

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.10.2021

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.Nos.461,503 and 669 of 2017

O.P.No.461 of 2017

M/s.G.G.Hospitals
Rep. By its Sole Proprietor,
Mrs.Kamala Selvaraj,
6E, Nungambakkam High Road,
Nungambakkam, Chennai – 600 034. .. Petitioner

vs

- 1.M/s.Ascent Engineers & Infrastructures Pvt Ltd.,
(Formerly M/s.Ascent Engineers, a Partnership Firm)
Rep. By its Managing Director,
Mr.Srinivasan S.Iyer,
No.12, 46th Street, 9th Avenue,
Ashok Nagar, Chennai – 600 083.
- 2.M/s.Larsen & Toubro Limited,
Mount Poonamalee Road,
Manapakkam, Chennai – 600 089. ..Respondents

O.P.No.503 of 2017

M/s.Ascent Engineers & Infrastructures Pvt Ltd.,
(Formerly M/s.Ascent Engineers, a Partnership Firm)
Rep. By its Managing Director,
Mr.Srinivasan S.Iyer,
No.12, 46th Street, 9th Avenue,
Ashok Nagar, Chennai – 600 083. .. Petitioner

Vs

- 1.M/s.G.G.Hospitals
Rep. By its Sole Proprietor,

Mrs.Kamala Selvaraj,
6E, Nungambakkam High Road,
Nungambakkam, Chennai – 600 034.

2.Larsen & Toubro Limited,
Mount Poonamalee Road,
Manapakkam, Chennai – 600 089.

.. Respondents

O.P.No.669 of 2017

M/s.Larsen & Toubro Limited,
Mount Poonamalee Road,
Manapakkam, Chennai – 600 089.

.. Petitioner

VS

1.M/s.Ascent Engineers & Infrastructures Pvt Ltd.,
(Formerly M/s.Ascent Engineers, a Partnership Firm)
Rep. By its Managing Director,
Mr.Srinivasan S.Iyer,
No.12, 46th Street, 9th Avenue,
Ashok Nagar, Chennai – 600 083.

2.M/s.G.G.Hospitals
Rep. By its Sole Proprietor,
Mrs.Kamala Selvaraj,
6E, Nungambakkam High Road,
Nungambakkam,
Chennai – 600 034.

.. Respondents

Prayer in O.P.No.461 of 2017: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying this Court to set aside arbitral award dated 14.04.2017 and an order order of correction of the error dated 20.04.2017 and pass such further or other orders as this Court may deem fit and proper in the circumstances of the case.

Prayer in O.P.No.503 of 2017: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying this Court to (a) setting aside the arbitral award dated 14.04.2017 as corrected/amended by an order dated 20.04.2017, passed by the Arbitrator herein, limited only in so far as the rate of interest awarded; grant of rebate of 2% and the cost factor, (b) awarding costs of the present petition; and (c) granting such further or other

reliefs as may be deemed fit and necessary in the circumstances of the case.

Prayer in O.P.No.669 of 2017: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying this Court (a) to set aside arbitral award dated 14.04.2017, corrected on 20.04.2017 passed by the learned arbitrator to the extent set out in this petition and (b) and pass such other or further orders as this Court may deem fit and proper in the circumstances of the case.

For Petitioner : Mr.V.Kuberan
for M/s.Rank Associates
(in O.P.No.503 of 2017)

Mr.S.R.Rajagopal
for M/s.Ojas Law Firm
(in O.P.No.461 of 2017)

Mr.R.Murari, Senior Counsel
for Ms.Preeti Mohan
(in O.P.No.669 of 2017)

For Respondents : Mr.S.R.Rajagopal
for M/s.Ojas Law Firm
Mr.R.Murari, Senior Counsel
for Ms.Preeti Mohan
for R2
(in O.P.No.503 of 2017)

Mr.V.Kuberan
for M/s.Rank Associates
for R1
Mr.R.Murari, Senior Counsel
for Ms.Preeti Mohan
for R2
(in O.P.No.461 of 2017)

Mr.V.Kuberan
for M/s.Rank Associates for R1
Mr.S.R.Rajagopal
for M/s.Ojas Law Firm for R2
(in O.P.No.669 of 2017)

COMMON ORDER

O.P.No.461 of 2017 has been filed challenging the arbitral award directing the petitioner/applicant to pay a sum of Rs.1,10,24,982/- towards refund of retention money with interest together as ordered in the award.

