



O.S.A.No.354 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:05.04.2023

Delivered on: 24.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

O.S.A.No.354 of 2008

&

C.M.P.No.1877 of 2008

1.R.A.Srinivasan (died)

2.R.A.Sundarraaj

3.Nandhini Srinivasan

4.R.A.Narayan

5.R.A.Srinivasan
(3 to 5 rep. by their agent
R.A.Srinivasan)

6.Sandhya Sundarraaj
by her agent R.A.Sundarraaj

7.Minor R.A.Arvind
by father and natural guardian R.A.Sundarraaj

8.Leela S.Iyengar



O.S.A.No.354 of 2008

9.Vijayalakshmi

A9 is impleaded as per the order
of this Court dated 14.12.2016
made in C.M.P.No.19870 of 2016

10. Susheela Sundaraj

A10 brought on records as legal heir of the
second appellant vide Court order
dated 29.03.2023 made in
C.M.P.No.4462 of 20121
in OSA .No.354 of 2008

.. Appellants

Vs.

1.Kishorekumar Gokaldas and or
Kishore Gokaldas (HUF)

2.S.A.P.Alvares

3.T.S.Sridharan

.. Respondents

Prayer:- Original Side Appeal filed under Order 36 Rule 1 of the Original
side Rules read with Clause 15 of Letters Patent against the judgment and
decree dated 16.06.2003 made in O.P.No.330 of 1996 and to allow this
Appeal.

For Appellants : Mr.P.R.Raman, Senior Counsel
for
Ms.S.P.Aarthi

For Respondents : Mr.R.Parthasarathy, Senior Counsel
for
Mr.K.Chandrasekaran for R1
R2 and 3-Given up



WEB COPY



O.S.A.No.354 of 2008

JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

This is a very unfortunate case where the parties, having proceeded under the old Arbitration Act of 1940, are still battling out their disputes in the corridors of Courts.

2. The admitted facts which are not in dispute are culled out hereunder:

The appellants, eight in number, as owners of adjoining properties, offered their respective properties for joint development with the 1st respondent herein, a property developer. Interestingly, only the respondents 3 to 7 entered into a written working arrangement with the respondent. In so far as appellants 1, 2 and 8, admittedly there was no written agreement between the parties and only an oral arrangement was pleaded by the appellants.

3. The memorandum of working arrangement dated 08.12.1987 between the appellants 3 to 7 and the 1st respondent set out various terms of joint development, including sharing of built up area in the proposed



O.S.A.No.354 of 2008

WEB COPY

multi storey building. The parties, under the said agreement also agreed to refer any difference or disputes between them, pertaining to the project or the agreements to be executed in respect thereof, to arbitration and the arbitrators viz., partners of M/s.Pais, Lobo and Alvares, Advocates, Madras were also specifically named therein. The said memorandum of working arrangement is not in dispute. It is relevant to note that there is absolutely no reference to the appellants 1,2 and 8 or their property in the said memorandum of working arrangement.

4. Despite the above admitted position, disputes arose consequent upon which the appellants, as claimants projected their claim before the named arbitrators under the memorandum of working arrangement dated 08.12.1987.

5. The 1st respondent filed a counter claim to the said claim made by the appellants. The appellants also filed their rejoinder. The named arbitrators proceeded to pass an award on 03.06.1995, allowing certain claims in favour of the appellants 3 to 7, certain claims in favour of appellants 1,2 and 8 and also a portion of the counter claim in favour of the



O.S.A.No.354 of 2008

WEB COPY

1st respondent. It is to be noted that the parties did not choose to lead any oral evidence and on the strength of the respective pleadings and documents filed by the parties, the arbitrators proceeded to dispose of the claim petition, together with the counter claim filed by the respondent.

6. On considering the respective cases put forth by the parties by way of claim and counter claim the arbitrators framed 17 issues, which are extracted here under:

1. Whether the Claimants are entitled to the built up areas claimed by them?

2. Whether Leela S.lyengar one of the Claimants has authorised anybody to represent her in the proceedings?

3. Whether the Opposite Party is bound to allot built up area in terms of the Memorandum of understanding?

3(a). Whether the Opposite Party can be permitted to deviate from the Memorandum of Working Arrangement and the permission obtained from the Court in O.P.No.133 of 1989 and to allot built up area according to the area shown in the Patta?

4. Whether R.A.Srinivasan, R.A.Sundarraaj and Leela S.lyengar, three of the claimants have not entered into an Agreement with the Opposite Party to sell the unutilised part of the FSI in their individual plots of land resulting in sanctioning of an additional FSI of 19180 sq.ft. of built up area marked as second FSI in the Opposite Party's reply claim statement?

