IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2020

C O R A M

THE HONOURABLE Ms.JUSTICE P.T.ASHA

**O.P.No.1116 of 2018**

1.Sri Vel Krupa Builders Private Limited,
rep. by its Director P. Harikrishnan,
No.83, 3rd Cross Street,
Maduravoyal,
Chennai - 600 095.

2.P. Harikrishnan

3.Jayanthi Harikrishnan ... Petitioners/respondents

-Vs.-

1.V. Kamaraj
2.K. Gandhimathi ... Respondents/claimants

**Prayer**: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 08.12.2017 passed by the learned Arbitrator.



For petitioners : Mr.A.K. Sriram

For Respondents : No appearance

**ORDER**

The petitioners herein are the builders and the Directors of the construction Company. An application under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") has been filed challenging the Award dated 08.12.2017, in and by which the learned Arbitrator has granted a sum of Rs.58,40,000/- to the respondents/claimants towards the loss of super built area and a proportionate undivided share of land and further a sum of Rs.25,00,000/- towards expenditure incurred by them as per the builder agreement. The learned Arbitrator had rejected all other claims raised by the claimants.

The facts in brief that are necessary to dispose of the present Original Petition are hereinbelow narrated:

2.The respondents/claimants were the absolute owners of the property described in Schedule Nos.1 and 2 of the Claim Petition. The 1st petitioner herein is a Private Limited Company and the petitioners 2 and 3 are the Directors. They had approached the respondents herein with a proposal to develop the scheduled mentioned property into residential apartments under a Joint Development Agreement. After negotiations, the Development Agreement was reduced into writing and under the said Agreement, the petitioners had agreed to build up residential apartments consisting of stilt + two floors as per the Plan sanctioned by CMDA at the cost of the petitioners. Under the said Agreement, 40% of the proposed construction and the proposed undivided share were to go to the respondents/claimants and 60% was agreed to be handed over the builder/petitioner herein. As regards the identity of the properties that were to be taken by each parties, the same was to be decided after finalizing the Plan and thereafter, the parties had agreed to enter into a Supplemental Agreement in which the identity of the Flats were to be included.



3.As per the terms of the Agreement, the petitioners herein were required to deposit a sum of Rs.60,00,000/- towards interest free refundable deposit which was to be returned at the time of the Owners taking possession of their shares of the constructed area and the undivided share. The petitioners would contend that the entire payment of Rs.60,00,000/- was made by them to the respondents herein. Thereafter, the amount received has been utilized by the respondents to clear their outstanding with Bank of Baroda, SIT Branch, Thenampet, Chennai. Since the money was paid to the Bank of Baroda, the earlier Power of Attorney executed by the respondents in favour of Mr.S.Karunakaran was cancelled and a fresh power of attorney was made in the name of the petitioners 2 and 3 herein. The terms of the Agreement are as follows:

> *"(1)The construction had to be completed within a period of 15 months from the date of handing over the entire lands or the approved building plan which ever is later.*
>
> *(2)The possession of the property was handed over to the petitioners on the execution of the Development Agreement on 08.06.2011. The Original documents were also handed over to them on 15.06.2011. The documents were to be kept in the care and custody of Mr.P.B.Ramanujam.*
>
> *(3)The General Power of Attorney was executed in*

*favour of the petitioner in respect of 60% of undivided share in the schedule mentioned property to enable them to sell their undivided land in favour of the prospective purchasers."*

4.The respondents herein was entrusted with the responsibility of getting Planning Permission from the CMDA for constructing the flats, re-classification and Sub division of the lands, Planning Permission and building sanction plan, etc.,

5.When the application was submitted for approval, the CMDA insisted upon the respondents herein providing a copy of the Approved Plan which would come in handy when attempting to repairs to electrical wiring, water line, sewage land, etc., However, the same was not given.



