

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.03.2021
Delivered on : 29.04.2021

C O R A M

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.A.No.376 of 2021

1.M/s.HANUDEV INFOPARK PVT. LTD.,
rep. by authorised signatory
Mr.Niranjan Rao,
R.R. Towers III,
TVK Industrial Estate, Guindy,
Chennai - 600 032.

2.M/s.RITHWIK INFRASTRUCTURE PVT. LTD.,
rep. by authorised signatory
Mr.Niranjan Rao,
R.R. Towers III, TVK Industrial Estate,
Guindy,
Chennai - 600 032.

3.M/s. RITHWIK INFOPARK PVT. LTD.,
Mr.Niranjan Rao,
R.R. Towers III, TVK Industrial Estate,
Guindy,
Chennai - 600 032.

...Appellants/Respondents

1.Mrs.Andal Dorairaj
2.Mrs.Vidhya Sharathram
3.Mr.D.Sharathram

सत्यमेव जयते

...Respondents/Claimants

Prayer: Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 praying to set aside the impugned order dated 15.12.2020 passed by the learned Arbitrator in Arbitration Case No.9 of 2020.

For Appellants : Mr.Vineet Subramani

For Respondents : Mr.AR.L. Sundaresan,
Senior Counsel
for Mr.K.S.Karthik Raja
for R1 & R2

JUDGMENT

The respondents before the Arbitral Tribunal has invoked the jurisdiction of this Court by filing an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act, 1996).

2.The Appeal arises against the order passed by the Arbitral Tribunal dismissing the defence taken by the appellants in their Preliminary Counter Statement to have the claim dismissed.

3.It is necessary to briefly allude to the events that have culminated in filing of the above Appeal:

(1)The 1st appellant and the respondents herein had entered into three Joint Development Agreements in respect of their lands at Sowripalayam Village, Coimbatore which is hereinbelow detailed:

Sl.No	Date of Agreement	Parties to the Agreement	Property and Extent
1	24.03.2006	Respondents 1, 2, Minors Swetha and Siddhartha (children of the respondents 2 and 3) 1 st appellant	S.F.Nos.559/2 Part 2, (belonging to minor Swetha), 559/3 (belonging to minor Siddhartha), 558/2 part, 559/1 part, 558/3, 556/2A, 556/1B, 556/1A, 558/4 part and 557/1 measuring 5.06 acres
2	06.07.2006	1 st respondent and 1 st appellant	S.F.Nos.559 and 560/2 measuring 2 acres 51 cents and 333 sq.ft
3	06.07.2006	Minor Swetha represented by her mother, the 2nd respondent herein and the 1st appellant	S.F.No.559/part measuring 51 cents

4.It appears that minors Swetha and Siddhartha represented by their mother had filed a suit O.S.No.1607 of 1995 for partition on the file of the Principal District Munsif Court, Coimbatore and a compromise had taken place in the said suit on 14.03.1996. Under the compromise, various portions were allotted to the minors and the respondents 2 and 3 herein. Since the Joint Development Agreements were entered into between the respondents herein and the minors with the 1st appellant Company, the parties decided to reconstitute their respective shares into one common unit. This reconstitution has been

reduced into writing in a Memorandum of Confirmation of Reunion of HUF dated 11.06.2006 entered into between the respondents 2 and 3 herein and the Minors Swetha and Siddharth. This was followed by the parties, namely, the respondents herein and Minors Swetha and Siddhartha entering into a supplemental Memorandum of Agreement dated 13.09.2007 with the 1st appellant herein. The Supplemental Agreement captured the earlier Joint Development Agreements and the Memorandum of Reunion as forming the genesis for entering into a Supplemental Agreement.

5.The Supplemental Agreement basically detailed the inter se allocation of 20% of building space amongst the owners, the respondents herein and the minors. The Deed further states that the Memoranda of Agreement dated 24.03.2006 and 06.07.2006 would remain the same and the Supplemental Agreement would form part and parcel of the Agreements. Thereafter, the Memorandum of Confirmation of Reunion was declared as valid and binding on the parties to the suit vide Judgment dated 13.12.2007 in O.S.No.2067 of 2007 on the file of the District Munsif Court, Coimbatore.

6.Pursuant to these Agreements and Decrees, three Sale Deeds, all dated 16.03.2009, as detailed hereinbelow was entered into between the appellants and the respondents and the minors for an extent of 6.42 acres. This constituted the entire share of the 1st appellant Company under a Joint Development Agreements and the Supplemental Agreements.

