IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	01.12.2022
Judgment pronounced on	31.01.2023

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

O.P.Nos.545 and 547 of 2020
and
O.A.No.65 of 2020
and
A.Nos.383, 2849 and 2855 of 2020

O.P.No.545 of 2020

1.Mrs.Tara Gulecha
2.Jinesh Kochar
3.Mrs.Rooprekha
4.Deepak Kochar
5.Jayesh Kochar ... Petitioners 1 to 5/Respondents 1 to 5
6.Jinesh Kochar
7.Mrs.Rooprekha ... Petitioners 6 & 7/Respondents 8 to 9
8.Deepak Kochar
9.Jayesh Kochar ...Petitioners 8 &9/Respondents 17 & 18

vs.

1.M/s.Idea Housing Corporation
A Registered Partnership Firm
Having its Registered Office at
1st Floor, 6/16,Bagvandas Street,
West Tambaram, Chennai – 600 045.
Rep. by its Partner
Mr.Shankar Babu ... 1st Respondent/Claimant

2.M/s.Anmol Housing Corporation
A Registered Partnership Firm,
having its office at
No.102, Lattice Bridge Road,
Adyar, Chennai – 600 020.
Rep. by its Partner and Power Agent
Mr.Alok Kumar Gulecha

3.Alok Kumar Gulechha
4.Jithendra
5.Utamchand
6.Ashok Kumar
7.Prakash Chand Sand
8.Dharam Chand Kochar
9.Arvind Kumar Gulecha
10.Mrs.D.Bhavana ... Respondents 2 to 10/Respondents 2 to 10

<u>O.P.No.547 of 2020</u>

1.M/s.Anmol Housing Corporation
A Registered Partnership Firm,
having its office at
No.102, Lattice Bridge Road,
Adyar, Chennai – 600 020.
Rep. by its Partner and Power Agent
Mr.Alok Kumar Gulechha

2.Mr.Alok Kumar Gulechha ... Petitioners/ Respondents 6 & 7

vs.

1.M/s.Idea Housing Corporation
A Registered Partnership Firm
Having its Registered Office at
1st Floor, 6/16,Bagvandas Street,
West Tambaram, Chennai – 600 045.
Rep. by its Partner
Mr.Shankar Babu ... 1st Respondent/Claimant

2.Mrs.Tara Gulechha
3.Jinesh Kochar
4.Mrs.Rooprekha
5.Deepak Kochar
6.Jayesh Kochar
Respondents 2 to 6 rep. by their
attorney Mr.Alok Kumar Gulechha and
Mr.K.Shankar Babu ... Respondents 2 to 6/1 to 5 Respondents

7.Jinesh Kochar
8.Mrs.Rooprekha
9.Jithendra
10.Utamchand(Deceased)
(Amended as per order dated 18.08.2021
in A.No.2821 of 2021)
11.Ashok Kumar
12.Prakash Chand Sand
13.Dharam Chand Kochar
14.Arvind Kumar Gulecha
15.Mrs.D.Bhavana
16.Deepak Kochar
17.Jayesh Kochar ...Respondents 7 to 17/Respondents 8 to 17

PRAYER IN O.P.NO.545 OF 2020: Petition filed under Section 34(1) of the Arbitration and Conciliation Act, 1996 and Section 2(1)(c)(vi) of the

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act,2015(Act 4 of 2016), pleased to set aside the Arbitral Award dated 13.11.2019 made by the Sole Arbitrator, Hon'ble Mr.Justice K.P.Sivasubramaniam(Retired) in the matter of Arbitration between M/s.Idea Housing Corporation and Ms.Tara Gulecha and 17 others.

PRAYER IN O.P.NO.547 OF 2020: Petition filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, pleased to set aside the impugned award of learned Sole Arbitrator dated 13.11.2019 allowing the claim petition and allow the counter claim filed by the first petitioner/6th respondent and for cost of the proceedings.

For Petitioners : Mr.M.S.Krishnan, Senior Advocate
for Mr.K.Ashok Kumar
(in O.P.No.545 of 2020)
Mrs.Chitra Sampath, Senior Advocate
for M/s.K.V.Bhashyam Chari
(Petitioners in O.P.No.547 of 2020 & Respondents 2 &3 in O.P.No.545 of 2020)

For Respondents : Mr.N.C.Ramesh, Senior Advocate
for M/s.K.Bijai Sundar
Mr.T.Sivaprakasam
Mr.G.Dhyaneshwar
(For R1 in both petitions)

Mr.S.Sivasankar
for Mr.N.Jayakumar
R- 4,6,8 to 10 in O.P.No.545 of 2020
R-9,11,13, to 15 in O.P.No.547/2020

COMMON ORDER

Mrs.Tara Gulecha, Mr.Jinesh Kochar, Mrs.Rooprekha, Mr.Deepak Kochar, Mr.Jayesh Kochar and a partnership firm called M/s.Anmol Housing Corporation (Anmol Housing) collectively own a large extent of land. They intended to develop a total extent of about 70,212 sq.ft. by constructing about 140 flats thereon. The construction was to be multi-storied. Initially, the land owners and Anmol Housing undertook such construction and about four floors consisting of about 80 flats were constructed. In order to proceed further with such construction, two agreements both dated 04.03.2011 (Exs. C46 and C47) were entered into by the owners of the relevant parcels of land with the Chennai Integrated Construction Company Private Limited(CICC). One agreement was styled as Memorandum of Agreement and was a project management consultant agreement and the other was styled as Agreement but was effectively a joint development agreement. In terms thereof, CICC was to undertake development and in relation thereto, payments were made by CICC, including as deposit, to the land owners and the land owners issued receipts. CICC could not continue the development. By mutual consent, both these agreements were cancelled by a cancellation deed dated 24.01.2016(Ex.C-2).

