IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.12.2024
Pronounced on : 21.12.2024

CORAM

THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

O.P.No.837 of 2017

1.M/s.INNO Estates Pvt. Ltd.,
Represented by its Authorized Signatory
Mr.C.V.Lakshmanan.

2.M/s.INNO Development Management
Company LLP,
Represented by its Partner,
Mr.R.Ravi Shankar. ... Petitioners

vs.

M/s.Tamil Nadu Teachers Housing and Welfare Trust,
Represented by its Managing Trustee
Mr.M.Vishwanathan,
No.30/1, Ramakrishnapuram,
North Usman Road, T.Nagar,
Chennai – 600 017. ... Respondent

PRAYER: Arbitration Original Petition filed under Sections 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award dated 31.05.2017, grant the reliefs sought for by the petitioner in the arbitration.

For Petitioners : Mr.Anirudh Krishnan

For Respondent : No appearance

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ORDER

This Section 34 original petition has been filed challenging the award dated 31.05.2017 passed by the Arbitral Tribunal.

2.The petitioners are claimants before the Arbitral Tribunal. The respondent herein also, aggrieved by the award, filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996. However, the said original petition was dismissed for non-prosecution and the present Section 34 petition is at the instance of the claimants. The respondent remained ex-parte, though initially they were represented by a counsel. I have therefore proceeded to hear Mr.Anirudh Krishnan, learned counsel for the petitioners in the above original petition. I have also gone through the records, including the impugned majority award by two of the Arbitrators and minority award by the third Arbitrator.

3.The brief facts of the case are as follows:

The petitioners entered into a Memorandum of Understanding with the respondent Trust on 18.11.2010 for developing the lands owned by the petitioners to an extent of 52.13 acres in Kattavakkam Village, Kanchipuram Taluk. Pursuant to the said Memorandum of Understanding dated 18.11.2010, an Agreement of Development and Sale was entered into between the parties on 09.12.2010, setting out various terms and conditions for the joint development. A Supplementary Agreement was entered into between the parties on 19.04.2012, acknowledging the failure of the respondent to fulfill its obligations. In and by the said Supplementary Agreement, sale consideration and time lines were revised. In or about June 2012, the respondent Trust raised certain issues and called upon the petitioners to rectify the same. The petitioners replied to the said communication of the respondent stating that the error pointed out would not in any manner affect the development or sale and also undertaking to indemnify any third party in the event of any loss being suffered owing to the said typographical error. However, the respondent Trust insisted on rectification deeds being executed and was not satisfied with the proposed suggestion of the petitioners. As there was a deadlock between the parties, the petitioners invoked the arbitration clause after terminating the agreement between the parties in terms of the termination clause under the agreement.

4.The Arbitral Tribunal consisted of three Arbitrators. After elaborate trial, the Majority Tribunal, namely two Arbitrators found that the request of the respondent Trust for execution of the rectification deeds was just and proper and therefore, the termination of the contract by the petitioners was illegal and consequently found that the respondent had not committed any breach and it was only the claimants who have violated the terms of the agreement.

5.However, the Minority Tribunal, third Arbitrator gave a separate award holding that the respondent Trust was at fault for failure to adhere to the representations and warranties given in the agreement, besides also holding that the respondent Trust was not possessed of sufficient funds to perform its obligations and also that the petitioners were not obligated to execute any rectification deeds as required by the respondent Trust.

6.Aggrieved by the award of the Majority Tribunal and placing strong reliance on the award of the Minority Tribunal, the petitioners have filed the present OP under Section 34 of the Arbitration and Conciliation Act, 1996.

7.Mr.Anirudh Krishnan, learned counsel for the petitioners would take me through the relevant clauses of the Joint Development Agreement. Clause 4 pertains to the obligations of the Trust, Clause 8 deals with payments and Clause 13 relates to termination and Clause 15 contains representations and warranties of the respondent Trust.