Sl.No.	Registration Number	Name of Vendor	Name of Purchaser
1	896/2009	1st and 3rd respondent (as Kartha of joint family consisting of 2nd respondent and minors Swetha and Siddhartha)	1st Appellant
2	297/2009	1st and 3rd respondent (as Kartha of joint family consisting of 2nd respondent and minors Swetha and Siddhartha)	2nd appellant
3	898/2009	1st and 4th respondent (as Kartha of joint family consisting of 2nd respondent and minors Swetha and Siddhartha)	3rd appellant

7.Since the work was not progressing as undertaken, the

respondents herein, viz., the 1st and 3rd respondent for himself and as Kartha of joint family consisting of the 2nd respondent and minors Swetha and Siddhartha had issued a Legal Notice dated 15.03.2011 highlighting the fact that despite giving an assurance that the construction of the IT Park would be completed within a period of 24 months from the date of Bhoomi Pooja and the constructed portions allotted to them, the appellants had committed a breach of undertaking. Several allegations were made against the appellants and the respondents had informed the appellants that they had cancelled the Joint Development Agreements dated 24.03.2006 and 06.07.2006, the Memorandum of Supplemental Agreement dated 13.09.2007 as well the Powers of Attorney dated 28.03.2006 and 24.01.2007. The respondents had also contended that the three Sale Deeds dated 16.03.2009 were void on account of fraud, misrepresentation and undue influence, as a result, no right under the Sale Deeds would flow to the appellants. They had called upon the respondents to return all the documents of title and co-operate with the cancellation of the Sale Deeds.

8.To this, there was no response. This was followed by a Notice dated 01.11.2011 issued by the 1st respondent herein to the appellants herein invoking the Arbitration Clause under the Joint Development Agreement dated 06.07.2006 and calling upon the appellants to provide three names for appointing an Arbitrator. Since the appellants had not responded to the said Notice the 1st respondent had filed O.P.No.808 of 2021 (with reference to the Joint Development Agreement dated 06.07.2006) and O.P.No.824 of 2012 (with reference to the Joint Development Agreement dated 24.03.2006) under Section 11(6) of the Arbitration Act, 1996 for appointing an Arbitrator. The 2nd and 3rd respondents and the husband of the 1st respondent were also arrayed as the respondents 4 to 6 in the said Original Petitions besides the appellants herein. After contest, this Court by order dated 08.02.2016 was pleased to appoint one Mr.V.Sivasubramanian, a retired District Judge, residing at Coimbatore as sole Arbitrator to enter upon the reference and adjudicate the disputes inter se the parties.

9.It appears that after the learned Arbitrator had entered reference, the 1st respondent had filed her claim statement dated 07.11.2016. The 2nd and 3rd respondents herein had also filed their claim statement as a counter claim dated 23.11.2016. However, by an undated Memo which was filed before the Arbitrator on 20.04.2017, the 2nd and 3rd respondents, they had withdrawn their counter claim. In the meanwhile, the appellants herein had filed O.P.No.362 of 2017 seeking to terminate the mandate of the Arbitrator appointed by orders of this Court dated 19.02.2016 and to appoint a new Arbitrator. The Mandate of the Arbitrator was accordingly terminated and one Mr.S.A.Sriramulu, a retired District Judge was appointed in his

place.

10. After the 2nd Arbitrator had entered reference, the respondents herein had joined together as claimants and filed a Claim Statement dated 16.04.2019 in which they had sought the following reliefs:

"a) Award a sum of Rs.24,29,30,250/- (Rupees Twenty Four Crores Twenty Nine Lakhs Thirty Thousand Two Hundred and Fifty Only) payable by the respondents 1 to 3 to the 1st Claimant as compensation for delay in handing over the built up area as per the Joint Development Agreements dated 24.03.2006 & 06.07.2006;

b) Award a sum of Rs.75,67,90,620/- (Rupees Seventy Five Crores Sixty Seven Lakhs Ninety Thousand Six Hundred and Twenty Only) payable by the respondents 1 to 3 to the 1st Claimant as compensation for delay in handing over the built up area as per the Joint Development Agreements dated 24.03.2006 & 06.07.2006;

c) Direct the respondents 1 to 3 to pay the 1st Claimant a sum of Rs.1,71,81,503/- (Rupees One Crore Seventy One Lakhs Eighty One Thousand Five Hundred and Three Only) towards the proceedings initiated by the Income Tax Department towards Capital Gain Tax in pursuance of the aforesaid Sale Deeds dated 16.03.2009;