2. Thereafter, M/s.Idea Housing Corporation (Idea Housing), a registered partnership firm, entered into a Memorandum of Understanding(MoU) dated 06.02.2016 (Ex.C3) purportedly with Mrs.Tara Gulecha, Mr.Jinesh Kochar, Mrs.Rooprekha, Mr.Deepak Kochar, Mr.Jayesh Kochar and Anmol Housing. The said MoU was executed by Mr.Alok Kumar Gulecha for Anmol Housing and other owners. The said MoU related to the construction of a multi-storied residential complex on the Schedule 'B' property under the said MoU. Idea Housing was required to develop the property for the land owners. The said MoU provided for the payment of a sum of Rs.1.85 crore as caution deposit and a sum of Rs.3.50 crore by Idea Housing to the land owners towards purchase of 7,778 sq.ft. at the rate of Rs.4,500/- per sq.ft. and a further sum of Rs.1.10 crore towards purchase of 2750 sq.ft. at the rate of Rs.4,000/- per sq.ft. in the multi-storied building complex to be developed by Idea Housing. Clause 31 of the MoU provided for dispute resolution by arbitration. For the sake of ease of reference, throughout this order, the developer is referred to as Idea

Housing, the five individual landowners as the Individual Landowners, the land owning partnership firm as Anmol Housing and the other parties as alleged partners.

3. Upon disputes arising between the parties to the MoU, Idea Housing initiated arbitration proceedings. In the said arbitration proceedings, the following reliefs were prayed for: a declaration that the land owners breached the MoU; a declaration that the unilateral termination of the MoU dated 27.10.2016 by Anmol Housing was *ex facie* invalid; to direct the respondents therein to pay a sum of Rs.57,01,58,114/- to Idea Housing with interest thereon at 18% per annum from the date of the claim petition until realisation towards damages for breach of contract, breach of trust etc.; and for costs of the arbitration. Anmol Housing filed a statement of defence along with a counter claim. By way of counter claim, Anmol Housing claimed an aggregate sum of Rs.65,41,24,541/-. The aggregate counter claim consisted of a counter claim of Rs.39,18,74,725/- towards 31,163 sq.ft. of land which could not be utilized owing to the actions of the claimant; a sum of Rs.13,06,24,908/- towards mental agony; a sum of Rs.13,06,24,908/- towards loss of reputation and Rs.10,00,000/- as costs.

The Individual Landowners (respondents 1 to 5 in the arbitration) also filed a statement of defence refuting the averments in the statement of claims. Rejoinder statements were also filed upon receipt of the statement of defence.

4. The Arbitral Tribunal framed 13 issues on 04.08.2018. The claimant adduced evidence by examining Mr.Shankar Babu, Partner of Idea Housing, as C.W.1. Mr.S.Jayakumar was examined as C.W.2. Exs.C-1 to C-60 were marked on behalf of Idea Housing. Both C.W.1 and C.W.2 were cross examined by learned counsel for the respondents. On behalf of the respondents, Mrs.Tara Gulecha and Mr.Alok Kumar Gulecha were examined as R.W.1 and R.W.2, respectively. During the course of examination-in-chief of R.W.1 and R.W.2, Exs.R-1 to R-10 were exhibited. By Arbitral Award dated 13.11.2019 (the Award), a sum of Rs.6.45 crores was directed to be paid by the respondents to Idea Housing towards refund of amounts received pursuant to the MoU. Interest was awarded on the said sum. A sum of Rs.4,56,850/- was directed to be paid towards expenditure incurred for obtaining no objection certificates from various authorities and towards payment of electricity bills and a sum of Rs.10,00,000/- was

awarded towards costs. In the aggregate, a sum of Rs.6,59,56,850/- was awarded with interest on the sum of Rs.6,49,57,000/- from 06.02.2016 until 13.11.2019 at 12% per annum, and on Rs.6,59,57,000/- from 12.01.2020 at 18% per annum until payment. The Award is challenged by respondents 1 to 5, 8 to 9 and 17 & 18 before the Arbitral Tribunal in O.P.No.545 of 2020. By a separate petition, O.P.No.547 of 2020, the 6th and 7th respondents in the arbitral proceedings have challenged the Award.

5. Oral arguments on behalf of the petitioners in O.P.No.545 of 2020 were addressed by Mr.M.S.Krishnan, learned senior counsel for Mr.K.Ashok Kumar, learned counsel; for the petitioners in O.P.No.547 of 2020 by Mrs.Chitra Sampath, learned senior counsel, assisted by Mr.K.V.Bhashyam Chari, learned counsel; on behalf of Idea Housing, in both the petitions, by Mr.N.C.Ramesh, learned senior counsel, assisted by Mr.K.Bijai Sundar, learned counsel; and on behalf of the alleged partners /respondents 4,6,8-10 in O.P.No.545 of 2020 (respondents 9,11,13-15 in O.P. No.547 of 2020) by Mr.S.Sivasankar, learned counsel. Written arguments were also submitted by all the parties.

