O.P.Nos.435 & 633 of 2019

&

A.No.3903 of 2019

P.T.ASHA, J.,

Today the matter is posted under the caption "For Being Mentioned". The learned counsel for the petitioner in O.P.No.435 of 2019 would submit that in the last paragraph of the order the amount is shown as Rs.21,24,000/- and it should be rectified as Rs.63,72,000/-. He has drawn the attention of this Court to paragraph no.82 of the award. Accordingly the figure of Rs.21,24,000/- shall be rectified as Rs.63,72,000/-.

2. The corrected order copy shall be issued to the party.

14.07.2020

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P.T.ASHA, J.,

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O.P.Nos.435 &

633 of 2019 &

A.No.3903 of 2019

14.07.2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.12.2019

Delivered on : 08.05.2020

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.Nos.435 & 663 of 2019

O.P.No.435 of 2019:

M/s.Olympia Tech Park (Chennai) Pvt. Ltd.,
Plot No.1, SIDCO Industrial Estate,
Guindy, Chennai – 600 012.
(Respondent is substituted in the place of
M/s.Olympia Infratech Pvt. Ltd. and
M/s.Opaline Hotels Pvt. Ltd. Based on the memo filed)
... Petitioner

Vs

M/s.Karishmaa Foundations,
Rep. by its Managing Director,
Mr.Rakesh Seth,
No.340, 1st South Main Road,
Kapeleswarar Nagar,
Neelankarai, Chennai – 600 115. ... respondent

<u>Prayer</u>: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 08.04.2019 of the Learned Arbitrator in the matter of Arbitration under Arbitration Agreement dated 06.08.2010, 28.07.2011, 03.05.2012, 13.07.2012, 01.04.2011, 21.04.2011 and 13.07.2012 in so far as it relates to the award against the petitioner herein.

For Petitioner : Mr.A.R.L.Sundaresan,
Senior Counsel
For Mr.C.T.Murugappan

For Respondent : Mr.Nithyaesh
For M/s.Nithyaesh & Vaibhav

<u>O.P.No.633 of 2019:</u>

M/s.Karishmaa Foundations Pvt. Ltd.
Rep. by its Director Mr.C.Rajesh
Having Office at No.340,
1st South Main Road, Kapeleswarar Nagar,
Neelankarai, Chennai – 600 115. ... Petitioner

Vs

M/s.Olympia Tech Park (Chennai) Pvt. Ltd.,
Plot No.1, SIDCO Industrial Estate,
Guindy, Chennai – 600 032.
(Respondent is substituted in the place of
M/s.Olympia Infratech Pvt. Ltd. and
M/s.Opaline Hotels Pvt. Ltd. Based on the memo filed)
... respondent

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 08.04.2019 insofar as allowing the counter claim of Rs.1,17,59,018/- passed by the Hon'ble Arbitral Tribunal.

For Petitioners	:	Mr.Nithyaesh For M/s.Nithyaesh & Vaibhav
For Respondent	:	Mr.A.R.L.Sundaresan, Senior Counsel For Mr.C.T.Murugappan

COMMON ORDER

O.P.No.435 of 2019 and O.P.No.633 of 2019 have been filed by the respondent and the claimant before the arbitral Tribunal respectively. The respondent has challenged the award directing them to pay a sum of Rs.1,45,59,615/- to the claimant. O.P.No.633 of 2019 is filed by the claimant challenging that part of the award allowing the counter claim of the respondent. The parties are referred to in the same status as in the arbitral Tribunal. The facts in brief are as follows.