d) Direct the respondents 1 to 3 to pay the 3rd Claimant a sum of Rs.3,63,28,840/- (Rupees Three Crores Sixty Three Lakhs Twenty Eight Thousand Eight Hundred and Forty Only) towards the proceedings initiated by the Income Tax Department towards Capital Gain Tax in pursuance of the aforesaid Sale Deeds dated 16.03.2009;

e) Declare that the Joint Development Agreements dated 24.03.2006 and 06.07.2006 are all cancelled due to the non-performance of the obligations on the part of the respondents, fraudulent representation and misrepresentation on the part of the respondents;

f) Declare that the Sale Deeds dated 16.03.2009 executed by the Claimants 1 and 3, registered as Document Nos. 895/2009, 896/2009 and 897/2009 before the Sub-registrar Office, Peelamedu are void;

g) Direct the respondents to clear the encumbrance created in the property by Creating an Equitable Mortgage with the LIC Housing Finance Ltd.:"

11. The appellants herein had filed a Preliminary Counter Statement dated 03.07.2019 setting forth the following objections to the Claim Statement which are extracted briefly

hereinbelow:

(1) Since the appellants had not consented for the initiation of the arbitration proceedings and taking into account the vagueness of the arbitration agreement as set out in Clause 17 of the Joint Development Agreements dated 24.03.2006 and 06.07.2006 the present proceedings is liable to be terminated.

(2) The arbitration proceedings cannot be initiated by a single owner and it has to be a joint initiation. The 1st respondent alone had issued a Notice initiating arbitration on 01.11.2011. The other respondents were not the parties issuing the said Notice.

(3) The appellants 2 and 3 are not the parties to the Joint Development Agreements and therefore, the Arbitral proceedings initiated against them had to be terminated.

(4) The Agreement contemplates the Resolution of Disputes through negotiations and only if it fails arbitration is contemplated. This mode of settlement has not been undertaken in the instant case and therefore, the proceedings initiated is pre-mature.

(5) Before the first Arbitrator appointed pursuant to the orders in O.P.Nos.808 and 824 of 2011, only the 1st respondent has filed a Claim Statement and the 2nd and 3rd respondents had filed a counter claim which they later withdrew without reserving liberty to file a fresh claim. However, after the appointment of the 2nd Arbitrator, the 2nd and 3rd respondents have joined hands with the 1st respondent and they have now been impleaded as claimants and have also filed a fresh claim statement thereby, de novo commencing the arbitral proceedings. The earlier claim statement has not been withdrawn.

(6) The minors have instituted several suits to declare the Sale Deeds dated 16.03.2009 as null and void and not binding on them.

(7) The claim is barred by limitation as it was not filed within three months from the date of issue of the Section 21 Notice. Since the respondents herein have sought to cancel the Joint Development Agreements on the ground of fraud and misrepresentation arbitral proceedings cannot be initiated with regard to allegations of fraud and misrepresentation as it involves elaborated evidence which can be decided only by a Civil Court.

(8) The appellants therefore sought to have the arbitration proceedings terminated on the ground of lack of competence and jurisdiction on the part of the Tribunal.

12.The respondents had file a reply refuting the various allegations raised in the preliminary counter statement. They would contend that the allegations regarding the issue of the Section 21 notice only by the 1st respondent and not by Rs.2 and 3 as well as the inclusion of the appellants 2 and 3 as parties to the Arbitral proceedings have been raised before this Court in the counter filed by the appellants to the Section 11 application and argued by them and these contentions were overruled by this Court and the Arbitrator thereafter appointed. The appellants cannot seek to re-agitate the very same contentions after the orders of this Court in O.P.Nos.808 and 824 of 2011 as against which no appeal has been filed by the appellants. In fact, the appellants 2 and 3 had been arrayed as respondents in the above petitions and there was no protest by the appellants. As regards, the objections regarding the filing of a fresh claim statement by the respondents herein, they would submit that under Section 15(3) of the Arbitration Act, it is well open to the substitute Arbitrator, with the consent of the parties, to start the proceedings afresh and therefore, no exception can be taken to the same. One of the minors has already not pressed the suit filed by her and the other minor would be following the suit. The allegations regarding limitation and fraud were denied and it was stated that the Arbitral proceedings is only a continuation of the earlier arbitration. The respondents sought to have the prayers regarding the competence and jurisdiction be dismissed and the appellants directed to file their counter and contest the Original Petitions.

