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Arb.O.P (Com.Div.) No.393 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2023

CORAM

**THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY**

**Arb.O.P (Com.Div.) No.393 of 2022**

1.M/s.Oyester Homes Chennai Pvt. Limited,  
Represented by its Managing Director, S.Balasundaram,  
Having registered business at Old No.24,  
New No.11, 5<sup>th</sup> Street, X Block, Anna Nagar,  
Chennai 600 040.

2.S.Balasundaram

... Petitioners

**Vs.**

G.Loganathan,  
S/o.Govindasamy,  
Represented by Power Agent, L.Indumathi,  
D/o.M.Natarajan,  
No.59, Gandhi Nagar,  
Peria Uppupet, Vilapakkam Post,  
Arcot Taluk, Vellore District 632 521.

... Respondents

Arbitration Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 19.03.2022 passed by the sole Arbitrator Mr.R.Bharanidharan.



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For Petitioners : Mr.M.Himavanth

For Respondent : Mr.A.Karthikeyan,  
for Mr.Salai Varun

### **ORDER**

The petitioner filed the present Arbitration Original Petition in Arb.O.P.No.393 of 2022, feeling aggrieved and dissatisfied with the award passed by the sole Arbitrator dated 19.03.2022, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”).

#### **2. The brief facts of the case are as follows:**

The petitioner is a builder and promoter and the respondent is the buyer of a flat. The petitioner has registered an undivided share of land to an extent of 435 square feet in the name of the respondent vide sale deed dated 13.11.2014. Thereafter, a construction agreement dated 09.11.2014 was entered by the petitioner with the respondent to construct the flat S1 in second floor. The petitioner had agreed to hand over the possession of the same to the respondent within 15 months from the date of registration along



with two months grace period subject to the building work not being delayed or suspended due to unexpected or unavoidable circumstances, shortage of water and commodities like steel, cement and other building materials, civil commotion, riots, act of God, orders of Court, statutes, notification etc., or due to any additional/alteration works required/requested by the Client, or delay in getting electrical or water or excessive rain beyond the control of the Builder or delay caused on account of any notice, order or rule, relating to the schedule property pending final determination by the Court, or any other authority or change in any Rule, Regulation or Bye-laws or any Statutory body or authority from time to time affecting the development/Building project, or other reasons which are not in control of the Builder.

3. The respondents, who were the claimants, had filed a claim statement before the learned Arbitrator stating that in terms of the agreement, the petitioner refused to hand over the flat within the time prescribed in the construction agreement. The learned Arbitrator after hearing both the parties, passed a final award dated 19.03.2022 and the



relevant portion of the finding of the award is as follows:

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*“In the light of the factual background, evidence recorded, arguments advanced and precedents of the Hon'ble Apex Court, this Arbitral Tribunal grants the following reliefs to the claimant:-*

*A. The 1<sup>st</sup> respondent shall deliver the Flat No.S1 in the second floor measuring 860 sq.ft. of plinth area together with undivided 435 sq.ft. of share in the land out of the total 2400 sq.ft., with all amenities inclusive of car parking area, within 15 days from the date of receipt of this Award in a habitable condition.*

*B. The Claimant is entitled for a compensation of Rs.6,92,900/- (Rupees Six Lakhs, Ninety Two Thousand and Nine Hundred Only) from the first respondent for delay in delivering and handing over of the possession of the Flat.*

*C. The Claimant is entitled for an interest @ 10.70% per annum for the amount of Rs.6,92,900/- (Rupees Six Lakhs, Ninety Two Thousand and Nine Hundred Only) from the first respondent from the date of filing of the Claim statement till date of payment.*

*D. The Claimant is entitled for an amount of Rs.25,000/- (Rupees Twenty Five Thousand Only) towards cost of Arbitration Proceedings.”*



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4. Aggrieved over the said award, the petitioner/builder filed the present Arbitration Original Petition. The learned counsel appearing for the petitioner submitted that as per the construction agreement dated 09.11.2014, the respondent has failed to make the entire payment as agreed, thus, they are not in a position to hand over the flat to the respondent. The learned Arbitrator, while passing the award, has completely ignored the terms and conditions as agreed by both the parties in Clause Nos.2.2, 2.7, 3.4 and 7.6 of the construction agreement.