6.The Development Agreement also contained a Default Clause. In case of default by the respondents, the petitioners were entitled to Specific Performance. In case of default on the part of the petitioners in constructing and handing over the constructed area, it was open to the Owners to recover fair rent of 40% of the built area. The construction was commenced showing the two items of the property subject matter of the claim and the another item of the property as a contiguous Unit. Item Nos.1 and 2 which are the subject matter of the present suit and the Item 3 of the property was consolidated into a single unit. They were divided as 10 Blocks of dwelling units. Item No.3 was divided in Blocks A, B, C and D. Item No.1 divided as E and F and Item No. 2 as Blocks G, H, J and K. Thereafter, the petitioners had split Item No.1 into 2 plots and obtained planning permission on 23.08.2011 and for construction of 6 flats in each plot totalling 12 flats on 14.10.2011.

7.As already agreed by the petitioners, the respondents had entered into a Supplementary Agreement dated 22.01.2012 for the allotment of specific areas in respect of Item No.1 and under this agreement the owners/respondents were allotted six flats in F block with the super built area 4716 sq.ft along with an extent of 2277 sq.ft of undivided share in the land. However, there still remained the deficit of 10% to the petitioner as provided under the terms of the contract.

8.The respondents herein/owners agreed to compensate and adjust an extent of 466 sq.ft. of undivided share of land and 965 sq.ft super built up area in the A, B, C and D blocks proposed to be constructed in Item -3. The respondents submitted that the petitioners had split up item Nos.3 as 4 plots in Block A, B, C and D Blocks and obtained Planning Permission dated 14.03.2012 for constructing 4 flats in Block A and six flats in Block B, 4 flats in Block C and D in Item 3. The total constructed area was 14229 sq.ft. The respondents were to be allotted the shares in Block D and the petitioners in Blocks A, B and C. The respondents were to get 5692 sq.ft. of built up area and 2841 sq.ft. of UDS. The petitioner was entitled to 8537 sq.ft. built up area and 1624 sq.ft of UDS.



9.This Agreement was once again reduced into writing in a Supplemental Agreement dated 30.03.2012 in Item No.3. However, in reality, the respondents were allotted flats in D block measuring 3267 sq.ft of super built up area and 1624 sq.ft. of undivided land. The petitioners were allotted 10905 sq.ft super built up area and 5454 sq.ft UDS. After adjusting the excess of 466 sq.ft. UDS and 965 sq.ft. super built up area allotted to the respondents, the respondents by virtue of the allotment to the petitioners in Item No.3 was short of 1460 sq.ft super built up area and 751 sq.ft. of undivided share in the land.

10.Though the parties had agreed to adjust this towards the construction in Item-2, however, the petitioners did not proceed to construct on Item 2. In view of the above, the respondents/claimants had sought compensation as per the prevailing market value of Rs.58,40,000/-.

11.The respondents would contend that the petitioners had proceeded with the construction with a malafide intention. They had completed the construction of 14 flats allotted to themselves but had not completed the four flats in Block D alloted to the respondents herein. The petitioners were also constrained to issue a criminal complaint on the ground of cheating against the petitioners herein and after the investigation, the respondents came to know that the developer was not a person of repute. The respondent also came to learn that using the powers of attorney executed by the respondents in their favour, they had created third party interest in Item No.2 of the property.

12.The petitioners had created sham and nominal documents in favour of their relatives. The respondents had no prior knowledge about these fraudulent transactions and on coming to know about the same, the respondents had cancelled the power of attorney given to the petitioners 2 and 3 and they have also moved an application under Section 9 of the 1996, Act, restraining the petitioners from dealing with the same. This Court was also pleased to grant an order of interim injunction against the respondents and others.



13.To counter the Section 9 application the petitioners had taken out a defence that they had paid an interest free deposit of Rs.52,00,000/- and also sustained huge expenses for TNEB deposit, infrastructure amenities, maintenance, etc, to the tune of Rs.1,15,82,326/- and that they were still willing to complete the constructions in Item 2 of the properties. The respondents herein through their counsel sought for proof for having spent the said sum of Rs.63,82,326/- which constituted interest free deposit and the expenses.

14.Considering the fraudulent activity of the petitioners and the fact that they had not been allotted to the rightful claim, the respondents had invoked the arbitration clause contained in the Joint Development Agreement for the reliefs stated therein.