6. Mrs.Chitra Sampath, learned senior counsel, opened her submissions by providing an introduction to the parties to the arbitral proceedings. She pointed out that the claimant before the Arbitral Tribunal was Idea Housing, a partnership firm. Respondents 1 to 5 are the Individual Landowners. The 6th respondent before the Arbitral Tribunal was another partnership firm, namely, Anmol Housing, which owns a part of the land. Respondents 7 to 18 before the Arbitral Tribunal were the partners of Anmol Housing. Learned senior counsel submitted that the intention of the land owners was to develop a total extent of 70,212 sq.ft. by constructing about 140 flats thereon. The construction was to be multi-storied. Initially, the land owners and Anmol Housing undertook such construction and about four floors consisting of about 80 flats were constructed. In order to proceed further with such construction, agreements dated 04.03.2011 were entered into with CICC. In terms thereof, CICC was to undertake development and, in relation thereto, payments were made by CICC to the land owners. CICC could not continue the development. By mutual consent, the agreements were cancelled by a cancellation deed dated 24.01.2016(Ex.C-2). Thereafter, the MoU dated 06.12.2016 was entered

into by and between Anmol Housing and Idea Housing. Although the MoU specifies the names of the Individual Landowners, they did not execute the document. The document was executed by Mr.Alok Kumar Gulecha, Partner, Anmol Housing, and by Mr.Shankar Babu, Partner, Idea Housing. The MoU was for the development of about 31163 square feet undivided share in the overall extent of 70212 square feet by construction of a residential complex consisting of flats. The MoU was terminated by a termination letter dated 27.10.2016(Ex.C-15). This resulted in the institution of arbitral proceedings by Idea Housing against all the land owners.

7. Learned senior counsel submitted that the Award is liable to be interfered with because it is largely based on three documents, namely, Exs.C-4, C-4A and C-29. All three exhibits are receipts. By referring to Ex.C-4, learned senior counsel pointed out that it is evident that the document was executed by Mr.Alok Kumar Gulecha on the letter head of Anmol Housing. The receipt is unstamped. Ex.C-4A is also an unstamped receipt executed by Mr.Alok Kumar Gulecha. Since these two receipts are unstamped, learned senior counsel contended that these receipts should not have been received in evidence. By relying upon Section 35 of the Indian

Stamp Act,1899(the Stamp Act), learned senior counsel contended that an instrument, which is inadequately stamped, should not be received in evidence by any authority authorised by law or by consent of parties to receive evidence. Unlike Section 49 of the Indian Registration Act,1908 (the Registration Act), she submitted that an inadequately stamped document should not be received in evidence even for collateral purposes. Put differently, she submitted that Exs.C-4 and C-4A are inadmissible both for primary and collateral purposes. Consequently, the Arbitral Tribunal should have refused to receive these documents in evidence. As regards Ex.C-29, it comprises about five receipts. All these receipts bear the signature of Mr.Alok Kumar Gulecha. All the receipts acknowledged receipt of payment from CICC and not from Idea Housing. Therefore, she submitted that Ex.C-29 is irrelevant and cannot be relied upon for purposes of concluding that the land owners received a sum of Rs.6.45 crore from Idea Housing. According to learned senior counsel, the Arbitral Tribunal committed the grave and patent error of conflating payments received by the land owners from CICC with payments allegedly made by Idea Housing to the land owners.

8. By referring to the MoU(Ex.C-3), learned senior counsel submitted that the MoU is not binding on the Individual Landowners because it was not signed by them and because Mr. Alok Kumar Gulecha was not duly authorised to execute the document on behalf of the Individual Landowners. She further submitted that the MoU provides for the payment of a sum of Rs.1.85 crore as advance and a further sum of about Rs.4.06 crore towards purchase of UDS. The MoU does not record that these payments were received prior to the MoU. Therefore, Idea Housing should have adduced evidence of payment subsequent to the MoU. By referring to the cross examination of C.W.1, as discussed in internal pages 55 to 59 of the Award, learned senior counsel submitted that the evidence of C.W.1 is riddled with contradictions and inconsistency. When questioned about the source of funds of Idea Housing, in answer to question 93, C.W.1 stated that Rs.2,00,00,000/- was received by way of credit transfer from CICC and the balance was paid by C.W.1's son. In response to question 43, she pointed out that the witness stated that Rs.2,00,00,000/- was paid by credit transfer and the remaining Rs.4.45 crore in cash. In reply to question 56, she pointed out that C.W.1 admitted that Exs.C-4 and C-35 (the income tax

return) do not correlate. She also pointed out that Idea Housing refused to file the books of accounts and relied on the balance sheet.

9. Learned senior counsel also referred to the cross examination of C.W.1 by Anmol Housing. With specific reference to questions 157 and 158 and the answers thereto, she submitted that C.W.1 stated that the sum of Rs.1.85 crore, which is mentioned in Clause 8(b) of the MoU, was paid in 2011. By reiterating that the MoU was executed on 06.02.2016, she pointed out that the amounts paid by CICC to the land owners were construed as amounts paid by Idea Housing to the land owners. As regards the alleged payment of Rs.4.45 crore, learned senior counsel referred to the answers of C.W.1 to questions 166 to 177 and submitted that C.W.1 stated that the sum of Rs.4.04 crore was paid in cash in installments. However, the witness was unable to specify the denomination in which such cash was paid and also admitted that the receipts do not make any reference to Ex.C3. In light of the discrepancies and contradictions in the evidence of C.W.1, learned senior counsel submitted that the Arbitral Tribunal should have rejected the claim for refund.