5. The learned counsel for the petitioner further submitted that in Clause No.2.2 of the construction agreement, it is stated that at the time of handing over the possession, the claimant is supposed to pay 5% of the construction cost and in terms of Clause No.3.4 of the construction agreement, the builder undertakes to ensure handing over the possession of the construction to the client/respondent within 15 days from the completion or after receipt of the entire payment as provided herein from the client,



whichever is later. In the present case, the learned Arbitrator has categorically come to the conclusion that the respondent has not paid the construction cost of Rs.2,10,250/-. By referring Clause No.3.4 of the construction agreement, he submitted that the obligation for the petitioner/builder is to hand over possession of the flat to the respondent would only arise within 15 days immediately after receipt of the entire payment. But in the case on hand, the respondent has not paid the entire consideration and therefore, the obligation to hand over the possession to the respondent would not arise and this vital aspect has not been considered by the Tribunal.

6. When the question of handing over the possession by the builder to the respondent/claimant does not arise, the question of payment of compensation for delay in handing over the possession to the respondent will not arise. However, without taking into consideration of the Clause Nos.2.2 and 3.4 of the construction agreement, the Arbitral Tribunal had wrongly passed an award as if that the builder is liable to hand over the possession and that there was delay in handing over the possession. Hence,



the award passed by the Tribunal, that the builder is liable to pay the compensation for the delay period to the respondent, is not correct and same is not in accordance with the agreed terms and conditions of the agreement.

7. The learned counsel further submitted that apart from the admitted amount that the client/respondent is liable to pay to the petitioner as arrived at by the learned Arbitrator, the respondent is also liable to pay the additional costs towards electricity fitting charges, inverter, erection of safety grill gates in main door, utility safety grill, balcony, shoe rack, three phase electricity connection, water connection, over head tank, septic tank, soak pit and for water treatment plant. However, though the respondent has specifically agreed to pay these additional costs, in the award it was held as if the cost of construction includes the additional cost of construction. Therefore, the learned counsel would contend that without any application of mind and against the agreed terms, the award has been passed and the same is liable to be set aside.

8. On the other hand, the learned counsel appearing for the respondent



would contend that 5% of the cost of constructions will be paid only at the time of handing over the possession of flat. Since the petitioner has not handed over the possession of the flat, the question of payment does not arise and the tribunal has rightly held that the respondent is liable to pay only a sum of Rs.2,10,250/- and the same has been rightly adjusted against the compensation awarded by the tribunal.

9. Further he contended that the cost of constructions includes all the additional works whatever agreed by the respondent by virtue of the agreement. In Clause No.1.1 of the construction agreement, the cost of construction mentioned as Rs.18,05,875/- and it has also been stated that the respondent is liable to pay certain additional cost to the contractors, as contended by the learned counsel for the petitioner in his argument. Both the learned counsel have also referred the area and the cost break up dated 09.11.2014, which is annexed to the construction agreement wherein the total cost mentioned as Rs.40,14,000/-. The learned counsel for the respondent by referring cost in the annexure and in the construction agreement, would contend that in the construction agreement it has been



mentioned as Rs.18,05,875/-, whereas in the annexure, the total cost has been mentioned as Rs.40,14,000/-, which means this total cost includes all other additional cost which are all mentioned in the construction agreement for which the respondent/claimant is liable to pay to the petitioner. According to him, he has paid 95% of the total cost of construction and remaining 5% is liable to pay only at the time of handing over the possession of the property. Since the possession is not handed over, he is not liable to pay. Therefore, he submitted that there is no illegalities in the award passed by the learned Arbitrator to interfere by this Court under Section 34 of the Act.

10. Heard the learned counsel appearing for the petitioner as well as the respondent.

11. The petitioner is the builder and the respondent is the purchaser of a flat. There is no dispute with respect to the construction agreement and the annexure to the agreement. The petitioner mainly challenged with respect to the award of compensation to the respondent for the delay in handing over



the possession of the flat by the petitioner, without taking into consideration of the additional cost rendered to carry out the work by the builder and also Clause No.3.4 of the construction agreement.

12. The learned Arbitrator arrived at the compensation of a sum of Rs.9,03,150/-, which the petitioner is liable to pay to the respondent for the delay in handing over the possession of the flat. From the said amount, the respondent's outstanding amount of Rs.2,10,250/- has been deducted. After deduction, the tribunal held that the petitioner is liable to be pay a sum of Rs.6,92,900/- with interest at the rate of 10.70% per annum from the date of filing the claim statement till the date of payment.

