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O.S.A Nos.327 of 2019 and 94 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **10.06.2024**

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**

and

THE HONOURABLE MRS.JUSTICE **K.GOVINDARAJAN THILAKAVADI**

O.S.A Nos.327 of 2019 and 94 of 2020

O.S.A.No.327 of 2019

K.K.Krishnan Kutty

... Petitioner

Vs.

1. Green Tree Homes and Ventures Pvt. Ltd.,
Represented by its Managing Director
Mr.Sathya Murthy
No.13, Sriman Srinivasan Road
Alwarpet, Chennai – 600 018

2. Green 201 Owners Welfare Association
Rep. By its Secretary
Green-201, Mr.Radha Garden Road
Pudupakkam, Siruseri, Chennai

... Respondents

Original Side Appeals filed under Section 37 (1)(b) of the Arbitration and Conciliation Act ,1996 read with Clause 15 of Letters Patent to set aside the order of dismissal passed in O.P.No.347 of 2018 dated 12.06.2019.

For Appellant: Mr.S.Suresh

For Respondents : R1 – Exparte

[Mr.J.Ravishankar reports 'No Instructions']



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Mr.V.Ramesh for R2

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O.S.A.No.94 of 2020

Green 201 Owners Welfare Association
Represented by its Secretary
residing at Plot No.69
Radha Nagar, 2nd Main Road
Perumbakkam
Chennai – 600 100

... Petitioner

Vs.

1. K.K.Krishnan Kutty

2. Green Tree Homes and Ventures Pvt. Ltd.,
Represented by its Managing Director
Mr.Sathya Murthy,
having its Registered Office
at No.13, Sriman Srinivasan Road
Alwarpet, Chennai – 600 018

... Respondents

Original Side Appeals filed under Order XXXVI Rule 1 of
Original Side Rules to set aside the order dated 12.06.2019 in
O.P.No.542 of 2018.

For Appellant : Mr.V.Ramesh
for Mr.R.Ashwanth

For Respondents : Mr.S.Suresh for R1
R2- Ex-parte
[Mr.J.Ravishankar reports 'No Instructions']



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JUDGMENT

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(Judgment of the Court was delivered by **M.Sundar, J.**)

This common order will now dispose of both the captioned intra-court appeals i.e., 'Original Side Appeals' ['OSAs' in plural and 'OSA' in singular for the sake of brevity] which are statutory appeals under Section 37 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity].

2. Owing to the limited perimeter of legal drills under Sections 34 and 37 of A and C Act, short facts [shorn of elaboration and granular particulars] will suffice.

3. Factual matrix in a nutshell is that the subject matter pertains to development (*inter alia* by putting up apartments) of land admeasuring 3.91 acres or thereabouts in Pudupakkam Village, Kancheepuram District in Tamil Nadu owned by one K.K.Krishnan Kutty (hereinafter 'land owner' for the sake of brevity); that the land owner entered into a 'Joint Development Agreement dated 08.11.2010' [hereinafter 'said JDA' for the sake of brevity and convenience] with a



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Company which goes by the name 'Green Tree Homes and Ventures Private Limited' [hereinafter 'Builder Company' for the sake of brevity and convenience]; that in said JDA, Clause 13.5 is an 'arbitration clause' and this arbitration clause serves as an 'arbitration agreement' between land owner and Builder Company i.e., 'arbitration agreement' within the meaning of Section 2(i)(b) read with Section 7 of A and C Act; that two General Powers of Attorney documents were executed by land owner in favour of Builder Company on 11.11.2010 and 22.07.2011; that the project was started by Builder Company; that many persons booked apartments in the project, which was expected to come up; that thereafter disputes erupted between land owner and builder company leading to triggering of the arbitration clause; that ultimately a Section 11 Court in and by an order dated 24.06.2016 in O.P.No.42 of 2016 appointed a former Hon'ble Judge of this Court as sole Arbitrator; that it is to be noted that in this Section 11 petition (O.P.No.42 of 2016), land owner was the petitioner, Builder Company was R1 and 'Green 201 Owners Welfare Association' registered by prospective buyers who had booked apartments, under the Tamil Nadu Societies Registration Act, 1975 with Registration Number 88/2015 on the file of the District Registrar, Chengleput, was R2; that it is to be noted that this Association shall



