



O.P.No.126 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.12.2024

Pronounced on : 24.01.2025

CORAM

THE HONOURABLE MR.JUSTICE P.B.BALAJI

O.P.No.126 of 2021
& A.Nos.435 of 2021 & 1271 of 2023
& E.P.SR.No.78425 of 2020

K.G.Foundations (P) Limited,
No.5, Bishop Wallers Avenue (East),
Mylapore, Chennai – 600 004.

... Petitioner

Vs.

M/s.Consolidated Construction Consortium Limited,
Rep. by its Managing Director,
Mr.S.Sivaramakrishnan,
No.5, 2nd Link Road,
C.I.T Colony, Mylapore, Chennai – 600 004.

... Respondent

PRAYER: Arbitration Original Petition filed under Sections 34 of the Arbitration and Conciliation Act, 1996, to set aside the interim award dated 22.02.2019 passed by the learned Arbitrator in I.A.No.1 of 2019 in Arbitration Claim Petition No.2 of 2018 insofar as it relates to the rejection of the petitioner's prayer seeking dismissal of the respondent's claim that does not form part of the agreement dated 31.01.2011 and the subsequent final award dated 30.12.2019 passed in Arbitration Claim Petition No.2 of 2018 insofar as it relates to the partial acceptance of the respondent's claim.



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For Petitioner : Mr.Sathish Parasaran
Senior Counsel
for Mr.S.V.Pravin Rathinam

For Respondent : Mr.P.S.Raman
Senior Counsel
for Mr.Karthikei Balan

ORDER

This Original Petition has been filed under Sections 34(2)(a)(iv) & 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 challenging the final award passed by the Arbitral Tribunal dated 30.12.2019.

2.The petitioner herein in the present Original Petition is the respondent and the respondent in this Original Petition is the claimant before the Arbitral Tribunal.

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

The claimant is in the business of construction for several years. The respondent was intending to construct two multi storied buildings, namely Blocks A and B @ KG Signature City, situated at 200 Feet New Bye-pass Road, Adayalampattu Village, Ambattur Taluk, Thiruvallur District. In this



connection, the respondent floated a tender for executing of construction of the Civil, RCC and other general builder's work and miscellaneous works such as roads, drains, compound wall gates, U.G. Sump, ramp, STP, etc., in the said project. The claimant was the successful bidder and was awarded the contract, pursuant to which an agreement dated 31.01.2011 was entered into for completion of Block B for a total value of Rs.19,47,49,610.05/- and in respect of Block A, an agreement dated 31.03.2011 was entered into for a total value of Rs.19,47,49,610.05/-. The claimant also deposited a corporate guarantee for a sum of Rs.50,00,000/- for each of the Blocks.

4. According to the claimant, the project was successfully completed and final bills were also certified by the developer on 24.05.2016. Though the claimant made several requests for settlement of the dues, the developer evaded payment and had raised debit notes for a sum of Rs.1,45,72,486/-. In view of the dispute regarding the amount payable to the claimant, the parties went to arbitration. A Sole Arbitrator was appointed by this Court in Section 11 application. The claimant made a claim for Rs.3,68,63,460/- towards the amounts outstanding and payable by the developer. The developer besides filing his statement of defense also filed a counter claim.



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5.A specific contention is raised that in the Section 11 application, a reference was only in respect of the disputes that arose in respect of Block B i.e., agreement dated 31.01.2011. In respect of Block A, there was a separate agreement between the parties which contain an arbitration clause and in the absence of reference of the disputes in respect of Block A, the learned Arbitrator had no jurisdiction to go into the consolidated claim made by the claimant. The developer also disputed the claim on the basis of the retention money being already factored and consequently, the claim itself being baseless. The learned Sole Arbitrator specifically went into the said objection raised by the developer that there were two independent agreements and when the reference was only arising out of one agreement dated 31.01.2011 and without any reference to the second agreement dated 31.03.2011 whether the claim made by the respondent herein in respect of both the agreements was maintainable. The Sole Arbitrator, in fact framed a specific issue whether the claimant is entitled to all or any of the claims set out in the claim statement, with specific reference to two different Blocks covered by two independent agreements and found that Ex.C2, final bill dated 21.05.2016 which was certified by the developer was a consolidated