2. O.P.No.503 of 2017 is filed by the first respondent only against the rate of interest awarded, rebate granted at 2% and the cost factor.

3. O.P.No.669 of 2017 is filed against the arbitral award challenging certain observations recorded against the petitioner/applicant in the award. The above OP has been filed by the second respondent in the main proceedings.

4. Since all three OPs are arising out of the same award, this Court is inclined to dispose of all the three OPs by way of a common order.

5. For the sake of convenience, petitioner in O.P.No.503 of 2017 viz, M/s.Ascent Engineers & Infrastructures Pvt Ltd., is

referred as claimant, petitioner in O.P.No.461 of 2017 viz., M/s.G.G.Hospitals is referred as first respondent and the petitioner in O.P.No.669 of 2017 viz., M/s.Larsen & Toubro Limited is referred as second respondent.

6. The claimant is the Contractor for execution and construction of the Hospital, for the first respondent. The first respondent wanted to construct a new multi speciality hospital and engaged the services of the second respondent by agreement dated 23.04.2008 i.e., Consultancy Service Agreement wherein the second respondent was appointed for providing Architecture & Engineering Services for the project besides overseeing and supervising the day-to-day execution of the work and the payment to be made by the first respondent.

7. The second respondent has identified the claimant as the contractor and, accordingly, a Tripartite agreement dated 21.10.2009 between the parties came to be executed. The construction was carried as per the drawings and specifications of the second respondent and on instructions issued from time to time and to carry out day-to-day activities under the supervision of respondents 1 and 2. The second respondent after measurements

and after satisfying with the completion certificate, raised the Bill of Quantities.

8. The first respondent has not paid the outstanding amount of Rs.4,08,33,039/- as on 15.11.2012. Hence it is the contention that the claimant has raised for non-payment of the building constructed by him and it is further stated that the entire construction has been done as per the drawing and plan by the second respondent, which has also been approved by the first respondent. The first respondent has also started constructing the fourth floor. As the fourth floor plan was not sanctioned, Chennai Metropolitan Development Authority (CMDA) has issued a letter for removal of unauthorized construction.

9. Hence, the contention of the first respondent is that the planning permission was issued by the CMDA for construction of double basement, ground floor plus three floors in the hospital project. In the mean time, on the suggestion of the first respondent, the claimant was entrusted with the construction of the hospital project under the Tripartite agreement dated 21.10.2009 and on 01.02.2010 itself the first respondent handed over the site to the claimant.

10. Though the plan was sanctioned for three floors, the claimant started construction in the fourth floor without the knowledge of the first respondent during the month of May,2011. It is his contention that the first respondent has not issued any written instructions to the claimant and the second respondent for putting up additional/extra works in the fourth floor of the project. It is the main contention that they never gave any permission to put up construction in the fourth floor. Thereafter, when the CMDA officials came for site inspection, it was found that the construction of the fourth floor was in deviation of the sanctioned plan and the same had to be demolished. The first respondent came to know about the unauthorized construction by then only and was requesting the claimant and the second respondent to demolish the fourth floor in accordance with the norms. As the second respondent is not willing to demolish the same, the first respondent was constrained to engage the third party contractor to rectify the situation.

11. Insofar as the second respondent is concerned, it is the contention that no claim can be raised against the second respondent. Based on the pleadings, the Tribunal has framed the issues. On appreciation of the evidence on both sides, the Tribunal has passed the following award:-

"(I) Rs.2,69,74,070/- towards the certified Bills Account.

(II) Rs.1,10,24,982/- towards the refund of Retention Money, subject to the adjustment as directed below.

(III)Rs.21,15,363.44/- being the Interest @ 9% payable for the bleated payment of the certified RA Bills as on 28.02.2013.

(IV) Interest @ 9% P.A. From 01.03.2013 on Rs.2,69,74,070/- till date of realization of the said amount by the claimant from the 1st respondent.

