



WEB COPY

OSA NOS.139 AND 140 OF 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2024

CORAM:

**THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL**

**OSA NOS.139 AND 140 OF 2021
AND
CMP NOS.4036 AND 4040 OF 2022**

OSA NO.139 OF 2021

Barath Building Construction (India)
Private Limited
Formerly known as M/s.BBC Foundation
Private Limited
Represented by its Joint Managing Director
Mr.Vummidi Barath
No.20 (Old No.23/2) Mylai Ranganathan Street,
T.Nagar, Chennai – 600 017. ... Appellant / Applicant

Vs.

V.Gnanarajapushpam (Died)
2.V.Gnanamani
3.G.Joseph Raj Kumar
4.A.Priya
5.G.Vijay Ratnakumar
(Sole respondent died – RR2 to 5 are
brought on record as LRs' of the deceased
sole respondent viz., (Mrs.V.Gnanarajapushpam)
vide Court order dated 05.10.2023 made in
CMP No.13087, 13089 of 2022 in
OSA Nos.139 & 140 of 2021) ... Respondents / Respondents



OSA NOS.139 AND 140 OF 2021

PRAYER: Original Side Appeal filed under Order XXXVI Rule II of Original Side Rules read with Section 37 of the Arbitration and Conciliation Act, 1996, praying to set aside the judgment and decree dated 05.07.2019 passed in O.P.No.111 of 2009.

For Appellant : Mr.R.Yashod Varadhan
Senior Counsel
for Mr.Rajnish Pathiyil

For Respondents : Ms.I.Sivagami
For Mr.P.L.Narayanan

OSA NO.140 OF 2021

Barath Building Construction (India)
Private Limited

Formerly known as M/s.BBC Foundation
Private Limited

Represented by its Joint Managing Director
Mr.Vummidi Barath

No.20 (Old No.23/2) Mylai Ranganathan Street,
T.Nagar, Chennai – 600 017.

... Appellant / 1st Respondent /
Claimant

Vs.

1.V.Gnanarajapushpam (Died)

... Respondent / Petitioner /
Respondent

2.Dr.A.K.Rajan

Sole Arbitrator

S-79, Anna Nagar, New No.5,
16th Street, S Block, Chennai – 600 040.

(Pro forma Party)

... 2nd Respondent /
2nd Respondent /
Sole Arbitrator

3.V.Gnanamani

4.G.Joseph Raj Kumar

5.A.Priya



OSA NOS.139 AND 140 OF 2021

6.G.Vijay Ratnakumar
(R1 died – RR3 to 6 are
brought on record as LR's of the deceased
sole respondent viz., (Mrs.V.Gnanarajapushpam)
vide Court order dated 05.10.2023 made in
CMP No.13087, 13089 of 2022 in
OSA Nos.139 & 140 of 2021)

... Respondents /
Petitioners /
Respondents

PRAYER: Original Side Appeal filed under Order XXXVI Rule II of Original Side Rules read with Section 37 of the Arbitration and Conciliation Act, 1996, praying to set aside the judgment and decree dated 05.07.2019 passed in O.P.No.27 of 2009.

For Appellant : Mr.R.Yashod Varadhan
Senior Counsel
for Mr.Rajnish Pathiyil

For Respondents : Ms.I.Sivagami
3 to 6 For Mr.P.L.Narayanan

COMMON JUDGMENT

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

These appeals under Section 37 of the Arbitration and Conciliation Act, 1996 are at the instance of the claimant who succeeded before the Arbitrator, since the award was set aside by the Section 34 Court.



