

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.10.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.78 of 2017

G. Sreekanth,
S/o.G. Ranganathan
Bharani Enclave,
G1, No.9 S.B.I. Officers Colony,
First Street, Arumbakkam,
Chennai – 600 106.

... Petitioner

vs.

M/s. Kasi Housing and Development Limited represented,
By its Senior Staff Mr.M.Gowthaman,
K.K. Ponurangam Salai,
Omsakthi Nagar,
Khaikankuppam,
Valasaravakkam, Chennai – 600 087.

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 25.11.2016 by the Sole Arbitrator in A.R.C.No.2 of 2010 between the petitioner and the respondent.

For Petitioners : Mr.K.Elango

For Respondent : Mr.P.Ramesh Kumar

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as hereinafter 'A and C Act' for the sake of convenience and clarity.

2. Read this in conjunction with and in continuation of proceedings made in three previous listings on 14.09.2020, 05.10.2020 and 07.10.2020, which read as follows:

'Proceedings dated 14.09.2020

Mr.Veerabathran Prasanth, learned counsel representing counsel on record for sole respondent requests for re-scheduling of the matter. There is no representation for petitioner.

List this matter after three weeks.'

'Proceedings dated 05.10.2020

Read this in conjunction with and in continuation of earlier proceedings dated 14.09.2020.

2.In this web-hearing on a video-conferencing platform today, Mr.Mudit. A.Bohara, learned counsel on record for lone respondent is before me, but there is no representation for the sole petitioner in this listing also. However, with the intention of giving further opportunity to the petitioner, list this matter under the same caption day-after-tomorrow i.e., 07.10.2020.

'Proceedings dated 07.10.2020

Read this in conjunction with and in continuation of earlier proceedings dated 05.10.2020.

2.The position is no different today. In other words, Mr.Mudit. A.Bohara, counsel on record for sole respondent is before me, but there is no representation for the sole petitioner in this listing also.

3.It is made clear that next listing shall be peremptory and this Court will proceed with the matter, if there is no representation for the sole petitioner in the next listing also.

List on 14.10.2020.'

3. The aforesaid proceedings made in the preceding three listings set out the trajectory captioned OP has taken before this Court.

4. Notwithstanding the proceedings in the last listing dated 07.10.2020, the position is no different today. In other words, Mr.P.Ramesh Kumar, learned counsel on record for lone respondent is before this virtual Court in this web-hearing on a video-conferencing platform, but there is no representation for petitioner though the name of the petitioner as well as learned counsel, who are on record for sole petitioner, have been duly shown in the cause list.

5. As already mentioned in the previous listing, the present listing is peremptory and therefore, this Court proceeds to deal with the matter on merits. It is made clear that an application under Section 34 of A and C Act is not an appeal and it is a mere challenge to an arbitral award within

the limited legal landscape of Section 34 of A and C Act. This obtaining position has been reiterated repeatedly by Hon'ble Supreme Court and this Court. Therefore, this Court has taken the view that the principles underlying the provisions of Explanation to sub-rule(1) and sub-rule (1) of Rule 17 of Order XLI or in other words Order XLI Rule 17(1) read with Explanation thereof of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) will not apply to challenges to arbitral awards and therefore will not apply to captioned OP. This means that though the counsel for petitioner has continuously not appeared before this Court (to be noted, 4th consecutive listing details of which have been alluded to supra), this Court can proceed to deal with the captioned OP on merits on the basis of available records, on the basis of submissions made by learned counsel for lone respondent and there is no legal impediment for adopting such a course.