10. Similarly, by drawing reference to the oral evidence of C.W.2, learned senior counsel submitted that the oral evidence of C.W.2 contradicts that of C.W.1. With specific reference to questions 17 & 18 and the answers thereto, she pointed out that C.W.2 stated that a sum of Rs.200 lakhs was transferred on 24.01.2016 and confirmed on 10.02.2016, whereas C.W.1 stated that Rs.1.85 crore was lying with the land owners from 2011. By drawing reference to the answers of C.W.2 to questions 92 to 95, learned senior counsel submitted that C.W.2 did not provide any details about the cash payment of Rs.4.45 crore except to the extent of stating that it was not paid in a lump-sum. By referring to paragraphs 91 to 95 of the Award, learned senior counsel submitted that the findings and conclusions recorded therein are patently incorrect; specifically, in paragraph 92, the Arbitral Tribunal noticed that there was no revenue stamp on the receipts. However, instead of dealing with Section 35 of the Stamp Act, the Arbitral Tribunal recorded that the non-compliance with stamp duty requirements should be dealt with by authorities under the relevant regulations. By referring to relevant cross examination, learned senior counsel further submitted that the conclusion of the Arbitral Tribunal that Exs.C-4, C-4A and C-29 were not

challenged is contrary to record. Therefore, in conclusion, it was submitted that the Award is liable to be set aside.

11. Mr.M.S.Krishnan, learned senior counsel, advanced arguments next. His first contention was that the arbitral proceedings were not preceded by a notice under Section 21 of the Arbitration and Conciliation Act,1996(the Arbitration Act). When the Section 11 petition was filed by Idea Housing, the said petition was opposed by the respondents therein *inter alia* on the ground that a Section 21 notice was not issued. In the order passed in the Section 11 petition, this Court did not record any findings with regard to the non-issuance of a Section 21 notice. Instead, the Court left it open to the Arbitral Tribunal to decide all issues. The Arbitral Tribunal framed an issue on the implications of not issuing a Section 21 notice. However, the Tribunal failed to decide the issue and instead rejected the objection of the petitioner on the ground that the Section 11 petition was allowed by Court and, therefore, it was not open to the respondents before the Arbitral Tribunal to raise the objection that a Section 21 notice was not issued before instituting arbitral proceedings. In support of this contention, learned senior counsel relied upon the judgment of the Delhi High Court in

Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd. 2017 SCC Online Del 7228, particularly paragraphs 25 to 30 thereof, for the proposition that the issuance of a Section 21 notice is mandatory and that such notice serves multiple purposes such as setting out the disputed claims, enabling parties to agree upon an arbitrator, serving as the date of commencement of arbitral proceedings and thereby the date on which the clock of limitation stops. For the same proposition, the judgment of a Division Bench of this Court in *M/s.Indus Ind Bank Ltd., formerly known as Ashok Leyland Finance Ltd., Chennai-600 018 v. Mulchand B Jain & others, 2013-2-L.W.67,* particularly paragraph 8 thereof, was relied upon. Reliance was also placed on the judgment of the Hon'ble Supreme Court in *Oval Financial Pvt. Ltd. & others v. Indiabulls Financial Services Ltd. and others, 2009 (112) DRJ 195.* The next contention of Mr.M.S.Krishnan was that the power of attorney executed in favour of Mr.Jayakumar by the land owners was in respect of the agreements between CICC and the land owners and not in respect of the MoU. Moreover, he submitted that the said power of attorney did not authorise receipt of money by the agent on behalf of the principals. Therefore, learned senior counsel submitted that vital evidence was disregarded by the Arbitral Tribunal and that the Award is liable to be set aside for the reasons stated.

12. In reply to these contentions, Mr.N.C.Ramesh, learned senior counsel, pointed out that arbitral proceedings commenced after the entry into force of Act 3 of 2016. Therefore, the amendments made by Act 3 of 2016 apply to this proceeding. By drawing reference to Exs.C-4 and C-4A, learned senior counsel submitted that even the correction on Ex.C-4A has been counter signed by Mr.Alok Kumar Gulecha. He also pointed out that the signature is contained just beneath the printed content. If signatures are obtained on a blank sheet, learned senior counsel submitted that the signature is ordinarily obtained at the foot of the page and not immediately beneath the printed content. This belies the allegation that the signature of Mr.Alok Kumar Gulecha was obtained on a blank sheet. In this connection, he referred to questions 153 and 154 to R.W.2. In response to question 153, he pointed out that R.W.2 admitted that the signatures found beneath the printed matter on Exs.C-4 and C-4A are the signatures of Mr.Alok Kumar Gulecha, whereas the signature against the alteration, on the side of the page, was denied.

13. Learned senior counsel thereafter referred to the Award and pointed out that the Arbitral Tribunal drew an adverse inference against the respondents because they refused to produce their income tax returns in spite of the issuance of a notice by Idea Housing for production of IT returns. With respect to the liability of the Individual Landowners(R1 to R5 before the Arbitral Tribunal), learned senior counsel submitted that a power of attorney was executed by the said individuals in favour of Mr.Alok Kumar Gulecha(Ex.C1). The MoU(Ex.C3) was signed by Mr.Alok Kumar Gulecha for and on behalf of the individual land owners and Anmol Housing on the basis of such power of attorney. In support of this contention, he referred to and relied upon the last page of the MoU, wherein Mr.Alok Kumar Gulecha has signed on behalf of Anmol Housing and other owners.