(V) The claimant shall pay Rs.39,10,000/- being the 2% rebate assured to be given to the first respondent. This amount shall be set off and adjusted against the sum of Rs.1,10,24,982/- to be paid by the respondent and as against the sum, the claimant shall be entitled to and the respondent shall pay only Rs.71,14,982/- in full quit satisfaction of the amount awarded in (II) above.

(VI) Interest 9% P.A on Rs.21,15,363.40/- from the date of the award till the date of realization.

(VII) The counter claims raised by the 1st respondent shall stand rejected and dismissed.

(VIII) The parties on either side shall bear their own respective costs of this Arbitration proceeding."

12. As against the award as well as the dismissal of the counter claim raised by the first respondent, O.P.No.461 of 2017 has been filed by the first respondent. Similarly, O.P.No.503 of 2017 is filed by the claimant as against the interest portion and O.P.No.669 of 2017 is filed by the second respondent as against certain observation that was made by the arbitrator in the award.

13. The learned counsel appearing for the petitioner in O.P.No.461 of 2017, vehemently contended that the learned arbitrator has passed award beyond the terms of the contract and hence he has re-written the contract. It is his further contention that the consultancy service agreement entered into between the first respondent and the second respondent makes it obligatory on the part of the second respondent for preparation of master plan for the proposed new hospital block. It is the contention that the second respondent has to prepare all necessary drawings and documentation necessary for getting necessary approval of Government statutory bodies and to ensure compliance with the codes, standard and legislation, as applicable. Similarly, Clause 7 of the contract makes it very clear that the second respondent submitted the completion report and drawings for project as

required and assessed plan in terms of the Certificate. Tripartite agreement entered into between the parties also makes it clear that the second respondent has to supervise the entire construction and the second respondent shall construct as per the approved plan.

14. It is his further contention that drawing plan of construction of the fourth floor did not contain the signature of the first respondent. Hence it is the contention that as per the contract entered into between the parties, only as per the instructions and drawings, the fourth floor has been constructed deviating the plan sanctioned for third floor. Therefore, the first respondent has to suffer severe damages in removing the deviation and hence it is the contention that the learned arbitrator has not considered all these facts and had re-written the contract.

15. Similarly, it is the contention that the construction of the fourth floor was not in the knowledge of the first respondent and only at the time of inspection by the CMDA officials, the owner of the hospital came to know about the construction. Hence it is the contention that the entire award has not been passed based on the contractual terms and obligations entered upon between the parties and, therefore, prays for setting aside the award. In support of his

contention, the learned counsel relied upon the following decisions that (i) *Associate Builders v. Delhi Development Authority* reported in (2015) 3 SCC 49, (ii) *MMTC Limited v. Vedanta Limited* reported in (2019) 4 SCC 163, (iii) *Patel Engineering Limited v. North Eastern Electric Power Corporation Limited* reported in (2020) 7 SCC 167, *Peddi Virayya v Doppalapudi Subba Rao and another* reported in 1957 SCC Online AP 341, (iv) *Sheladia Associates Inc. v. Tamil Nadu Road Sector Project II, Rep. By its Project Director* reported in 2019 SCC Online Mad 1783 and (v) *State of Orissa and another v. Kalinga Construction Co. Pvt Ltd.,* reported in (1970) 2 SCC 861.

16. Learned counsel appearing for the claimant submitted that the sanction was available only upto third floors and he was engaged and acted as per the instruction of L&T Management. As per the direction of the drawing of the L&T and with approval of the first respondent, he has put up the construction in the fourth floor. It is his further contention that the owner of the hospital does not have any knowledge about the construction is beyond the factual aspects and there were six instances available on record to show that the hospital authorities are aware of the construction put up on the fourth floor. There is a tacit approval of the owner for

construction in the fourth floor. Hence it is his submission that when the arbitral Tribunal has considered the entire aspect by appreciating the evidence, the Court cannot re-appreciate the entire evidence once again as an appellate court. No grounds have been made out to interfere with the award. It is his further contention that it is only grievance that the arbitrator has not awarded the interest fully and a portion of the award alone has to be set aside.

17. Whereas the Learned Senior Counsel appearing for the second respondent submitted that the second respondent was a formal party in the case and this petition has been filed only to challenge certain observations of the arbitral tribunal that the second respondent has not participated in the proceedings, which is contrary to the facts. Thus, the contention is that the OP has been filed only to a limited extent.