13.Meanwhile, the appellants once again sought to terminate the mandate of the 2nd Arbitrator in O.P.No.694 of 2019 and by order dated 08.09.2020, with the consent of the parties, the 3rd Arbitrator was appointed after terminating the mandate of the 2nd Arbitrator.

14.Thereafter, the arguments on the preliminary counter statement was heard by the learned Arbitrator who by his order dated 15.12.2020 was pleased to reject the Preliminary arguments and direct the appellants to file their reply statement on or before 18.01.2021. It is challenging this order that the appellants are before this Court.

SUBMISSIONS:

15.Mr.Vineet Subramani, learned counsel appearing for the appellants traced the events leading to the invocation of the Arbitration Clause and the events which transpired thereafter till the filing of the preliminary counter statement. Apart from making his oral submissions he had also filed written submissions on 16.04.2021.

16.The grievance of the appellants articulated by the learned counsel is hereinbelow stated:

(1)Absence of Section 21 Notice:

The learned counsel would submit that it was only the 1st respondent who had issued a notice as contemplated under Section 21 of the Arbitration Act and that too with reference to the Joint Development Agreement dated 06.07.2006 relating to her share. The 1st respondent had impleaded respondents 2 and 3 herein as respondents 4 and 5 in the petitions filed under Section 11(6) of the Arbitration Act in O.P.Nos.808 and 824 of 2021. The learned counsel for the appellants would submit that the Arbitral Tribunal has not considered these objections though the issue of a notice under Section 21 was the pre-requisite for instituting a petition under Section 11 and the arbitration proceedings thereafter. The issue of a notice under Section 21 is a statutory and mandatory requirement for initiation of Arbitral proceedings. The learned counsel would further submit that the two petitions which have been filed under Section 11(6) are only with reference to the Agreements dated 24.03.2006 and the Joint Development Agreement dated 06.07.2006 executed only by the 1st respondent and not the Joint Development Agreement executed on the same day for and on behalf of Minor Swetha. He would argue that the arbitral proceedings is therefore not maintainable as the very constitution of the Arbitral Tribunal was flawed. He would rely on the Judgments reported in T.S. Kisan & Company Private Limited v. Union of India and others [O.P.(D).NO.63965 – 6/2020 dated 19.02.2021, Madras High Court] and 2012 (2) SCC 582 [State of Goa v. M/s.Praveen Enterprises].

(2)Some of the reliefs claimed are not arbitrable:

The learned counsel would submit that the prayer in the claim petition which is now on file includes a prayer for setting aside the Sale Deeds dated 16.03.2009 and to declare the Joint Development Agreements dated 24.03.2006 and 06.07.2006 as cancelled due to non performance of the obligations by the respondents herein and to direct the appellants to clear the encumbrances created, mortgaged in favour of the LIC Housing Finance Limited. It is the argument of the learned counsel that the relief for declaring the Sale Deeds as void and the directions to the respondents to clear the mortgage due is a right in rem which cannot be tried by the Arbitral Tribunal. The learned counsel would rely upon the unreported Judgment of this Court in the case of M.Mythrai v. T.Ramesh in C.M.A.No.1582 and 1584 of 2020 dated 02.02.2021.

(3)Transposition of claimants 2 and 3 who were originally respondents 4 and 5 in the first claim statement and filing of fresh claim statement:

The learned counsel would submit that in the petitions filed for appointment of the Arbitrator in O.P.Nos.808 and 824 of

2012, the claimants 2 and 3 / respondents 2 and 3 herein were arrayed as the respondents 4 and 5. After the mandate of the first Arbitrator was terminated and the second Arbitrator took over, the claimants were directed to file their claim statement at which point the claimants have come forward with the joint claim and respondents 2 and 3 herein came to be arrayed as claimants 2 and 3. He would argue that in the proceedings before the 1st Arbitrator after the claim statement was filed by the 1st respondent herein, respondents 2 and 3 herein had filed a claim statement as a counter claim. Thereafter, a Memo was filed on 20.04.2017 in and by which the respondents 2 and 3 herein on their own volition had withdrawn the statement of claim (counter claim filed by them). The learned counsel would state that while withdrawing the counter claim, the respondents 2 and 3 did not seek liberty to file a fresh claim. In the absence of such liberty being granted, it is per se illegal and erroneous that the present claim statement is taken on file. The same deserves to be rejected outright. He would submit that the Arbitral Tribunal is not vested with the powers of the Civil Court under Order 1 and Order 2 of the Code of Civil Procedure to transpose and implead the parties. He would rely upon the following Judgments:

