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CMA NO.1384 OF 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.02.2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

CMA NO.1384 OF 2023

AND

CMP NO.13838 OF 2023

M/s.Kozone Reality Private Limited
Rep. By its Managing Director
Mr.S.Ashok Kumar
SDS Enclave, Flat No.7, 4th Floor,
Opp. To Sathiyamurthy Hospital Road,
2/5, Perundurai Road, Erode – 638 011.

... Appellant /
Petitioner

Vs.

1.Mrs.Susila
2.Mr.Suman Babu

... Respondents /
Respondents

PRAYER: Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, praying to set aside the order dated 19.04.2023 passed by the Commercial Court (District Judge Cadre) Coimbatore in A.O.P.No.61 of 2023.



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For Appellant /
Petitioner : Mr.P.J.Rishikesh
For Respondents /
Respondents : Mr.Advaidh Nelakanttan
for M/s.ARK Law Associates

J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The only point that is argued by the learned counsel for the appellant in this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is that there is no basis for the conclusion of the Arbitrators for fixing a monthly rent of Rs.12,500/- per Flat for the 29 Flats that are allotable to the land owners.

2.The claim arose on a Construction Contract dated 10.07.2011 in and by which, the parties agreed that the builder / appellant herein would develop the land and construct 68 apartments and the apartments have to be shared between the builder and the owner as 39 and 29 respectively. As per the Agreement, the contract was to be completed by October 2012. It is further submitted that there was a delay of 29 months in



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completion of the work and the contract has been completed only in the year 2015. Upon completion and handing over of the apartments, the builder made a claim for refund of the deposits that are made by him for and on behalf of the flat owners which claim worked out to Rs.56,46,789/-.

2.1. Since a dispute was raised, the claimant nominated one Mr.S.A.Sreeramulu, retired District Judge as an Arbitrator. Since there was no nomination by the respondents herein, an application was filed under Section 11 of the Arbitration and Conciliation Act, 1996, in O.P.No.614 of 2017 and one Mr.H.Joseph David, a retired District Judge was appointed as an Arbitrator on behalf of the respondents namely the land owners. Both the two Arbitrators nominated one Mr.R.Dhandapani, a retired District Judge as a Presiding Arbitrator on 17.11.2017. The arbitration proceedings were held at Coimbatore. Upon receipt of the claim, the respondents namely the owners lodged a counter claim stating that they had suffered a loss of Rs.1,00,04,743/- because of the delay in completion of the project



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and therefore, they are entitled to be compensated for the loss caused by

the builder. The loss was worked out on an assumed rental value of

Rs.12,500/- per month per flat for a period of 29 months.

2.2.Before the Arbitrators, the claimant marked Ex-C.1 to Ex-C.12 and on the side of the respondents, Ex-R.1 to Ex-R.31 were marked. One Ms.Susila was examined as R.W.1.

2.3.The Arbitrators found that the claims of the appellant are justified and he is entitled to the refund of the money that he had deposited in obtaining various facilities in the apartment complex. On the said conclusion, the Arbitrators found that the appellant is entitled to a sum of Rs.56,46,789/- as claimed by it. However, on the counter claim, the Arbitrators accepted the claim of the land owners that the monthly rent will be Rs.12,500/- per flat and calculated the damages at Rs.1,00,04,743/-The relevant portion of the award regarding the fixation of damages reads as follows:



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“22.The land owners have claimed rental loss at the rate of Rs.12,500/- per apartment. We are inclined to accept that. Had the builder/developer has completed the construction and delivered possession of the flats as per the contract they would have gained by letting out to tenants at the rate of Rs.12,500/- per month per flat. Hence we fix the developer / builder has to compensate the land owners for the damages caused to them by the delay at the rate of Rs.12,500/- per flat for 27 months 18 days for 29 flats specified in the schedule to the supplementary Joint Development Agreement (Ex.C-5) at Rs.1,00,04,743/- (29 flats x Rs.12,500/- per flat x 27 months and 18 days months = Rs.1,00,04,743/-).

