



Original Side Appeal (CAD) No.58 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.01.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE R.SAKTHIVEL

Original Side Appeal (CAD) No.58 of 2022

FIH India Developer Private Limited

Formerly known as Foxconn India

Developer Private Limited,

Hi Tech SEZ, Plot No.M2A & M2B

Sicot Industrial Park

Sunguvarchatram, Sriperumbudur

Kancheepuram 602 105.

... Appellant/Petitioner

Versus

M/s. R.D.Associates,

Rep by its Proprietor G.Diliban

Exotica 6th Floor, No.24 Venkatnarayana Road,

T.Nagar, Chennai 600 017.

.... Respondent/Respondent



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PRAYER: Original Side Appeal (CAD) filed under Order XXXVI Rule 1 of the Original Side Rules read with Section 37 of the Arbitration and Conciliation Act, 1996 and Section 13 of Commercial Courts Act 2015, to set aside the order passed in O.P.No.58 of 2019 dated 03.02.2020 and the award passed in Arbitration No.1 of 2014 dated 04.04.2018.

For Appellant : Mr.AR.L.Sundaresan, Senior Counsel
for M/s.D.Prabhu Mukunth Arunkumar

For Respondents : Mr.C.Jagadish

J U D G M E N T

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

The petitioner in Arbitration OP No.58 of 2019, an application under Section 34 of the Arbitration and Conciliation Act, is on Appeal, aggrieved by the dismissal of the said application upholding the award of the Arbitrator.

2. The facts necessary for disposal of the Appeal are as follows:



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2.1. The Appellant entered into four contracts for carrying out various works in its building in the Industrial Estate at Irungattukottai, Sriperumbudur, Kanchipuram District, with the respondent. The offer letters were submitted by the respondent on various dates and the letters of intent were issued on 24.08.2007, 25.07.2007 and 05.10.2007. The contracts were entered into on 18.09.2007 and 10.12.2007, in all there were four contracts for four different works. According to the respondent, all the four contracts were completed within the extended time and the completed works were handed over to the appellant or to the contractor, who was to do the remaining work in the same building.

2.2. The respondent also claims that while the appellant had paid the monies due under three contracts, it did not pay the monies due under the first contract dated 18.09.2007 which related to internal sewerage. Claiming that the final bill amount of Rs.5,26,122/- and the retention money of 5% quantified at Rs.28,48,060/- remains to be paid, the respondent invoked the Arbitration Clause and sought for arbitration. Since there was no agreement in appointment of Arbitrator, the respondent moved this Court under Section 11 of the Arbitration and Conciliation Act 1996, and a retired Judge of this Court was appointed as the



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Arbitrator. The claim before the Arbitrator was for the sum of Rs.33,74,182/- as stated above.

3. The claim was resisted by the appellant contending that as per Clause 2.3 of the contract, the work has to be certified by the appellant and only upon issuance of a completion Certificate as contemplated under the said Clause, the work is deemed to have been completed and the defect liability period/warranty period of 12 months would commence only from the date of the issuance of such certificate. Contending that since the work was incomplete, the appellant had not issued the certificate, the appellant would seek rejection of the claim before the Arbitrator. Even before the reference to the Arbitrator, the appellant had filed an application under Section 9, seeking appointment of an independent Commissioner with technical qualification to find out whether the work has been completed or not. The said application was closed by this Court with liberty to the appellant to approach the Arbitrator.



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4. The learned Arbitrator did not favour appointment of a Commissioner, but choose to decide the matter on the evidence that was available before him. The learned Arbitrator upon considering the evidence that was placed before him concluded that the claim of the appellant that the works have not been completed is incorrect. In coming to the said conclusion, the learned Arbitrator relied upon the counter affidavit filed by the appellant in OA Nos.799 to 802 of 2009, wherein the appellant had admitted the fact that the respondent has completed the work. In the affidavit filed in support of the said applications, the respondent had made a specific statement that it had completed the work in paragraph 3, the said paragraph 3 reads as follows:

“3. I humbly submit that the first respondent is a private limited company registered under Companies Act 1965. I have completed the work covered by all the aforesaid for contracts. As per the terms and conditions of the contracts I have handed over the construction to the first respondent as detailed below:



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Contract No.	Date of Handing Over
FIP3/07/Internal Water supply/034	04.05.2009
FIP3/07/External Sew/033	28.01.2009
FIP3/07/3C10/099, Central Kitchen.	28.01.2009
FIP3/07/3C01/100, Chemical mere house.	28.01.2009

This averment in paragraph 3 of the affidavit has not been denied in the counter affidavit filed in the said application. In fact there is a positive admission of the fact that the work has been completed. While dealing with the averments in paragraphs 2 to 5 of the affidavit filed in support of Application Nos.799 to 802 of 2009, the appellant has in its counter affidavit stated as follows:

*“2. The averments and allegations contained in the file in support of the Original Applicants Nos. 799 to 802 of 2009 which are all identical excepting the contract sworn too by Mr.G.Diliban, Proprietor of M/s. R.D.Associates are all denied. **The averments in paragraph 2-5 and the conditions of the contract extracted are all substantially correct.** (Emphasis supplied) The averments starting from paragraph 6 excepting the guarantees as specified in paragraph 8 are*



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all totally false and has been made as averments from out of the fertile imagination of the deponent of the affidavit. There is only a parrot like repetition in paragraphs 8,9,10 as regards submission of the final bill for the internal water supply, sanitary and sewerage arrangements for accessorial building 3C08 training centre, 3C12 dining hall, 3C07 dormitory one, 3D1 and dormitory 3 and 3D3.”