8.Referring to the particular clauses in the said Joint Development Agreement, Mr.Arirudh Krishnan, would primarily contend that the first respondent has given a false representation that the respondent Trust was possessed of sufficient funds to perform and discharge all its obligations under the Agreement. He would also contend that the Majority Tribunal misconstrued the clauses in the Joint Development Agreement and also ignored material evidence and consequently the award by the Majority Tribunal is patently illegal and the same is liable to be set aside. He would also refer to mandate of Section 28(3) of the Arbitration and Conciliation Act, 1996 being violated by the Majority Tribunal.

9.Referring to the specific arguments advanced by the learned counsel for the petitioners on the above aspects, I would now deal with the obligations of the respondent Trust. Clause 4.9 has been discussed by the Tribunal at length. For the sake of convenience, the same is extracted hereunder:

> *"**Clause 4.9:** Trust shall not do or suffer or cause to be done any act, deed or thing which will derogate from the responsibilities conferred on it by these presents, nor shall it at any point of time create any charge, or lien, clog, encumbrance, hypothecation, mortgage, sale pre-emptive rights, license, lease or exchange or agreement for sale or otherwise raise any loans or securitise the Schedule Land or this Agreement with any lenders, banks or third parties nor shall suffer or incur any attachment or the appointment of any receiver or custodian in respect of the Schedule Land by way of its acts of commission or omission de hors this Agreement".*

10.According to the Majority Tribunal, the respondent Trust did not violate the terms and conditions of the agreement by entering into agreements with third parties. In fact, the Majority Tribunal even held that in order to make payments to the petitioners, the respondent Trust had to necessarily enter into agreements with third parties and therefore, the said acts on the part of the respondent Trust cannot be found fault with.

However, the Minority Tribunal held that the respondent Trust had no authority to enter into any agreements of sale with prospective third party buyers, even in the absence of a Power of Attorney being executed by the petitioners in that regard and consequently held that the respondent Trust had violated the terms of the contract. In this context, that clause 4.9 extracted herein above requires to be considered.

11.According to the Majority Tribunal, the word *de hors* employed in the said condition empowered or permitted the respondent Trust to enter into agreements with lenders, banks and third parties. In fact, the Majority Tribunal has found that the agreements entered into by the respondent Trust with the third parties was falling within "*de hors*" the agreement. However, the Minority Tribunal held that the word "*de hors*" meant outside of or without and therefore, the agreement prohibited the respondent Trust from execution of agreements of sale outside the scope of the agreement. The Minority Tribunal also found that even though the Clause 4.9 as interpreted by the Majority Tribunal was correct, however, any power to enter into an agreement of sale with the third parties was qualified by subsequent clauses, especially Clause 8.3 of the agreement, which requires payment of balance sale consideration to be made to the claimant, consequent upon which, the claimant would execute a registered Power of Attorneys in favour of the respondent Trust for effecting sales.

12.Relying on the Minority Tribunal's findings in this regard, Mr.Anirudh Krishnan would point out that in respect of certain pockets of land, the petitioners had executed a Power of Attorney under Ex.R72 and Ex.R73 in favour of the respondent Trust. He would refer to the said Powers of Attorney which empowered the agent to enter into agreements of sale with purchasers and to receive advance and issue valid receipts etc.

13.Placing reliance on the said clause in the Power of Attorneys in Ex.R72 and Ex.R73, Mr.Anirudh Krishnan would contend that when admittedly the respondent Trust defaulted in payment of monies as contemplated under the agreement with the petitioners, the petitioners did not execute any power of attorneys like done in the other cases and therefore, the agreements of sale entered into by the respondent without any authority from the petitioners, the lawful owners was clearly violative of the terms of the contract.