2.The brief facts that led to the arbitration proceedings are as

follows:

2.1.The appellant entered into a Joint Development Agreement with the respondent on 17.06.2004, under which the appellant agreed to develop an extent of 14.17 grounds, out of a total extent of 1 Acre and 11 Cents. The Joint Development Agreement provided for obtaining permission from all the statutory authorities within a period of six months and for completion of the entire construction within a period of 15 months from the date of obtaining necessary approvals. A sum of Rs.50,00,000/- (Rupees Fifty Lakhs Only) was paid as earnest money to the respondent by the appellant on the date of the Agreement. The appellant had applied for necessary permission but he could not obtain necessary permissions within the period of said six months. There were correspondence between the parties as well as the appellant and the Chennai Metropolitan Development Authority, namely, the Planning Authority regarding grant of permission. There were various correspondence between the parties on the happenings and finally on 04.03.2006, the respondent cancelled the Joint Development Agreement in view of the delay on the part of the appellant in getting the statutory



approvals. The attempts made by the appellant to revive the contract failed. This led to arbitration and a retired Judge of this Court was appointed as an Arbitrator.

2.2.The appellant filed a claim statement before the Arbitrator contending that the delay in getting approvals was for reasons beyond his control. Time was not the essence of the contract and therefore, the cancellation of the Agreement on the ground that time is the essence of the contract cannot be sustained.

2.3.The appellant sought for the following prayers before the Arbitrator:

“a)For a Direction , directing the Respondent to execute sale deeds in respect of 75% U.D.S of Schedule “B” property in favour of the Claimant or their nominees.

b)For a Direction, directing the Respondent to revalidate or in the alternative execute a fresh power of attorney in favour of the Claimant or their nominees, containing the same terms, clauses and directions as contained in the earlier Power of Attorney dated 17.06.2004, registered as Doc.No.1317 of 2004, at SRO, Tambaram.

c)For a Direction, directing the Respondent to issue suitable letters / documents for the 6,000 Sq.ft of constructed area together with the undivided share of land from the 25% to



WEB COPY



OSA NOS.139 AND 140 OF 2021

be allotted to her, which is originally to the Claimant surrendered towards the advance of Rs.50,00,000/- made as per the Development Agreement dated 17.06.2004.

d)For a Permanent Injunction restraining the Respondent, her men, agent, servant and assign from in any manner interfering with the Claimant's peaceful possession and enjoyment of the schedule mentioned property or in any manner disturbing or interfering with the construction activities of the Claimant, their workmen and agents.

e)For costs of this arbitration proceedings.

f)And pass such further or other order as this Hon'ble Court may deem fit in these circumstances and thus render justice.”

2.4.The claim was resisted by the respondent contending that it was always agreed between the parties that time should be the essence of the contract and the outer time limit for obtaining necessary approvals was fixed at six months. Only after taking into account the various stages, approvals will have to be obtained. It was further contended that time being the essence of the contract and the appellant having failed to perform his part of contract within the time stipulated, it could not seek specific performance. It was also contended that the appellant was not ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, 1963 and therefore, it is not entitled to specific performance.



2.5.The claimant filed a reply mostly reiterating the contentions raised by it in the claim statement.

2.6.On the rival contentions, the learned Arbitrator framed the following issues:

“1.Whether the agreement dated 17.06.2004 stands automatically terminated, in view of clause 5 of the agreement, since the competent authority did not grant planning permission?

2.Whether the power of attorney is not coupled with interest?

3.Whether the Respondent is entitled to cancel the registered power of attorney deed, document No.1317 of 2004 dated 17.06.2004 at Sub Registrar Office, Tambaram?

4.The property is in whose possession?

5.Is not the claimant entitled to get sale deed registered in respect of 75% of the undivided share of the property and also the proportionate undivided share of the land towards 6000 sq.ft of built up area in terms of the agreement?

6.Whether the claimant is entitled for specific performance of the agreement?

7.Whether the claimant is not bound to return the title deeds to the Respondent?

8.Whether the Respondent is entitled for damages?

9.Which of the parties are entitled for permanent injunction?

10.Whether the claimants are entitled for the costs?