5. This statement in the counter affidavit in a judicial proceeding and the evidence that was on record impelled the Arbitrator to conclude that the Appellant has waived the requirement of a Certificate under Clause 2.3 and it had accepted delivery of the site without any objection. The learned Arbitrator has found that the site was delivered to the appellant in some cases and in some works the site was delivered to the contractor, who was to continue the work and both of them have signed in acceptance of such delivery. The fact that neither of them had chosen to claim that the work was incomplete was also noticed by the Arbitrator, in coming to the conclusion that the appellant cannot now go back and contend that the work was not completed when the site was delivered. On the said conclusion, the learned Arbitrator found that the respondent is entitled to the claim made.



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6. A counter claim was made by the appellant claiming that certain works were incomplete and therefore, it is entitled to a sum of Rs.1,38,95,000/- towards the counter claim. It was also contended that the Project Management Consultant, who had certified the work done by the respondent had fraudulently colluded with the respondent and certified works which were not completed, as if they were completed.

7. The counter claim was rejected by the learned Arbitrator on the ground that it was barred by limitation, since it was treated the date of filing of the counter claim is the date of the claim, inasmuch as the appellant had not issued a notice under Section 21 nor it had sought for appointment of an Arbitrator. Therefore, the Arbitrator rejected the counter claim as barred by limitation. Aggrieved the appellant moved the Section 34 Court seeking to set aside the award. The Hon'ble Judge, who heard the Section 34 Application also concurred with the reasoning of the Arbitrator. It was also pointed out that there was no evidence available on record to show that the works were not completed. Considering the limited scope



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for interference under Section 34, the learned Judge confined the investigation to the grounds that are available under Section 34 and finding no warrant to interfere upheld the award. Hence this Appeal.

8. We have heard Mr.AR.L.Sunderasan, learned Senior Counsel appearing for M/s.D.Prabhu Mukunth Arunkumar, for the appellant and Mr.C.Jagadish, learned counsel appearing for the respondent.

9. Mr.AR.L.Sunderasan, learned Senior Counsel appearing for the appellant would vehemently contend that once there is a contractual requirement of a completion certificate to be issued by the appellant in the absence of such completion certificate, both the Arbitral Tribunal and the learned Single Judge were not right in coming to the conclusion that the work was completed. It is the further contention of the learned Senior Counsel that once the appellant had alleged fraud and collusion between the Project Management Consultant and the respondent, the Arbitral Tribunal should not have brushed aside the allegation and come to the conclusion based on the affidavit that was filed in the Section 9 Application. The learned Senior Counsel would also fault the learned Single Judge



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for not having considered the issue relating to fraud committed by the Project Management Consultant and brushing aside the contention regarding non-completion on the basis of the findings of the Arbitrator being satisfactory.

10. Contending contra, Mr.C.Jagadish, learned counsel appearing for the respondent would submit that though a claim of fraud was made there was no evidence let into prove such fraud. Once it is admitted that the Project Management Consultant had certified all the works and the appellant had paid the monies due under the three other three contracts without insisting upon a certificate under Clause 2.3 of the contract, the appellant cannot be heard to contend that the production of the certificate is mandatory. The learned counsel would also draw our attention to the findings of the Arbitrator, after discussing the evidence on record to the effect that both the appellant and the subsequent contractor, who was to continue the work, had accepted delivery without demur, therefore they cannot turn around to contend that the work was not completed.

11. On the question of limitation, the learned Senior Counsel would submit



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that both the Arbitrator and the learned Single Judge were not right in concluding that the counter claim is barred by limitation overlooking the fact that the cause of action for the counter claim would arise only on issuance of a completion certificate and on the completion of the warranty period of one year. Therefore, the conclusion of the learned Arbitrator as well as the learned Single Judge regarding Limitation, according to him, is flawed.

12. We have considered the rival submissions.

13. We will have to remind ourselves of the fact that the jurisdiction of the Court under Section 34 is very limited and our jurisdiction in Appeal under Section 37 is much more limited. There cannot be a reappraisal of the evidence and there cannot be a review, as pointed out by the Hon'ble Supreme Court and this Court on several occasions an application under Section 34 is not even a review on facts, the jurisdiction is limited to the grounds set out in the said provision itself. What is sought to be urged by the learned Senior Counsel is that once fraud is alleged and established then the Arbitrator was not right in ignoring it and going by certain admissions made in other judicial proceedings. The Arbitrator has gone into the



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evidence and found that there is no basis for the claim of fraud and he has also as of fact found that the evidence on record shows that the work was completed.

14. The Section 34 Court has also concurred with the arbitrator on the effect of the evidence that was available before the Arbitrator. No doubt, the contention of the learned Senior Counsel that a non-issuance of a certificate under Clause 2.3 of the contract, would have a bearing on the claim that the work has been completed appears to be very attractive, but if we are to consider the reasoning of the Arbitrator to conclude that the requirement of a Certificate under Clause 2.3 was actually waived by the appellant even if another view is possible on that, we do not think we can interfere with the award on that Clause.

15. On the question of limitation, we find that it is wholly unnecessary for us to go into the question in view of the fact that we affirm the conclusion of the Arbitrator that the work was completed, therefore *dehors* the question of limitation, the counter claim has to fail, once we find that the work was completed. Hence we see no reason to interfere with the order of the learned Single Judge made in exercise of the jurisdiction under Section 34 of the Arbitration and



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Conciliation Act, 1996. The Appeal fails and it is accordingly dismissed. There shall be no order as to costs.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)

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jv

Index : No

Internet : Yes

Neutral Citation : No

Speaking Order

To

The Section Officer,

Original Side,

High Court of Madras



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and

R.SAKTHIVEL, J.

jv

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