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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.01.2022

Coram:

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

Application No.79 of 2022
in O.P.No.761 of 2019

1. Mrs.Hemalatha,
2. Mr.K.Natarajan,
3. Ms.N.Tharini,
4. Mr.R.Selvaraj,
5. Mrs.S.Saraswathi,
6. Mr.S.Vijayarathinam,
7. Mr.S.Yogeswaran,
8. Mrs.Uma Maheswari,
9. Mr.A.L.Subbiah,
10. Mrs.S.Nithya,
11. R.Alagappan,
12. Mrs.AL.Alamelu,
13. Mr.N.Mathivanan,
14. Mrs.M.Tamilselvi,
15. Mr.P.S.Sekar,
16. Mrs.S.Vijaya,

... Petitioners

/versus/

M/s.NAVIN HOUSING & PROPERTIES (P) LTD.,
Rep. by its Managing Director, Dr.R.Kumar,
“NAVIN'S TRIUMPH” 802 & 804,
Anna Salai, Nandanam,
Chennai – 600 035.

... Respondent

Prayer: This application is filed under order XIV Rule 8 of the Original Side Rules read with Section 34(4) of the Arbitration and Conciliation Act, 1996, to remand the award dated 04.07.2019 back to the Learned Arbitrator for eliminating the Grounds for setting aside, if any, according to the view



of the Hon'ble Court such ground has been satisfactorily made out by the Petitioner/Respondent in the above O.P.No.761 of 2019.

For Petitioners : Mr.G.Vijay Anand, for
M/s.G.Vijay Anand Associates

For Respondent : Mr.Vijay Narayan, Senior Advocate, for
M/s.Shree Law Services

ORDER

The present application is filed under Section 34(4) of the Arbitration and Conciliation Act 1996 (the Arbitration Act) seeking a remission to the Arbitral Tribunal for purposes of eliminating the grounds for setting aside the arbitral award dated 04.07.2019 (the Award).

2. Both the respondent herein/petitioner therein and applicants herein/respondents therein had concluded submissions in the petition to set aside the Award. At that juncture, the applicants/respondents therein requested for leave to file an application to seek remission under Section 34(4) of the Arbitration Act. The applicants contend that an application under Section 34(4) of the Arbitration Act is maintainable at any time before the relevant award is set aside. Therefore, it is contended that the present application is maintainable.



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3. In the affidavit in support of the application, the applicants refer to the decision of the Arbitral Tribunal on issues 5 & 8 and, in particular, the direction to the respondent herein to pay compensation of Rs.4,02,15,000/- by relying upon the formula prescribed for fixation of fair rent under the repealed Tamil Nadu Buildings (Lease and Rent Control) Act 1960 (the Rent Control Act). According to the applicants, about 11 years have elapsed after the agreement between the parties was signed and, therefore, the matter may be remitted to the Arbitral Tribunal so as to eliminate the grounds for setting aside the Award in case the Court is inclined to set aside the Award. In such situation, the applicants contend that irreparable loss would be caused to them unless the matter is remitted.

4. In support of these contentions, the applicants refer to and rely upon the following judgments:

(i). *Som Datt Builders Limited v. State of Kerala* (2009) 10 SCC 259 (**Som Datt**), wherein the Supreme Court concluded that the matter should be remitted under Section 34(4) of the Arbitration Act because it did not contain reasons for attribution of responsibility for delay.

(ii). *Kinnari Mullick and another v. Ghanshyam Das Damani* (2018)11 SCC 328(**Kinnari Mullick**), wherein the Supreme Court held that



the following two conditions should be satisfied for remission: an application should be received and the relevant award should not have been set aside.

(iii). *AKN and another v. ALC and others (2015) SGCA 63 (AKN)* and, in particular, paragraphs 27, 34 and 39 thereof wherein the Court of Appeals of Singapore concluded that Section 34 (4) of the International Arbitration Act of Singapore, which is in *pari materia* with Section 34(4) of the Arbitration Act, is a curative alternative.

5. These contentions are refuted by the respondent. At the outset, the respondent submits that the scope of Section 34(4) is limited and narrow. The respondent relies upon the reasons set out in its reply affidavit, including, in particular, those in paragraph 9 thereof to contend that this application is liable to be rejected. In the case at hand, the respondent states that the applicants have not indicated the grounds on which remission is sought under Section 34(4). With specific reference to one of the issues raised in the Section 34 petition, namely, the failure of the applicants herein to provide a life certificate after a particular date, the respondent points out that the Award on this issue is challenged on the basis that this constituted an anterior breach by the applicants, and that, consequently, the respondent cannot be held guilty of breach of contract. By drawing reference to the



recent judgment of the Hon'ble Supreme Court in *I-Pay Clearing Services*

Private Limited v. ICICI Bank Limited, Civil Appeal No.7 of 2022 (I-Pay Clearing Services) and, in particular, paragraphs 18 to 21 thereof, the respondent contends that this is not an appropriate case to exercise discretion under Section 34(4) of the Arbitration Act.