6. This being an application under Section 34 of A and C Act, short facts shorn of elaboration will suffice.

7. Factual matrix in a nutshell is that there is a registered sale deed dated 05.11.2001 registered as Document No.4970 in the Office of the Sub-Registrar, Virugambakkam, wherein the petitioner has purchased 'undivided share of 104.80 sq.ft or thereabouts from and out of 'total land

admeasuring 4.91 cents comprised in Survey No.346 situated in Old No.16, New No.263, Ashtalakshmi Nagar, 9th Street, Mathuravoyal Village, Saidapet Taluk Chennai District' (hereinafter 'undivided share' and 'said land' in said land respectively for the sake of convenience and clarity); that thereafter the petitioner has entered into a construction agreement dated 29.01.2003 with the lone respondent for construction of a flat/apartment admeasuring 440 sq.ft or thereabouts (including common passage) in second floor of the proposed construction to be put up in said land {; that the construction agreement provides for completion of said flat by February 2003; that it provides for a consideration of Rs.2,33,320/- (Rupees Two Lakhs Thirty Three Thousand Three Hundred and Twenty only); that this construction agreement dated 29.01.2003 shall hereinafter be referred to as 'said contract' for the sake of convenience and clarity; that said contract contains an arbitration clause and the same is Clause 16; that the respondent issued a notice dated 01.07.2010 making it clear that the petitioner has paid Rs.2,14,414/- (Rupees Two Lakhs Fourteen Thousand Four Hundred and Fourteen only) calling upon the petitioner to pay the balance and what according to the respondent is variant amount; that the petitioner sent a reply legal notice dated 19.08.2010; that thereafter the petitioner has

filed a complaint in the District Consumer Dispute Redressal Forum, Chennai (South) in C.C.No.424 of 2010 on 29.11.2010; that the consumer complaint was disposed of vide an order dated 05.06.2017 by the said District Consumer Dispute Redressal Forum; that the impugned award came to be passed by a sole Arbitrator (appointed by the respondent constituted the AT) on 26.11.2016; that the petitioner has presented captioned OP on 02.01.2017 assailing the impugned award.

8. This Court, having set out the factual matrix in a nutshell as well as the trajectory the matter has taken, before proceeding further makes it clear that there is one more reason besides what is being alluded to supra for proceeding with this matter on merits. To be noted, this Court has already alluded to supra that captioned OP not being an appeal, Order XLI Rule 17(1) will not apply. Therefore, the matter is being dealt with on merits. The other reason is, sub-section (6) of Section 34 under which a time line of one year has been prescribed for expeditious disposal of applications under Section 34. To be noted, sub-section (6) was brought into statute book on and from 23.10.2015 and instant OP has been presented in this Court on 02.01.2017. Therefore, applying the ***Ssangyong*** principle being principle laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited***

Vs. National Highways Authority of India reported in (2019) 15 SCC 131, the present captioned OP will be governed by post 23.10.201 amendment regime of the A and C Act or in other words, it will be governed by A and C Act as amended by Act 3 of 2016 which kicked in with retrospective effect on and from 23.10.2015. Hon'ble Supreme Court emphasised the importance of sub-section (6) of Section 34 of A and C Act in *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472. Though *Bhumi Vikas Bank* case law is an authority for the broad proposition that pre-application notice under sub-section (5) is directory and not mandatory, the observation made by Hon'ble Supreme Court in Paragraph 26 cannot be lost sight of. Paragraph 26 of *Bhumi Vikas Bank* case law reads as follows:

'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial

Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'

9. Therefore, applications under Section 34 cannot be pending indefinitely, dismissal for default/non-prosecution can also be contributing to avoidable delays as there is likely hood of restoration process. In any event, as already alluded to supra, there is no impediment for disposal of the instant OP on merits as Order XLI Rule 17(1) does not apply to captioned OP as it is not an appeal.