4(a) Or Whether R.A Srinivasan,R.A. Sundarraaj and Leela S.lyengar Claimants are entitled to an admitted additional FSI as set out in the Claim?

4(b) Whether or not saleable constructed built up area should be the basis for calculating allotment to



WEB COPY



O.S.A.No.354 of 2008

each party to the agreement dated 8.12.1987?

5. Whether or not the land measurements taken by the Architects. M/s.Raj& Associates calculated as per Simpsons's Rule is accepted to the MMDA and Town Planning Authorities for sanctioning of FSI for the construction on the disputed plot?

6. Whether the clarification for computation of FSI issued by the MMDA to the Opposite Party should not be the basis for resolving the dispute in the Arbitration?

7. Whether the building plan sanction for the construction made on the disputed plot is based on the area as found in the (a) Patta (b) Title Documents or (c) Actual measurements for determining Floor Space Index as per rules and regulations of the MMDA? and whether fresh Pattas are required?

8. Whether the Opposite Party has committed breach of the Memorandum of Understanding? And has committed a fraud on the minors as alleged by them?

9. Whether the claim made by the Opposite Party is maintainable?

10. Whether the Claimants had not delayed the construction project by 21 ½ months thereby causing financial loss and damage to the Opposite Party?

11. Whether the Claimants have not suppressed/omitted production of certain documents and receipts regarding their claim in the Arbitration in order to present a fraudulent picture to their advantage?

12. Whether or not the Claimants have substantiated their claim of extra extent of 1934 sq.ft. of land in the disputed plot with authentic Government records as to their titled submitted to the Arbitrators?

13. Whether or not the Claimants are entitled to the Claim of Rs. 1,04,74,242/- with costs?

14. Whether the Opposite Party is entitled to the claim of Rs.4,41,42,077/-?

15. Are the claimants are entitled to 32.5% of 2nd FSI or to 19.5% only?

16. Whether or not Claimants 3 to 7 should be allotted a further built up area of 1175 sq.ft.?



O.S.A.No.354 of 2008

WEB COPY

17. To what other reliefs are the Claimants entitled?

7. Answering the said issues, as already indicated, an award came to be passed, not only in favour of the appellants partly but also in favour of the respondent partly in so far as the counter claim.

8. The 1st respondent, aggrieved by the award passed, chose to file O.P.No.330 of 996 before this Court U/s. 30 and 33 of the Arbitration Act, 1940. It was the specific case of the 1st respondent in the said O.P challenging the award that there was no written agreement between the appellants 1,2 and 8 and the 1st respondent in the first place, leave alone an agreement to refer disputes or differences to arbitration and in such circumstances the arbitrators were clearly in error in taking cognizance of the claims of appellants 1,2 and 8 and proceeding to pass an award in their favour. The 1st respondent also contended that the Arbitrators were the lawyers of the land owner viz., the appellants and they exhibited clear bias which again necessitates the award to be set aside. The 1st respondent raised other factual issues, challenging the award passed by the named arbitrators.



O.S.A.No.354 of 2008

WEB COPY

9. The learned Single Judge after hearing the arguments of the parties, held that the arbitrators ought not to have participated in the proceedings as arbitrators even though they had been named as arbitrators. The learned Single Judge further held that in the absence of a written agreement to refer disputes between the appellants 1,2 and 8 and the 1st respondent, there could not have been any valid arbitration proceedings as between appellants 1,2 and 8 and the 1st respondent. The learned Single Judge allowed the Original Petition giving liberty to the appellants 1, 2 and 8 to seek appropriate relief before the competent Civil Court and in so far as the appellants 3 to 7 giving them liberty to approach the competent Court for appointment of an arbitrator or arbitrators to decide their disputes afresh.

10. Aggrieved by the setting aside of the award by the learned Single Judge, the appellants are before this Court. The grounds of challenge are multifold and are summarily extracted hereunder:

a. The question of arbitrators not being competent to act as arbitrators or as whether there was any bias were never raised before the award came to be passed and for the first time only at the time of filing O.P.No.330 of 1996, they came to be raised and therefore the award ought not have to



O.S.A.No.354 of 2008

been set aside on this ground.

WEB COPY

b. The reference of disputes pertaining to appellants 1,2 and 8 and the 1st respondent was also never challenged by the respondent and infact the parties had clearly submitted to the jurisdiction of the arbitrators. Therefore, the learned Single Judge erred in holding that the arbitrators has no jurisdiction to entertain the disputes between appellants 1,2 and 8 and the 1st respondent, especially in the absence of a written agreement to such effect.

c. The learned Judge erred in holding that the Arbitrators had enlarged the scope of arbitration.

d. In so far as the bias, it is the case of the appellants that the arbitration proceedings spread over two years and about 25 hearings and never, at any relevant point of time, the 1st respondent raised the issue of bias.