14.I am in agreement with the findings of the Minority Tribunal in this regard. As rightly contended by the learned counsel for the petitioners, the Majority Tribunal, while rightly interpreting Clause 4.9 to the extent that any encumbrance or allegations outside the scope of the agreement alone was prohibited, however, failed to harmoniously read the other clauses in the Joint Development Agreement, especially the obligations on the part of the respondent Trust to pay the balance sale considerations to the petitioners which was a precondition for the petitioners to execute and register a Power of Attorney in favour of the respondent Trust. Therefore, I find force in the submissions of the learned counsel for the petitioners that there has been misconstruction of the relevant and significant clauses pertaining to the obligations of the respondent Trust under the Joint Development Agreement.

15.With regard to Clause 5.3, which required documents to be submitted by the petitioners as may be required by the respondent Trust, the Majority Tribunal has held that the petitioners have violated the said terms and conditions imposed and agreed upon under the Clause 5.3 and the same is extracted hereunder for easy reference:

“5.3. INNO, to facilitate the sale promotion by TRUST of the plots/saleable area in the layout to / among the members of TRUST, shall, within 7 (seven) days from the date of execution of this agreement, produce and or cause to be produced copies of the following documents / deeds to enable TRUST, at their cost and expenses to carry out and complete the due diligence and causing a report from their advocate/solicitor on the title and the marketability of the Schedule Land.

(a) Copy of the title documents to the Schedule Land in favour of INNO and / or its nominees.

(b) Copy of the link / parent documents to the title documents of the Schedule Land.

(c) Copy of the revenue records such as Patta, Chitta, Adangal for the recent fasili in respect of the Schedule Land.

(d) Copy of the receipt for the recent / current fasli for payment of kist in respect of the Schedule Land.

(e) Copy of the encumbrance certificate covering the period from 01.01.1977 to 31.10.2010 in respect of the Schedule Land.

(f) Village map showing the Schedule Land.”

16.Admittedly, a Memorandum of Understanding was entered into between the parties preceding the Joint Development Agreement. The

Memorandum of Understanding is dated 18.11.2010 and almost within a month thereafter, the Joint Development Agreement was entered into between the parties on 09.12.2010. Subsequently, a Supplementary Agreement was also entered on 19.04.2012, revising certain terms of the Joint Development Agreement dated 09.12.2010. As can be seen above from Clause 5.3, the respondent Trust can call upon the petitioners to furnish such documents or deeds that may be necessary to carryout and complete due diligence and for causing a report from their Advocate on the title and marketability of the Schedule of the subject property. However, the parties had clearly agreed that such requirement was to be made within seven days from the date of execution of the agreement. In other words, any documents or deeds that may have a bearing on the title or marketability of the petitioners had to be required by the respondent Trust by calling upon the petitioners for production of the said documents within seven days i.e., on or before 16.12.2010. It is in this context that the Supplementary Agreement assumes relevance and significance.

17.Even when the Supplementary Agreement came to be executed on 19.11.2012, almost four months after the execution of the agreement, there was no whisper about any further documents being required by the respondent Trust. In fact, in the said Supplementary Agreement, the respondent Trust has admitted its failure to fulfill its obligations to complete the project within the time frame originally envisaged under the Joint Development Agreement dated 09.12.2010.

18.For the first time, the issue was raised as late as June 2012 and there have been back and forth mails exchanged between the parties in this regard. The Majority Tribunal has found that the petitioners were obligated to execute the rectification deeds to establish good and marketable title to the property owned by the petitioners. However, the minority Tribunal has held that there was no necessity for execution of rectification deeds and in any event, the same could not impede or postpone payment of the balance sale consideration as agreed upon by the respondent Trust under the various terms of the Joint Development Agreement as well as the Supplementary Agreement.

19.The learned counsel for the petitioners would submit that the error pointed out by the respondent Trust was firstly, belated and secondly, insignificant in as much as that they were pertaining to a mistake in the name of the Revenue Taluk and that too, in the parent document which would not affect the title to marketability of the subject lands. In fact, it is also an admitted fact that several plots of land were sold, mentioning Walajahbad Taluk instead of Kachipuram Taluk. However, the said sales effected already were brushed aside by the respondent Trust, citing that some of the buyers who has opting for bank loans had raised the issue and therefore, without the rectification deeds, the respondent Trust was unable to sell the plots in the layout.