bill covering both the Blocks A and B. The learned Arbitrator also decided the preliminary objection under Section 16(9) of the Arbitration and Conciliation Act and held that when the petitioner herein, namely the developer had issued a collective certified bill in respect of the entire work carried out in both the Blocks A and B. The claim made in respect of both the Blocks before the learned Arbitrator would be maintainable.

6.Though the specific challenge was made even before the learned Arbitrator that the dispute ought to have been referred to the Project Management Consultant (PMC) first and only thereafter, appointment of Arbitrator ought go have been sought, the learned Senior Counsel appearing for the petitioner, Mr.Sathish Parasaran, would fairly concede that the petitioner is not pressing the said ground in this Original Petition under Section 34.

7.The decision in the Section 16 application has been challenged in the Section 34 petition along side the other grounds touching the merits of the award. The learned Senior Counsel appearing for the petitioner/developer would first and foremost contend that the respondent



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herein, namely the claimant had filed O.P.No.738 of 2017 under Section 11(6) of the Act before this Court specifically for appointing a Sole Arbitrator in respect of the agreement dated 31.01.2011. The order passed by this Court was also only in respect of the said agreement dated 31.01.2011 and not the agreement dated 31.03.2011.

8.Placing reliance on the decision of the Hon'ble Supreme Court in *Duro Felguera S.A V. Gangavaram Port Limited* reported in *AIR 2017 SC 5070*, the learned Senior Counsel for the petitioner/developer would contend that when there are independent agreements having separate arbitration clauses, then separate Arbitral Tribunals pertaining to each of the agreements will have to be constituted and cannot be clubbed together as one. He would also contend that the learned Arbitrator has misread and misconstrued the directions issued by this Court while appointing the Arbitrator in O.P.No.738 of 2017.

9.The learned Senior Counsel for the petitioner/developer would further contend that in respect of retention money to the tune of



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Rs.1,69,96,302/-, the said amount pertains to both the Blocks A and B, including underground Sump/STP works and other miscellaneous items of works which clearly fell outside the even the scope of the contract dated 31.01.2011 and the Arbitral Tribunal therefore fell in error in awarding the retention money to the petitioner. He would also invite my attention to the defect liability period entitling the petitioner to retain 50% of the retention money to be released only after the issuance of a Virtual Completion Certificate by the PMC, which was after successful completion of the project.

10.The learned Senior Counsel would take me through the various documents to fortify his contention that the claimant had delayed completion of the work awarded to him and the defect liability period was still in force and the respondent was therefore not entitled to refund of the retention money. The learned Senior Counsel would invite my attention to the award and contend that the Arbitrator has ignored vital material evidence of C.W.1 and consequently the award is perverse and liable to be set aside. In this connection, he would place reliance on the following decision of this Court in *Chennai Bunkering Terminal Private Limited Vs. Chennai Port Trust*



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passed in *O.P.No.415 of 2018* dated *30.04.2019* and *Grid Corporation of Orissa Limited Vs. Balasore Technical School* reported in *AIR 1999 SC 2262*, where the Hon'ble Supreme Court held that when the award of the learned Arbitrator was incorrect in regard to a particular aspect of the matter, other questions referred to the Arbitrator formed integral part of the same and therefore, the entire award was liable to be set aside. He would also place reliance on the decisions of the Hon'ble Supreme Court in *MSK Projects (I) (JV) Limited Vs. State of Rajasthan* reported in *(2011) 10 SCC 573*, *Kuldeep Singh Vs. Commissioner of Police* reported in *(1999) 2 SCC 10* and *Oil and Natural Gas Corporation Limited Vs. Saw Pipes Limited* reported in *2003 (5) SCC 705*, in support of his contentions.