11. Heard Mr.P.R.Raman, learned Senior Counsel for Ms.S.P.Aarthi, for the appellants and Mr.R.Parthasarathy, learned Senior Counsel for Mr.K.Chandrasekaran for the 1st respondent.

12. As already mentioned in the very beginning of this judgment, the present proceedings arise under the old Arbitration Act of 1940 which has



O.S.A.No.354 of 2008

WEB COPY

already been long over shadowed by Arbitration Act of 1996 and Act 3 of 2021. The very purpose of parties resorting to alternate dispute resolution is to gain considerable time in such process. Infact, the very objects of Arbitration Act, 1940 as well as the subsequent Act of 1996 are that it provides an alternate and efficacious as well as speedy remedy to parties who agree to refer their disputes to arbitration. The arbitration Act of 1940 was holding field until the 1996 Act came into force on 22.08.1996. Under both the Acts, substantially the procedure to be adopted is more or less similar. Under the old Act an award could be challenged only under Sections 30 and 33. However, under the new Act of 1996, an award could be challenged under Section 34. Under the new Act an appeal is specifically provided as against an order passed under Section 34 of the Act. However, under the 1940 Act there is no specific provision pertaining to an appeal as against an order passed under Sections 30 ad 33, excepting Section 39 which provides for appealable orders unlike sec. 34 of 1996 Act which specifically spells out circumstances under which an award may be set aside. Sec.39 of 1940 Act merely provides for an appeal being maintainable. Therefore, it is to be fundamentally understood that the scope of an appeal under the Arbitration Act of 1940 is clearly different



O.S.A.No.354 of 2008

from the procedure contemplated under the 1996 Act. Keeping in mind the above, this Court having heard the respective rival submissions made by the respective learned Senior Counsel on either side proceeds to formulate the following points:

1) Whether the award in favour of the appellants 1, 2 and 8 is vitiated for want of a written agreement for Arbitration?

2) Whether the award passed by the arbitrators is liable to be set aside on the ground of bias exhibited by the arbitrators who ought not to have accepted to arbitrate the disputes in view of their relationship to the parties especially the claimants namely lawyer and client?

3) Whether the Arbitrators committed an error of jurisdiction and exceeded their authority?

13. Learned Senior counsel appearing for the appellants, Mr.P.R.Raman, would submit that the respondent did not take up the objection of jurisdiction at the earliest point of time and having participated in the arbitration proceedings, it was not open to the respondent to turn around and take a plea with regard to maintainability of the very arbitration proceedings, that too after suffering an award. Learned



O.S.A.No.354 of 2008

WEB COPY

senior counsel would also take us through the various portions of the award and justify the findings rendered by the arbitrators. Learned senior counsel would state that there was no bias at all since both the parties agreed to refer their dispute to be decided by the arbitrators, knowing fully well of the contractual relationship between the arbitrators and the claimants. Moreover, according to Learned senior counsel, it was agreed by both the parties that no oral evidence would be let in by any of them and the arbitration would proceed on the basis of available documents produced by the respective parties. He would also rely on the following decisions:-

1. *Waverly Jute Mills & ors Vs. Raymon &Co & other* reported in *AIR 1963 SC 90*;

2. *Union of India Vs Salween Timber Construction (India) and ors* reported in *AIR 1969 SC 488*;

3. *Prasun Roy Vs Calcutta Metropolitan Development Authority & ors* reported in *AIR 1988 SC 205*;

4. *Reliance Cellulose Products Ltd Vs Oil Natural Gas Corporation Ltd* reported in *(2018) 9 SCC 266* in support of his contentions.



O.S.A.No.354 of 2008

WEB COPY

14. Learned senior counsel would also contend that the Learned Single Judge ought not have interfered with the reasoned award of the arbitrators and he prayed for the appeal being allowed.

15. Per contra, Learned senior counsel, Mr.R.Parthasarathy, appearing for the respondents would state that the arbitrators were acting as lawyers for the claimants and as such they ought to have wriggled out of the proceedings, without venturing to act as an arbitrators, leave alone hear and decide the matter. Learned senior counsel would also point out various instances which according to him would clearly exhibit bias on the part of the arbitrators, which would vitiate the entire award itself. Learned senior counsel would also state that objections to the claim could be threefold, namely, (i) pecuniary, (ii) territorial and (iii) relating to subject matter of dispute itself and when it related to the very subject matter of the dispute between the parties, he would state that consent was immaterial and despite the respondents participating in the proceedings, the award would still be invalid. Learned senior counsel would also point out two portions of the award which according to the respondents clearly brought out the factual errors committed by the arbitrators and though such errors may



O.S.A.No.354 of 2008

WEB COPY

have been with regard to the interpretation of the document, yet when the very concept of joint venture contract being a bundle of contractual terms and conditions between two parties, there could be no charity shown by one party to the other and the arbitrators, unfortunately according to the learned senior counsel, committed a jurisdictional error and acted beyond the arbitration clause available in respect of some of the claimants. In so far as appellants 1, 2 and 8, learned senior counsel would state that, straightaway, in the absence of a written arbitration agreement, the award in their favour was wholly unjustified and unsustainable. Learned senior counsel would also rely on

1. *Associated Engineering & Co Vs. Government of Andra Pradesh & another* reported in (1991) 4 SCC 93.