10. Reverting to merits of the matter, learned counsel for respondent points out that the petitioner has not paid the entire consideration of Rs.2,33,320/- under the said contract. Learned counsel also points out that a notice has been issued on 01.07.2010 making it clear that the construction amount was fixed at Rs.2,59,000/-. It was pointed out that in the notice dated 01.07.2010 it has been made clear that the petitioner has paid Rs.2,14,414/- and the balance and variant amount has to be paid. The petitioner instead of paying the balance, issued a reply legal notice dated 19.08.2010 taking the stand that he is not liable to pay any variant amount as claimed. A careful perusal of the notices exchanged between the petitioner and respondent, being aforementioned legal notice dated

01.07.2010 and reply legal notice dated 19.08.2010, makes it clear that execution of said contract and contents of the same are not in dispute. As already alluded to supra, Clause 16 of the said contract is the arbitration clause and the same reads as follows:

'16.All disputes arising out of or in connection with this agreement dated 29.01.2003 shall be decided by arbitration at Chennai, arbitrator being appointed by the party of the first part or upon the receipt of your letter of request from the party of second part to appoint an arbitrator.'

11. Therefore, Clause 16 of said contract serves as an arbitration agreement between the petitioner and respondent, being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of the A and C Act. What is of significance is, there are two impediments for the respondent. One impediment is, the respondent has not invoked Section 8 of the A and C Act, seeking reference to arbitration in the aforementioned consumer complaint filed by the petitioner. The second impediment is by way of limitation. As limitation goes to the root of the matter, this Court deems it appropriate to examine the limitation aspect first. From the case file placed before this Court it comes to light that the parties have not raised the limitation issue either before the consumer forum or before the AT. Be that as it may, Section 43 of the A and C Act

makes it clear that the Limitation Act is applicable to arbitral proceedings. If Limitation Act is applicable to arbitral proceedings, AT ought to have examined limitation even if it is not set up as a defence by the respondent in the light of Section 3 of the Limitation Act. In the instant case, said contract is dated 29.01.2003 and the agreed date of completion is February of 2003. However, the first notice has been issued only on 01.07.2010. Therefore, any relevant article that is applicable to said contract under the Limitation Act would prescribe a maximum of only three years. In the instant case, arbitrable disputes are clearly barred by limitation as the first notice has been issued more than 7 years after the date fixed for completion of the flat in question. Therefore, the impugned award is hit by limitation. If the impugned award is hit by limitation, it is obviously vitiated by being in conflict with public policy of India as limitation is founded on public policy. Therefore, the impugned award will be vitiated by Section 34(2)(b)(ii) read with Clauses (ii) and (iii) of Explanation 1 therein. Though the limitation aspect itself can put an end to the matter, this Court deems it appropriate to examine Section 8 of A and C Act aspect also. Section 8 of A and C Act reads as follows:

'8. Power to refer parties to arbitration where there is an

arbitration agreement.—(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

12. This Court had the benefit of perusing the order dated 05.06.2017 made by the aforementioned consumer forum. The respondent herein is the opposite party therein and the stated position of the respondent herein before the consumer forum has been captured in Paragraph 3 of the order of the consumer forum, which reads as follows:

'3. The brief averments in Written Version of the opposite party are as follows:

The opposite party state that the opposite party denies all the allegations contained in the complaint except those which are specifically admitted herein and the opposite party puts the complainant to strict proof of each and every allegation. The complaint is also filed beyond the period of limitation prescribed under the Consumer Protection Act. It is true that the

complainant has purchased an undivided share of land from one Mr.K.Srinivasan represented by his General power of attorney agent M/s.Sagar constructions on 05.11.2001 and later he entered into an agreement of construction on 29.1.2003 with the opposite party for construction of his flat, bearing No.B in Second floor, measuring an extent of 500 sq.ft. In fact the construction was entered into between the complainant and the opposite party and in the construction agreement, the complainant was not paying the amount within the stipulated period and after several persuasion and demand, a part payment of Rs.2,14,414/- was made being the balance amount and the variation amount to be paid.

4. Further the opposite party submit that as per the construction agreement dated 29.1.2003 the complainant has paid a sum of Rs.2,14,414/- to the opposite party as advance and he has to pay a sum of Rs.18,906/- and hence the complainant has no chance to make any delayed payment is a factually incorrect statement. The complainant has suffered mental strain, inconvenience, harassment and loss of reputation in not getting the flat as well as the service of the opposite party are also total defective and negligent in all ways are denied and is a misconceived statement. Hence there is no deficiency in service on the opposite party and therefore this complaint is liable to be dismissed in limine.'