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hereinafter be referred to as 'Buyers Association' for the sake of brevity and convenience; that Section 11 Court appointed the sole Arbitrator after hearing land owner, the builder company (R1) and the Buyers Association (R2); that the former Hon'ble Judge of this Court so appointed i.e., 'Arbitral Tribunal' shall be referred to as 'AT' for the sake of brevity and convenience; that AT embarked upon adjudication of arbitrable disputes and after full contest, made an 'award dated 15.01.2018' [hereinafter 'impugned award' for the sake of convenience and clarity]; that land owner, builder company and the buyers association by way of separate petitions assailed the impugned award under Section 34 of A and C Act before a Hon'ble single Judge of this Court; that the land owner's Section 34 petition is O.P.No.347 of 2018, Section 34 petition of Buyers Association is O.P.No.542 of 2018 and Section 34 petition of Builder Company is O.P.No.581 of 2018. Section 34 Court took up all three OPs together, heard out the same and by a 'common order dated 12.06.2019' [hereinafter 'impugned order' for the sake of brevity and convenience] dismissed all three Section 34 petitions; that the land owner has preferred captioned O.S.A.No.327 of 2019 and Buyers Association has preferred captioned O.S.A.No.94 of 2020; that we are informed that Builder Company did not file an appeal and that



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Section 37 Court issued notices, service is complete and the captioned matters are before us.

4. This Section 37 Bench having set out the facts as well as the trajectory the matter has taken in reaching this Court, deems it appropriate to set out the trajectory the matter has taken in the Section 37 Court as well as certain other facts before embarking upon the Section 37 legal drill.

5. In the land owner's OSA, namely O.S.A.No.327 of 2019, the Builder Company is R1 and Buyers Association is R2. In the Buyers Association O.S.A i.e.,O.S.A.No.94 of 2020, land owner is R1 and the Builder Company is R2. From hereon and henceforth, for the sake of convenience and clarity, 'O.S.A.No.327 of 2019' shall be referred to as 'I OSA' and 'O.S.A.No.94 of 2020' shall be referred to as 'II OSA'.

6. In I O.S.A, Mr.S.Suresh, learned counsel on record for the appellant land owner and Mr.V.Ramesh, learned counsel for R2-Buyers Association is before us. As regards, R1-Builder Company, the same has been duly served, name of the Builder Company is duly shown in the cause list but the Builder Company has neither entered appearance through a counsel nor chosen to come before this Court. Therefore, we set R1 *ex parte* and proceed with the main matter.



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7. As regards, II OSA preferred by the Buyers Association, the Builder Company is R2. R2 has been served by resorting to substituted service. Mr.J.Ravishankar (Enrollment No.1040 of 2002) with address for service at 295, Law Chambers, Madras High Court, Chennai – 104 [Mob: 90030 71939], who is before us, submits that he has filed Vakalatnama for R2-Builder Company in I OSA, the same was returned by Registry as it did not contain the seal. Learned counsel submits that thereafter in spite of best efforts and multiple e-mails, he has not received any instructions from Builder Company (R2). In this scenario, in the II OSA, Mr.J.Ravishankar, learned counsel reports 'No Instructions' for R2 (Builder Company). Learned counsel has made an endorsement in the case file and a scanned reproduction of the same is as follows:

I report no
instructions for
R-2.
Dy. no. 1040/02
J. Ravishankar
10/6/2024



Considering this trajectory, we deem it appropriate to set R2-Builder Company in II OSA *ex parte*.

8. This takes this Court to the arguments advanced in the captioned OSAs.

9. As regards I OSA preferred by land owner, Mr.S.Suresh, learned counsel submitted that he accepts the impugned award except for one part in one paragraph, namely Paragraph 239 and that part of paragraph 239 reads as follows:

'239.The Claimant has to return an amount of Rs.2.5 Crores to the 1st respondent Company. The Claimant is also directed to refund a sum of Rs.1.26 Crores to the 1st Respondent Company.'

10. As paragraph 239 refers to Issue No.1, we deem it appropriate to set out Issue No.1. Issue No.1 as framed by AT is as follows:

'1. Whether the Joint Development Agreement dated 08/11/2010 between the Claimant and 1st respondent is liable to be cancelled in view of the default committed by the 1st Respondent?'