2. *Atlanta Limited Vs Union of India* reported in (2022) 3 SCC 739.

3. *M/s/ Tribol Engineering Private Limited vs Indian Oil Corporation* reported in 1998 (3) CTC 385 to fortify his contentions with regard to the maintainability of the arbitration proceedings and as well as bias warranting setting aside of the award.

16. Having heard the Learned senior counsel appearing for the parties, before proceeding to decide the points formulated, we would refer



O.S.A.No.354 of 2008

WEB COPY

to certain provisions of the Arbitration Act, 1940 (1940 Act).

“ Section 2(a) “arbitration agreement” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

“ Section 15 - Power of Court to modify award.

The Court may by order modify or correct an award-

(a)where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b)where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c)where the award contains a clerical mistake or an error arising from an accidental slip or omission.”

“ Section 30- Grounds for setting aside award.

An award shall not be set aside except on one or more of the following grounds, namely:-

(a)that an arbitrator or umpire has misconducted himself or the proceedings

(b)that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;



WEB COPY



O.S.A.No.354 of 2008

(c)that an award has been improperly procured or is otherwise invalid.”

“ Section 33 Arbitration agreement or award to be contested by application.

Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.”

“ Section 39 Appealable orders.

(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:-

An order-

- (i)superseding an arbitration;*
- (ii)on an award stated in the form of a special case;*
- (iii)modifying or correcting an award;*
- (iv)filing or refusing to file an arbitration*



O.S.A.No.354 of 2008

agreement;

*(v)staying or refusing to stay legal proceedings
where there is an arbitration agreement;*

(vi) setting aside or refusing to set aside an award;

*Provided that the provisions of this section shall not
apply to any order passed by a Small*

Cause Court.

*(2) No second appeal shall lie from an order passed
in appeal under this section, but nothing in this
section shall affect or take away any right to
appeal to the Supreme Court.”*

17. Learned senior counsel, Mr.R.Parthasarathy, would harp on the definition of arbitration agreement under Section 2(a) extracted hereinabove and would state that there can be no substitute for a written agreement as the phraseology in the said section was clear and certain to the effect that only a written agreement was contemplated. He would also draw our attention to the provisions of the Arbitration and Conciliation Act, 1996 (the 1996 Act), namely Section 7 where several instances have been specifically included to mean an arbitration agreement. For example, exchange of letters, a clause in a contract. He would also refer to Section 7(1) which does not speak about a written agreement unlike Section 2(a) of the 1940 Act. In this backdrop, we have to decide the validity of the



O.S.A.No.354 of 2008

WEB COPY

arbitration proceedings, especially in so far as appellants 1,2 and 8 are concerned in respect of whom, admittedly there was no arbitration agreement. It is an admitted fact that the 1st respondent approached the appellants 3 to 7 who were owning approximated 6 grounds and 2262 sq.ft at D.No.58, McNichols Road, Chetpet, Chennai – 600 031 with a proposal for the joint development of the said property. It is not in dispute that in respect of this property, the parties entered into a memorandum of working arrangement and leave and license agreement under which the 1st respondent would be entitled to 60.5% of the proposed built-up area in the construction to be put up and the appellants 3 to 7 would be entitled to the remaining 39.5% of the total built-up area. Thereafter, the 1st respondent approached the appellants 1,2 and 8 to transfer the available Floor Space Index (FSI) in their property, D.No.59&60, McNichols Road, Chetpet, Chennai – 600 031 and No.66 Pachaippas College Hostel Road which would enable additional construction being put up at D.No.58, McNichols Road, Chetpet, Chennai – 600 031. It was agreed that additional FSI would be shared by the appellants 1,2 and 8 and the 1st respondent in the ratio 25% to appellants 1,2,8 and 75% to the 1st respondent. Construction was put up by the 1st respondent and it is the case of the appellants that in so far



O.S.A.No.354 of 2008

WEB COPY

appellants 3 to 7 there was not only delay in completing the project reduced area was alone offered to them as against the originally agreed ratio of 39.5% of built-up area. In so far as appellants 1, 2, 8, it was their grievance that 1st respondent neither gave them any area in form of the constructed portions nor any compensation in so far as the land forgone by them to enable additional FSI to be obtained Flat No.58, McNichols Road.