6. The rival contentions entail an examination of the scope of Section 34(4), the precedents in relation thereto and, above all, the consideration of the question whether this is an appropriate case to exercise discretion under Section 34(4) of the Arbitration Act. The text of Section 34(4) is the logical starting point of discussion, and the same is set out below:

34. Application for setting aside arbitral award.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

7. On perusal of Section 34(4), it is evident that the power under this

provision may be exercised on receipt of an application “where it is



appropriate”. In *Som Datt*, the Hon'ble Supreme Court directed remission because findings were recorded, but such findings were not supported by reasons. In *Kinnari Mullick*, the Hon'ble Supreme Court concluded that remission can be directed only upon the receipt of an application to set aside the award under sub-section 1 of Section 34 and before the relevant award is set aside. In *I-Pay Clearing Services*, the Supreme Court held that the exercise of power under this provision is discretionary and should not be exercised where the challenge is on the basis that no finding was recorded on an issue, whereas it could be exercised where a finding is recorded without adequate reasons. As already indicated, in *AKN*, the Court of Appeals of Singapore described this provision as being a curative alternative.

8. While deciding whether it is appropriate to exercise power under Section 34(4) of the Arbitration Act, it should be borne in mind that a remission under Section 34(4) is substantially different from a remand under the Code of Civil Procedure, 1908. In specific, upon remission, the Arbitral Tribunal cannot change its conclusion or even the basis thereof. Indeed, the object and purpose of Section 34 is only to resume arbitral proceedings for the limited purpose of endeavouring to eliminate the defects in the award, if possible, before the award is tested in the adjourned Section 34 proceedings.



Consequently, resort to this provision would be appropriate only in a few situations. By way of illustration, in an award where findings are recorded but the reasons are sketchy, a remission would enable the arbitral tribunal to flesh out the reasons for its findings or conclusions. Upon completion of this exercise, the challenge process may be resumed. By contrast, if the challenge to the award is on the ground that a contractual provision prohibiting a claim was disregarded, a remission would be inappropriate because the arbitral tribunal would have no choice but to consider and interpret the relevant provision in such manner as to justify its award. Likewise, if an award is assailed on the ground that vital evidence was disregarded and the matter is remitted, the arbitral tribunal would have no choice but to consider such vital evidence and appraise it with a view to justify the award. In both these illustrations, irreparable prejudice would be caused to the party assailing the award because such party would effectively be a mute spectator while the award is re-written in a manner which would render its challenge futile. Indeed, a contention that such a course would be contrary to public policy would not be devoid of merit. If the same illustration is tweaked and the fact situation is that the arbitral tribunal had dealt with vital evidence but its reasons for assigning little or no materiality or weight thereto are not fully articulated or difficult to discern, the court



advisable to attempt an exhaustive catalogue of situations in which remission is appropriate, a not-too-difficult-to-apply general principle would be to resort to Section 34(4) only where the court perceives the possibility of the arbitral tribunal eliminating defects in the award by supplementing the award in ways that do not, in substance, change the award or the basis thereof. To put it differently, Section 34(4) provides for a curative alternative subject to satisfaction of the above test. These principles should be applied to the case at hand.

9. In this case, the Arbitral Tribunal drew inspiration from the Rent Control Act in order to fix the fair market rent for purposes of determining compensation. The said finding is assailed by the respondent herein on the grounds that the relevant enactment was repealed and that the formula prescribed therein should not, in any case, be applied for determining compensation in the present dispute. If the application for remission is allowed, can the Arbitral Tribunal change the basis on which compensation was determined by adopting a different method or formula? The unequivocal answer is that it cannot do so inasmuch as it would tantamount to re-writing the Award. Instead, as regards this ground of challenge, in the Section 34 petition, this Court should decide as to whether the adoption of such formula would render the award patently illegal or contrary to public



policy. The fate of the award would turn on such determination and not on the remission. As pointed out by the respondent, the applicants have also failed to set out the grounds on which remission is sought. Therefore, this is not an appropriate case to exercise the power of remission.

10. For reasons set out above, Application No.79 of 2022 is dismissed without any order as to costs.

Sd/.S.K.R.J.
19.01.2022

//Certified to be a true copy//

Dated at Madras this the day of 2022.

SU./21.01.2022

COURT OFFICER(O.S.)

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