

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.510 of 2018

and

A.No.4588 of 2018

1. The Managing Director,
Tamil Nadu Housing Board,
331, Annasalai,
Chennai- 600 035.

2. The Chief Engineer,
Tamil Nadu Housing Board,
No.331, Annasalai, Chennai- 600 035.

3. The Superintending Engineer
Tamil Nadu Housing Board,
Salem Circle, Salem -636008.

4. The Executive Engineer,
Tamil Nadu Housing Board,
Salem Circle, Salem.

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...Petitioners

Vs.

M/s. Annamar & Co
Represented by its Managing Partnership
1. L. Subramani and
2. Indra Prakash,
2A/1. Kamarajarpuram,
CHB Colony, Vellore Road,
Tiruchengode,
Namakkal District - 637211

PRAYER: Petition is filed under Section 34 (2) (a) (iii) & (v) AND (b) (ii) of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 03.11.2017 made in arbitration proceedings arising out of O.P.No.475 of 2010 on the file of Hon'ble High Court, Madras in the matter of dispute under work order No.SC.SE3/4193/97 dated 24.02.1998 and L.S.Agreement No.70/97 dated 05.03.1998.

For Petitioner : Mr. Bharat Kumar
For Respondents : Mr. S. Parthasarathy

ORDER

The unsuccessful respondent in the Arbitral Tribunal is the petitioner in Section 34 Petition before this Court.

2. The parties are referred to in the same ranking as they were before the Arbitral Tribunal.

3. The challenge is to the Arbitral award passed by the sole

Arbitrator allowing the claim made by the claimant.

4. The facts in brief which are necessary for disposing of the above Petition are as follows: The claimant is a registered partnership firm engaged in the business of building and is a registered contractor with the first respondent Board. In the year 1997, the first respondent had floated tenders for the construction of 21 MIG I (Duplex) Houses, 21 HIG II Houses and 22 MIG Houses at Namakkal NHS.

5. The claimant had submitted their bid which was accepted and the respondent had issued them with a work order dated 24.02.1998. The claimant and the respondent had entered into a Lump Sum agreement hereinafter referred for the sake of brevity as LS agreement. Pursuant to this agreement, the claimant had also deposited a sum of Rs.2,31,000/- towards the ASD. In clause 4 of the LS agreement, the claimant was supposed to commence the execution of the work from the date of handing over of the site. The claimant would contend that contrary to agreement, the respondent was not able to hand over the entire site and only site for 10 houses could be handed over to them. As regards the larger extent, there

were some disputes between the legal heirs of the erstwhile land owners and in anticipation of the respondent succeeding in the dispute, construction materials worth over Rs.10,00,000/- were handed over by the respondent to the claimant.

6. The claimant would submit that on 28.01.2000 they were informed that the site was available and that the claimant should take over the same but however on condition that the claimant should commit in writing that they would not go for arbitration for variation in the land against the portion agreed. The claimant refused to accept the payment by contending that the cost of construction which was calculated as per the rates prevailing on the date of agreement namely 1997-1998 when only a small portion was handed over to them had escalated. Consequently the remaining portion had been handed over only after a period of two years. Considering the delay, the prices of the materials had gone up considerably and therefore the claimant had requested the respondent to rework the cost.

7. The respondent took a stand that unless the claimant executed the undertaking they would not proceed further. The

claimant was therefore constrained to file W.P.No.11628 of 2000 before this Court for mandamus directing the respondent to handover the possession of the site.

8. By order dated 24.08.2000, this Court directed the fourth respondent to handover the site within seven days without insisting on any kind of undertaking. The Court had thereafter extended the time for a period of ten days from 19.10.2000.

9. The claimant would submit that after possession was taken by them they had started construction and had to stop the construction after the basement level as respondents did not supply cement and steel as agreed. They had also addressed the respondent in this regard several times, however the efforts did not yield the desired result. The request was followed by a legal notice which was also left unanswered. The claimant calculated their loss at Rs.1,87,90,672/- till that date. The respondent stuck to their stand that the claimant should give an undertaking and only then they would supply the cement and steel.