18. It is seen from the records that the arbitration proceedings went on for over two years and finally, in and by award dated 30.06.1995, the arbitrators held that the appellants 3 to 7 were entitled to Rs.11,37,369/-; appellants 1,2 and 8 were entitled to Rs.81,80,474/- and in respect of a counter claim made by the 1st respondent a sum of Rs.7,75,549/- was awarded in favour of the 1st respondent.

19. The 1st respondent filed O.P.No.330 of 1996 before the learned Single Judge of this Court under Sections 30 and 33 of the 1940 Act on the grounds that the arbitrators being advocates for the claimants ought not to have accepted to arbitrate in the first place; the arbitrators virtually represented the claimants; the arbitrators have not considered the specific



O.S.A.No.354 of 2008

contentions raised by the 1st respondent regarding the claimants taking the expensive flats, leaving the lower priced flats to the 1st respondent which resulted in monetary loss to the 1st respondent; several claims of the 1st respondent were rejected on the unreasonable grounds; the award of interest at 24% p.a was unfounded without any basis.

20. In order to adjudicate the first point for determination, namely, the absence of the written arbitration agreement between appellants 1,2,8 and 1st respondent, some of the grounds that were raised by the 1st respondents in O.P.No.330 of 1996 assume great relevance and they are extracted hereunder:

“13. The Arbitrators failed to take into account that the Respondents 1 to 8 are eligible for 39.5% for the built up area for the Ground + 3 storeys only and for the Mezanine floor, they are entitled to only 25% under clause 5 (20 of the Memorandum of Working Arrangement. This has not been mentioned anywhere in the award.

14. The Arbitrators failed to take into consideration with regard to the



WEB COPY



O.S.A.No.354 of 2008

oral agreement between the petitioner and the Respondents 1,2 and 8 that for the additional FSI area provided by them, the Petitioner agreed to allot only 19.75% built up area, proportionate to the additional FSI area transferred by them and the Arbitrators have erred in allotting more area for them.

21. The Arbitrators erred in rejecting the claim of Rs.9,70,000/- paid by the Petitioner to Respondents 1 to 8, on unreasonable ground, even though the payment was not denied and is supported by documents.

24. With regard to the Award for the Respondents 1 to 8 for their claim, item (a) has to be rejected in limine, as the same being towards the alleged 'shortfall area'. As stated supra, there is no shortfall in the area. For the claims (c) & (d), by adding the area of the adjoining property, being the properties of Respondents 1,2 & 3, extra FSI was made available by the Petitioner's action and but for the re-constitution, both the properties would have lost more space in respective premises and hence, actually the entire additional FSI area should be allotted in favour of the Petitioner. In any event, the Respondents 1,2 & 8 are not entitled for more than 19.75% over the same. Thus the award of a built up area of 7481 sq.ft towards extra



WEB COPY



O.S.A.No.354 of 2008

*FSI is exhorbitant and that too at Rs.450/- per sq.ft.
is not sustainable. The interest is allowed at 24%
p.a. is also not sustainable.”*

21. From the above specific grounds which have been taken before the learned Single Judge, it is seen that upto the said point of the filing of the O.P.No.330 of 1996 for setting aside the award, the 1st respondent has not even once raised an eyebrow or even a whisper that in absence of a written agreement between the appellants 1,2,8 and the 1st respondent, the entire arbitration proceedings stood vitiated. Moreover, it is needless to state that by examining all the grounds raised in the said O.P., we do not find a single ground raised by the 1st respondent challenging the award on the ground that there could be no arbitration proceedings at all between appellant 1,2,8 and 1st respondent. Further, on going through the entire grounds raised in O.P.No.330 of 1996 we are able to see that the award was primarily attacked only on the ground of being unilateral, biased in favour of the claimants and also on the ground that the arbitrators had vested interest in the claimants, who were admittedly their clients. The said O.P. filed in the year 1996 was taken up for final disposal in the year 2003 and only at that point of time, the 1st respondent appears to have worked



O.S.A.No.354 of 2008

WEB COPY

upon a new strategy and canvassed the issue of regarding the issue reference of disputes between appellants 1,2,8 on one side and 1st respondent on the other side to Arbitration.