11.In *MSK Project's case*, the Hon'ble Supreme Court has held that if the learned Arbitrator commits an error in construction of the contract, then it was an error within his jurisdiction but if he wanders outside the contract and deals with matters not allotted to him, it would be a jurisdictional error.

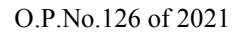
12.In *Kuldeep Singh's case*, the Hon'ble Supreme Court held that if the Arbitrator arrives at a decision on no evidence or on evidence which is



unreliable and which no reasonable person would act upon, then the award is liable to be set aside as being perverse.

13.In *Oil and Natural Gas Corporation Limited's case*, the Hon'ble Supreme Court held that if an award is contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996, then it would be patently illegal. The learned Senior Counsel would therefore pray for the award being set aside.

14.Per contra, Mr.P.S.Raman, learned Senior Counsel appearing for Mr.Karthikei Balan, learned counsel for the respondent would invite my attention to the arbitration clause, clause 46 of the both the agreement dated 31.01.2011 as well as 31.03.2011 which pertain to same project K.G Signature City, however, relating to two different Blocks, namely Block A and B. The learned Senior Counsel would invite my attention to the interim award dated 22.02.2019, in and by which the petitioner's challenge to the award on the ground of jurisdiction of the Arbitration was rejected while disallowing the additional claim made by the respondent in respect of a different project K.G.Chandravista was disallowed. He would further bring



15. Referring to the ground of maintainability/jurisdiction of the Arbitration Tribunal with regard to the Block A pertaining to a different agreement altogether, the learned Senior Counsel Mr.P.S.Raman would invite my attention to the order dated 30.07.2019 passed by this Court in O.P.No.456 of 2019. Referring and relying on the same, the learned Senior Counsel would contend that this Court has already dismissed the very same contentions raised in the said original petition and therefore, it is not open to the petitioner to re-agitate the same. Even on facts, the learned Senior Counsel would contend that even the petitioner had clubbed both the contracts and treated them as a single transaction and payments were remitted on a consolidated basis for both Blocks A and B and even the final bill in Ex.C2 which was certified by the petitioner was covering both the Blocks A and B. The learned Senior Counsel would therefore contend that when the petitioner himself did not treat Blocks A and B as separate and distinct but only as one single contract, it is not open to the petitioner to take

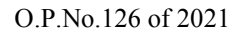


such a stand, that too belatedly.

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16.Further, according to the learned Senior Counsel Mr.P.S.Raman, the petitioner has taken such a defense only as an after thought and only for the first time in the arbitration proceedings. He would further contend that having not objected to the appointment of the Arbitrator based on final bill dated 21.05.2016 and in fact having consented for arbitration, the petitioner is now estopped from contending that the Arbitral Tribunal fell in error in dealing with the agreement pertaining to Block A which was not subject matter of reference to the learned Arbitrator.

17.The learned Senior Counsel Mr.P.S.Raman would additionally contend that when the interim award passed by the learned Arbitrator dated 22.02.2019 was separately challenged under Section 34 of the Act in O.P.No.456 of 2019 and the same having been dismissed by this Court on 30.07.2019, the petitioner allowed it to become final without preferring further appeal against the same. Therefore, even from this angle, according to the learned Senior Counsel, the petitioner can only be said to have waived his right and cannot agitate the very same contentions over and over again.



19. I have carefully considered the submissions advanced by the
d Senior Counsel on either side. I have also carefully gone through the
ons on which reliance is placed on by the learned Senior Counsel for



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22.The counter affidavit has been filed by the petitioner herein in the said O.P.No.738 of 2017. The only contention raised by the respondent was that the reference to arbitration was premature since under clause 46, the disputes shall have to be first refer to the Project Management Consultant and without doing so, the respondent has rushed to this Court invoking under Section 11 of the Act. No other ground, more specifically the defense that in respect of Block A reference to arbitration was not sought for was not taken in the counter affidavit filed before this Court in the Section 11 proceedings.

