IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.226 of 2023
and
A.No.2778 of 2023

M/s.Electronics Corporation of Tamil Nadu Limited,
Represented by its Managing Director,
No.692, M.H.U.Complex, 2nd Floor,
Anna Salai, Nandanam,
Chennai – 600 035. ... Petitioner

Vs.

M/s.Okaya Infocom Private Limited,
Represented by its Authorized Representative,
Having its Office at:
H-19, Udyog Nagar,
Rohtak Road,
New Delhi – 110 041. ... Respondent

Prayer: Original Petition is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the impugned Award dated 06.01.2023 passed by the Hon'ble Arbitral Tribunal in the dispute arising out of Lease Deed dated 05.11.2012 and to award costs.

For Petitioner : Mr.M.Vijayan
for M/s.King & Partridge

For Respondent : Mr.S.L.Sudarsanam

ORDER

The petitioner is aggrieved by the impugned Award dated 06.01.2023 passed by the learned Arbitrator. The learned Arbitrator was appointed by this Court pursuant to order passed on 26.04.2022 in Arb.O.P.(Com.Div.) No.184 of 2022.

2. By the impugned Award, the learned Arbitrator has awarded a sum of Rs.2,23,19,500/- to the respondent/claimant and a further sum of Rs.8,33,93,342/- towards interest at 18%. Relevant portion of the impugned Award reads as under:-

> "13. Answers to the issues framed.
>
> i) Whether the Claimant has failed to discharge its obligation under the Co-Developer Agreement?
>
> As regards the first issue is concerned, the question of Claimant discharging their obligation did not arise at all, in the face of the fact that the Respondent not having discharged their obligation in the first place. Therefore the issue is answered in favour of the Claimant.
>
> ii) Whether the breach of contract occurred as a result of non- performance of the Respondent as to his part of the agreement?
>
> As a corollary to the answer to the first issue, the second issue is to be held against the Respondent i.e. breach of contract occurred as a result of non-performance of the Respondent as it its part of the agreement.

iii) Whether the Claimant can seek cancellation of the Lease Deed without cancelling the Co-developer status?

In consideration of the totality of the circumstances, the Claimant cannot seek cancellation of the Lease Deed without cancelling the Co-developer status. On this aspect, the crucial document to be relied upon was the communication of the Respondent dated 02.08.2017 (R-11), which communication was in response to the letter of the Claimant dated 04.01.2016 (R-10) seeking refund of the land lease deposit. In the said communication, the Respondent has clearly advised the Claimant to have the Co-developer status cancelled by the competent authority i.e., Ministry of Commerce, Government of India. Thereafter, the Claimant had instituted W.P.No.15049 of 2017 before the Honorable High Court and only on its direction, disposing of the writ petition dated 04.10.2019, the Co-developer status came to be cancelled vide Office Memorandum dated 15.10.2019 (R-13). The claim for refund was processed thereafter and sanctioned on 14.08.2020 (R-18). The issue is to be answered namely that unless or until the Co-developer status is cancelled by the competent authority sanctioning of refund of land lease deposit would not arise.

iv) Whether the Respondent was right in deducting a sum of Rs.2,23,19,500/- as per Clause 2 and 4(c) of the Lease Deed?

In view of the answers to issues 1 and 2 as above, the Respondent was not legally right in deducting a sum of Rs.2,23,19,500/- as per Clause 2 and 4(c) and Clause 9 of the Lease Deed.

v) Whether the deduction specified under Clause 2 and 4 (c) of the Lease Deed is against Section 73 and 74 of the Indian Contract Act?

Since the Tribunal has come to the categorical conclusion that the Respondent has breached the terms of the contract in the first place, the question of invoking Clause 2 and 4(c) dated 05.11.2012 did not arise at all and therefore the applicability of section 73 and 74 of Indian Contract Act would also not arise in the given case.

vi) Whether the Claimant is entitled to receive a sum of Rs.8,33,93,342/- (Rupees Eight Crores Thirty Three Lakhs Ninety Three Thousand Three Hundred Forty Two) as per the Statement of Claim raised by the Claimant?