11. Learned counsel for appellant in I OSA submitted that while he has no grievance about other aspects of the award, the direction to return/refund monies to Builder Company alone is his grievance and



in support of this submission, learned counsel submitted that this would arise only after completion of the project. This argument does not find favour with us owing to the first part of paragraph 239 wherein Hon'ble AT in answering issue No.1 has cancelled said JDA. This part is not assailed. In any event, in the light of the obtaining legal position qua Ssangyong principle [***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131***] i.e., legal position that there can be no review of a arbitral award on merits in a Section 34 legal drill, the findings of Hon'ble AT cancelling said JDA is clearly outside the legal perimeter or in other words, the legal landscape within which Section 34 legal drill has to perambulate. For the sake of specificity and clarity, we deem it appropriate to extract and reproduce paragraph 239 of the impugned award as regards aforementioned issue number 1 and the same reads as follows:

'239. In the light of the above the issues are answered as follows:

'Issue No.1: The Tribunal has power to cancel the Joint Development Agreement dated 8.11.2010 (Ex.C1) entered into between the Claimant and the 1st Respondent in



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view of the defaults committed by the 1st respondent and Accordingly the JDA dated 8.11.2010 (Ex.C1) is hereby cancelled. The Claimant has to return an amount of Rs.2.5 Crores to the 1st respondent Company. The Claimant is also directed to refund a sum of Rs.1.26 Crores to the 1st Respondent Company.'

12. Though very many grounds have been raised in the Memorandum of Grounds of Appeal, learned counsel make it clear that he is predicated his argument on aforementioned one point. We carefully considered the aforementioned submission.

13. In paragraph 239, Hon'ble AT has proceeded on the basis that the said JDA [to be noted, said JDA is Ex.C1 before AT] was cancelled and on this basis, ordered refund. We wanted to know the provision of law i.e., which of the eight pigeon holes in Section 34 of A and C Act under which this challenge was made before the Section 34 Court. Learned counsel submits that it is under Section 34(2)(a)(iv) of A and C Act. To be noted, learned counsel says it is Section 34(2)(iv) of A and C but it is clear that only Section 34(2)(a)(iv) will arise when the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or when it contains decisions on matters beyond the scope of the submission to arbitration.



In the case on hand, we find that it is neither. The reason is, the arbitration agreement between the parties i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act, which is in the form of a clause in said JDA (Ex.C1) is Clause 13.5 and the same reads as follows:

'13.5.Any dispute, controversy, claim of disagreement of any kind whatsoever between or among the parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof shall be referred to and finally resolved by Arbitration irrespective of the amount involved in the dispute or whether such disputes would otherwise be considered justifiable for resolution by any Court. The Parties expressly agree that they shall attempt to resolve through good faith any such dispute between the parties by mutual discussion. In the event of a deadlock, both parties shall nominate an Arbitrator of their choice and the nominated Arbitrators shall appoint a Presiding Arbitrator who shall decide the dispute so referred to him in accordance with the Arbitration and Conciliation Act, 1996 (26 of 1996) then in force. The seat of Arbitration shall be Chennai and shall be in English Language. The Parties agree that the Arbitration Award so passed by the Presiding Arbitrator shall be final and binding on both the parties.'

Further this agreement for Joint Development and its performance shall be governed by the law of India and subject to exclusive jurisdiction of courts in Chennai, India.'

14. A bare reading of Clause 13.5 makes it clear that it is comprehensive as it talks about 'any dispute, controversy, claim of disagreement of any kind whatsoever'. Furthermore, this is buttressed by the fact that a Section 11 Court (as alluded to supra) by order dated 24.06.2016 has constituted the AT (a former Hon'ble Judge of this Court)



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2

ORDER

The learned counsel for parties jointly proposed that Mr. Justice K.Chandru, retired Judge of this Court may be appointed as the Sole Arbitrator and that the proceedings be governed by the Rules of Madras High Court Arbitration Centre.

2. In view thereof, by consent, I appoint Mr. Justice K.Chandru, a retired Judge of this Court as the Sole Arbitrator, to enter upon the reference and adjudicate the disputes *inter se* the parties. The arbitration proceedings will be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

3. Memo be filed by the petitioner to carryout the amendment in the Original Petition.

4. The original petition is, accordingly, allowed, leaving the parties to bear their own costs.

(S.K.K., C.J.)
24.06.2016

bbr

Note: Mark a copy to

- (i) The Addl. Registrar-Vigilance
Madras High Court Arbitration Centre,
Madras High Court Campus, Chennai.

15. A further submission that was made by learned counsel for appellant is that vide Ex.R8, the Builder Company has undertaken to refund money and therefore, the aforementioned finding of AT vide Paragraph 239 is untenable. It may really not be necessary to go into this



as Section 34 and obviously Section 37 legal drills are not appeals. A review on merits is impermissible vide **Ssangyong** case law. Therefore, this argument is a non-starter is our considered view.

16. We also deem it necessary to set out that as before the Section 34 Court the argument was predicated not vide Section 34(2)(a)(iv) of A and C Act but on public policy [Section 34(2)(b)(ii) of A and C Act] and therefore, we deem it appropriate to say that we tested it vide Section 34(2)(a)(iv) and we find that Paragraph 239 of the impugned award neither deals with dispute not contemplated or falling within the terms of the submission to arbitration nor contains a decision on matters beyond the scope of submission to arbitration. This drops the curtains on the I OSA.