14. The next contention of Mr.N.C.Ramesh was that the Arbitral Tribunal considered the documentary and oral evidence holistically with regard to proof of payment by Idea Housing to the land owners. For instance, he pointed out that the Arbitral Tribunal referred to Ex.C-14 at paragraph 94 of the Award. Ex.C-14 is a communication dated 27.10.2016

from the claimant to Anmol Housing and the said communication refers to payment made by Idea Housing to the land owners. By drawing reference to questions 44 to 52 and the answers thereto of R.W.2, learned senior counsel submitted that the answers of R.W.2 lead to the conclusion that the evidence of R.W.2 lacks credibility.

15. As regards the Section 21 notice, learned senior counsel submitted that the non-issuance of the Section 21 notice was not raised in the Section 11 petition. The order passed in the Section 11 petition was affirmed by the Division Bench and attained finality because it was not challenged by filing a special leave petition. Even before the Arbitral Tribunal, the respondents therein did not file an application under Section 16 challenging the jurisdiction of the Arbitral Tribunal. He also pointed out that such defence was not raised in the statement of defence of Anmol Housing. In fact, he submitted that Anmol Housing waived such objection and acquiesced in the arbitral proceedings by making counter claims.

16. With regard to payments made by Idea Housing to the land owners, learned senior counsel referred to Clause 8 of Ex.C2 and pointed out that Ex.C-2 provided for a credit transfer of Rs.2 crore. Ex.C3 provided

for the payment of a sum of Rs.1.85 crore as caution deposit and an aggregate additional amount of Rs.4.60 crore. These amounts tally with the receipts. Ex.C4 evidences receipt of an aggregate sum of Rs.2 crore and Ex.C-4A evidences receipt of a sum of Rs.4.45 crore. After referring to paragraphs 81 to 88 and 93 of the Award, learned senior counsel concluded his submissions by stating that the Arbitral Tribunal carefully sifted through the documentary and oral evidence on record and entered findings by a reasonable appraisal thereof. Therefore, no interference is warranted.

17. Learned counsel for the alleged partners of Anmol Housing submitted that the said persons did not execute the MoU containing the arbitration clause. Therefore, they should not have been joined as parties to the arbitral proceedings. By drawing reference to the Retirement Deed (Ex.R2), it was submitted that, except for Mr.Dharm Chand Kochar, these persons retired from the partnership on 31.03.2012 and with effect from 01.04.2012. He also referred to the returns filed with the Income Tax Department (Ex.R4) to corroborate the contention that these persons were not partners when the MoU was signed. He further contended that Exs.C4 and C4A pertain to transactions with CICC and not with Idea Housing.

18. By way of rejoinder, learned senior counsel for the petitioners in O.P.No.547 of 2020 reiterated that unstamped receipts should not have been received in evidence. In support of this contention, she relied upon the judgment of the Hon'ble Supreme Court in *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and others, 1971 AIR 1070.* She also relied upon the judgment of this Court in *Pakkiri v. Saraswathi and others, order dated 07.04.2016 in C.R.P.(PD)No.866 of 2016.* By referring to question 177 and the answer thereto of C.W.1, she submitted that a suggestion was put with regard to the genuineness of Ex.C-4 and Ex.C-4A, and, therefore, the conclusion of the Arbitral Tribunal that Ex.C-4 and Ex.C-4A were not challenged is contrary to record. She further pointed out that the Arbitral Tribunal noticed in paragraph 85 of the Award that the payment of Rs.4.45 crore in cash was not reflected in the income tax return (Ex.C35). By referring to the proof affidavit of C.W.2 at paragraph 23 thereof, she submitted that C.W.2 deposed that the land owners unjustly enriched themselves by enjoying the amount of Rs.6.45 crore since 2011, and that this deposition completely contradicted the evidence of C.W.1 with regard to payment being made after the execution of the MoU(Ex.C-3). She

concluded her submissions by referring to and relying on the following judgments:

(1) M/s.Vedanta Limited v. M/s.SGS India Private Limited, order dated 02.08.2019 in O.P.No.1115 of 2018.

*(2) PSA SICAL Terminals Pvt. Ltd. v. The Board of Trustees of V.O.Chidambaranar Trust, Tuticorin and others (**PSA Sical)**, 2021 SCC OnLine SC 508.*

(3) E.D.Poulose v. State of Kerala and Another, CDJ 1975 SC 186.

<u>Discussion, analysis and conclusions</u>

19. As pointed out by Mr.N.C.Ramesh, learned senior counsel, the arbitral proceedings commenced after 28.10.2015. Therefore, the amendments made by Act 3 of 2016 apply to the determination of this dispute. By virtue of Act 3 of 2016, *inter alia*, Section 34(2A), which provides for patent illegality as a ground to challenge a domestic award, was inserted and public policy was redefined by considerably whittling down its ambit. In *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49**(Associate Builders)**,* the Hon'ble Supreme Court analysed the law with

regard to challenges to an arbitral award before the entry into force of Act 3 of 2016. In *Ssangyong Engineering and Constructions Co. Ltd. v. National Highways Authority of India (**Ssangyong**), 2019 SCC OnLine SC 677*, the Hon'ble Supreme Court analyzed the law after the entry into force of Act 3 of 2016. The principles laid down in ***Ssangyong*** were affirmed in several subsequent judgments, including ***PSA Sical.*** In a nutshell, for procedural infirmities, an arbitral award may be interfered with if the arbitral tribunal was not properly constituted; or exceeded the scope of reference; or the composition thereof was not in accordance with the arbitration agreement; or if the person aggrieved was not provided a reasonable opportunity to present the case; or if the award was improperly procured. As regards challenges on merits, such challenges are limited to the violation of the fundamental policy of Indian law or the most basic notions of morality and justice or patent illegality. The most relevant ground, as regards this case, is patent illegality. The judgments of the Hon'ble Supreme Court instruct that an award would be patently illegal, if the substantive law or contractual stipulations were disregarded, in contradistinction to interpretation of law or contract, which would not be interfered with unless the person challenging the award can establish that the interpretation was implausible. An interpretation would be implausible if it lies outside the spectrum of credible interpretations but not otherwise.