13. This makes it clear that the respondent, as opposite party before the consumer forum, has subjected itself to the jurisdiction of the consumer forum without resorting to invocation of Section 8 of A and C

Act. It is clear that Section 8 can be filed before any judicial authority. Therefore, nothing prevented the respondent, as opposite party before Consumer Forum, from invoking Section 8 of A and C Act before the same forum. The respondent not having invoked Section 8 is fatal as that tantamounts to respondent submitting itself to the jurisdiction of the consumer forum.

14. There cannot be two orders one by a judicial fora and the other by a private Tribunal (Arbitral Tribunal) with regard to the same dispute between same parties. This also vitiates the impugned award.

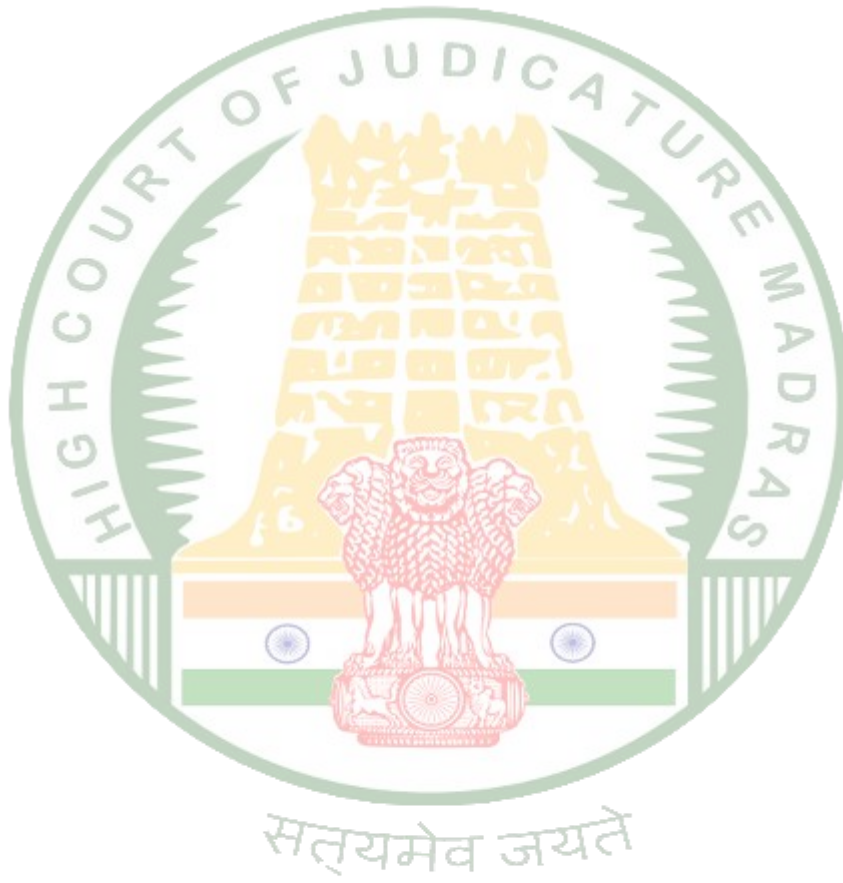
15. In the light of the narrative thus far, it is clear that the impugned award is liable to be set aside as being vitiated as it is in conflict with public policy owing to being hit by limitation and owing to non-invocation of Section 8 of A and C Act and submission to the jurisdiction of the Consumer Forum as captioned OP not being an appeal, Order XLI Rule 17(1) will not apply. It will suffice to set aside the impugned award and no other orders need to be passed.

OP allowed on above terms. There shall be no

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Speaking order: Yes/No

Index: Yes/No
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