23.This Court, by order dated 11.12.2017 in O.P.No.738 of 2017, appointed Hon'ble Justice Mr.K.Venkatraman, retired Judge of this Court as the Sole Arbitrator to enter upon reference and adjudicate the disputes between the parties. Pursuant to the order passed by this Court on 11.12.2017, the learned Arbitrator has also written to the parties on 03.04.2018 referring only to the agreement pertaining to Block B dated 31.01.2011. However, in the claim statement, the respondent has made a consolidated claim in respect of both the Blocks A and B.



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24.A primary objection was taken before the learned Arbitrator in the statement of defense along with the counter claim by the petitioner herein on the ground that the claims made were outside the scope of reference made to the Arbitral Tribunal.

25.In and by an interim award, the learned Arbitrator in I.A.No.1 of 2019 under Section 16 r/w 19 of the Act rendered a finding that the claim raised covering disputes pertaining to a different project altogether, namely K.G Chandravista was not maintainable, but however, the claim in respect of Block A of the very same project, namely K.G Signature City was very well maintainable in view of the composite bill raised by the petitioner/developer vide Ex.C2 which covered both the Blocks A and B.

26.Aggrieved by the said interim award, the petitioner in O.P.No.456 of 2019 under Section 34(2)(a)(iv) of the Act, wherein the specific ground of challenge was that the consolidated claims by clubbing the independent agreement was not maintainable before the learned Arbitrator to whom the reference was made only in respect of the one agreement pertaining to Block



B dated 31.01.2011.

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27.This Court, by order dated 30.07.2019, specifically dealt with the said ground of challenge and rendered the following findings:

1.The petition before the High Court for appointment of Arbitrator clearly indicated that the dispute had arisen in view of the final bill relating to both the Blocks A and B.

2.Reference was sought on the basis of final bill which included not only the agreement dated 31.01.2011 but also the agreement dated 31.03.2011 as well as the third agreement dated 21.03.2012.

3.No objection was raised counter to the Section 11 application specifically raising the objection of floating of two or three different contracts.

4.The parties were aware of disputes pertaining to all the contracts culminating in final bill and therefore it was not open to the petitioner to contend that the reference was not valid in respect of the other contracts. That apart, the order under Section 16, no appeal is provided and the decision in Section 16 application can be challenged under section 34 when the entire award is put to challenge. The challenge to the decision to the order under Section 16 has been postponed to the final award passed by the learned Arbitrator and finally, the petition was held to be not



maintainable and consequently dismissed.

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28.Straight away meeting the submission of the learned Senior Counsel Mr.P.S.Raman that the petitioner having allowed this order to become final is estopped from challenging the interim award pertaining to the clubbing of two contracts, I am unable to countenance the said argument for the simple reason that though certain observations have been made by this Court, ultimately, while dismissing the Original petition has not maintainable, this Court has clearly held that it would be open to the petitioner to challenge the findings in the Section 16 petition at the time of raising or making the challenge under Section 34 of the Act at the time of challenging the main award. Therefore, this Court is certainly entitled to deal with the said arguments regarding the jurisdictional error, as to whether the Arbitral Tribunal has committed any jurisdictional error in traveling outside the scope of reference.