20. As regards appreciation of evidence by the Arbitral Tribunal, the arbitration court will not reappraise evidence because it is not a court of appeal. There is some confusion as to what this means as was evident from some of the contentions advanced in this case. Therefore, a brief explanation is in order. The sequitur of not re-appraising evidence is not that the arbitration court should refuse to look at or examine the evidence. Such approach would render the remedy under Section 34 illusory in a considerable proportion of cases. At least for the limited purpose of deciding whether the award is perverse in its appreciation of evidence, it is necessary to examine the evidence. In paragraph 31 of ***Associate Builders,*** the Hon'ble Supreme Court concluded that an award which is based on no evidence or on irrelevant evidence which goes to the root of the matter or disregards vital evidence is perverse. The Court further held that such award would violate the public policy of India. After the definition of public policy was narrowed down by Act 3 of 2016, in paragraph 41 of

Ssangyong, the Supreme Court revisited the above principles and concluded that they would no longer lead to the conclusion that the award is violative of public policy but would render an award patently illegal under Section 34(2A). The challenge in this case is focused largely on the appreciation of, including contradictions and inconsistency in, the evidence. Therefore, it remains to be considered whether the contentions advanced for purposes of assailing the Award warrant interference therewith.

21. One of the grounds of challenge was that the ratification deed(Ex.C6) is illegal and, therefore, the MoU is not valid and binding on the Individual Landowners. Since this contention pertains to the validity of the MoU, it is dealt with first. The petitioners contended that the MoU cannot be relied upon by Idea Housing mainly because of the unilateral ratification by only one out of the two agents under the power of attorney dated 19.06.2014 (Ex.C1). Upon considering this objection as Issue 10, the Arbitral Tribunal concluded that the ratification was valid and that the MoU was binding and enforceable for the following reasons:

> "72....I have already held that R1 to R5 were not only bound by Ex.C3 but were also aware of C3. It is not the case of the Respondents that any of them

had at any time thereafter had chosen to repudiate the MoU on the ground that Jaikumar did not join in executing the MoU and therefore it was invalid and not binding on them. After execution of the MoU several communications have passed between claimant and R6 on the progress of the project such as Ex.C7, C9, C10, C12, C13 and C15 and other letters. R6 has not objected to or refer to Jaikumar not signing Ex.C3 or that he has not properly complied with the requirements of the project...."

"73.The issue was not raised even on 29.11.2016(C31) when R1 to R5 has sent a notice of termination of the Power of Attorney. In that letter also there is no mention of any impropriety in both the POA not joining together in the execution of C3. Under C2 dated 02.12.2016, the reply by Jaikumar, he had contended that the agency was coupled with interest having received consideration and hence irrevocable and therefore the cancellation was illegal, void and amounted to criminal breach of trust and thus as such the revocation was illegal. Subsequently under Ex.C33 dated 09.12.2016, R1 to R5 have executed a Registered Deed of Cancellation of the Power of Attorney executed on 09.06.2014 in

> favour of R7 and Jaikumar and it stood cancelled. Even under the said document no reference is made to Ex.C3. The only reason given there under is that there was no development of Schedule 'A' property and no sanctioned plan had been obtained. No other reasons have been stated...."
>
> "73....The MoU was cancelled only very much subsequently on 29.11.2016(C31) and the Cancellation Deed executed by R1 to R5, that too only on the ground that the requirements under the PoA were not fulfilled and not on the ground of defect in the execution of the MoU as a result of Jaikumar not having simultaneously executed the MoU...."
>
> "74. Hence I am inclined to hold this Issue in favour of the Claimant."

The above conclusions were drawn after examining the power of attorney, the MoU, the ratification deed and the correspondence between the parties. These conclusions are eminently reasonable and cannot be characterised as perverse.

22. The principal grievance with regard to appreciation of evidence is that Exs.C-4 and C-4A were received in evidence in spite of being

unstamped receipts. Section 35 of the Stamp Act deals with instruments bearing inadequate stamp duty. Section 35 is set out below:

> ***"35. Instrument not duly stamped inadmissible in evidence, etc. -*** *No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped...."*

From the plain language of Section 35, it is clear that the embargo imposed therein applies to instruments chargeable with duty. The expression instrument is defined in Section 2(14) as "includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded." If Section 35 is read with Section 2(14), it follows that any document by which a right or liability is created, transferred, limited, extended, extinguished or recorded is required to bear the prescribed stamp duty. In this case, the receipts relate to the payment of a sum of about Rs.2 crore under Ex.C4 and a further sum of about Rs.4.45 crore under Ex.C4A. Therefore, these are instruments recording payment and receipt of the amounts specified therein. As per Article 53 to Schedule I to the Stamp Act, if the receipt records payment of an amount exceeding Rs.5000, the stamp duty is one rupee. Therefore, these receipts should have been stamped in accordance with Article 53. Whether the appraisal of evidence by the Arbitral Tribunal should be interfered with on the grounds of Exs.C4 and C4A being received in evidence or the alleged inconsistencies in such evidence or for any other reason is examined next.