DETAILS OF CALCULATION

<i>Date of commencement of construction</i>	<i>1.9.2013</i>
<i>Time for Completion (add)</i>	<i>15 months</i>
<i>Date on which developer should have completed construction</i>	<i>31.12.2014</i>
<i>Deemed date of intimation about completion to the land owner by the developer</i>	<i>18.04.2017</i>
<i>Amount of delay</i>	<i>27 months 18 days</i>
<i>(i.e. Period between 31.12.2014 and 18.04.2017)</i>	
<i>Number of flats allotted to the land owner</i>	<i>29 flats</i>
<i>Damages calculated at the loss of rental value of Rs.12,500/- per month per apartment.</i>	

23) Hence we hold that the claimant / developer has committed delay in completion of construction of flats violating



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clause 8 of the Joint Development Agreement dated 10.07.2011 and therefore is liable to pay a compensation of Rs.1,00,05,174/- towards the damages caused to the landowners in this regard by the party in default viz., the claimant/developer. Issue Nos.1 and 2 are answered accordingly.”

2.4.The Arbitrators set off the amount due to the appellant / builder from the amount awarded as damages and granted an award in favour of the respondents for a sum of R.43,58,385/- with interest at 9% per annum that is to be calculated after two months from the date of the award.

2.5.Both the claimant as well as the respondents challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996.

2.6.The Commercial Court, Coimbatore which heard the Section 34 Petitions, dismissed both the Original Petitions. Aggrieved by the said dismissal, the claimant has come up on appeal.



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3. We have heard Mr.P.J.Rishikesh, learned counsel for the appellant and Mr.Advaidh Nelakanttan, learned counsel appearing for the respondents / claimants.

4. Mr.P.J.Rishikesh, learned counsel for the appellant would vehemently contend that there is not even a iota of evidence to justify the quantum of damages as assessed by the Arbitrators. He would draw our attention to paras 22 and 23 of the award which has been extracted supra to contend that the discussion in the award is without any evidence and fixation of monthly rent at Rs.12,500/- per flat has no evidentiary basis. He would also draw our attention to the evidence of P.W.1 and the documents that have been filed by the respondents to point out that there is nothing on record to show that the flats would have fetched a sum of Rs.12,500/- as rent, per month during the relevant period. He would also point out that each flat is of different measurement and therefore, fixation of Rs.12,500/- per month per flat for all the 29 apartments for the entire period of 29 months is seriously flawed.



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5. Contending contra, Mr. Advaidh Nelakanttan, learned

counsel for the respondents would submit that the jurisdiction of Section 34 Court is limited and if two views are possible on the evidence on record and the Arbitrators or the Section 34 Court had taken one view, we cannot, sitting under Section 37 of the Arbitration and Conciliation Act, 1996, interfere with the award or the order of the Section 34 Court.

6. We have considered the rival submissions.

7. We have no hesitation to conclude that both the award as well as the order of the Section 34 court are seriously flawed. When a claim for damages is made, it is fundamental that there should be some basic evidence, at least oral evidence, to support such claim. In the absence of any evidence, the Arbitrators cannot fish out a magic figure and fix it as damages. Pleadings cannot be elevated to the status of evidence. In the absence of any evidence regarding quantum of damages the Arbitrators, in our opinion, seriously erred in accepting the pleading of the owners /



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respondents herein to fix the monthly rent at Rs.12,500/- per flat. We do

not find any discussion whatsoever and the award is absolutely *laconic* when it comes to the fixation of damages. No doubt, the jurisdiction of the Section 34 Court to interfere with the award is very limited. The limited jurisdiction can be exercised in the cases of serious infraction both law of evidence as well as the public policy. We find that the award is completely perverse because it is a case of no evidence. Award based on no evidence, in our opinion, cannot stand judicial scrutiny even within the limited scope of scrutiny permitted by Section 34 of the Arbitration and Conciliation Act, 1996.

8.The attention of the Section 34 Court was drawn to this fact, namely the absence of evidence and the Section 34 Court unfortunately has chosen to gloss over it by just observing as follows:

“It is true that without any basis, a sum of Rs.12,500/- has been fixed as loss of rent in calculating damages. The agreement is also silent in this regard...”



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9. Thereafter, Section 34 Court goes on to discuss the law

relating to public policy, perversity and patent illegality. The Section 34

Court does not discuss as to whether there is any evidence in support of the

award for damages. We therefore find that the award is completely

perverse and patently illegal. We have no hesitation in setting aside the

award in respect of the claim for damages is concerned.

10. Hence, this Civil Miscellaneous Appeal is allowed and the

order of the Section 34 Court and the award in so far as they relate to

fixation of the damages are set aside. It will open to the parties to seek to

reopen the arbitration if they so advised. No costs. Consequently,

connected miscellaneous petition is closed.

[R.S.M., J.]

[R.S.V., J.]

07.02.2024

Index : No

Internet : Yes

Neutral Citation : No

Speaking Order

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To
The Commercial Court
(District Judge Cadre)
Coimbatore.



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