Claimant's case in the claim statement and written submission before the Arbitrator:

2. The claimant had entered into several work orders with the respondent for carrying out construction work at the respondents site at Opaline and Panache. The following are the details of work:

Date of the Work Order	***Work & Value***
06.08.2010	For constructing one East facing villa (A2) Contract value is Rs.21,96,946/-. For thirty individual Villas, value is Rs.6,59,08,380/-.
13.07.2012	For constructing one West facing villa (B1) Contract value is Rs.22,51,490/-. For twenty two individual Villas, value is Rs.4,95,32,780/-.
13.07.2012	For constructing one Villa (C1) Contract value is Rs.25,00,988/-. For forty individual villas, value is Rs.10,22,39,520/-.
28.07.2011	For constructing one Villa (C1) Contract value is

Date of the Work Order	***Work & Value***
	Rs.25,00,988/-. For thirty individual villas, Rs.7,50,29,640/-.
12.09.2012	For construction of Panache Club building. The contract value is Rs.1,18,00,244/-.
21.01.2013	For Phase – I (30 Villas), Phase – II (22 Villas) and Phase – III (40 Villas) Total 92 Villas. Total contract value is Rs.1,38,00,000/-.
15.02.2013	For Phase – I (30 Villas), Phase – II (22 Villas) and Phase – III (40 Villas) Total 92 Villas. Total contract value is Rs.1,56,00,000/- (This work order has been given in lieu of the work order dated 12.09.2012 and by reason of this work order, the work order dated 12.09.2012 becomes null and void).

It is the case of the claimant that additional work order had been issued on various dates. The claimant had raised periodic invoices and RA bills for the Work done by them for the respondent.

3. The claimant would submit that after completion of the entire work they had on 13.11.2014 submitted the bills certified by the respondent for the works undertaken by them to the respondent. The following are the dates on which the certified bills were raised by the claimants.

a) Work order dated 06.08.2010 – certified bills raised on 05.06.2014.

b) Work order dated 13.07.2012 – certified bills raised on 01.03.2014.

c) Work order dated 13.07.2012 – certified bills raised on 03.03.2015.

d) Work order dated 28.07.2011 – certified bills raised on 03.12.2012.

e) Work order dated 12.09.2012 – certified bills raised on 09.08.2014 by the respondent for the works completed under that work order till it was substituted by work order dated 15.02.2013.

f) Work order dated 21.01.2013 – certified bill raised on 25.07.2015

g) Work order dated 15.02.2013 – certified bills raised on 25.07.2015.

h) Work order dated 28.04.2015 – certified bills raised on 25.06.2015

i) Work order dated 03.05.2012 – certified bills raised on 12.03.2015 j) Work order dated 21.04.2011 – certified bill raised on 13.06.2012 by the respondent.

4.The case of the claimant is that though they had raised periodical invoices and RA bills based on the work done by them, those were not cleared by the respondent. As a result, there was a total outstanding of Rs.2,39,97,236/-. The said amount was due towards the bills which were raised by the claimant and certified by the respondent. Therefore, the claimant had invoked the arbitration clause and since the respondent had not agreed with their choice of an Arbitrator they had moved this Court under Section 11 of the Arbitration and Conciliation Act, 1996, hereinafter called the Act, which has culminated in the filing of claim.

Defense statement, counter claim and Submissions before the Arbitrator:

5. The respondent had along with their defense statement filed a counter claim inter alia contending that the arbitral proceedings is not maintainable since the respondent is constituted by amalgamation of several companies which includes M/s.Opaline Hotels Private Limited and M/s.Olympia Infratech Private Limited. The said Companies had wanted to construct residential apartment, Villas and a Club House on the old Mahabalipuram Road at Navalur/Egattur, Chennai. The respondent would contend that based on the promises of the claimant M/s.Opaline Hotels had issued many Work Orders.

6. The respondent would further contend that the claimant had issued a notice to M/s.Olympia Infratech Private Limited on 19.01.2016 through its counsel claiming that a sum of Rs.2,39,97,236/- was due to them and wanted to appoint a retired Judge of the Honourable Supreme Court, India,

as an Arbitrator. The respondent had not agreed to this proposal vide their reply dated 18.02.2016. Thereupon, the claimant without issuing any notice to M/s.Opaline Hotels Private Limited, though substantial work orders were issued by it, filed O.P.Nos.195 to 201 of 2016 invoking the provisions of Section 11 of the Act.

