent agreed to pay a sum of Rs.1,575/- per square feet for the construction, which would be in accordance with the approved plan and the petitioner agreed to complete the construction within a period of twelve months from the date of the agreement. The total cost was pegged at Rs.1,63,99,510/-. According to the petitioner, the respondent requested some modifications to be carried out in the plan with an oral promise to pay additional costs for the additions in the constructions, which he obliged on account of their long standing relationship. The petitioner completed the construction of 11,493 square feet, as against the planned area of 9790 square feet, and handed over possession on 27.08.2015 to the respondent to utmost satisfaction. The petitioner demanded an additional sum of Rs.44,93,031/- for the additions, in addition to what was agreed earlier. Now there was an outstanding of Rs.97,85,541/- to be paid by the respondent. In spite of umpteen number of reminders in person and by phone, the respondent failed to settle the same. Hence, the petitioner issued a legal notice dated 19.04.2018 to pay the said amount and there were exchanges of notices between them.

3. Under the said circumstances, the petitioner invoked Clause 16 of the Construction Agreement providing for arbitration for resolution of disputes and differences of opinion between the parties and nominated a sole Arbitrator. However, the same is not accepted by the respondent. This led to the filing of this petition invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, "the Act") by the petitioner.

4. Resisting the claim of the petitioner, the respondent filed a counter affidavit. It is her case that the Construction Agreement is a void document and it cannot be enforced, as it was executed only for the purpose of reference for the business of the petitioner and hence, the arbitration clause contained therein, which is vague and unclear, also cannot be invoked. The respondent also stated that there was no written agreement for additional construction and payment between them and it is the petitioner, who owes certain amount to the respondent, which she spent for purchase of certain materials at the request of the petitioner. The respondent further stated that the petitioner failed to fulfill his commitment and left the building incomplete in so many aspects with an enormous delay and there were also defects in the completed portion. Thus, the respondent prays for dismissal of this petition.

5. After hearing the parties for a while, though the learned counsel for the respondent resisted the prayer has agreed for an Arbitrator being appointed by this Court preferably a retired District Judge.

6. Admittedly, the factual disputes between the parties cannot be gone into by this Court. The preliminary objection of the learned counsel for the respondent is that the alleged Construction Agreement dated 30.01.2014 is an informal one and it being not registered cannot be looked into to arrive at a decision as to the competency of the parties to invoke the arbitration clause. It is to be noted that the respondent did not dispute her signature in the document or the arbitration clause contained therein, though she pleaded that it is for the purpose of interruption (sic) over the clauses of the agreement shall be referred to a mutually agreed arbitrator.

7. At this juncture, for the purpose of academic interest, it is relevant to state that the Hon'ble Apex Court dealt with the question pertaining to the validity of the unstamped and unregistered document in arbitral proceedings, in **Garware Wall Ropes Ltd. V. Coastal Marine Constructions & Engineering Ltd., 2019 (3) CTC 339,**

after referring the judgment in **Sri Venkataramana Devaru V. State of Mysore, 1958 SCR 895, J.K.Cotton Spinning & Weaving Mills Co. Ltd. V. State of U.P., 1961 (3) SCR 185, Chief Inspector of Mines V. Lala Karam Chand Thapar, 1962 (1) SCR 9 Anwar Hasan V. Mohd. Shafi, 2001 (8) SCC 540** and also a Seven-Judge judgment in **SMS Tea Estates (P) Ltd. V. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66** and held that the unstamped document is to be impounded to see that the stamp duty and penalty, if any, is paid before the same can be acted upon and Section 11 application could be heard and disposed of expeditiously.

8. I had an occasion to consider similar issue in O.A.Nos.219 and 220 of 2019 and following the aforesaid judgment of the Hon'ble Apex Court in **Garware Wall Ropes case (cited supra)** delivered the order dated 28.06.2019.

9. Learned counsel for the petitioner relied on the judgment rendered by a Full Bench of the High Court of Bombay in **Gautam Landscapes Private Limited V. Shailesh S.Shah** reported in **2019 SCC OnLine Bom 563**, wherein, in paragraph 120, the following questions were framed and answered in the following manner :

"120. In view of the above deliberation, we answer the questions as framed by us as follows :

(1) Whether a Court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped ?

In the Affirmative

(2) Whether, inter alia, in view of Section 11(6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped ?

In the Negative"

10. The Hon'ble Supreme Court in **Garware Wall Ropes Ltd. (cited supra)** considered the aforesaid Full Bench judgment of the Bombay High Court and held that the answer to the second question referred to above is incorrectly decided.

11. In such view of the matter, this Court is of the view that the applicant is at liberty to present Construction Agreement before the registering authority concerned for registration by paying requisite stamp duty and get it registered within a period of four weeks from the date of receipt of a copy of this order. Once registration is done, it will cure the defects in the document and the same can be enforced and the arbitration clause also can be invoked as stipulated therein.

12. In the result, if the document is registered to make it enforceable and to enable the parties to invoke the arbitration clause contained therein, Mrs.K.Elaiyarani, District and Sessions Judge (Retd.) residing at Door No.29A, (HIG977), First Main Road, (Near Nolambur Police Station & Opp. Velammal West School) Eri Scheme, Mogappair, Chennai-600 037 (Phone No.26532424), is appointed as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix her remuneration and other incidental expenses. The proceedings shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules. It is made clear that if the petitioner fails to make the document enforceable, the benefit of this order is not available to him.