As regards the issue is concerned, the exact sum claimed in the Claim Statement is Rs.8,33,90,342/- (Rupees eight crores thirty three lakhs ninety thousand three hundred and forty two only). However, while framing the issues, the Claimant has indicated the above sum instead. In any event, it was strongly contended that the learned counsel for the Respondent that despite their advice to have the Co-developer status cancelled by the competent authority i.e., Ministry of Commerce, Government of India, the Claimant had needlessly embarked upon litigation before the Honorable High Court by filing a writ petition which caused considerable delay. The writ petition which was filed in 2017 was disposed on 04.10.2019 with a direction to the Ministry of Commerce to consider the application of the Claimant for cancellation of their Co-developer status. According to the counsel for the Respondent, this delay could have been avoided by the Claimant had they heeded to the advice of the Respondent, as reflected in their communication dated 02.08.2017 (R-11). In the circumstances, it has to be held that whopping claim towards interest of Rs.5,30,53,145/- for the period from 01.04.2016 to 17.08.2020 is unsustainable both in law and on facts. The Claimant cannot be allowed to take advantage of its own self-inflicted delay and claim interest for the said period, from the respondent.

On behalf of the Claimant no justifiable reason was forthcoming as no submissions have been made for sustaining the claim towards interest during the said period, for which the Respondent cannot be faulted with, at all. Therefore, above issue has to be answered in favour of the Respondent to the extent that the Claimant is not entitled to the interest for the period from 01.04.2016 to 17.08.2020 as claimed by them in the claim statement.

vii) Whether the Claimant is entitled to interest @ 18% p.a. from 17.08.2020 till 30.06.2022 and future interest from 01.07.2022 till the realization of the amount as claimed in favour of the Claimant?

In view of the conclusions by this Tribunal as to the entitlement of the Claimant in receiving the forfeited amount on the ground that the Respondent was not within their right to invoke forfeiture Clause as they had breached the contract in the first place, the Claimant is entitled to interest at the rate of 18% per annum from 17.08.2020 till 30.06.2022 and future interest from 01.07.2022 till the date of realisation of the forfeited amount.

viii) Whether Claimant is entitled to interest on the land lease deposit, when the lease agreement prohibits such interest payable?

The Claimant is entitled to interest on the land lease deposit as the breach of the contractual terms is attributable to the Respondent, as found by the Tribunal supra. The prohibition to the claim of interest on the land lease deposit by the Claimant can said to be applicable only if the Respondent has acted within the framework of the agreement. Therefore, the above issue is answered in favour of the Claimant.

ix) Whether the Claimant is entitled to any other relief/reliefs?

In the facts and circumstances of the case, the Claimant is not entitled to any other relief.

x) Whether the parties are entitled to costs.

Parties are directed to bear their own cost for the proceedings. The claim for litigation expenses by the Claimant has not been supported by any evidence and therefore this Tribunal holds that the Claimant is not entitled to litigation expenses. As a matter of fact, this claim has been strongly objected to by the counsel for the Respondent which in the opinion of the Tribunal is justified, in the absence of supporting material for such a claim from the side of the Claimant.

14. In the conspectus of the above discourse, the Tribunal holds that the Claimant is entitled to refund of the forfeited and deducted amount of Rs.2,23,19,500/- with interest at 18% from 17.08.2020 till 30.06.2022 and future interest @ 18% per annum from 01.07.2022 till the date of realisation of the forfeited amount with accumulated interest as indicated in para 20 of the Claim Statement by the Claimant.

15. It is hereby held that the Claimant is not entitled to interest @ 18% from 01.04.2016 till 17.08.2020 and litigation expenses as indicated in para 20 of the Claim Statement.

The Claimant is not entitled to any further or other relief.