7. The respondent had filed their counter affidavit to each of these petitions and the matter had come up before this Court on 29.04.2016 and on the very same day, the order amalgamating the several companies into the respondent company was passed by this Court in C.P.Nos.525 to 531 of 2015. Therefore, when orders were pronounced in O.P.Nos.195 to 201 of 2016, this Court had suo motto impleaded M/s.Opaline Hotels Private Limited as a second respondent in all the Original Petitions on 29.04.2016.

8. It is also the case of the respondent that though the works were under taken by the claimant for M/s.Opaline Hotels Private Limited and M/s.Olympia Infratech Pvt Ltd no notice was issued to them prior to the

institution of the Arbitral Proceeding. Therefore, the respondent would contend that the appointment of arbitrator in respect of O.P.Nos.196 to 201 of 2016 is void and the claims in respect of all these work orders cannot be adjudicated in the arbitral proceedings. The respondent had also denied the claim made by the claimant on the ground that the claimant had not filed any proof to substantiate the claim of Rs.2,39,97,236/-.

9. The respondent further contended that the claims subject matter of the 7 original petitions had been fully paid up to the extent of the work completed by the claimant and there is no amounts outstanding to the claimant in respect of these work orders. The respondent has submitted the following specific denials in respect of the various claims:-

i. Insofar as the Work Order subject mater of O.P.Nos.196 and 1980 of 2011, the same has merged into a single Work order and the amounts have been fully settled vide Cheque dated 11.03.2015.

ii. Work Orders in respect of O.P.Nos.199 and 201 of 2011 also merged into a single Work Order and the same settled by issuing Cheques to

24 persons and by a Demand Draft favouring the claimant dated 08.03.2014.

iii. Doc.No.23 filed by the claimant contemplates payment of only Rs.80,81,907/- comprising *ex gratia* of Rs.47,93,472/- and bill values of Rs.25,23,260/- and Rs.7,65,175/-. The claim for Rs.2,39,97,326/- was baseless.

iv. Ex gratia is payable only if work is executed by the claimant to the satisfaction of the respondent which in the instant case is absent.

v. Claim in respect of 4 Work Orders has to be rejected for want of compliance as it relates to M/s.Opaline Hostels Private Limited.

10. In support of the counter claim the respondent would rely upon the following clauses in the work order, namely,

(a)Clause 2 – relating to the period of completion which was six months, Clause 3 – relating to escalation where it is clearly provided that prices would not be subjected to revision, Clause 5 – relating to Force Majeure, Clause 6 – relating to extension of time which could be granted only on a written request being made by the contractor, the claimant

herein.

(b) Clause – 19. Defect Liability Period (DLP) : 12 months from the date of completion of works as specified in the completion certificate issued by OIPL. The contractor shall rectify/replace/make good at his own cost and expenses (Material+Labour+including oh) all defects notified by OIPL either verbally or through written notice within a reasonable time and to the satisfaction of OIPL. Defects shall due to faulty workmanship, quality of not being in accordance With the drawings or specifications or BOQ. In case Contractor fails to perform his obligations under DLP after due notice OIPL shall complete such obligations through other agencies and adjust all expenses incurred against the retention money. If such cost and expenses incurred by the company is over and above the amount of retention money, then the contractor shall be liable to reimburse such expenses to the company within 30 (thirty) days from the date of submission of invoices thereto by the company.

(c) Clause - 20. Penalty for delay(PD): If the Contractor fails to complete the works within the specific period, it shall be liable to pay

liquidated damages at the rate of 0.25 % of the balance work per week of delay subject to a maximum of 2.5 % of the total Contract Value.