(i)V.G. Santhosam v. Shanthi Gnanasekaran
[2020 SCC Online Mad 560]

(ii)M.Mythrai v. T.Ramesh in C.M.A.No.1582 and 1584 of
2020 dated 02.02.2021

(iii)2013 (1) SCC 641 [Chloro Controls (I) P. Ltd vs.
Severn Trent Water Purification Inc. and others]

(4)The impleadment of the appellants 2 and 3 who are not parties:

The learned counsel would submit that the Joint Development Agreements and the Supplemental Agreement are only entered into between the 1st appellant and the respondents herein along with the minor. Appellants 2 and 3 are not parties to any of these Agreements which contain the Arbitration Clause, therefore, their impleadment in the said arbitration proceedings is totally unsustainable. In support of this contention, the learned counsel would rely upon the Judgment in AIR 2003 SC 2252 [Sukanya Holdings Private Limited v. Jayesh H. Pandya].

(5)Mis-joinder of cause of action:

The learned counsel would submit that there are three sets of Joint Development Agreements that have been entered into and the constructed portion to be allotted under each of the Agreements is different for each of the respondents. In these circumstances, the filing of a joint claim statement is per se erroneous and there is a mis-joinder of the causes of action and on this ground also, the claim statement deserves to be

rejected. He would press into service the following Judgments:

(i) 2017 (9) SCC 729 [M/S Duro Felguera S.A vs M/S. Gangavaram Port Limited]

(ii) CDJ 2016 MHC 1682 (DB) [Alaska Exports USA v. Alaska Exports]

(iii) CDJ 2021 MHC 186 [Padam Chand Kothari v. Shriram Transport Finance Company Limited]

(iv) CDJ 2021 MHC 104 [T.N. Road Sector Project v. IRCON]

(6) Non-application of mind on the part of the Arbitrator:

The learned counsel would submit that the learned Arbitrator has totally ignored the fact that it was only the first respondent who had invoked the Arbitration Clause and followed it up with the filing of the application under Section 11 (6) of the Arbitration Act right upto the filing of the claim statement. Therefore, the learned Arbitrator ought to have rejected the claim with reference to the Joint Development Agreements dated 24.03.2006 and 06.07.2006 entered into between the 1st appellant and the 2nd respondent herein representing the minors. The learned Arbitrator has also overlooked the fact that the appellants 2 and 3 who are not parties to the arbitral proceedings and who have also not consented to the appointment of the Arbitrator, cannot be compelled to participate in the arbitral proceedings. That apart, the learned Arbitrator has overlooked the fact that the respondents 2 and 3 who have originally filed the counter claim had withdrawn the same and after withdrawing the said claim statement without reserving their right to file a fresh claim have proceeded to join the 1st respondent to file a common claim statement. They have raised fresh claim which they had not raised in the original counter claim and claim statement. The learned counsel has relied on the following Judgments in support of his contentions:

(1) M. Mythrai v. T. Ramesh in C.M.A. Nos. 1582 and 1584 of 2020 dated 02.02.2021

(2) V.G. Santhosam v. Shanthi Gnanasekaran [2020 SCC Online Mad 560]

(3) Duro Felguera v. Gangavaram Port Limited [(2017) 9 SCC 729].

(4) Alaska Export USA Inc. v. Alaska Exports [CDJ 2016 MHC 1682]

(5) Padam Chand Kothari. vs. Shriram Transport Finance [CDJ 2021 MHC 186]

(6)TN Road Sector Project v. IRCON
[CDJ 2021 MHC 104]

(7)Sukanya Holdings Private Limited v. Jayesh
H. Pandya, [AIR 2003 SC 2252]

(8)Sankar Sealing Systems v. Jain Motor Trading,
[AIR 2004 Mad 127]

17.Per contra, Mr.AR.L. Sundaresan, learned Senior Counsel appearing on behalf of the respondents would at the outset raise the question of maintainability of this Appeal under Section 37 of the Act. The learned counsel would submit that the appellants have not come forward to state under which provisions of Law the preliminary counter statement was filed and the provisions of Law which the order has violated / overlooked which would give them a right to file an Appeal. He would draw the attention of this Court to the language of Section 37 of the Arbitration Act which clearly provides that the appeals would lie from the orders enumerated therein and from no other orders.