20.In fact, the reply to the E-mail of the petitioners on 30.07.2012 assumes a lot of importance. In the said E-mail, the respondent Trust has contended that the respondent has been asking the petitioners to furnish rectification deeds and that without the same, the respondent was not in a position to obtain a project loan and in the absence of a project loan, purchasers would not buy and consequently payments would not flow to the respondent Trust and in turn, payments to the petitioners would be delayed.

21.This stand of the respondent Trust is on the face of it going against the warranties given by the respondent Trust under the agreement dated 09.12.2010. In this regard, clause 15.5 is extracted hereunder:

> *"15.5. TRUST represents and warrants that it has sufficient and adequate or is otherwise possessed of sufficient funds to enter into, perform and discharge the obligations assumed by it under this Agreement, including the effecting of the sale consideration in the manner and within the time lines more fully envisaged in this Agreement."*

22.It is not the case of the respondent Trust that they were going for a project loan or that they were dependent on purchasers to make advances and in turn, the respondent Trust would be able to make payment to the petitioners. The respondent Trust has in no uncertain terms at clause 15.5 represented that the Trust is possessed of sufficient and adequate funds to perform and discharge all its obligations under the agreement, including payment of the sale consideration in the manner and within the time lines more fully envisaged in the agreement. Therefore, it is not only a clear violation of the said warranty given by the respondent Trust, but also the stand subsequently taken insisting upon the rectification deeds cannot be countenanced for the simple reason that the respondent Trust never represented to the petitioners that they were dependent on a project loan to be obtained for making payment of the sale consideration.

23.Further, the belated request well beyond the agreed seven days period also clearly appears to be an after thought to buy time. I do not find any nexus between the furnishing of documents and payments to be made by the respondent Trust. Even as late as in April 2012, the respondent Trust did not deem it necessary to require any further documents from the petitioners.

24.The Minority Tribunal has discussed the evidence adduced by the parties in this regard at great length and has rightly, in my opinion found that the shield of rectification deeds being projected by the respondent Trust was only to cover up their inability to make payment of the balance sale consideration and therefore, it is not a case where the petitioners have violated the terms of the contract, but it is only the respondent Trust which has failed to discharge and fulfill its obligations under the agreements, namely Joint Development Agreement and Supplementary Agreement.

25.With regard to the termination, it is the specific case of the petitioners that the respondent, without any power or authority, had proceeded to enter into agreements of sale and invited third party interests and that the balance sale consideration was also not paid as promised under the subsequent agreement and for all these reasons, the termination letter was issued by the petitioners.

26.The Majority Tribunal has held that the execution of the agreements of sale would not attract the mischief of Clause 4.9 of the agreement dated 09.12.2010. However, the Minority Tribunal held that the non payment of the agreed sale considerations by 31.07.2012 clearly amounted to failure on the part of the respondent Trust and therefore, the termination by the claimant cannot be found fault with.

27.Section 28(3) of the Arbitration and Conciliation Act, 1996 reads thus:

> *"28(3). While deciding and making an award, the arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."*

28.I have already found that the Majority Tribunal has failed to consider the obligations cast on the respondent Trust to make payments being independent of the other clauses and also there being a clear misconstruction of Clauses 5.3 by the Majority Tribunal. Therefore, even under Section 28(3), the Majority Tribunal's award requires to be interfered with.

29.The learned counsel for the petitioners would place reliance on the decision of the Hon'ble Supreme Court in *Delhi Metro Rail Corporation Limited Vs. Delhi Airport Metro Express Private Limited*, reported in *(2024) 6 SCC 357*, where the Hon'ble Supreme Court held that when the award ignores vital evidence and also did not appreciate the import of the two phrases separately from each other, in that case, it would result in an unreasonable and incontrovertible clause frustrating the very provision, thereby warranting interference by the Court exercising power under Section 34 or 37 of the Arbitration and Conciliation Act, 1996.