The Award is accordingly passed.

16. ORAL EVIDENCE:

Witnesses: 1). Claimant's witness - CW1 (Mr.Naresh Kumar Singhal)

2). No oral evidence on behalf of the Respondent.”

3. The challenge to the impugned Award is primarily on the ground that the impugned Award has been passed contrary to the terms of the Lease Deed dated 05.11.2012 signed between the petitioner and the respondent and therefore contrary to Section 28(3) of the Arbitration and Conciliation Act, 1996. In this connection, the learned counsel for the petitioner would draw attention to the decision of the Hon'ble Supreme Court in **Food Corporation of India** Vs. **Chandu Construction and**

another, (2007) 4 SCC 697, rendered in the context of Section 30 of the Arbitration Act, 1940, wherein the Hon'ble Supreme Court has concluded that an Arbitrator being a creature of the Agreement between the parties and therefore the Arbitrator has to act within the four corners of the Agreement and if he ignores the specific terms of the Contract, it would be a question of jurisdictional error on the face of the Award, falling within the ambit of "legal misconduct" which could be corrected by the Court.

4. The learned counsel for the petitioner would submit that although the expression of "misconduct" is absent in Arbitration and Conciliation Act, 1996, an Award passed contrary to the terms of the Contract between the parties, particularly, the Lease Deed dated 05.11.2012 is liable to be set aside under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996 on the ground of patent illegality.

5. Specifically, it was submitted that under the Lease Deed, in case, there is a clause for pre-mature termination of the Lease Deed by the respondent/claimant for which, the petitioner was entitled to recover/deduct 5% per year, subject to a maximum of 85% and that no

compensation for improvement of building or other structures erected in the schedule property shall be made by petitioner/lessor. The petitioner/lessor is therefore not bound to pay any interest for the amount remitted by the petitioner/lessee. It is further submitted that Lease Deed also contemplates that no interest will be payable.

6. However, the learned Arbitrator has awarded interest at 18% and therefore submits that the impugned Award is patent illegality and therefore liable to be set aside.

7. Learned counsel for the petitioner referred to relevant Clauses from the Lease Deed dated 05.11.2012, which reads as under:-

Clause 2	***Clause 4(c)***
In consideration of the lease of the Schedule Property by the Lessor, the Lessee has paid a sum of Rs.6,37,70,000/- (Rupees Six Crores Thirty Seven Lakhs and Seventy Thousand only) to the Lessor by Demand Draft No.075571 dated 06.08.2012 issued by State Bank of Bikaner and Jaipur Bank, Chennai being the land	The land lease deposit shall be refundable after forfeiting an amount of 5% per year (rounded to include the year in entirely) for the number of years the plot was held by the Lessee subject to a minimum deduction of 15% and a maximum of 85% and no compensation for improvement of building or other structures

Clause 2	*Clause 4(c)*
lease deposit as referred to in Clause – 1 above. The land lease deposit shall be refundable after forfeiting an amount of 5% per year (rounded to include the year in entirety) for the number of years the plot was held by the Lessee subject to a minimum deduction of 15% and a maximum of 85% and no compensation for improvement of building or other structures erected in the Schedule Property shall be made by Lessor. The Lessor shall not pay any interest for the amount remitted by the Lessee.	erected in the Plot shall be made by the Lessor. The Lessor shall not pay interest for the amount remitted by the Lessee.

8. The learned counsel for the petitioner would further draw attention to Clause 6 of the aforesaid Lease Deed dated 05.11.2012 as per which it has been specifically stated that after three years, the Lessee shall be entitled to surrender the Schedule Property against receipt from Lessor of the land lease deposit amount paid by the Lessee hereunder less with a minimum of 15% and maximum of 85% as per Clause 2 above of the land lease deposit which shall be forfeited by the Lessor. Similarly, attention

was drawn to Clause 7 of the Lease Deed dated 05.11.2012.