(d) Clause - 34. Payment Terms: a) Contractor is to present Running bills once in 30 days.

b) All running bills will be submitted in a prescribed format.

c) Retention money will be deducted from Running Bills @ 5 % and shall be refunded after defect liability period of 12 months.

d) To release the retention amount, the Contractor has to submit a requisition along with the copy of certified final bill and payment for the same will be released with in 30 days from the date of submission.

e) Final bill will be submitted by the Contractor for the total work along with the reconciliation statement.

f) All Running Bill payment will be made as follow

i. Adhoc payment of 75 % shall be released within seven days.

ii. Balance payment shall be made within fifteen days from the date of payment of Adhoc.

g) Payments shall be by Cheque.

h) All payments shall be net after deduction of recoveries and tax deducted at source.

11. The respondent would contend that the claimant had executed defective work and the same had to be rectified by the respondent. The respondent would also contend that from out of the retention money the respondent was entitled to appropriate a sum equivalent to 2.5% of the total contract price for delayed delivery. The respondent had to get the rectification done through M/s.Allied Investments Private Limited and others. Therefore for the above reasons the respondent had raised a claim of Rs.32,49,745/- being a sum of Rs.26,13,563/- towards penalty and further sum of Rs.21,24,000/- towards rectification. The respondent had issued a notice to the claimant dated 14.05.2018 demanding the above sum. The respondent had also claimed interest on the above sum at 18 % per annum.

Commencement of Proceedings before the Arbitrator:

12. Though initially the claim statement was made before the arbitrator appointed by orders of this Court dated 29.04.2016, thereafter, since the arbitrator was unable to proceed with the arbitral proceedings the Arbitrator whose award is the subject matter of challenge in these petitions were appointed by orders of this Court dated 22.11.2017.

Proceedings of the learned Arbitrator appointed by orders dated 22.11.2017:

13. Considering the pleadings, the arbitrator had framed the following issues:

"1. Whether the Arbitral Tribunal possesses jurisdiction to try the claim against Opaline Hotels Private Limited in the absence of statutory notice?

2. Whether the respondent is due and liable to pay to the claimant the amount mentioned in the claim statement?

3. Whether Opaline Hotels Pvt. Ltd., and Olympia Infra Tech Pvt. Ltd. are sister concerns and are jointly and severally liable to the claimant?

4. Whether the respondent co waived its right to question the jurisdiction of this Hon'ble Tribunal to continue the present proceedings?

5. Whether the claimant is entitled for joinder of claims against two separate and distinct legal entities?

6. Whether the claimant has completed / discharged its obligation under the work orders of the respondent?

7. Whether the claimant is entitled to maintain the claim of Ex-Gratia against the respondent?

8. Whether the counter claims raised by the respondent against the claimant is maintainable in law or facts?

9. Whether the respondent is estopped through its conduct from denying its liability to the claimant and further from claiming any amounts from the claimant?

10. To what other reliefs the claimant and respondent are entitled to?

11. Whether M/s.Opaline Hotels Private Limited (since merged and *now known as M/s.Olympia Tech Park (Chennai) Private Ltd.,) is entitled to additional counter claim of Rs.33,49,745/- and Rs.47,37,563/-"*

14. The parties had also adduced oral evidence apart from marking the documents. The claimants had examined one witness on their side and had marked Ex.C.1 to Ex.C.27. The respondent had examined one witness and had marked Ex.B.1 to Ex.B.35. The parties had concluded their arguments on 11.02.2018 and the matter was reserved for orders. The arbitrator by his letter dated 13.02.2019 addressed the counsels appearing on behalf of the claimant and the respondent seeking the following clarifications:

1) To narrate the facts relating to each of the seven work orders which are the subject matter of O.P.Nos.195 to 201 of 2016 and also the claims arising out of the twelve other work orders.

2) The respondents to narrate the facts relating to the counter claim arising out of the seven work orders and the other twelve work orders.