18. It is not disputed by both sides that the Consultancy Agreement was entered into between the owner and the applicant herein and the L&T Management for providing services like drawing, planing etc., It is relevant to note that the GG Hospital engaged the services of L&T Limited for professional services for giving architectural design and engineering design with various other

detailed engineering services. Clause 2 to 6 sub-clause (6) makes it clear that the L&T Management will provide necessary drawings and documentation also to get approval from the Government statutory bodies. However, the costs to be paid by the owner. It is also agreed by L&T that even during construction such L&T has to check and approve the drawings submitted by the contractor and visit the site of work and wherever necessary to clarify the decision. The entire document makes it clear that the main part of agreement entered between the hospital and L&T is to provide design and necessary documents of drawings etc., The claimant was engaged to construct the hospital and accordingly, the Tripartite agreement came to be executed between the parties. These facts are not in dispute.

19. The construction put up by the claimant is not disputed up to third floor of the hospital. The only dispute seems to be with regard to the fourth floor violating the sanctioned plan. The sanctioned plan was only up to third floor by the CMDA, whereas, in the fourth floor construction have been raised in the month of May,2011 as per the plan by L&T. It is the case of the owner that they have no knowledge that such construction has been put up in the fourth floor.

20. The learned arbitral tribunal on appreciation of entire evidence negated the contention of the Hospital and recorded a factual finding that in fact such construction was in violation of the plan and the same has been put up with the knowledge of the owner. Therefore, they cannot retain the running bills account for the claim. The learned Arbitrator has not only considered the documentary evidence but also the oral evidence of the parties and concluded that the construction has been put up in the fourth floor only as per the drawing and instructions furnished by the second respondent which had necessary power along with Tripartite agreement and the second respondent has obligatory under the Tripartite agreement has also factually recorded that the hospital is also aware of the construction of the fourth floor. Therefore, the contention that they are not aware of the construction put up in the fourth floor is dis-believed by the learned Arbitrator on appreciation of evidence.

21. After appreciating the entire evidence, the learned Arbitrator recorded the finding. It is also relevant to note the very contention that the first respondent has no knowledge about the construction of the fourth floor cannot be countenanced for the

simple reason that Ex.C17 filed before the Arbitral tribunal would show that the letter was written on behalf of the hospital authorities enclosing the cost analysis for the fourth floor and it is agreed that the cost of the fourth floor is Rs.360 lakhs. Similarly, letter addressed to the owner of the hospital for bringing the officials for inspection to be taken up in the fourth floor construction. Same indicates that the owner of the hospital remained silent to go ahead with the construction and the letter dated 3.07.2012 by the hospital to the CMDA indicated that in fact they wanted to retain the fourth floor building construction. The mail sent by the hospital authorities available on record also indicate that they agreed to pay the amount after getting the loan. All these facts clearly indicate that deviation has been made with the knowledge of the owner of the hospital. Therefore, it cannot be said that the owner had no knowledge in bringing up the construction in her own building. This has been appreciated factually by the learned Arbitrator. Therefore, the contention that the Arbitrator has not taken note of the terms of the contract has no legs to stand. In fact, the learned Arbitrator has in detail discussed every issues and considered various documents including the oral evidence.

22. In such view of the matter, this Court is of the view that once the learned Arbitrator has passed the award appreciating the evidence, merely because, some view is possible, this Court cannot substitute the counsel's own views, in the place of arbitrators view. It is in the domain of the Arbitrator to interpret the contract and to appreciate the evidence and that he has done it rightly in this matter. The very contention that the owner had no knowledge about the unauthorized construction put up in a massive building itself is highly improbable and cannot be believed.

23. In such view of the matter, the contention of the learned counsel to challenge the award in entirety has no legs to stand though various judgments have been cited by the learned counsel appearing for the petitioner in O.P.No.461 of 2017. On a perusal of the award, this Court is of the view that the arbitrator has appreciated every document and facts including the oral evidence and gave the finding. Therefore, this Court cannot re-write the award by substituting the view of the Applicant, who suffered an award. On a perusal of the award, none of the grounds has been made out to interfere with the very reasoned award passed by the learned Arbitrator.