10. The claimant filed Writ Petition in W.P. No. 15256 of 2002 seeking a direction to the respondent to forthwith supply cement and steel so as to enable the claimant to complete the construction without their calling upon the claimant to relinquish their right of arbitration. By order dated 06.12.2004, this Court had disposed of the above Writ Petition directing them to invoke the arbitration clause in keeping with clause 3 of the agreement dated 05.03.1998. The claimant had filed AOP 6 of 2005 on the file of the Principal District Judge, Namakkal to appoint the Arbitrator. The learned Principal District Judge dismissed the Petition stating that he was not conferred with the powers to appoint the Arbitrator since the claim was over a sum of Rs.3,66,000/- . This order was taken up on revision by the claimant in CRP 517 of 2018, wherein this Court upheld the order passed by the learned Principal District Judge, Namakkal. The claimant had filed a Review wherein this Court by order dated 19.12.2009 had directed the claimant to move the Section 11 Petition before this Court. Accordingly the said Petition was filed and the sole Arbitrator was appointed and the proceedings commenced before him.

11. The second respondent had filed a counter statement

refuting the averments contained in the plaint and contended that the site could not be handed over on account of certain legal issues that have been raised by the legal heirs of the erstwhile owners and constraining the respondents to defend the proceedings filed by these legal representatives for re-conveying the land to them in W.P.No.5916 of 1998. By order dated 24.09.1998, the Writ Petition came to be disposed of with a direction that the respondent should dispose of the representation of the legal representatives within a period of six months from the date of receipt of a copy of this order.

12. Thereafter the respondents have considered the representations made by the legal representatives in detail and thereafter refused the same. During the pendency of the Writ Petition, the respondent Board was not able to handover the site to the claimant however considering the request and insistence of the claimant, a portion of the site was handed over. The respondent would also contend that wherever there is a delay in handing over the site to the contractor, it is the general practice that the undertaking is taken from them that they would not proceed for arbitration. The claimants would go on to state that though the site was handed over

on 25.10.2000 however work had commenced only on 22.11.2000. The respondent would further contend that even the ten houses that were constructed by the claimants in the year 1998 was not built completely and had only reached basement level. The petitioner would further submit that after 25.10.2000 earth work of the land was undertaken by the claimant and no further construction activity had undertaken which has resulted in a huge loss to the Board as well. The respondent would further counter the claimant's argument regarding the supply of cement and steel by contending that as per the clause 12 of the original agreement, it was made clear that in case the respondent did not supply the cement and steel, it was still open to the contractor to purchase the same from the open market. The claimant had requested extension of time from 27.07.2001 to 31.03.2002 and time was accordingly extended. The second respondent would further contend that the claimants have totally given a go by to clause 12 and 37 of the agreement.

13. The fourth respondent filed an additional counter contending that despite several letters and reminders by the respondent, the claimant had not come forward to take over the site and the

construction which they had commenced in the portion of the property was without the due approval of the respondent. The agreement had made it clear that for every stage of the work the claimant was bound to get an approval from the respondent. The respondents would further contend that since the delay was on account of the claimant, they were bound to pay a fine at the rate of Rs.2300 per day for the delay. The Board by order dated 30.10.2001 had decided to permit the claimant to complete the ten houses, where the work had commenced.

14. The claimant had refuted the allegations made by the second and fourth respondents in their respective counters and had stated that the allegations made by the respondents are only an after-thought, and made with an intent to avoid making payments to the claimants.

15. The parties had gone to trial and the learned Arbitrator had framed over 15 issues based on the pleadings and documents filed. The learned Arbitrator had dealt with each and every issue in a detailed manner and in keeping with the terms of the contract. The

sole Arbitrator has held that the conduct of the respondent was regrettable and that even for matters, where the same had to be ordered, the respondent had put spokes. When the claimant had attempted to bring on record the Legal heirs of the deceased partner where the respondent had fought tooth and nail against the same being allowed for reasons best known to them. The Arbitrator has further taken note of the fact that the claimant had been forced to take possession of a portion of the site despite their being legal hindrances only upon the insistence of the respondent as evidenced by Ex.C40 and C41. The learned Arbitrator has also extensively dealt with the reasons for the claimant insisting upon the respondents supplying cement and steel as evidenced by clause 12 and 37 of the agreement. Ultimately the learned Arbitrator had passed the following award.

"A. The respondent shall pay to the claimant a sum of Rs.35,95,000/- (Rupees thirty five lakhs ninety five thousand only) with interest at the rate of 9% p.a. From 1.11.2001 till this date. The period of calculation of

interest shall however be excluded by a period of 5 years.