23. The Arbitral Tribunal noticed that Ex.C4 and Ex.C4A were unstamped. The Arbitral Tribunal also took into account Ex.C-29, Ex.C-14 and the oral evidence of C.W.1, C.W.2, R.W.1 and R.W.2. By taking a cumulative perspective, the Arbitral Tribunal concluded that Idea Housing had proved that a sum of Rs.6.45 crore was paid by it to the land owners. Undoubtedly, there are contradictions between the evidence of C.W.1 and C.W.2 as regards the date of payment of this amount. In paragraph 23 of the proof affidavit of C.W.2, he stated that the land owners had been unjustly enriched because they held these amounts from 2011. On the contrary, C.W.1 stated that a part of the sum of Rs.4.45 crore was paid before executing the MoU(Ex.C3) and a part thereafter(question and answer 167).

Indeed, it appears from the answer of C.W.1 to question 166 that the sum of Rs.4.45 crore was paid between 24.01.2016 [date of execution of cancellation agreement between CICC and Anmol Housing (Ex.C-2)] and 10.02.2016 (date of execution of receipts). This contradicts paragraph 23 of the proof affidavit of C.W.2.

24. The Arbitral Tribunal also took into account the income tax returns of Idea Housing for the assessment year 2016-2017, with the balance sheet attached thereto, which were exhibited as Ex.C-35 and Ex.C-42. In particular, the balance sheet annexed thereto was noticed. The said balance sheet shows that a sum of Rs.6,57,66,885/- was available in the form of Partners' capital and current account, and, therefore, indicates that money was available for payment in terms of the MoU. Schedule IV to the balance sheet goes further and indicates that a sum of Rs.6.52 crore was used for purposes of Anmol Housing Corporation and other land owners. The Arbitral Tribunal also noticed Ex.C14 which is a communication from Idea Housing to Mr.Alok Kumar Gulecha. The said communication refers to the huge advance paid by Idea Housing to Mr.Alok Kumar Gulecha. Thus, the conclusions of the Arbitral Tribunal were not based only on Exs.C4 and 4A.

25. As set out while commencing the discussion, the scope of interference with appreciation of evidence is very limited. It certainly cannot be said that no evidence was adduced by Idea Housing. Learned senior counsel for the petitioners herein contended that Ex.C-29 is irrelevant inasmuch as it covers receipts issued to CICC and not Idea Housing. The receipts evidencing payments received by the land owners from CICC are not entirely irrelevant because the Deed of Cancellation (Ex.C-2) provided for a credit transfer of the sum of Rs.200 lakhs, which was received as a deposit by the land owners, in favour of Mr.Jayakumar. The first receipt under Ex.C29 is for this sum, as is evident from the document (p.137 of volume II). Even otherwise, CICC was involved in part execution of the same project and Mr.Jayakumar, who is closely connected with Idea Housing, was a Director of CICC. In this factual context, it cannot be said that Ex.C-29 is irrelevant and, in any event, it cannot be said that the Award hinged on Ex.C29. After taking note of the evidence discussed above, the Arbitral Tribunal recorded as follows in paragraphs 93 to 95 of the Award:

> "93. It is also seen that on the side of the Claimant their IT returns have been filed. On the contrary, when the Claimant had called upon the

Respondents by their notice to produce (1) income tax return of the Respondents for the period from financial year 2010-11 till date and (2) books of accounts of the Respondent for the said period, the Respondents have not chosen to produce the same and have contended that they are not relevant. I am inclined to hold that the attitude of the Respondents cannot be sustained and would result in adverse inference being drawn as regards the payments received by them which are denied by the Respondents. While the Claimant is able to establish transfer of amount in favour of the Respondents and the Respondents had chosen to completely deny it, it is the duty of the Respondents to rebut the evidence against them. Burden of proof unlike in criminal cases, in civil disputes is not one sided. The burden would keep shifting from one party to the other depending on the evidence produced by the respective parties. Hence, non production of IT returns/ accounts by the Respondents is bound to weigh against them. There is evidence to establish transfer of amount in favour of R6 and R7. R1 to R5 have conveniently claimed that they have not received any amount. I have already held that R1 to R5 feigning ignorance of Ex.C3 and C47 etc. as totally unacceptable. Therefore, R1 to R5 are also jointly liable to pay the due to the Claimant.

94. It is also noteworthy that in the letter dated 27.10.2016(C-14)the Claimant after mentioning about various obstacles created in the matter of obtaining sanction for Phase II,he has also stated that the Respondents ***"....scarcely need any reminder about huge advance we had paid to and the time and money we have spent....".*** There was no denial of this fact except for immediately terminating the MoU. The Respondents did not deny the receipt of huge advance amount either in their letter C-15 or by any other reply immediately thereafter denying the claim of huge advance amount.

95. Therefore on an overall consideration of the evidence, R6 not having challenged his signature in Ex.C4, C4A and C29 series and in the absence of proper explanation as to how and why he received the said amounts, I am inclined to hold that Claim No.1 is liable to be allowed as against R6 as partnership and R7 as a partner as well as individually and against all the land owners/partners of R6, who are liable to pay back the amount to the Claimant."

26. The above conclusions were recorded by engaging with the evidence; deciding on the admissibility and relevance thereof; and by assigning materiality and weight thereto. It certainly cannot be said that vital evidence was disregarded. Without doubt, as stated earlier, there is inconsistency in the evidence especially with regard to the dates of payment and receipt of a sum of Rs.4.45 crore. Unlike in a first appeal, in a challenge under Section 34, even if the manner of appraisal of evidence, such as the materiality and weight assigned to pieces of evidence, is not in consonance with how the arbitration court would have appraised such evidence if it stepped into the shoes of the arbitral tribunal, the award cannot be interfered with on that ground. This is the trade-off that the opting-out from the public court system entails for parties to arbitral proceedings. Otherwise, the limited judicial intervention and light-touch regulation envisaged by the Arbitration Act would be denuded of purpose and meaning.