22. First and foremost, we would rely on the conduct of the parties to the proceedings. Though the appellants 1,2 and 8 did not have any written agreement with the 1st respondent, it can be seen from the manner in which the project went ahead that there appears to have certainly been an oral arrangement between appellants 1, 2, 8 and 1st respondent as the properties of appellants 1, 2 and 8 was put to use by the 1st respondent to achieve additional FSI in the property of the appellants 3 to 7. Though it the case of the appellants 1, 2, 8 that the 1st respondent had agreed to give 39.5% to appellants 3 to 7 and 32.5% to appellants 1,2 and 8 and in the counter claim made by the 1st respondent the share of appellants 3 to 7 was admitted but however in so far as appellants 1,2 and 8 it was only agreed that they would be entitled to 19.75% of the construction area and not 32.5%. In fact in the said counter claim, the 1st respondent had also provided calculations, working out the share of the appellants referring to the said 39.5% to the appellants 3 to 7 and 19.75% of appellants 1,2, 8.



O.S.A.No.354 of 2008

WEB COPY

Interestingly, the 1st respondent while seeking for dismissal for entire claim of the appellants, prayed for a sum of Rs.4,41,42,077/- to be paid by the appellants and for costs. We have to bear in mind that the said counter claim was made way back in the year 1993/1994. Even in the said counter claim, the 1st respondent had not protested with regard to the maintainability of the claim by the appellants 1,2 and 8. On the contrary, the 1st respondent has filed a counter claim not only against the appellants 3 to 7, but also against appellants 1, 2 and 8. It is to be borne in mind that arbitration itself is an Alternative Dispute Resolution mechanism in terms of which the parties agree to resolve disputes outside court, by submitting their disputes to a common person who would act as arbitrator and give his final decision, which would bind both the parties. In this backdrop, the conduct of the 1st respondent in accepting the named arbitrators to act as arbitrators to decide the disputes not only with regard to appellants 3 to 7 and but also against appellant 1,2 and 8; 1st respondent having participated in the arbitration proceedings; the 1st respondent making a specific counter claim against the appellants 1,2, and 8; the 1st respondent succeeding to a portion of his counter claim; the 1st respondent seeking to set aside the award of the arbitrator in so far as the monetary claim being awarded as



O.S.A.No.354 of 2008

WEB COPY

against the appellants 1, 2 and 8 would all clearly go to show that despite the absence of a written agreement to refer the disputes to arbitration, the 1st respondent and the appellants 1,2 and 8 have consciously agreed to have their disputes also resolved by the process of the arbitration along with the disputes between the appellants 3 to 7 and the 1st respondent.

23. The Hon'ble Supreme Court in *Waverly Jute Mill*'s case held that

“Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction. But in such a case there is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrators, and in that event the proceedings thereafter before them might be upheld as referable to that agreement, and the award will not be open to attack as without jurisdiction. But it will make all the difference in



WEB COPY



O.S.A.No.354 of 2008

the result whether the parties have entered into an arbitration agreement as defined in Section 2(a) of the Arbitration Act or have merely taken steps in the conduct of proceedings assumed or believed to be valid. In the former case the award will be valid; in the latter, a nullity.”

24. Testing the facts of the present case in the light of decision of the Hon'ble Supreme Court, we find that the conduct of the parties, especially the 1st respondent submitting himself to the jurisdiction of the arbitrators despite the fact that there was no written agreement in so far as the appellants 1,2,8 were concerned and the further fact that 1st respondent had also made a counter claim against all the appellants including appellants 1, 2, 8 would clearly indicate that even pending adjudication before the arbitrators, the parties, by their implied conduct had referred all the disputes to arbitration, which would not be open to attack as one without jurisdiction. Though, the Learned senior counsel for the 1st respondent would also rely on the very same decision and contend that admittedly there was no fresh agreement in the instant case and in and whereby the parties referred the disputes to the arbitration, from the express as well as the implied conduct of the 1st respondent in choosing to not dispute the



O.S.A.No.354 of 2008

WEB COPY

maintainability of the claim of the appellants 1,2,8 but also by choosing to file a counter claim to the said claim, it would only bring out the intention of the parties to refer the disputes to the arbitration.

25. In *Salween Timber Construction*'s case, the Hon'ble Supreme Court, deciding an arbitration case arising under the 1940 Act held that when there is no contention raised by either of the parties that there was no contract entered into at all and that it was void ab initio, the arbitrator had jurisdiction to decide the matter referred to him.

26. In *N.Chellapan*'s case, where the Hon'ble Supreme Court relied on the decision of the Privy *Council in Chowdhri Murtaza Hossin Vs Mussumat Bibi Baciwnnissa 3 I.A.209*, the Privy Council held that

“On the whole, therefore, their Lordships think that that appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable



WEB COPY



O.S.A.No.354 of 2008

to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.”

27. The Hon’ble Supreme Court held that there was no room left for doubt that it was a consent order and the board had participated in the proceedings without any demur to the jurisdiction of the umpire and the only inference from such conduct on the part of the board would be that no objection to the order revoking the authority of the arbitrators in the said case and ultimately held that the acquiescence precluded a challenge to the jurisdiction of the umpire.