15.The petitioners had countered the said claim by *inter alia* contending that the claims that are now raised have not been raised earlier in the Section 9 application and therefore, the same was only an after thought and not a bonafide claim. The petitioners would submit that having taken possession of the flats in F block and D block and having executed the Supplementary Agreement dated 30.03.2012, the respondents cannot make a claim for damages in respect of the same. The petitioners would further submit that the title of the respondents, especially, the 2nd respondent was disputed by some third party in O.S.No.5 of 2011 pending on the file of the learned District Munsif, Coimbatore. The petitioner would submit that they have spent huge amounts for defending the said suit and for raising a counter claim. They would further submit that time was never the essence of the contract. As regards Item 2, construction is yet to commence. The petitioners had submitted the plan for approval which was rejected initially as the extent of 9600 sq.ft was subdivided after 1989 and it was impossible for the petitioners to obtain approval for the entire extent of lands. It was for this reason that the Agreement was made apportioned 60% of the UDS to the petitioners and 40% to the respondents.

16.The petitioners had in fact executed a Sale Deed in favour of the third party only after obtaining the consent of the respondents. The petitioners would submit that they have spent over Rs.55,00,000/- for the infrastructure expenses and for obtaining drinking water, sewage connections, VLT Tax payment, OSR charges, EB deposit, service tax, etc, and that apart, they had paid a refundable deposit of Rs.52,00,000/- to the respondents and therefore, they would contend that the respondents cannot claim damages. They would further submit that with reference to the first item, the claimant was given more than 40% of the agreed share and it was the petitioners who had incurred deficit of 10%. It was agreed that the 10% of deficit was to be adjusted in the next phase and it was adjusted in Item 3. When the Approval was obtained by them with reference to the 3rd item of property for construction of four blocks A, B, C and D a boundary dispute arose with the neighbour. The Supplemental Agreement dated 30.03.2012 was entered into between the parties whereby it was agreed that the respondents would take the entire D block and the petitioners would retain A, B and C blocks. The plaintiffs in O.S.No.8 of 2013 on the file of the learned District Munsif, was not ready to resolve the dispute and the petitioners would contend that it was really the respondents herein who was fighting through the plaintiffs in O.S.No.8 of 2013. They would contend that by filing the suit, the respondents were trying to create obstructions and not permit the petitioners herein to proceed as agreed.

17.The petitioners would further contend that the respondents had obtained an interim injunction from this Court with reference to 40% share in O.A.No.953 of 2013 and in view of this injunction order, the petitioners are unable to proceed with the constructions. Though O.A.No.953 of 2013 was with reference to 40% of share in Item 2 of the property, the respondents had filed O.S.No.247 of 2015 on the file of the learned District Munsif, Thiruvallur, at Poonamallee against the respondents and their nominees for declaring the Sale Deed executed in favour of the third party as null and void. In the said suit, an interim application was filed restraining the petitioners from dealing with the entire property and the same has also been granted initially and the petitioners therefore took up the interim order on appeal and the same is pending. The petitioners would therefore contend that on account of the action of the respondents they were unable to proceed further with the construction.



18.The petitioners in their counter had claimed a sum of Rs.4,35,65,471/- from the respondents as detailed below:

*"31.Though the Hon'ble Court granted interim injunction with respect to the share of the claimant alone, the claimant issued a paper publication (Doc.No.23 of the claimant side document) as though the injunction was granted by the Hon'ble High Court with respect to the whole property and spoiled the reputation of the respondent/counter claimant. The said injunction granted by the High Court is till in force due to which the respondent/claimant is unable to sell even his share and has caused huge loss to the respondent/counter claimant.*