OSA NOS.139 AND 140 OF 2021

11. Whether the Respondent is entitled for the cost?

12. To what relief the parties are entitled?"

WEB COPY

2.7. Before the Arbitrator, parties had let in evidence. The learned Arbitrator upon consideration of the evidence, that was let in, concluded that the Agreement does not stand cancelled. Considering Clause 5 of the Agreement, learned Arbitrator came to the conclusion that unless and until permission is denied by the Planning Authority, the Agreement does not get cancelled automatically. On the second issue relating to the Power of Attorney, the learned Arbitrator concluded that the Power of Attorney is one coupled with interest and therefore, cancellation of the Power of Attorney is impermissible. The Arbitrator also concluded that possession of the property was with the claimant. On the above findings, the learned Arbitrator concluded that the appellant is entitled to the reliefs prayed for in the claim petition and passed an award granting those reliefs.

2.8. Aggrieved, the respondent herein moved this Court under Section 34 of the Arbitration and Conciliation Act, 1996. The Hon'ble Single Judge, who heard the Section 34 application concluded that there was considerable delay on the part of the appellant in getting the planning



OSA NOS.139 AND 140 OF 2021

permission, which amounted to lack of readiness and willingness in performance of the contract, which is an essential fact to be established by a person, who seeks a decree for specific performance in a Court of Law. The Hon'ble Single Judge also found that the very Agreement itself was vague and the property which is the subject matter of the Agreement namely 14.17 grounds has not been properly identified at the time of the Agreement. It was also pointed out that unless the property is specifically identified, the Agreement itself is not capable of performance. On the above conclusion, the Hon'ble Single Judge allowed the Section 34 application and set aside the award. The Hon'ble Single Judge further directed the respondent to refund the advance amount of Rs.50,00,000/- with 12% interest from the date of the Agreement till date of realization. Aggrieved by this order setting aside the award, the appellant has come up with this appeal.

3.We have heard Mr.Yashod Varadhan, learned Senior Counsel, instructed by Mr.Rajnish Pathiyil, learned counsel appearing for the appellant and Mr.P.L.Narayanan, learned counsel, instructed by Ms.I.Sivagami, learned counsel appearing for the respondents.



OSA NOS.139 AND 140 OF 2021

4.Mr.Yashod Varadhan, learned Senior Counsel for the appellant would vehemently contend that the Court sitting under Section 34 of the Arbitration and Conciliation Act, 1996, does not have jurisdiction to correct any error of law or fact. Drawing inspiration from the precedents, the learned counsel would submit that the jurisdiction of the 34 Court is limited and the Court cannot correct any error of law or fact while deciding an application under Section 34. According to the learned Senior Counsel, the grounds based on which the Hon'ble Single Judge has chosen to set aside the award are not one falling within the scope and ambit of Section 34 of the Arbitration and Conciliation Act, 1996.

4.1.The learned Senior counsel would also point out that when he had earnestly taken all the efforts to obtain a planning permission and that he was at the verge of obtaining the planning permission, the respondent has chosen to cancel the Agreement as well as the Power of Attorney. It is also the contention of the learned counsel that interest granted at 12% of the advance money to be refunded is also very nominal. The learned counsel would submit that the Hon'ble Single Judge was not right in his interpretation of Clause 5 of the Agreement between the



OSA NOS.139 AND 140 OF 2021

parties. According to him, Clause 5 only prescribes for automatic cancellation of the Agreement on a rejection of the planning permission by the authorities. Therefore, so long as the planning permission is not rejected, the Agreement will not get cancelled.

5. Contending contra, Mr. P. L. Narayanan, learned counsel appearing for the respondent would submit that though only six months time was prescribed in the contract, the respondent waited for almost two years before cancelling the contract. The contract was cancelled basically because the appellant was unable to get these permissions required for development of the property despite lapse of more than two years.

5.1. Mr. P. L. Narayanan, learned senior counsel would also point out that even prior to the Agreement dated 17.06.2004, the respondent had executed a registered lease deed on 04.06.2004 leasing out the entire extent of One Acre and 11 Cents of land to a Trust represented by her husband and therefore, the property was in actual physical possession of a third party under a valid instrument of lease. It is also further pointed out that the property with the extent of 14.17 grounds has not been properly identified in the Agreement itself. The identification was



OSA NOS.139 AND 140 OF 2021

done much later when a sub-division was effected. Therefore, according to the learned counsel, Section 34 Court was right in concluding that the appellant was not ready and willing to perform his part of the contract and that the contract itself was unenforceable for being uncertain in extents. The grounds on which the award was set aside by the Section 34 Court would fall within the four corners of Section 34 as it is opposed to public policy and the award amounts to patent illegality.