9. The learned counsel for the petitioner further submits that on the same date as the Lease Deed dated 05.11.2012, another Agreement was also entered between the petitioner and the respondent to facilitate the respondent to register itself as the "co-developer" with the authorities under the provisions of the Special Economic Zones Act, 2005 (Special Economic Zones Rules, 2006) and a status of a "co-developer" was also accorded to the respondent on 22.04.2014.

10. The learned counsel for the petitioner would further submit that the request for refund of the deposits was made for the first time on 04.01.2016 and the permission was granted for refund only to the co-developer after the status of the respondent was cancelled by the Ministry of Commerce on 22.10.2019. It is submitted that pursuant to order dated 22.10.2019 of the Ministry of Commerce, a Board Resolution was passed by the petitioner on 27.02.2020 for cancelling the Lease Deed.

11. It is submitted that a Deed of Surrender of Lease was signed on 08.07.2020, wherein, the parties have put their signatures and agreed for

refund of Rs.4,14,50,500/- out of the amount of Rs.6,37,70,000/- which was paid as the lease amount for 99 years lease under the Allotment Letter of the petitioner to the respondent pursuant to which Lease Deed dated 05.11.2012 was signed.

12. The learned counsel for the petitioner would submit that there was a full satisfaction under the Deed of Surrender of Lease dated 08.07.2020 and therefore there was no arbitral dispute before the learned Arbitrator.

13. In this connection, the learned counsel for the petitioner has drawn attention to the decision of the Hon'ble Supreme Court in **Cauvery Coffee Traders, Mangalore** Vs. **Hornor Resources (International) Company Limited,** (2011) 10 SCC 420 which decision was later followed by the Hon'ble Supreme Court in **Bharat Cooking Coal Limited** Vs. **Annapurna Construction,** (2003) 8 SCC 154.

14. It is submitted that in view of Section 53 of the Indian Contract Act, 1872, there was a full and final settlement of liability and therefore it

was not open for the respondent to raise the dispute before the Arbitrator.

15. The learned counsel for the petitioner would submit that although the petitioner did not raise an objection under Section 16 of the Arbitration and Conciliation Act, 1996, this plea was specifically taken before the learned Arbitrator. However, the learned Arbitrator has awarded the amount that was retained under the terms and conditions of the Lease Deed dated 05.11.2012.

16. That apart, the learned counsel for the petitioner would also draw attention to the decision of the Hon'ble Supreme Court in **M/s.Alopi Parshad and Sons Limited** Vs. **The Union of India, 1960 (2) SCR 793,** rendered in the context of Section 56 of the Indian Contract Act, 1872. It is further submitted that there was no pleadings regarding impossibility under Section 56 of the Indian Contract Act, 1872. Unless the situation warranted, invocation of Section 56 of the Indian Contract Act, 1872 did not arise and therefore, the question of awarding amounts retained by the petitioner in terms of the Clause mentioned in the Lease Deed dated 05.11.2012 would not have arisen. In any event, it is submitted that

learned arbitrator also ought not to have awarded interest at 18% contrary to Clause 4(c) of the Lease Deed dated 05.11.2012. Hence, prays for setting aside the impugned Award.

17. The learned counsel for the petitioner also would draw attention to the conclusion in Paragraph 13 of the impugned Award that unless or until the co-developer status was cancelled by the competent authority, questioning of sanctioning of refund of the land lease deposit did not arise.