30.Also Clause 4.9 of the agreement has not been interpreted by the Majority Tribunal in a manner that a reasonable man would interpret such a clause. Clauses 8.3 and 15.6 regarding the obligations cast on the respondent Trust and also the warranties and representations given by the respondent Trust which form the basis on which the petitioners came forward to offer its lands for development and sale have to be read together and harmoniously. However, the Minority Tribunal has rightly considered the material evidence available on record in coming to the conclusion that the representations and warranties made by the respondent regarding possessing sufficient funds was vital to the case of the respondent Trust. As rightly discussed above, though the respondent Trust carried out due diligence and had an option of seven days to require any additional documents. The respondent did not deem it fit to seek for any clarifications or further documents even after executing the Supplementary Agreement. As late as in April 2012, at the fag end of the period contemplated for making the balance sale consideration, the respondent Trust has raised the issue of typographical error in the parent deed and caught on to it apparently to only cover up its inability to make payment as promised originally under the Joint Development Agreement and subsequently, stood modified under the Supplementary Agreement dated 19.04.2012.

31.For all the above reasons and on the grounds that the Majority Tribunal has contravened Section 28 (3) of the Arbitration and Conciliation Act, 1996 and also failed to consider the vital documentary evidence and having misconstrued the terms and conditions in the agreement dated 09.12.2010, the findings arrived at by the Majority Tribunal are clearly falling within 'patent illegality' and therefore, requires to be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996.

32.The Majority Tribunal has entertained the counter claim made by the respondent Trust. However, as rightly contended by Mr.Anirudh Krishnan, learned counsel for the petitioners, the Tribunal while awarding the counter claim for the tune of Rs.4,00,00,000/- to the respondent Trust, failed to factor the terms of the Supplementary Agreement dated 19.04.2012, in and whereby, the respondent had agreed to compensate the petitioners to the tune of Rs.8,94,08,050/- under Clause 5 of the Supplementary Agreement. If at all any amount was even due and payable to the respondent Trust, the Majority Tribunal ought to have set off the same as against the amount due and payable by the respondent. Also as rightly pointed out by Mr.Anirudh Krishnan, the claim for compensation by way of counter claim was not even made by the respondent Trust under the head in which it came to be awarded by the Majority Tribunal. Further, even in the counter affidavit of the respondent Trust, the respondent has admitted to have received a sum of Rs.6,86,00,000/- towards cost of development. Therefore, without adjusting or setting off this amount or the admitted liability of the respondent to the tune of Rs.8,94,08,050/- as discussed herein above, the award of Rs.4,00,00,000/- towards loss was wholly unsustainable, especially on the ground that it is based on no evidence adduced by the respondent Trust in this regard.

33.Referring to the counter claim, I am able to see that the claim for compensation made by the respondent Trust was only on account of delay, loss of reputation and goodwill and not for illegal termination of the contract. Therefore, the Majority Tribunal has granted a relief which is beyond what was even prayed for and the same is clearly hit by the ratio laid down by the Hon'ble in *Associate Builders Vs. Delhi Development Authority* reported in *(2015) 3 SCC 49.* It attracts Section 34 of the Arbitration and Conciliation Act, 1996 as well has been opposed to public policy.

34. The Minority Tribunal, on the other hand, has rightly placed reliance on the material evidence and effect of the various clauses in the Joint Development Agreement as well as the Supplementary Agreement and rightly came to the conclusion that the respondent Trust was at fault and failed to honour its obligations to make balance sale consideration and consequently, the termination notice issued by the petitioners was valid.

35.For all the above reasons, I am constrained to interfere with the award of the Majority Tribunal.

36.In fine, the Original Petition is allowed and the award of the Majority Tribunal dated 31.05.2017 stands set aside. However, there shall be no order as to costs.

21.12.2024

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Index : Yes / No
Internet : Yes / No

P.B.BALAJI, J.,
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