27. The other ground on which the Award was assailed was that arbitral proceedings were not preceded by a notice under Section 21 of the Arbitration Act. The Section 11 petition was preceded by a communication

dated 24.12.2016 (Ex.C39) from Idea Housing to Mr. Thirumalai Karpagam, Advocate, which was copied to the Individual Landowners (respondents 1-5) and Anmol Housing, under which he was appointed as the arbitrator. In response, communication dated 07.01.2017(Ex.C40) was sent by the Individual Landowners. Their stand therein was that the MoU was not executed by them and that, therefore, there is no arbitration agreement. The same stand was taken by Anmol Housing in its reply dated 07.01.2017(Ex.C41). They did not state, however, that Ex.C39 was not a valid Section 21 notice. In the Section 11 petition before this Court, Idea Housing referred to Exs.C39-C41 and stated that there was no option but to file the petition in view thereof. In the reply of the Individual Landowners, at paragraph 24 thereof, they stated that the MoU is not valid and that Idea Housing is not entitled to appoint an arbitrator. They did not state, however, that the petition was not preceded by a Section 21 notice. In the counter of Anmol Housing, at paragraph 19, an identical stand was taken. In paragraph 4 of the order dated 14.02.2018, this Court referred to the notice dated 24.12.2016(Ex.C39) as the notice invoking the arbitration clause. The Court, however, at paragraph 12 of the order, noticed the contention by learned counsel that the appointment was not valid because it was not preceded by a prior notice. No finding was recorded on this contention while allowing the petition but it was left open to parties to raise all contentions before the Arbitral Tribunal. Although an appeal is not provided for against such order as per Section 37 of the Arbitration Act, an appeal was filed. The Division Bench disposed of the appeal by upholding the order. This judgment was not challenged by filing a special leave petition before the Supreme Court.

28. Instead, parties participated in the arbitral proceedings. Neither in the counter of respondents 1-5 nor in that of Anmol Housing was there a pleading that no Section 21 notice was issued. In fact, Anmol Housing raised counter claims as mentioned earlier. While framing issues, as the second limb of Issue No.2, an issue was framed on whether the notice dated 24.12.2016 was valid in terms of Section 21 of the Arbitration Act. The Arbitral Tribunal referred to the fact that this contention was raised before this Court, including before the Division Bench. Thereafter, the Arbitral Tribunal took into account that no objection was raised in this regard at the first hearing on 03.04.2018 and that Section 4 of the Arbitration Act

provides for waiver. Paragraph 67 of the Award, in relevant part, is set out below:

> "Further it also requires to be noted that apart from the fact that the Single Judge's order has not been specifically called in question in that context, the decision of the Division Bench has also become final and has not been appealed against. Hence as the issue pertains to procedural issue which can be waived under Section 4 of the Act, considering that the objections had not been raised even before the arbitral tribunal at the first hearing held on 3.4.2018, the judgment of the Supreme Court in BSNL -v- Motorola India Pvt. Ltd. - 2009(2) SCC 349 is directly applicable...".

29. In the overall context of this objection not being raised in Exs.40 and 41, the Section 11 order attaining finality and Anmol Housing raising counter claims, this conclusion cannot be characterised as patently illegal or as going to the root of the matter. Thus, there is no scope for interference with the Award on this ground also.

30. The contention of the alleged partners (respondents 10,11,12,13,15,17 and 18) before the arbitral tribunal remains to be

considered. As regards respondents 8-18 before the Arbitral Tribunal, a finding was recorded in paragraph 109 of the Award that they informed the Registrar of Firms of their retirement only on 12.10.2018. After noticing that respondents 8,9 and 17 are also impleaded in their capacity as land owners, the Arbitral Tribunal rejected their contention that they retired by stating as under:

> "111. In the above background, the bonafides of their retirement is called in question. I am inclined to hold that the contention that they had retired from the partnership cannot be accepted for the following reasons:
>
> > (1) There is absolutely no explanation as to why the retirements under the deed which is alleged to have been executed on 31.3.2012 was not reported to the ROF for more than 6 1/2 years and was reported only on 12.10.2018.
> >
> > (2) Such reporting has also been complied with only after the Claimant had filed the petition on 25.8.2018 to implead them and also after the Arbitrator having ordered the petition on 7.9.2018. It is rather strange that the intimation has been given only very belatedly and subsequently. To say

that they can report to the ROF at any time they thought fit and that their right would not be affected, is not acceptable.

(3) The deed of retirement is not a registered document and therefore cannot be readily accepted without proper proof.

(4) Only one witness has attested the deed of retirement (Vikram Singh) and he has not been examined to prove the document in the face of the challenge to the retirement."

The above conclusions are not only based on an appraisal of evidence but are eminently reasonable. Hence, no interference is called for under Section 34 of the Arbitration Act on this count.

31. For reasons set out above, O.P.Nos.545 and 547 of 2020 are dismissed. In the circumstances, there will be no order as to costs. Consequently, connected original application and applications are closed.

31.01.2023

Speaking Order
Index : Yes/No
Internet : Yes/No
rrg

SENTHILKUMAR RAMAMOORTHY, J
rrg

Pre-delivery order
in
O.P.Nos.545 & 547 of 2020

31.01.2023