24. As far as the interest portion challenged by the learned counsel, the learned arbitrator in fact awarded interest from 28.02.2013 at the rate of nine per cent, the same cannot be said to be perverse. Further, none of the circumstances pointed out by the learned counsel to contend that the interest restricted by the learned Arbitrator at 2% is perverse. Therefore, the O.P. challenging the interest portion, namely, O.P.No.503 of 2017 also fails.

25. The other O.P. filed by the second respondent challenging the award on the ground that certain observations have been made against L&T is also liable to be dismissed. It is to be noted that the second respondent was only made as a formal party and no claim whatsoever is made against them. In fact, no claim whatsoever is also passed against them. Admittedly, no relief has been granted. Therefore, the mere dismissal of the application filed under Section 16 by the arbitral tribunal cannot be a ground to interfere with the well reasoned award passed as against the first respondent. What is recorded is only that the second respondent has not participated fully in the proceedings. Except filing the defence, they have not participated in the proceedings, which has been recorded by the arbitral tribunal and, therefore, by no stretch of imagination it can

be said that such a finding is adverse and have any impact on the second respondent. Accordingly, as there is no award passed against them, the award passed by the learned arbitrator, cannot be interfered with, for the sake of the second respondent merely based on some observations recorded by the arbitrator.

26. For the foregoing reasons, the award passed by the learned Arbitrator stands confirmed and all these Original Petitions are dismissed. No costs.

07.10.2021

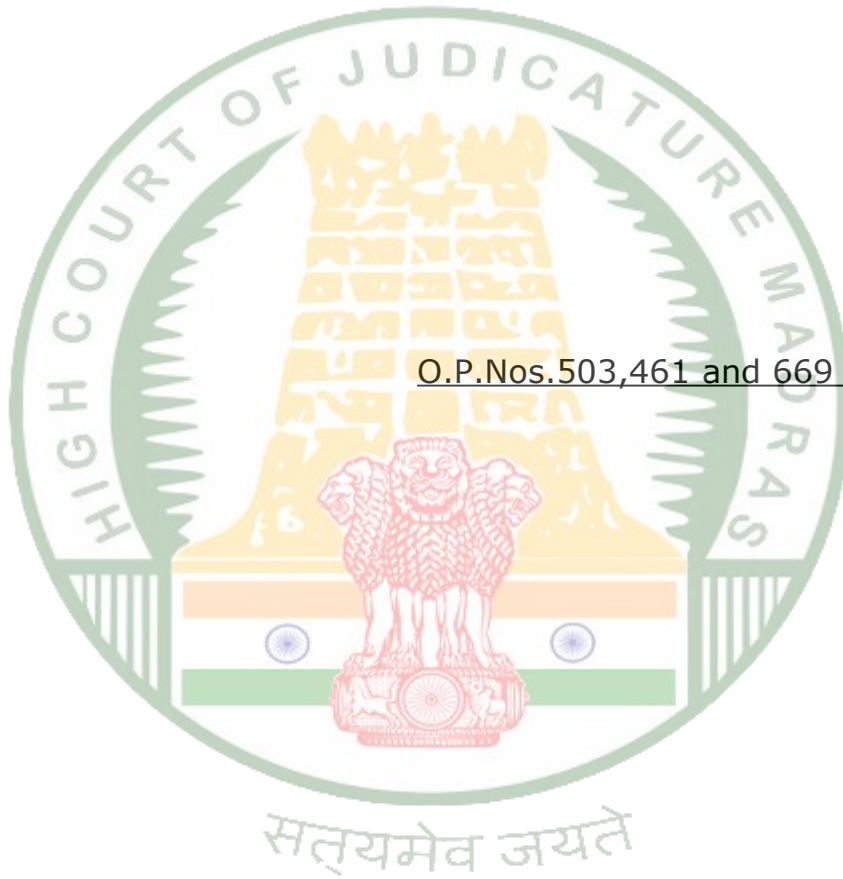
Index: Yes/No
ssm



WEB COPY

N. SATHISH KUMAR, J.

(ssm)



O.P.Nos.503,461 and 669 of 2017

WEB COPY

07.10.2021