15. Pursuant to the above request both the parties had submitted their notes of arguments. The claimant would submit that the work orders marked as Ex.C.1 to Ex.C.7 and Ex.C.8 to Ex.C.19 gives raise to claims under the following heads:

1) Retention money

2) Non-compliance report

3) Penalty

4) Cement Co-efficient

5) Ex-gratia

16. Ex.C.1 which relates to the work order subject matter of O.P.No.195 of 2016. The total contract value was a sum of Rs.6,59,08,380/-, the retention amount was a sum of Rs.28,64,582/-, of which a sum of Rs.26,24,870/- was released leaving a balance of Rs.2,39,712/-. Ex.C.3 relates to the work order subject matter of O.P.No.196 of 2016. The total contract value was Rs.7,50,29,640/- and the

retention amount withheld was Rs.35,85,922/-. Out of this amount a sum of Rs.5,69,387/- was approved and adjusted leaving a balance of Rs.30,16,535/-.

17. Ex.C.4 relates to the work order covered in O.P.No.197 of 2016. The total value of the contract was Rs.8,95,48,582/-. The retention amount of Rs.30,37,375/- was not paid. Ex.C.5 related to the work order in respect of which O.P.No.198 of 2016 was filed. The total contract value is Rs.4,32,35,580/-. A sum of Rs.20,83,877/- was due towards the retention amount which has not been paid.

18. Ex.C.7 relates to work order subject matter of O.P.No.199 of 2016. The total contract value is Rs.1,18,00,244/-. The retention amount of Rs.4,01,888/- is not released. Ex.C.2 is the claim in respect of the work order relating to O.P.No.200 of 2016. The total value of work is Rs.76,58,645/-. The sum of Rs.1,13,872/- withheld as retention amount.

19. Ex.C.6 relates to the work order covered in O.P.No.201 of 2016. The total contract price is Rs.10,22,32,520/-. A separate retention amount is not claimed under this head and the same is claimed under Ex.C.3. The retention amounts were also claimed under Ex.C.10 to Ex.C.19 to the tune of Rs.91,507/-. Under work orders subject matter of O.P.Nos.195 to 201 of 2016 the total retention amount claimed was Rs.94,11,384/-. The total amount under the head of non compliance report was being claimed only under the work orders covered under O.P.Nos.195 to 201 of 2016. The Cement Co-efficient was claimed to the tune of Rs.55,29,397/- relatable to Ex.C.1 to Ex.C.7.

20. The claim of ex-gratia as provided in Ex.C.8 and Ex.C.9 did not relate to any independent work done by the claimant but only on the basis of the promise of the respondent to pay money on completion of the 92 villas. The claimant therefore contended that they are entitled to a sum claimed under the claim statement.

21. The respondent has also provided necessary clarification for the counter claims raised by them. Ultimately, the arbitrator had awarded the sum of Rs.2,36,25,936/- to the claimant. Out of the said sum, the claimant was liable to pay the counter claim raised by the respondent, namely, Rs.1,17,59,018/-. Ultimately the award directed the respondent to pay to the claimant a sum of Rs.1,45,59,615/- which included interest at 12% per annum. Aggrieved by the order in so far as it related to the payment due to the claimant, the respondent filed O.P.No.435 of 2019 and the claimant filed O.P.No.633 of 2019 challenging the award allowing the counter claim raised by the respondent.

Submissions:

22. Mr.Nithyaesh, learned counsel arguing on behalf of the claimant would first make the submissions on the counter claim raised by the respondent. The learned counsel would argue that the counter claim of the respondent is based under two heads.

a) Defective work

b) Penalty for delay.

23. He would argue that neither had the respondent put the claimant on notice that the work executed by them was defective nor had they initiated any action on the ground that the work executed by the claimant was defective. The learned counsel would contend that under clause 19 of the contract, the defect liability period was twelve months from the date of completion of the works. The said clause clearly stipulates that wherever the respondent points out the defects the same shall be rectified by the claimant. In case, the claimant fails to rectify the same, even thereafter, the respondent could engage other agencies and adjust the expenses that they have incurred from out of the retention amount kept back by the respondent.