18.The preliminary counter statement and its contents does not fall within any one of the grounds contemplated under Section 37(1)(a) to (c) or Section 37(2)(a) or (b) of the Arbitration Act. In these circumstances, the Appeal filed invoking the provisions of Section 37 of the Arbitration and Conciliation Act is not maintainable and has to be dismissed at the outset.

19.On the merits of the case, the learned Senior Counsel would submit that these defences were already raised at the stage of the arguments in the Section 11 (6) petition and the appellants whose objections had been rejected by this Court are now seeking to re-agitate the very same allegations in the form of a preliminary counter statement. The appellants have not challenged the order passed in O.P.Nos.808 and 824 of 2011 and the same has attained finality. He would further submit that the claim statement which is now questioned has been filed only after obtaining the consent of the respondents by the learned Arbitrator. Therefore, questioning it at this stage after giving their consent is totally baseless and therefore liable to be dismissed.

20.In support of the above contentions, the learned Senior Counsel has relied upon the following Judgments:

- (1) (2018) 14 Supreme Court Cases 715
Kandla Export Corporation & another v.
OCI Corporation and another

- (2) 2020 SCC Online SC 655
Deccan Paper Mills Co. Ltd., v.
Regency Mahavir Properties and others
- (3) (2020) 4 Supreme Court Cases 234
BGS SGS Soma JV v. NHPC Limited
- (4) 2021 SCC Online SC 80
Chintels India Limited v.
Bhayana Builders Private Limited

DISCUSSIONS:

21. An appeal under Section 37 of the Arbitration Act, 1996 has been filed challenging the orders passed by the Arbitral Tribunal refusing to reject the claim on the basis of the averments contained in the preliminary counter statement. At the commencement of the arguments when a specific question was put to the counsel for the appellant as to the provision of law under which the preliminary counter statement was filed the counsel responded that it open to the Court to decide under which provision of the Act the objection can be brought into. Before proceeding to analyse the arguments it is necessary to consider the provision of Section 37(2) of the Arbitration Act, 1996 which alone is relevant to the case of hand as it is an appeal against the order of the Arbitral Tribunal. Section 37 (2) of the Arbitration Act, 1996 contemplates the filing of an appeal in the case of orders of the Arbitration Tribunal under two circumstances and

from no others given below is the extract of Section 37(2) of the Arbitration Act:

"Section 37(2) - An appeal shall also lie to a Court from an order granting of the arbitral tribunal.

—

- (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or
- (b) granting or refusing to grant an interim measure under section 17."

22. The provisions of Section 16(2) and 16(3) is herein below provided:

"2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

3. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as

the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.”

23. In this background let us examine the objections raised by the appellants in their preliminary counter statement. The appellants have raised the following issues:

(a) that the commencement of the Arbitral proceedings is flawed since the notice contemplated under Section 21 of the Arbitration Act has been issued only by one of the owners and that too with reference to one Joint Development Agreement;

(b) that the arbitral agreement contemplates initiation of arbitration proceedings only with the consent of the other parties and since the respondents have not consented to the arbitration proceedings being initiated the present proceedings ought to be terminated;

(c) The arbitration agreement between the parties contemplates negotiations and in the instant case, such negotiations have not taken place; and

(d) Non signatories are made parties to the arbitration proceedings.

(e) Respondents have been transposed as claimant and they have jointly filed the claim statement along with the original claimant despite withdrawing their counter claim without seeking liberty to file a fresh one”

24. The issues relating to joinder of parties, that the arbitration agreement contemplates negotiations prior to referring the dispute to the arbitration, as also the lack of consent of the appellants for initiating arbitration proceedings, have been dealt with in the orders in O.P.Nos.808 and 824 of 2012 passed by this Court. The discussion regarding the mechanism of the settlement of disputes and the manner in which Arbitration has to be initiated after the failure of the Settlement talks is available in Paragraphs 15, 16 and 24 of the said order. The learned Judge after elaborate discussions proceeded to reject this defence. As regards the joinder of the parties, the same has been dealt with in great detail in Paragraphs 27 and 28 of the said order, wherein the learned Judge has rejected the contentions of the appellants herein and held that the appellants 2 and 3 herein claim under the 1st appellant Company and the appellants 1 to 3 are group companies having the same Directors and Shareholders. The learned Judge has gone on to hold that the Sale Deed executed by the appellants 2 and 3 could in a sense be construed as an agreement under Section 7(5) of the Act and therefore, their impleadment is not flawed. This order has not been challenged by the appellants and the same has attained finality. In these circumstances, the appellants cannot be allowed to raise this

issue once again in the form of a preliminary counter. Though the appellants have refused to quote the provision of law, however, analysing the objections raised by the appellants it would broadly fall within the ambit of Section 16(1) of the Arbitration Act, 1996.