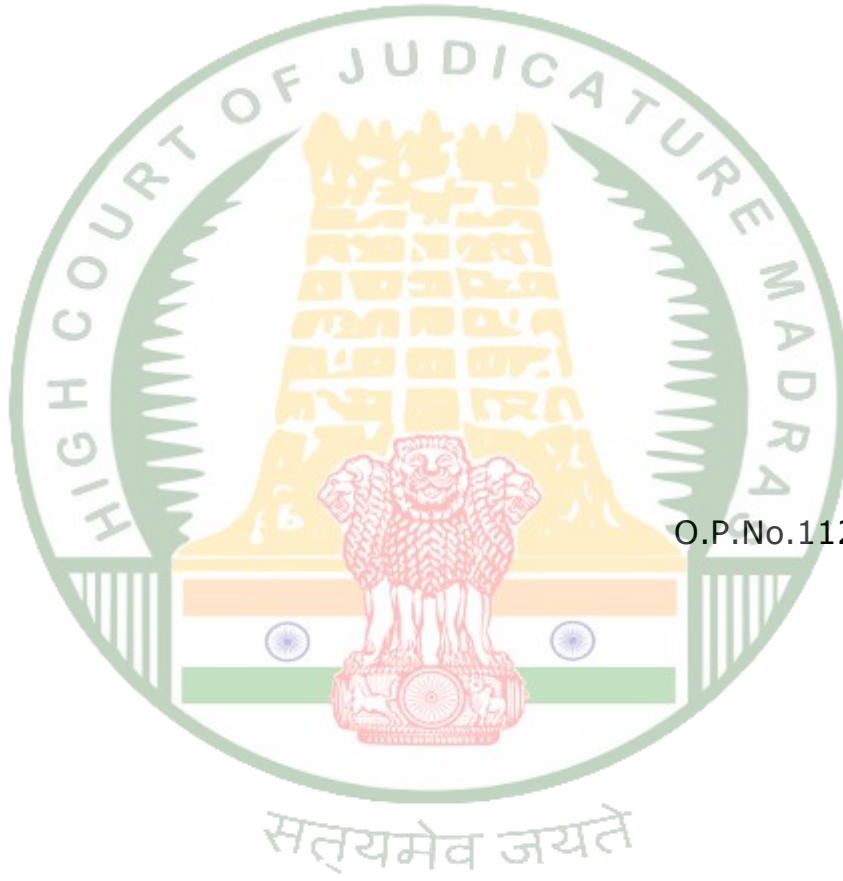
12. The Original Petition is ordered accordingly, leaving the parties to bear their own costs.

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After pronouncing the order today, learned counsel appearing on behalf of the respondent submitted that in paragraph 5 of the order, his consent was recorded for the appointment of the Arbitrator, after pointing out his resistance.

2. It is his submission that he did not give consent for the appointment, whereas, he merely left it to the Court to decide the question of appointment of the Arbitrator, after placing his client's case.

3. In view of the above findings recorded by this Court, it is not necessary to record his consent as it is recorded in paragraph 5. Accordingly, paragraph 5 of the order dated 19.07.2019 is replaced as follows :

"5. Heard the learned counsel for the parties and perused the materials available on record."

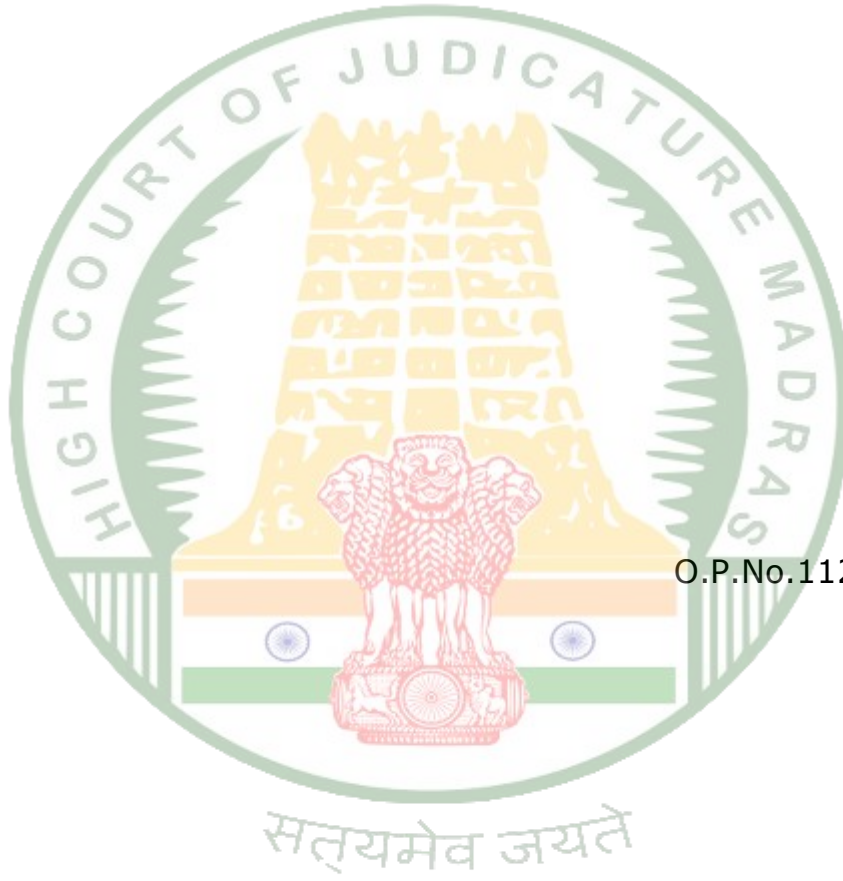
4. Excepting the above modification, the order dated 19.07.2019 remains unaltered.

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