24. The clause further provides that in the event of such expenses overshooting the retention money the claimant would be liable to pay the difference. He would further contend that the contract further provides that in the event of the work being executed slowly or where the poor quality of

work is executed, it is well open to the respondent to terminate the contract after due notice to the claimant. Such a situation has not arisen in the instant case. At no point of time had the respondent raised any issue about the quality or the pace at which the work was undertaken. Clause 30 of the contract also provides for the respondent to engage a third party to complete the work. He would argue that if really the quality of work executed by the claimant was poor, the respondent would have resorted to any one of the above provisions. However, the respondent had never made any complaint and it is only in these proceedings that a complaint has been made for the 1st time.

25. On the contrary by letter dated 21.01.2013, the respondent has admitted that the construction had been completed and Villas handed over to them and that the handing over had been approved by the respondent. He would therefore contend that the counter claim is nothing but an after thought and the learned arbitrator has ignored these documents and proceeded to allow the counter claim. Therefore there was a patent

illegality in as much as the learned Arbitrator has overlooked the terms of the agreement and the documents filed by the claimant.

26. As regards the amounts due under the head of retention money, the claimant would submit that the respondent have certified their work orders with reference to retention money and had also released a substantial portion of the same. Therefore, the respondent having certified a substantial amount withheld towards retention amounts can be released, cannot now contend that there is a delay in the execution of the work and thereby refuse to reimburse the retention amount. The learned counsel would draw the attention of this Court to the letter dated 06.10.2015 issued by the claimant to the respondent in which they have called upon the respondent to pay the sum of Rs.2,39,97,236/-. In the said letter the claimant had provided the details of the amounts due under various heads and also listed out the amounts that have been certified by the respondent under various heads. A perusal of this letter, would clearly indicate that the respondent had certified the entire amounts under cement coefficient and also substantial amounts

under the head of retention amount. Under the head of NCR as against claim of Rs.7,43,040/- a sum of Rs.15,000/- had been certified. Under the head of ex-gratia and final bill as against Rs.80,81,908/- a sum of Rs.27,13,172/- had been certified. Therefore as towards a total claim of Rs.2,39,97,236/-, the respondent had certified bills to the tune of a sum of Rs.1,72,52,654/-.

27. The respondent have replied to the said letter only on 10.12.2015. For the first time the respondent has raised the contention that there was a delay and that there were defects in the execution of the contract. On 11.12.2015, the claimant has responded to the letter issued by the respondent refuting the demand made by the respondent and stating that the claim is an after thought since the Villas had been completed and possession handed over to the respondent without any demur on the side of the respondent. The learned counsel therefore contend that the award in respect of the counter claim has to be set aside.

28. As regards the claimant's claim under various heads, the learned counsel would make the following submission:

a) Retention money

It is his argument that as against the claim of Rs.95,02,891/-, under this head the respondent has certified the bill to the extent of Rs.93,63,099/- which has been evident from Ex.C.22. That apart, the plea of defective execution cannot be sustained in the light of the fact that 90% of the retention money had been paid by the claimant.

b) NCR and Penalty

The claim under the head of NCR has been admitted by the respondent by the memo of payment dated 13.06.2012. The claimant has granted the amounts under the head of NCR and the respondent cannot now turn around and state that they have not agreed to make the above payment.

c) Cement Coefficient:

Even with reference to the claim under this head, the learned counsel would submit that the exchange of e-mails would clearly prove that the respondent has approved the claim under the head of cement coefficient. In answer to the mail dated 21.01.2014 of the claimant informing the respondent that they were yet to receive the clearance for cement, steel coefficient, the authorized representative of the respondent, one Lakshman had sent a reply on 22.01.2014 in which they have stated *"As discussed I have approved your working of cement, steel and calculation. Kindly proceed with the work and the payments shall follow soon"*.

In the light of the categoric undertaking, the learned counsel for the claimant would submit that they are entitled to the amount due under the head of cement coefficient.

d) Ex-gratia

Similarly, under the head of Ex-gratia, the claimant would submit that as against the total ex-gratia amount of Rs.2,93,48,000/- the respondent had paid only a sum of Rs.80,83,908/- issued. Further the learned counsel would submit that the ex-gratia certification have been done on 25.07.2015 and this is the period when the respondent contends that rectification of defective works was being done. The learned counsel would therefore submit that the arbitrator has clearly overlooked these factors while dismissing the claims claimed and allowing the counter claim of the respondent.