13. The findings of the learned Arbitrator was that the delay in handing over the possession of the property was due to the petitioner. At this juncture, it is important to refer Clause No.3.4 of the construction agreement, which is extracted hereunder:

*“3.4. That the builder do hereby undertake to ensure*



*handing over possession of the constructions to the client within 15 days after completion or after receipt of the entire payment has provided herein from the client, whichever is later.”*

and in terms of Clause No.2.2 of the construction agreement, the respondent has agreed to pay consideration as follows:-

*“2.2 The Clients further agrees to pay the balance of as detailed below in favour of the Builder:*

|                                                        |            |
|--------------------------------------------------------|------------|
| <i>i) At the time of land registration</i>             | <i>35%</i> |
| <i>ii) On completion of foundation work</i>            | <i>10%</i> |
| <i>iii) On completion of first floor roof slab</i>     | <i>10%</i> |
| <i>iv) On completion of second floor roof slab</i>     | <i>10%</i> |
| <i>v) On completion of brick work</i>                  | <i>5%</i>  |
| <i>vi) On completion of plastering work</i>            | <i>5%</i>  |
| <i>vii) At the time of handing over the possession</i> | <i>5%”</i> |

14. According to the respondent, they have paid 95% of the costs and only the 5% is liable to be paid at the time of handing over the possession of the flat. In conjoint reading of Clause No.2.2(vii) and Clause No.3.4 of the construction agreement, it is clear that the builder undertakes to hand over the possession of flat to the respondent within 15 days after completion or



after receipt of the entire payment, as provided in Clause No.2.2 of the construction agreement, from the respondent, whichever is later. Therefore, it is clear that once 100% payment is made by the respondent, thereafter the petitioner has to hand over the possession within 15 days either from the date of completion or after receipt of payment, whichever is later. In the present case, though the construction was completed, the entire payment has not been made. However, without taking into consideration of the Clause No.3.4 of the construction agreement, the learned Arbitrator has passed an award as if the 5% amount will be paid at the time of handing over of possession of flat and it is further held that the payment and handing over of possession should happen simultaneously. However, a reading of Clause Nos.3, 2.2 and 3.4 of the construction agreement, it is crystal clear that the question of handing over the possession of the flat would arise only 15 days after the completion or after the receipt of the entire amount from the respondent.

15. In the present case, when the learned Arbitrator has come to conclusion that the petitioner is still liable to pay a sum of Rs.2,10,250/- and



directing the builder/petitioner to hand over possession without payment of the entire consideration, this Court is of the view that the same is not in accordance with Clause No.3.4 of the construction agreement. Thus, the award passed by the learned Arbitrator is against the provision of the Clause No.2.2 read with Clause No.3.4 of the construction agreement.

16. Thus, the award passed by the learned Arbitrator is contrary to the agreed terms and conditions of the construction agreement, that is Clause Nos.2.3, 3 and 3.4 of the construction agreement. The learned Arbitrator without taking into consideration of Clause No.3.4 of the construction agreement, awarded the damages as if the fault is on the part of the builder and awarded the compensation of Rs.9,03,150/-, which in the opinion of this Court is not sustainable for the simple reason that the obligation of the builder to hand over the possession of the property would arise immediately upon the receipt of entire consideration from the respondent. In the present case, the finding of the learned Arbitrator was that the respondent/claimant is still liable to pay a sum of Rs.2,10,250/- towards the cost of construction. When such being the case, the obligation of the builder to hand over the



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possession of the property to the respondent/claimant would not arise as per the Clause 3.4 of the construction agreement. Hence, the award is liable to be set aside.

17. As far as the outstanding amount is concerned, the respondent is liable to pay a sum of Rs.2,10,250/-. Therefore, this Court confirming the award to the extent that the respondent is still liable to pay a sum of Rs.2,10,250/- to the petitioner. While confirming the above portion of the award, this Court directs the petitioner to hand over the possession of the property immediately within 15 days in terms of Clause 3.4 of the construction agreement upon the receipt of a sum of Rs.2,10,250/- from the respondent.

18. Accordingly, this Arbitration Original Petition is allowed and the award passed by the learned Arbitrator dated 19.03.2022 is hereby set aside. There shall be no order as to costs.

**12.01.2023**  
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Speaking/Non-speaking order  
Index : Yes / No

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**KRISHNAN RAMASAMY.J.,**

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