29.As can be seen Ex.C2 is the fulcrum of the claim of the respondent/claimant before the Arbitral Tribunal, in fact, even in the reference to arbitration by moving Section 11 application under the Arbitration and Conciliation Act. Though the petition refers to only the



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agreement pertaining to Block B dated 31.01.2011, the claim in the monetary terms refers to the final bill issued by the petitioner themselves which is a combined and consolidated bill for both the Blocks A and B which were admittedly covered by two different contracts having their own independent arbitration clauses. If really, the respondent intended to object to the maintainability of the Section 11(6) petition on the ground that it was pertaining only to one Block, namely Block B and not Block A, first and foremost, the petitioner ought to have taken a specific contention in this regard. Admittedly, no such objection has been raised in the counter to the Section 11(6) petition. In fact, by consent of the petitioner and the respondent alone, the Sole Arbitrator was appointed. The petitioner was conscious of the fact that the claim made even in the Section 11(6) petition was arising only under the consolidated bill dated 21.05.2016 which has been marked as Ex.C2 before the Arbitral Tribunal. When the petitioner themselves did not choose to segregate Blocks A and B and had always treated the same as a single entity for all practical purposes, it is too late in the day for the petitioner to turn around and contend that there being two separate agreements, each containing arbitration clauses and reference being made only to one agreement, the Arbitrator had no jurisdiction to go into the



other agreement which was not specifically referred to the Arbitrator.

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30.I have yet another reason to countenance the argument of learned Senior Counsel for the petitioner/developer in this regard. The respondent was never put on notice about the said objection which was taken for the first time before the Arbitrator. If such an objection had indeed been specifically taken in the counter, while opposing the Section 11 application, the respondent would have had an opportunity to have even amended the petition to formally include the other agreement dated 31.03.2011 pertaining to Block A. Having not raised such an objection at the earliest stage and in the light of the petitioner's final bill Ex.C2 itself consolidating both the Blocks A and B in respect of which bill alone, disputes have arisen, warranting reference to arbitration, it cannot be contended that the learned Arbitrator traveled outside the scope of the reference and thereby the award is liable to be set aside. Therefore, I do not find any illegality or perversity in the learned Arbitrator entering upon reference in respect of the agreement dated 31.03.2011 as well it is pertaining to Block A of the very same project K.G Signature City.

31.Coming to the other grounds of challenge, it is the specific



contention of the learned Senior Counsel for the petitioner/developer that vital evidence has been ignored and the learned Arbitrator has not even considered the counter claim made by the petitioner. On going through the impugned award passed by the learned Arbitrator, I find that the learned Arbitrator besides deciding on its own jurisdiction has also held that having certified the final bill dated 21.05.2016, the petitioner cannot contend that the final certified bill amount found payable to the respondent at Rs.16,36,099/- cannot be paid to the claimant. Insofar as interest on the final bill amount of Rs.16,36,099/-, the Arbitral Tribunal, as against the claim of 24% has awarded only 9% interest. I do not find the said findings arrived at by the Arbitral Tribunal to be perverse or illegal, warranting interference under Section 34 of the Act.

32. Even with regard to retention money of Rs.1,69,96,302/-, the Arbitrator has considered the statement of defense and found that the refusal to retention money is only an after thought. The learned Arbitrator also found that when the final bill issued by the petitioner indicated the actual date of completion to be 15.04.2014 it was not open to the petitioner to contend that the claimant had not completed the work in time and that the



work was also not meeting the required quality standards. The learned Arbitrator has also found that even in the statement of defense, the petitioner has not stated that the completion date has been wrongly mentioned in Ex.C2 bill. The learned Arbitrator rendered findings based on pleading and available evidence on record and a possible view has been taken, given the facts and circumstances and exercising powers under section 34 of the Act, I do not find any grounds warranting interference of the said findings rendered by the learned Arbitrator.

33.Even with regard to the counter claim, the learned Arbitrator has applied his mind and rejected the contention of the respondent that the counter claim was time barred. After holding that the counter claim was not time barred, the learned Arbitrator has proceeded to decide the counter claim and clearly held that the respondent has not established its entitlement to damages and therefore, in the absence of any satisfactory evidence in support of the counter claim, I do not find any error in the findings rendered by the Arbitrator dismissing the counter claim. It is not as if the learned Arbitrator has not considered the counter claim at all as contended by the learned Senior Counsel for the petitioner.



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