18. The learned counsel for the respondent on the other would submit that the impugned Award passed by the learned Arbitrator on 06.01.2023 was well-reasoned and does not warrant any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

19. Specifically, the learned counsel for the respondent would draw attention to Clause 4(b) and Clause 4(c) of the Lease Deed dated 05.11.2012. It reads as under:-

Clause 4(b)	***Clause 4(c)***
The Lessee shall also pay	The land lease deposit shall

Clause 4(b)	***Clause 4(c)***
from time to time to the Lessor proportionate share of the Common Infrastructure Development expenses (such as water supply/electricity/sewerage treatment/internet and such other facilities as insisted by statutory agencies from time to time) incurred for the ELCOSEZ HOSUR, Viswanathapuram of which Schedule Property is a part.	be refundable after forfeiting an amount of 5% per year (rounded to include the year in entirely) for the number of years the plot was held by the Lessee subject to a minimum deduction of 15% and a maximum of 85% and no compensation for improvement of building or other structures erected in the Plot shall be made by the Lessor. The Lessor shall not pay interest for the amount remitted by the Lessee.

20. It is submitted that Clause 4 has to be read along with Clause 25 of the aforesaid Lease Deed dated 05.11.2012. It is submitted that till date, the infrastructure facilities/amenities have not been developed by the respondent/claimant and therefore there was no justification in deducting the amount of Rs.2,23,19,500/- from Rs.6,37,70,000/- paid at the time of execution of the aforesaid Lease Deed dated 05.11.2012.

21. The learned counsel for the respondent would further submit that

only the respondent/claimant had produced the witness for oral examination to substantiate the fact that infrastructure facilities/amenities were not developed as was required under Clause 4(b) and 4(c) read with Clause 25 of the Lease Deed dated 05.11.2012. It is submitted that even as on date, the infrastructure facilities/amenities have not been developed and therefore, the Award passed by the learned Arbitrator does not call for any interference. It is further submitted that since the petitioner has failed to produce any oral evidence, the learned Arbitrator was entitled to draw an adverse inference in terms of illustration (g) to Section 114 of the Indian Evidence Act, 1872.

22. It is therefore submitted that the Award does not call for any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

23. In this connection, the learned counsel for the respondent has placed reliance on the following two decisions of the Hon'ble Supreme Court:

i. **Ajay Kumar D.Amin** Vs. **Air France**, (2016) 12 SCC 566.

ii. **Mussauddin Ahmed** Vs. **State of Assam**, (2009) 14 SCC 541.

24. That apart, the learned counsel for the respondent would submit that they have invested a sum of Rs.6,37,70,000/-. At the time of execution of the Lease Deed dated 05.11.2012, the respondent/claimant could not commence the construction within twelve months as no infrastructure facilities/amenities were developed by the petitioner herein.

25. In case, the interest if any already paid then, necessary charges would have been collected from the petitioner irrespective of the construction being put up by the respondent/claimant as was warranted under the aforesaid Lease Deed dated 05.11.2012. Hence, prays for dismissal of the present original petition.

26. By way of rejoinder, the learned counsel for the petitioner would submit that the respondent/claimant had filed W.P.No.15049 of 2017. It is submitted that in Paragraph 19 of the affidavit filed in support of the aforesaid writ petition also, the respondent/claimant had accepted for deducting a sum of Rs.75,70,500/- being 15% of the lease amount of

Rs.6,37,70,000/- and had stated that the respondent/claimant was entitled to only Rs.5,42,04,500/- whereas, the learned Arbitrator has awarded the entire amount that was deducted in accordance with Clause 26 of the Lease Deed dated 05.11.2012.

27. That apart, it is submitted that by an undated letter which was filed at Page No.3 of the Typed Set of Papers also, the respondent/claimant has expressed difficulties in starting with the project as the respondent/claimant was not having sufficient funds to commence the construction. This was right after the execution of Lease Deed dated 05.11.2012. Importantly, the learned counsel for the respondent would submit that the Deed of Surrender of Lease was prepared by the respondent/claimant and was forwarded through email to the petitioner on 24.02.2020. Thus, there was a full and final settlement as the Deed of Surrender was prepared by the respondent/claimant and thereafter the respondent/claimant was executed Deed of Surrender of Lease on 08.07.2020 pursuant to which, the same was signed, registered and resulting in execution of lease after deducting a sum of Rs.2,23,19,500/-. It is therefore submitted that the Award passed by the learned Arbitrator is

liable to be set aside.