6.We have considered the rival submissions.

7.No doubt, the power of Court under Section 34 is limited and an award can be set aside only if a ground is made out within the four corners of Section 34. The award being opposed to public policy and patently illegal are two of the several grounds that are available for the Court to set aside the award. The Hon'ble Single Judge, from the facts, found that there was inordinate delay on the part of the appellant in getting the required approvals. The Agreement itself provides only for a period of six months for getting the required approvals. But the appellant was not able to get the required approvals even after a lapse of more than two years. This by itself would demonstrate that the appellant was not ready



and willing to perform his part of the contract as agreed to, thereby directly bringing him under Section 16 of Specific Relief Act, 1963.

Readiness and willingness is *sine qua non* for a person to be favoured with a decree for specific performance. If that is absent and the Arbitrator overlooks such absence and grants an award, the award is definitely against public policy apart from being patently illegal. No doubt, a minor infraction of law, if condoned by the Arbitrator, cannot be a ground for setting aside the award, but at the same time, if one of the main ingredients required for grant of a decree is absent and that is overlooked by the Arbitrator, such a lapse cannot be condoned by the Court sitting under Section 34.

8.The issue relating to identity of the property also looms large. The Agreement contains two Schedules. “A” Schedule is the entire property measuring One Acre and 11 Cents. “B” Schedule sets out the property which is the subject matter of the development as 14.17 grounds. But unfortunately, there is no boundary description in the “B” Schedule property. The boundary description given is for the entire One Acre and 11 Cents. Therefore, the exact location of the 14.17 grounds could not be culled out from the Agreement. This was a major factor that influenced the



OSA NOS.139 AND 140 OF 2021

Section 34 Court to interfere with the award. The Agreement for Joint Development must be specific and it has to spell out at least the property to be developed properly. If that itself is absent, we do not think that the Court could lend a helping hand to such person who with his eyes wide open entered into an agreement to develop an un-ascertainable property.

9. Yet another question that would loom large is the right that the respondent had on the date of the Agreement. Admittedly, the property was subject matter of a lease that was entered into on 04.06.2004 by the respondent in favour of a Trust. The entire One Acre 11 Cents was subject matter of the lease deed entered into between the respondent and the Trust. Even during the currency of the said lease deed, without even attempting to modify the lease deed, the Joint Development Agreement was entered into on 17.06.2004 for development of a portion of the property that is subject matter of the lease. Once there is a registered lease deed and a third party is in possession of the land under a valid title, an Agreement to develop the said land by the owner of the land, who has parted with possession in favour of the third party, cannot at all be enforced. No doubt, the respondent is also responsible for the fiasco, but, when it comes to specific performance it is the plaintiff or the person who seeks specific



OSA NOS.139 AND 140 OF 2021

performance who has to suffer the consequences by entering into such Agreement. However, Section 34 Court has taken care to redress any injustice by directing refund of advance money with 12% interest from the date of the contract till the date of realization and we are also informed that the respondent has deposited the money with 12% interest into the Court which has been put in Fixed Deposit. It will be open to the appellant to withdraw the said moneys.

10.We, therefore, do not think that we should interfere with the order of the Section 34 Court, which we find just and proper. Both these appeals fail and therefore, it is dismissed. No costs. Consequently, connected civil miscellaneous petitions are closed.

[R.S.M., J.]

[R.S.V., J.]

14.02.2024

Index : No
Internet : Yes
Neutral Citation : No
Speaking Order
TK



WEB COPY



OSA NOS.139 AND 140 OF 2021

R.SUBRAMANIAN, J.

AND

R.SAKTHIVEL, J.

TK

OSA NOS.139 AND 140 OF 2021

14.02.2024