17. This takes us to II OSA, which has been preferred by the Buyers Association. Mr.Ramesh, learned counsel also submitted that his argument is on one point (though very many grounds have been set out in the Memorandum of Grounds) and that one point pertains to issues 6 and 7, which read as follows:

'6. Whether the members of the 2nd Respondent Association are entitled for compensation and damages from the 1st Respondent and its directors?



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7. *Whether the members of the 2nd Respondent Association are entitled to obtain refund of the excess amount collected by the 1st Respondent, in view of their abandoning the project?'*

18. Adverting to paragraph 233 of the impugned award wherein issues 6 and 7 have been answered, learned counsel submitted that AT had fallen in error.

19. To be noted, paragraph 233 of the impugned award reads as follows:

'233. As against these claims, on behalf of the 1st Respondent, director Sathyamoorthy (RW1) stated that they standby paying the compensation as per the JDA, but however these amounts will be adjusted against the amounts due from the members of the 2nd Respondent Association. With reference to the damages, no doubt because of the delay in the project there has been substantial loss to each buyer, but since on the ground of delay and non-completion of the project, the JDA itself has been cancelled at the instance of the claimant and the 2nd Respondent. Therefore the question of making further claim for any damages will not arise especially when the 2nd Respondent Association has been given charge to proceed with the construction and completion of the project in collaboration with the Claimant. Hence, Issues No.6 and 7 are answered against the 2nd Respondent.'



20. This Court wanted to know the exact slot under Section 34

under which this challenge was made and learned counsel submitted that it is under Section 34(2)(b)(i) of A and C Act. In other words, it is the pointed submission of learned counsel for appellant in II OSA that subject matter of the dispute is not capable of settlement by arbitration under law for the time being in force. The dispositive reasoning qua I OSA would apply in the case in II OSA too. The trajectory the matter has taken qua constitution of AT will make it clear that the parties cannot now be heard to contend that subject matter of dispute is not capable of settlement by arbitration. However, a careful perusal of issues 6 and 7 which deal with compensation / damages payable by the Builder Company as well as refund of excess amount makes it clear that there is absolutely no ground to say that the dispute is not capable of settlement by arbitration. Those of the matters which are not arbitrable have been clearly adumbrated starting from *Booz Allen and Hamilton Inc. Vs.SBI Home Finance Ltd. & Ors.* reported in (2011) 5 SCC 532, which was followed by *Nawal Kishore* case [*Nawal Kishore Sharma v. Union of India* reported in (2014) 9 SCC 329] and *A.Ayyasamy* case [*A.Ayyasamy Vs.A.Paramasivam* reported in (2016) 10 SCC 386]. There is nothing to demonstrate that the points urged falls under any one of the



adumbrations in ***Booz Allen, Nawal Kishore and A.Ayyasamy*** case laws.

21. Be that as it may, for completion of facts we deem it appropriate to write that we also find from Paragraph 41 of the impugned award that the Hon'ble sole Arbitrator who constituted the AT has even made spot visit with the parties, minuted the same and has rendered the finding. We find that Section 34(2)(b)(i) of A and C Act is also a non-starter for these reasons.

22. It is also deemed appropriate to record that a perusal of the order of Section 34 Court brings to light that argument there was predicated largely on public policy which is Section 34(2)(b)(ii) of A and C. Section 34(2)(b)(ii) of A and C Act is a different kettle of fish but it is not necessary to delve into it as both counsel submitted that the captioned appeals are not being predicated on Section 34(2)(b)(ii) of A and C Act.

23. We are informed that a contempt petition being Contempt Petition No.903 of 2015 is pending before a Hon'ble single Judge and that it arises out of orders under Section 9 of A and C Act. Though obvious, we make it clear that the contempt proceedings will proceed on its own merits and in accordance with law as it is a matter between between the



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Hon'ble Court and the petitioner, the petitioner in a contempt petition being an informant.

24. Ergo, the sequitur of the discussion and dispositive reasoning thus far is that in the Section 37 of A and C Act legal drill on hand we find no ground to interfere qua the order of Section 34 Court which has sustained the impugned award made by the AT. Apropos, the further sequitur is, both captioned OSAs fail and both the captioned OSAs are dismissed. There shall be no order as to costs.

(M.S.J.) (K.G.T.J.)
10.06.2024

Index:Yes/No
Neutral Citation: Yes/No
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and
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