B. Interest shall be chargeable on Rs.35,95,000/- at the rate of 18% p.a. From this date till date of realization.

C. A sum of Rs.3 Lakhs shall be paid towards cost to the Claimant within a period of 3 months from the date without interest failing which interest shall be paid for the subsequent period at the rate of 18 % till date of realization."

Challenging the said Award the respondent Board is before this Court.

16. Mr. R. Bharath Kumar, the learned counsel appearing on behalf of the housing Board by way of change of vakalat would submit that the contract clearly stipulated that time was the essence of the contract and this is found in clause 4 of the agreement. He would further submit that the only ground on which the claimants had not

proceeded with the project was on account of their demand for steel and cement. This demand according to the learned counsel was contrary to the tenor of clause 12 and 37 of the agreement. The learned counsel would submit that despite the claimant being asked to take possession of the properties by 25.10.2000, the claimants was not coming forward to take over the sites and commence construction as per the terms of the agreement. The construction ought to have been completed by July 2001 but however the learned counsel would further argue that even the ten sites were not handed over fully constructed. He would further argue that the Award is against the terms and conditions of the agreement and is therefore suffers from the vice perversity therefore he would submit that the award has to be set aside. He would rely upon the following Judgments:

- 1. (2006) SCC page 86- State of Rajasthan Vs. Nav Bharat Construction Co.**
- 2. (2001) 4 SCC 86 -Bharat Coking Coal Ltd Vs. L.K.Ahuja & Co.**

17. Per contra, Mr.S. Parthasarathy arguing on behalf of the claimant would contend that the delay was solely on account of the respondent and that delay cannot be mulcted upon the claimant. The

claimant has been time and again writing to the respondents to handover the possession of the entire site and he would further submit that the respondent was trying to arm twist the claimant into not invoking the arbitration clause by insisting upon their giving an undertaking as a condition precedent for handing over vacant possession of the site. This, according to the learned counsel, amounts to working against the letter and spirit of the Act. He would further contend that the respondent was not agreeable to revise the original rates which had been fixed on the basis of the market value then prevalent. The Board had tried to wriggle out of all its obligations under the contract. He would further submit that the award is a reasoned one and the respondent has not made out any case under Section 34 of the Arbitration and Conciliation Act to set aside the same.

18. Heard the counsel and perused the papers.

19. The entire issue revolves around the factum of delay. This Court is called upon to answer as to whether the delay that has been caused in handing over the site to the claimant has been the cause of

a monetary loss to the claimant and whether the insistence of the claimant that the respondents should supply the cement and steel is contrary to the terms of clause 12 and 37 of the LS Agreement. This Court is also called upon to consider as to whether the delay is on account of the claimant or the respondent.

20. Admittedly the contract between the claimant and the respondent was entered into in the year 1998 as per the agreement/work order dated 24.02.1998. The respondent has contended that there must be an agreement in writing between them and the claimant, without which the contract would not be deemed to be complete. This was followed by the articles of agreement dated 05.03.1998. It is no doubt true that the agreement stipulated that in case the respondent did not supply the cement and steel, it is open to the claimant to purchase the same. However the respondent has not addressed the fact that the agreement was entered into at the rates prevailing in the year 1992. Thereafter there has been a gap of two years for handing over the entire site and during which there is a rise in price of steel and cement. The claimant, if now compelled to purchase the cement and steel would suffer further monetary loss on

account of not only the rise in price but also on account of purchasing the material at higher rate without the same being compensated by the respondent. The learned Arbitrator has dealt with each issue elaborately and has extensively given reasons as to why the learned Arbitrator is upholding the claimant's contentions with reference to the supply of cement and steel by the respondent despite the fact that it is a deviation from the terms of the agreement. Therefore the respondent has not been able to make out any ground for challenging the arbitral proceedings award as envisaged under section 34 of the Arbitration and Conciliation Act, 1996. Consequently, the petitions stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