*32.Further, the respondents had also failed in their obligation in resolving the boundary dispute on the Northern side of Item 3 of the property where the respondents/counter claimants A and B block alone has been affected. On the other hand, the expenses incurred with respect to the 40% of the claimant's share for obtaining drinking water, sewage connections, VLT Tax payment, OSR charges, service tax not been paid by the* *claimant. However, the respondents spent their money for the above infrastructure for which the receipts are enclosed as documents. the claim made by the respondents/counter claimants under various heads are set out hereunder:*

| | |
|---|---|
| 1.Return of refundable deposit with interest | :73,84,000/- |
| 2.Vacant Land Tax | : 4,11,873/- |
| 3.Approval Fees | |
| 4.Building Plan approval | : 1,73,893/- |
| 5.Boundary Dispute litigation expense | :2,13,750/- |
| 6.Loss due to the boundary dispute | :1,92,54,000/- |
| 7.Title rectification expenses | : 4,96,000/- |
| 8.TNEB HT Line Shifting | :2,06,452/- |
| 9.TNEB refundable deposit | :2,06,667/- |
| 10.Service Tax payable | :13,92,000/- |
| 11.Sales Tax | : 4,38,383/- |
| 12.Item 2 land sub division expenses | :2,03,94,000/- |

| | |
|---|---|
| 13.Item 2 land block plan approval | :6,74,700/- |
| 14.Construction charges for item 2 land | :55,98,720/- |
| 15.Construction of model flat in F block | :1,15,92,000/- |
| 16.Legal fee and court proceedings | :2,50,000/- |
| Total | :4,35,65,471/- |

They therefore sought for dismissal of the Original Petition and for allowing their counter claim.

19.The learned Arbitrator had framed the following issues:

(1) *Whether the respondents are entitled to demand refundable deposit even before the completion of their obligations as per the Builders Agreement?*

(2) *Whether the respondents are liable to complete the construction of 4 flats in Block "D" of the property as per the builders Agreement dated 08.06.2011 and consequential Supplementary Agreement dated 30.03.2012 and hand over possession to the claimants satisfaction?*

*(3) Whether the respondents are liable to pay costs to be incurred by the claimants to complete the construction of 4 flats in "D" block in Item No.3?*

*(4) Whether the Respondents breached the Builders Agreement dated 08.06.2011 and delaying in handing over the 4 flats in Block "D" in Item No.3 to the Claimants?*

*(5) Whether the claimants are entitled for damages for the delay in completing and handing over the Flats by the respondents to the claimants?*

*(6) Whether the claimants are entitled to a sum of Rs.58,40,000/- in lieu of deficit extent of 1460 sq.ft built up area and 751 sq.ft undivided share of land as agreed by the parties in Supplementary Agreement dated 30.03.2012 or convey the same extent of area in other Apartments belong the respondent/Builders?*

*(7) Whether the respondents fraudulently executed*

*Sale Deeds dated 20.12.2012 in favour of their Benamies in violation of Builders Agreement dated 08.06.2011?*

*(8) Whether the respondents violated the Builders Agreement and General Power of Attorney dated 15.06.2011 by unilateral demarcation of separate portion of item- 2 property?*

*(9) Whether the respondents developing Item No.2 property by engaging 3rd party contractor without entering into supplementary agreement and violated the Builders Agreement and sold apartments in favour of third parties?*

*(10)Whether the claimants are entitled for get back the item No.2 property after canceling all encumbrances created by the respondents and their benamies or cost of the market value of the land for sum of Rs.4 crores?*

*(11)Whether the respondents had substantiated their*

*claim towards the expenditure incurred by them as per the Builders Agreement? If so to what amount?*

*(12)Whether the respondents are justified to retain original title deeds and documents of the properties in violation of Builders Agreement?*

*(13)Whether the Respondents are entitle to any claim towards litigation expenses for the dispute between the claimants and the third parties which is not covered under the Builders Agreement?*

*(14)Whether the counter claim made by the respondent is legal and justified and if so to what extent they are entitled to get relief?*

*(15)Whether parties are entitled for costs and if so to quantify and fix the liability?*

*(16)To what relief parties are entitle to?"*

20.Ultimately, after considering the evidence on record, the learned Arbitrator had passed an Award only with reference to the Issue No.6 and Issue No.11. Challenging the same, the petitioners are before this Court.

21.The petitioners had challenged the Award as being patently illegal and a perverse Award. The challenge was only with reference to Issue Nos.1 to 6.