29.Mr.AR.L.Sundaresan, learned Senior Counsel appearing on behalf of the respondent, at the outset would contend that the filing of the single claim petition was erroneous as the claim is made in respect of different work orders. Further in some of the work orders there is an arbitration clause and in some it is absent. He would further contend that even the applications for appointment of the arbitrator was made under made under separate petition and not under a single Petition. Therefore, he would contend that filing of the single claim petition is flawed and no claim can be sustained by the respondent. He would further argue that the learned arbitrator who had reserved orders had by a letter dated 13.0.2019 called upon both parties to submit clarifications regarding the work orders covered in each of the OPs which would clearly indicate that each of the Petition is a separate cause of action and all of them cannot be clubbed into a single Petition. He would further contend that the work executed by the claimant was defective and the respondent had to engage a third party to complete the construction. He would also submit that there is no agreement to pay ex-gratia or the cement coefficient. The claim under these heads was not maintainable.

30. He would further rely on Ex.B.2, Ex.B.7 and Ex.B.10 to buttress his argument that the claimant has acknowledged the fact that the execution of the work was defective and that the respondent had engaged the third party agency to complete the construction. Therefore, he would contend that arbitrator was clearly justified in allowing the counter claim but despite upholding the counter claim the arbitrator has committed a patent illegality in allowing the claim of the claimant. Since, the claimant has agreed that there has been a delay and defect the claimant would not be entitled to the amounts under heads of retention money, NCR, Cement Coefficient and Ex-gratia.

31. The counsel for the claimant by way of re-joinder would submit

that the challenge to a single petition has been taken out for the first time during the arguments. In fact, such a plea was not taken up before the arbitral Tribunal and the parties had consented and understood that the arbitration would be in respect of the claims raised in the claim statement. He would deny Ex.B.2, Ex.B.7 and Ex.B.10 and contend that the signatures therein are forged and despite this defence being taken by the claimant, the respondent had not taken any steps to have the same proved.

32. The counsel would further contend that the person who had signed Ex.B.2, Ex.B.7 and Ex.B.10 has not been examined on the side of the respondent to prove the same more particularly when the claimant had refuted and denied the signatures. He would contend that the best evidence has been deliberately kept away. He would further contend that the counter claim is barred by limitation and further having made the payments under the various head the respondent cannot now deny the claimant's demand. He would therefore contend that the counter claim had to be rejected.

Discussion:

33.The respondent has raised a defense that the filing of a single claim is flawed. As pointed out by the counsel for the claimant, this plea has not been urged before the learned Arbitrator and has been raised for the 1st time in this Section 34 petition. Further, the respondent have themselves raised a single counter claim in respect of all the Work Orders. Therefore, this contention of the respondent is rejected.

34. The issue to be considered is whether the respondent is entitled to an award with reference to the counter claim which has been made on the basis that there was a delay in the execution of the work and that the work was defective since an answer to this has a bearing on the claim raised by the claimant. The learned arbitrator has proceeded to allow the counter claim by upholding the contention of the respondent that there was a delay in the completion of project and further there were defects which were not rectified by the claimant. The documents filed on the side of the claimant would indicate that the respondent has released a substantial portion of the amounts under the head of retention money. The retention amount as per

the terms of the contract was to cover any defects that arise during the defect liability period which is twelve months from the date of handing over the villas.

35. It is further seen that a substantial portion of the retention money has been released. This would clearly indicate that the respondent while releasing the amounts under the head of retention money had not only acknowledged the handing over of the Villas but also the fact that there was no defect in the execution of the work. The respondent has also released the amounts under the head of NCR as well as Ex-gratia. Therefore, from a perusal of the documents it is clear that the respondent had acknowledged delivery of the villas / residential houses and not raised any claim under the head of defect liability or otherwise till such time as the claimant herein had made a demand for the payment of money.