28. In **Prasun Roy**’s case the Hon’ble Supreme Court held, rejecting the allegation of bias, that a party shall not be allowed to blow hot and cold simultaneously and long participation and acquiescence would preclude such a party from contending that the proceedings were without jurisdiction. The Hon’ble Supreme Court place reliance on **Jupiter General Insurance. Co. Ltd**’s case where the Calcutta High Court observed that the courts do not favour a contention and conduct of the



O.S.A.No.354 of 2008

WEB COPY

applicant who participated in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees the award had gone against him, he comes forward to challenge the whole of the arbitration proceedings as without jurisdiction on the ground of a known disability to the party. Reference was also made to ***Russell on Law of Arbitration, 15th edition***, where Russell states that

“Although a party may by reason of some disability be legally incapable of submitting matters to arbitration that fact is not one that can be raised as a ground for disputing the award by other parties to a reference who were aware of the disability. If one of the parties is incapable the objection should be taken to the submission. A party will not be permitted to lie by & join in the submission and then if it suits its purpose attack the award on the ground. The presumption in the absence of proof to the contrary will be that the party complaining was aware of the disability when the submission was made.”

29. In ***Reliance Cellulose***’s case, the Hon’ble Supreme Court dealt with the award of interest under the 1940 Act, the absence of an express bar under the agreement and hold the arbitrator had jurisdiction to award



O.S.A.No.354 of 2008

WEB COPY

interest for three periods namely pre-reference, pendent lite as well future interest noticing the major departure from the said position under the 1940 Act qua 1996 Act.

30. Per contra, the Learned Senior Counsel for the 1st respondent also relied on few decisions. We have gone through the said decisions in *Associated Engineering's* case. The Hon'ble Supreme Court had held that the arbitrator cannot act arbitrarily, irrational, capriciously or independently of the contract and when an arbitrator acts manifest disregard to the contract, it is an act without jurisdiction and it would tantamount to a malafide action and committing misconduct. It is also been held in the said decision that the arbitrator is bound by the contract and he cannot travel outside his bounds and if the arbitrator exceeds his jurisdiction by doing so then the award is liable to be set aside.

31. In *Tribol's* case, the Division Bench of this Court held that arbitrator cannot widen his jurisdiction and decide the questions not referred to him by the parties. The Division Bench of this court also discussed the question of bias and whether mere participation would



O.S.A.No.354 of 2008

WEB COPY

disentitle a party to contend bias.

32. In *Chandu Construction*'s case, the Hon'ble Supreme Court held that under Section 30 of 1940 Act the jurisdiction of court to set aside the award is limited and one of the grounds for interference is misconduct of the arbitrator and arbitrator being a creature of agreement between the parties, he has to operate within the four corners of the agreement, and if the arbitrator wanders outside the contract, he would be committing a jurisdictional error.

33. In *Atlanta limited*'s case, the Hon'ble Supreme Court held that the court does not sit in appeal to an award of an arbitrator and only grounds on which a award can be challenged are those specified in Sections 30 and 33 of 1940 Act. The Hon'ble Supreme Court further held that the arbitrator has taken a plausible view, which may be a possible view and then merely because a different view from the award was possible based on application of the same evidence, then it would not be a ground to interfere with the award.



O.S.A.No.354 of 2008

WEB COPY

34. The facts in the various cases discussed hereinabove facts are entirely on different footing and therefore the ratio laid down by the Hon'ble Supreme Court as well as Division Bench of this Court are proposition for such facts. However, already discussed in detail, this is a peculiar case where the 1st respondent has consciously participated in the arbitration proceedings by not merely defending the claim made against him by the appellants, but by also making a counter claim against them. Further, we have also seen that even in the grounds of challenge to the award, it was only bias that has been raised as the principal ground of attack and not a single ground has been taken that a jurisdictional error was committed by the arbitrators.

35. One another reason which strengthens our view regarding the maintainability of the arbitration proceedings between appellants 1,2,8 and the 1st respondent is that the contract between appellants 1,2,8 and the 1st respondent, though it may be oral, had a direct link and overlap with the written contract between appellants 3 to 7 and the 1st respondent. The factum of appellants 1,2 and 8 agreeing to forego a portion of their FSI in favour of the appellant 3 to 7 and the 1st respondent in order to achieve



O.S.A.No.354 of 2008

WEB COPY

additional FSI property in the belonging to appellants 3 to 7 would therefore necessarily bring into play the arrangement between the appellant 1, 2, 8 and 1st respondent. Therefore, it cannot be treated as an independent contract or agreement and it was at best nothing but an ancillary arrangement to aid the working arrangement between the appellants 3 to 7 and the 1st respondent. Even the nature of the arrangement only points to the fact that the agreement between appellants 1, 2, 8 and 1st respondent cannot survive independently and was wholly dependent on the agreement between the appellants 3 to 7 and 1st respondent. Thus, in such view of the matter, we are unable to hold that because there was no written agreement between appellant 1,2,8 and the 1st respondent, the award passed has to be set aside. Only being conscious of these factors, the 1st respondent never chose to dispute the maintainability of the claim by appellants 1,2,8 as already discussed. The very fact that the 1st respondent made a whopping counter claim of Rs.4,41,42,077/- only goes to show that there was never a trace of doubt in the mind of 1st respondent that the dispute with regard to appellant 1,2 and 8 can be delinked and thrown out of the arbitration process.