22.Mr.A.K.Sriram, learned counsel appearing on behalf of the petitioners, would submit that he is restricting his arguments only to Issue No.6. He would submit that the petitioners are not entitled to claim the amount as awarded under Item No.6 since on the one hand they were asking the petitioners to make the payment and on the other hand, they have cancelled the Power of attorney and therefore, the petitioners are unable to sell the undivided share in item No.2. The parties had entered into the first Supplementary Agreement dated 22.01.2012 wherein taking note of the allotment between the petitioners and the respondents, the parties had identified the location of the super built area and the undivided share and that has been reduced into writing under the Agreement. Under the Agreement, respondents were allotted six flats in F block with the super built area 4716 sq.ft along with an extent of 2277 sq.ft of undivided share and allotted a super built up area 4662 sq.ft along with an extent of 2250 sq.ft of undivided share in the land.

23.The parties while executing the Sale Deed have accepted the fact that they were agreeable to this share. The 2nd supplemental Agreement has been executed on 30.03.2012 wherein the learned counsel would rely upon the following statement:

> *"The shortfall or excess anount towards the abovesaid charges v. sale realization shall be adjusted towards either by cash in hand or adjustment or through mutual agreement or duting Item 2 land super built up with undivided share land allocation by the party of first part to the party of second part."*

24.He would therefore argue that having agreed to have the shortfall adjusted from out of the construction that is supposed to be put up in the Item - 2 of the property, the respondents by filing the suit O.S.No.247 of 2015 has practically rendered the contract impossible for performance. He would therefore contend that they learned Arbitrator has not considered this fact while granting the relief under the Issue No.6, which according to him was a patent illegality and therefore a perverse award.

25.The respondents though served have not entered appearance either through their counsel or in person.

26.Heard the learned counsel for the petitioners and perused the papers.

27.It is an admitted fact that there has been a deficit of 1461 sq.ft of built up area and the 751 sq.ft deficit of undivided share after the allotment of the flats and undivided share in Item Nos.1 and 2. The learned counsel for the petitioners had argued that Supplemental Agreement- 2 dated 30.03.20212 had contemplated this deficit to be compensated from out of the construction to be put up in Item 2. However, a reading of clause extracted above, would clearly indicate that the shortfall was to be made good either by paying cash for the said shortfall or through mutual agreement or adjustment or by compensating the same in the super structure that has to be constructed in the said Item 2. By filing the claim statement, the claimants/respondents had made it clear that they had wanted only the market value for the deficit and that they do not want an excess allotment in the construction proposed to be put up on the 2nd item of the Joint Development Agreement. The supplemental Agreement-2 does not in any way relate to Item No.2 and each of the items of the property were being independently developed and shares allotted to the petitioners and the respondents. The construction has been completed in Item Nos.1 and 3. In Item No.1, the respondents was allotted an excess and in Item No.3, the petitioners. Even after adjusting the excess allotment to the respondents in Item-1 from out of the allotment in Item 3 made in favour of the respondents there was still a deficit due to the respondents. The Supplemental Agreement-2 dated 30.03.2012 acknowledges the fact that the deficit existed and the agreement provided the modes in which this deficit could be made good. One mode was by adjusting it in the construction to be put up in Item No.2. The other mode was to pay the respondents the market value of this deficit and it is this that is claimed by the respondent.

Considering the fact that the suit O.S.No.247 of 2015 filed does not in any manner effect the claim of the respondents, the petitioners are bound to pay the above sum as per the Supplemental Agreement-2 dated 30.03.2012. The Arbitrator has rightly interpreted the Agreement and this Court does not find any reason to interfere with the Award of the Arbitrator. The fact that the Arbitrator has rejected the other claims would clearly show the total application of mind on the part of the Arbitrator to the evidence on record and no exception can be taken to the same. Consequently, this Original Petition is dismissed and the Award is sustained.

**27.02.2020**

Internet : Yes/No
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Speaking / Non-Speaking
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**P.T. ASHA, J,**

mps

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