36. The learned arbitrator has relied upon Ex.B.2, Ex.B.7 and Ex.B.10 to come to the conclusion that the defects pointed out under Ex.B.2, Ex.B.7

and Ex.B.10 had been brought to the notice of the claimant and despite which the same had not been rectified. Ex.B.2, Ex.B.7 and Ex.B.10 had been denied by the claimant who had clearly contended that the signatures found therein were forged ones. The arbitrator has overlooked the fact that the person who signed Ex.B.2, Ex.B.7 and Ex.B.10 was the employee of the respondent one Jaganathan. The said Jaganathan has not been examined on the side of the respondent. The respondent has kept away the best evidence.

37. That apart, in their letter dated 10.12.2015, which is in respect of the demand made by the claimant under their letter dated 06.10.2015, the respondent has not referred to Ex.B.2, Ex.B.7 and Ex.B.10. Therefore, Ex.B.2, Ex.B.7 and Ex.B.10 though dated 13.06.2015 and 18.06.2015 is not referred to in a reply dated 10.12.2015. On the contrary the letter dated 10.12.2015 would state that despite request to rectify the defects there was no response from the claimant and it does not contain a statement that the claimant had accepted the estimation for rectification which is found in Ex.B.2, Ex.B.7 and Ex.B.10. The counter claim has been made only on the

basis of Ex.B2, Ex.B.7 and Ex.B.10. Therefore in as much as the respondent has been unable to prove the defects through some other evidence, the Arbitrator in the absence of evidence has erroneously allowed the claim under the head of defects and the same has to be set aside. Therefore, a sum of Rs.21,24,000/- claimed under the head of defects has to be set aside.

38.The counter claim includes an amount under the head of penalty. A perusal of Ex.B.3, Ex.B.8 and Ex.B.11 would indicate that the respondent has provided the details of the penalty which is due from the claimant on account of the delayed handing over of the Villas / residential apartments / club houses. These documents have not been denied by the claimant. Admittedly, there has been a delay in handing over the finished building. Clause 20 of the Work Orders provides that if the contractor viz; the claimant fails to complete the works within the specified period they shall be liable to pay liquidated damages at the rate of 0.25% on the balance work per week of delay subject to a maximum of 2.5% of the total contract value. It is this calculation that has been indicated in Ex.B.3, Ex.B.8 and Ex.B.11.

39.That there is a delay is an admitted fact. That the delay is beyond the period of 10 weeks is also not disputed. Therefore, the claimant is liable to pay 2.5% on the total contract as per Clause 20 of the Work Orders. The sum of Rs.26,13,563/- under the head of penalty is payable by the claimant to the respondent together with interest @ 12 %. per annum from 01.04.2019.

40.Since this Court has arrived at a conclusion that the respondent is not entitled to the retention money since substantial amounts under this head had been certified as payable by the respondent. Further, no proof has been let in to show that the defects had been rectified by the respondent by engaging the third party contractors. The evidence produced on the side of the claimant would therefore entitle them to claim the retention money standing to their credit. As regards the amounts due under the heads of *ex gratia* payment and NCR, the respondent had certified a portion due under these heads as payable. Therefore, the respondent cannot now turn around and contend otherwise. The Claim under the head Cement co-efficient has also been acknowledged as payable by the respondent and the learned Arbitrator has considered the evidence let in by the parties to allow the claim of the claimant and this Court under Section 34 of the Act is not re-appreciating the evidence.

41.Therefore, the award in so far as relates to the Counter claim is partly modified by dismissing the claim with reference to a sum of Rs.21,24,000/- under the head of defects. In all other respects, the Award dated 08.04.2019 is confirmed. Consequently, the Original Petitions in O.P.No.435 of 2019 is dismissed and O.P.No.663 of 2019 is modified. There shall be no order as to costs.

08.05.2020

kan
Index : Yes/No
Speaking order/non-speaking order

P.T.ASHA, J.,

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O.P.Nos.435 & 663 of 2019

08.05.2020