03.01.2020

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Index : Yes/No

Speaking order/non-speaking order

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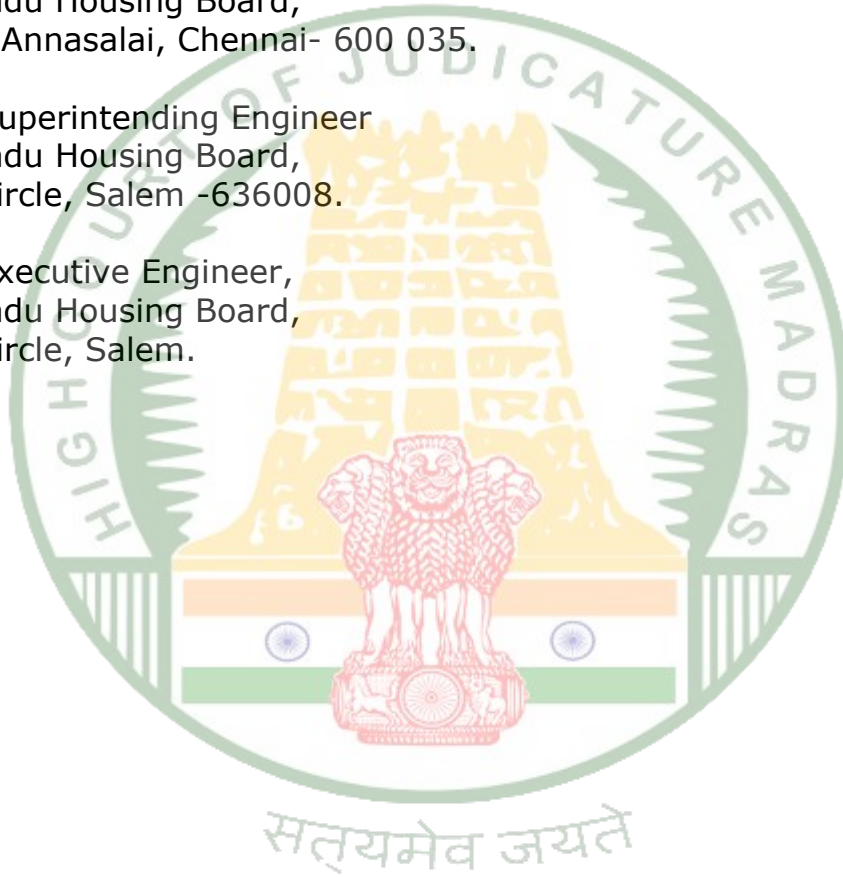
To,

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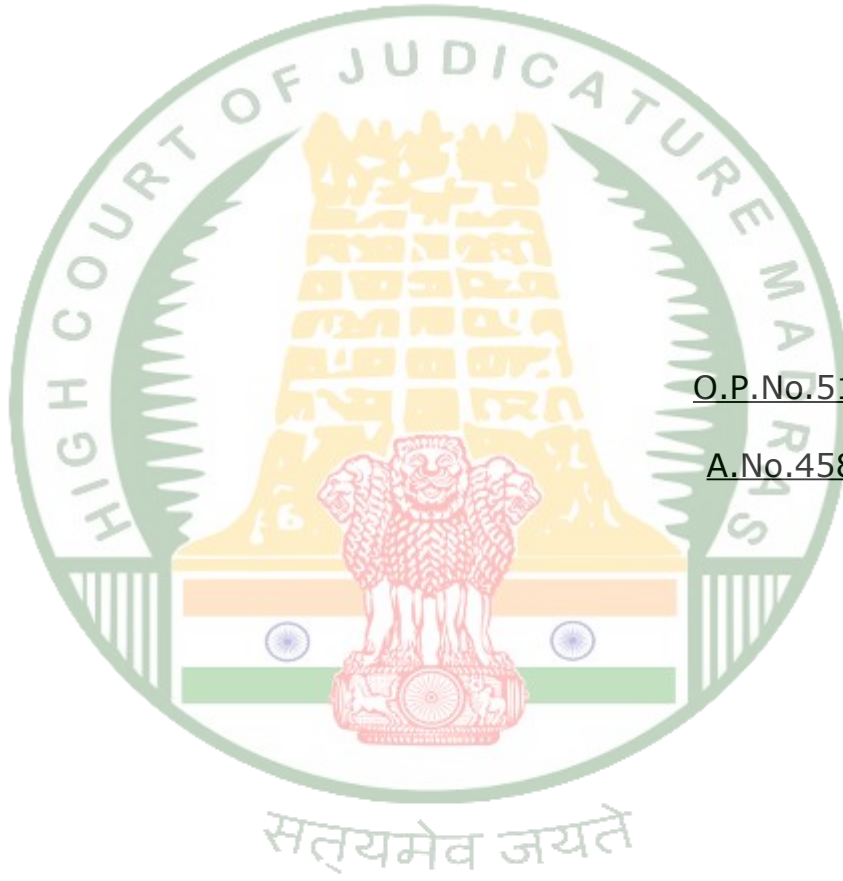
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