25.As regards the failure of respondents 2 and 3 to issue a notice as contemplated under Section 21 of the Act with regard to the other two Agreements, namely, Joint Development Agreements dated 24.03.2006 and 06.07.2006 has to be analysed on the basis of the following factors. The appellants have not raised this as a defence in the Section 11 application. A reading of the orders passed in O.P.Nos.808 and 824 of 2021 would clearly demonstrate that the parties, namely, the appellants and the respondents herein have very clearly understood and proceeded on the assumption that the arbitration was being initiated in respect of all three Joint Development Agreements and the Supplemental Agreement. In the Original Petitions in O.P.Nos.808 and 824 of 2012, the 1st respondent has clearly relied on all the agreements to make her claim. She has clearly pleaded that these agreements constituted the entire Agreement entered into between the parties and in respect of which the disputes have arisen. The appellants have also not entertained any doubt in this regard. The defence now taken appears to be an after thought and one more attempt on the part of the appellants to stall the proceedings. This argument is also one questioning the very constitution and jurisdiction of the Arbitral Tribunal also falling within the provisions of Section 16(1) of the Arbitration Act, 1996.

26.The next plea that has been raised is the issue of the respondents 2 and 3 withdrawing their counter claim and joining the 1st respondent to file a fresh claim statement without leave of this Court. With regard to the issue of the filing of the common claim statement and transposing respondents 2 and 3 as claimants 2 and 3, it is useful to refer the proceedings of the Arbitral Tribunal dated 21.03.2019. The proceedings dated 21.03.2019 was the first proceeding which was held after the second arbitrator, namely, Mr.S.A.Sriramulu, retired District Judge, has entered reference.

27.The Minutes of the proceedings indicate that the appellants and their counsels and the respondents and their counsels were present and the following arrangement was arrived at by the learned Arbitrator with the consent of both parties to proceed further with the arbitral proceedings:

"Both parties agreed that Under Section 15(3), the Arbitral proceedings shall commence afresh and the claimant shall file a fresh claim statement and proceed further and an attempt to complete the proceedings within six months to be conducted in

Chennai."

Having agreed to the above, it does not lie in the mouth of the appellants to now contend otherwise.

28.The appellants have raised the issue of limitation as well as fraud and stated that these issues being non-arbitrable the same cannot be dealt with by the Arbitral Tribunal. These are the issues which can be considered by the arbitrator while considering the disputes in the main arbitral proceedings itself. The other defence taken is that the two of the reliefs claimed are not arbitrable and falls within the exclusive jurisdiction of the Civil Court. It is needless to state that it is well open to the Arbitral Tribunal to decide about the arbitrability of the relief and this cannot be raised as the preliminary issue to knock off the entire claim.

29.The learned counsel for the appellants has relied upon the Judgment in the case of M.Mythrai v. T.Ramesh in C.M.A.No.1582 and 1584 of 2020 dated 02.02.2021 to buttress the contentions that this Court has allowed the appeal questioning the impleadment of parties on the ground that the relief sought for is not arbitrable, as the respondents in the counter claim had also included reliefs seeking the cancellation of Mortgage Deeds and Sale Deeds.

30.The facts in the case of M.Mythrai may not advance the argument of the appellant since in the present case the claim statement itself has been filed with these reliefs and it is well open to the appellants to raise this as a defence to the main claim. In fact, the Arbitral Tribunal has observed in its order that while considering the main issues if the Arbitral Tribunal is convinced that a relief is not maintainable under the provision of the Arbitration and Conciliation Act then the said relief can be denied. Further, this is not a ground for invoking the provisions of Section 37(2) of the Act.