28. The learned counsel for the petitioner would finally reiterate and having concluded that the question of sanctioning of refund prior to cancellation of the status of the respondent/claimant as a co-developer did not arise. While answering issue no.3, the Arbitral Tribunal has erred in awarding the amounts deducted as per Clause 9 read with Clause 26 of the aforesaid Lease Deed dated 05.11.2012. It is therefore submitted that the Award has to be set aside and it is open for the respondent/claimant to workout the remedy in accordance with law if at all as there was no arbitrable dispute between the parties.

29. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

30. A reading of the aforesaid Lease Deed dated 05.11.2012 indicates that the arrangements between the petitioner and the respondent/claimant was governed by Sections 51 to 55 of the Indian Contract Act, 1872.

31. The Lease Deed dated 05.11.2012 indicates that the petitioner was to develop the required infrastructure amenities for the respondent/claimant to put up a building in Special Economic Zone developed by the petitioner and the respondent/claimant under the provisions of the Special Economic Zones Act, 2005. Clause 25 of the Lease Deed dated 05.11.2012 also state that in case of any delay or event happened on the part of the Lessor (the petitioner) in execution/complaints of the above duties within the construction period, the construction period shall be extended by such time as may be mutually agreed between the Lessor (the petitioner) and the Lessee (the respondent).

32. Thus, the period of lease can be extended. However, Clause 26 of the Lease Deed dated 05.11.2012 casts an application on the respondent/claimant as a Lessee to commence the construction of the building within 12 months from the date of the Lease Deed.

33. Clause 26 of the Lease Deed dated 05.11.2012 further states that failure to start construction or commercial operation within the aforesaid periods for reasons solely attributable to the lessee i.e., the

respondent/claimant and not caused due to any of the acts or omissions of the lessor or any other Governmental agencies/statutory bodies whose clearance, approvals, consents, permissions etc., are required for the development of the Schedule Property will entail termination of the lease by the lessor and forfeiture of 15% of the land lease deposit paid by the lessee and the total amount of the service and development charges. In case of any reasons not entirely attributable to the lessee, the lessee is not able to commence construction or the commercial operations within the time limit as above, the lessor shall at the request of the lessee grant suitable extension of the time limit set out above.

34. This aspect ought to have been considered by the learned Arbitrator before proceeding to pass the impugned Award. That apart, the Deed of Surrender of Lease dated 08.07.2020 indicates that the respondent/claimant had agreed for return of a sum of Rs.4,14,50,500/- after adjusting the amounts in terms of the Lease Deed dated 05.11.2012. Thus, *prima facie* it indicates that there was a full and final settlement of all amounts and therefore this issue also ought to have been examined by the Arbitral Tribunal in terms of Section 63 of the Indian Contract Act,

1872. There are few contradictions in the impugned Award.

35. Issues which go to the root of the dispute between the parties ought to have been dealt by the Arbitral Tribunal. Whether the respondent/claimant was entitled for declaration that Clause 26 and Clause 9 of the Lease Deed dated 05.11.2012 were unconscionable or whether there was a full and final settlement of all dues between the parties and whether there was an estoppel operating against the respondent/claimant ought to have been considered by the Arbitral Tribunal. Thus, the Award passed by the Arbitral Tribunal warrants interference under Section 34 of the Arbitration and Conciliation Act, 1996.

36. Therefore, Court is of the view, the Award passed by the Arbitral Tribunal warrants an interference and is therefore liable to be set aside leaving the parties to workout their remedy afresh before the Arbitral Tribunal. The date from the passing of the Award i.e., 06.01.2023 till the date of communication of this order/till the date of passing of this order shall stand excluded for the purpose of computation of limitation.

37. This Original Petition stands allowed with the above observations. There shall be no order as to costs. Connected Application is closed.

08.02.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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C.SARAVANAN, J.

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