O.S.A.No.354 of 2008

WEB COPY

36. Though Section 2(a) mandates a written agreement for submitting present or future differences to arbitration, from the ratio laid down by the Hon'ble Supreme Court in the cases discussed hereinabove and also conscious of the fact that even the legislature has been alive to difficulties and restrictions arising out of a necessity of such written agreements as a pre-condition for referring disputes to arbitration, while enacting 1996 Act the legislature had been liberal. While defining an arbitration agreement and the restrictive and claustrophobic definition to the arbitration agreement under the 1940 Act has been greatly expanded in Section 7 of 1996 Act. Arbitration law is primarily a procedural law to facilitate the parties to resolve disputes by avoiding the long drawn process of regular court litigation. Even viewed from this angle, the Hon'ble Supreme Court has time and again reiterated that the procedure is always a handmade of justice and doing substantial justice to the parties is the paramount goal of any court of law and while dispensing substantial justice, there are bound to be spokes in the wheel, especially technical objections being raised regarding the procedure facilitating justice delivery system. Bearing these in mind and especially in the context of the present case where the parties have been litigating right from 1993 onwards, it would be highly



O.S.A.No.354 of 2008

WEB COPY

undesirable to relegate them to fresh arbitration proceedings or to regular proceedings before the competent civil court. It is also very unfortunate to notice that the building which was constructed by the 1st respondent in a joint venture basis has also almost outlived his age and has reached a stage where admitting parties were pushed have to demolition and reconstruction in the very near future. However, the parties are sadly awaiting a final decision of the court with regard to the rival contractual obligations and consequent reliefs which stem from the very construction of the said building decades ago. We answer point No.1 in favour of the appellants.

37. The Learned Single Judge has gone into minute factual details like the area of land available and allotted to the parties, percentage of built-up area allotted to the parties, permissible FSI etc. The Learned Single Judge ought to have been conscious of the facts he was not sitting on an appeal against the award passed by the arbitrators. In so far as the factual findings arrived at by the arbitrators, the Learned Single Judge ought not have interfered under Section 30 and 33 of 1940 Act. With regard to bias, Learned Single Judge while holding that the arbitrators have acted as lawyers for the claimants, the Learned Single Judge had failed to



O.S.A.No.354 of 2008

WEB COPY

take note of the fact that this aspect of bias was raised belatedly, only after the 1st respondent suffered an award. Infact, the Learned Single Judge failed to see that the arbitration proceedings were pending for over two years and the 1st respondent had voluntarily participated in the same including making a counter claim against the appellants. The course adopted by the arbitrators in proceeding to decide the claim and counter claim based on the documents produced by the parties was also accepted by the 1st respondent. It is not as if the arbitrators have rejected the counter claim of the 1st respondent and allowed the claim made by the appellant in toto. Portions of the claim made by the appellant have been disallowed and a portion of the counter claim made by the 1st respondent was also allowed in its favour. Thus, we do not see bias playing any role in the arbitration proceeding and it is clearly an afterthought and invention of the 1st respondent for the first time when he chose to file the O.P before the Learned Single Judge, attacking the claim on the ground of bias which cannot be countenanced. We accordingly answer the point Nos.2 and 3 in favour of the appellants.

38. In fine, we do not see any of the available grounds under Sections



O.S.A.No.354 of 2008

WEB COPY

30 & 33 of the 1940 Act to warrant setting aside of the award, and therefore the order of the Learned Single Judge allowing the O.P.No.330 of 1996 stating that there are grounds for interference under Section 30 and 33 of 1940 Act is set aside. Accordingly, the Original Side Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R.J) & (P.B.B.J)

.11.2023

Internet : Yes
Index:Yes/No
Speaking/Non-speaking order
Neutral Citation:Yes/No

To

1.The Sub Assistant Registrar (Original side)
High Court, Madras

2.The Section Officer
VR Section,
High Court, Madras

S.S.SUNDAR, J.,
and



WEB COPY



O.S.A.No.354 of 2008

P.B.BALAJI,J

kpr

Pre-delivery judgment in
O.S.A.No.354 of 2008

24.11.2023