31.As observed earlier, the jurisdiction of this Court under Section 37(2) of the Arbitration Act is limited to the situations contemplated under Sub Section (a) and (b) of Section 37(2) and none else. The grounds raised by the appellant falls within the provision of Section 16(1) of the Arbitration Act, 1996 as it is a challenge to jurisdiction and constitution of the Arbitral Tribunal. Section 37(2)(a) of the Act clearly stipulates that an appeal would lie only if the plea raised is accepted by the Arbitral Tribunal. In the instant case the Arbitral Tribunal has rejected these contentions and consequently, an appeal under Section 37(2) will not lie. If the scope of Section 37 is expanded to include all kinds of orders then the very object with which the Act has been enacted would fail. In the Judgment reported in (2020) 4 Supreme Court Cases 234 [BGS SGS Soma JV v. NHPC Limited], the Hon'ble Supreme

Court had observed as follows:

13. Given the fact that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of Section 37 of the Arbitration Act, 1996 alone which have to be looked at in order to determine whether the present appeals were maintainable. Section 37(1) makes it clear that appeals shall only lie from the orders set out in sub-clauses (a), (b) and (c) and from no others."

32. The learned Judges have very clearly observed that the challenge under Section 37 can only be from the orders set out therein and "from no others".

33. Similarly, in the case reported in (2018) 14 Supreme Court Cases 715 [Kandla Export Corporation & another v. OCI Corporation and another], the Hon'ble Supreme Court was considering the interplay between the provisions of Commercial Courts Act qua the Arbitration Act as to whether an appeal which was not maintainable under Section 50 of the Arbitration Act, could be maintained under Section 13(1) of the Commercial Division and Commercial Appeal Division of the High Courts Act, 2015. The learned Judges observed as follows:

"15. The proviso goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed that orders that are not specifically enumerated under Order XLIII of the CPC would, therefore, not be appealable, and appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.

16. Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1)(a), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in sub-sections (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(a) and, therefore, under Section 13(1) of the Commercial Courts Act.

...

22. However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the

Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done *ex abundanti cautela*. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasize the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(a) and would, therefore, not be appealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the ratio decidendi of the judgment in *Fuerst Day Lawson* (*supra*) would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone."

34. From the perusal of the records, it appears that the appellants herein are reluctant to have the dispute resolved by the Arbitrator. The appellants have twice raised objections to the Arbitrator appointed by orders of this Court and sought to have their mandate terminated. They had first filed O.P.Nos.362 of 2016 to terminate the mandate of the Arbitrator appointed by orders in O.P.Nos.808 and 824 of 2013 and appoint a new Arbitrator. This Court was accordingly pleased to terminate the mandate of the Arbitrator and appoint an other Arbitrator.

35. Thereafter, once again the appellants have filed a petition to terminate the mandate of the second arbitrator in the proceedings O.P.No.694 of 2019. This Court by order dated 08.09.2020 has allowed the Original Petition on consent and appointed the present learned Arbitrator. The preliminary counter statement though filed before the second Arbitrator has been heard by the present Arbitrator. Effectively the appellants have stalled the arbitral proceedings from the year 2016. The Appeal Petition is totally bereft of merits and is

not maintainable under Section 37(2) of the Arbitration Act as

none of the grounds contemplated therein is available in the instant case.

36.The Appeal therefore deserves to be dismissed for the following reasons:

(a)The grounds raised in the preliminary counter statement fall within the grounds contemplated under Section 16(2) of the Arbitration Act. Since the plea has been rejected by the Arbitral Tribunal an appeal will not lie under Section 37(2) (a) and (b) of the Act.

(b)The appellants have consented to the transposition of the respondent 2 and 3 as claimants and the filing of a fresh claim statement as evidenced by the Minutes dated 21.03.2019.

(c)The plea of limitation, fraud, etc., can be raised and argued before the Arbitral Tribunal.

(d)Since the Arbitral Tribunal has rejected the plea of the appellant the Arbitral proceedings should be proceeded with and its open to the appellants to challenge the same under Section 34 of the Act.

In fine, C.M.A.No.376 of 2021 is dismissed. The appellants shall file their counter statement within a period of 15 days from the date of receipt of a copy of this order. The learned Arbitrator shall endeavour to dispose of the proceedings within a period of eight months therefrom.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

mps

To

1.The Hon'ble Mr.Justice K.Kannan (RETD)
The Arbitral Tribunal of the Sole Arbitrator,
Chennai.

Copy to:
The Sub Assistant Registrar
O.S.(Main), High Court, Madras.

+1cc to M/s.K.S.Karthik Raja, Advocate, S.R.No.26535
+1cc to Mr.Vineet Subramani, Advocate, S.R.No.26488

C.M.A.No.376 of 2021

RLD(CO)
CB(18/06/2021)