

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2015

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
18.09.2015	25.09.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM****O.P. No.579 of 2013**

M.Velamudha @ Easter

.. Petitioner

Vs

1.M/s.Emaar MGF Land Limited,
Rep., by its Authorised Signatory
ECE House,
28, Kasturba Gandhi Marg,
New Delhi – 110 001.

2.P.Madan,
Advocate/Arbitrator,
No.5, Bharathiar Street,
1st Floor, Velachery,
Chennai – 600 042.

.. Respondents

Prayer :-Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint the Second Arbitrator and arbitration proceedings to commence after the appointment of umpire by the said two Arbitrators.

For petitioner .. Mr.P.V.Sudakar

For Respondents .. Mr.Koushik Sharma for R1

No Appearance for R2

ORDER

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, (Act) for a direction to appoint a second Arbitrator and to direct commencement of the arbitration proceedings after appointment of an umpire by the two Arbitrators.

2. An agreement for construction dated 07.03.2008, was entered into between the petitioner and the first respondent at Chennai in terms of which there was an agreement to develop the property described in the schedule to the agreement by putting up a multi-storied residential complex. The apartments to be constructed and handed over to the petitioner was described in the schedule 'C' of the agreement. The petitioner was liable to pay a total consideration of Rs.43,36,415/- to the respondent, which included a sum of Rs.1,00,000/- for reserved car parking at stilt level. The mode of

payment was in terms of clause 2.1 of the agreement. The petitioner would state that he has completed all payments and requested possession of the premises to be handed over to her. The petitioner would further state that the first respondent demanded further payment and also claimed interest on the delayed payment and insisted that the petitioner should pay a sum of Rs.70,45,937/-, thus a dispute arose between the petitioner and the respondent. The petitioner by her letter dated 14.05.2013, invoking clause 16(1)(i) of the agreement nominated the second respondent to be the Arbitrator on her side. The respondent by letter dated 13.06.2013, informed the petitioner that they do not accept the second respondent being appointed as an Arbitrator for various reasons and construing the nomination made by the petitioner to be an appointment of an Arbitrator stated that such appointment is incorrect, as it is unilateral. The petitioner would state that Arbitrator named by the petitioner was only nominated by her and in terms of clause 16(1), it was open to the first respondent to nominate their Arbitrator. Further, in their letter dated 13.06.2013, the first respondent mentioned the names of three Hon'ble Judges of the High Court of Delhi and J & K and the Hon'ble Supreme Court as sole Arbitrator. The petitioner would further state that in terms of Section 11 of the Act on receipt of letter of the

nomination, the first respondent should intimate his acceptance or rejection within a period of 30 days, failing which the nomination made by the petitioner, is deemed to be accepted. Further, it is stated that the claim made is in respect of a simple dispute valued at Rs.20,00,000/- and to retired Hon'ble Judges of the High Courts or the Hon'ble Supreme Court would be an expensive remedy and the claim not being a corporate arbitration, the names suggested by the petitioner, that too from New Delhi and J & K, for arbitration at Chennai is inequitable and made with a specific intention to mulct the petitioner with procedures. On these facts, the petitioner has approached this Court by way of this petition to appoint an Arbitrator apart from the second respondent, who has been nominated by the petitioner as her Arbitrator and the two Arbitrators to appoint an umpire and thereafter to proceed with the arbitration.

4. The first respondent would state that the petitioner was not prompt in her payment and did not adhere to the payment schedule as agreed to in the agreement, dated 07.03.2008 and for any delay in payment, interest is charged at 18% per annum compounded. It is further submitted that due to the failure on the part of the petitioner to make payments on time, interest has to be charged on the delayed

payment which is disputed and has been decided through arbitration. Further, it is submitted that the present petition is pre-mature, as the petitioner has failed to follow the procedure agreed to in terms of clause 16 of the agreement, dated 07.03.2008. It is submitted that in terms of clause 16 of the agreement, the parties have to resolve the dispute in accordance with the provisions of the Act; arbitration to be conducted mutually agreed or on failure for such agreement, on a mutually agreed, sole Arbitrator, one Arbitrator to be appointed by each party, who will then appointed an umpire. Referring to Section 11(6) of the Act, it is submitted that unless the agreement on appointment procedure provides for other means, there is no necessity to approach the Court for appointment of an Arbitrator. By referring to the relevant clause in the agreement, it is submitted that the procedure agreed between the parties namely, the petitioner and the first respondent is that a sole Arbitrator has to be mutually appointed or failing such agreement a panel of Arbitrators to be appointed; that the petitioner and the first respondent have neither mutually appointed a sole Arbitrator or followed the procedure of appointing a sole arbitrator or a panel of Arbitrators failing mutual agreement of appointing a sole Arbitrator.

5. It is further submitted that in response to the petitioner's letter dated 14.05.2013, nominating the second respondent as a sole Arbitrator, the first respondent within a period of 30 days sent a reply dated 13.06.2013, while expressing their unwillingness for the unilateral appointment of the second respondent as a sole Arbitrator, since it should be mutually agreed upon and upon failure to mutually appoint a sole Arbitrator, the matter shall be referred to a Tribunal of three Arbitrators. It is further submitted that in the same letter dated 13.06.2013, the first respondent has given a list of three names for nomination as a sole Arbitrator by mutual agreement and in the event of the petitioner not consenting within 30 days, the first respondent will assume that the petitioner has no intention to have arbitration by a sole Arbitrator and they will proceed for appointment, appointing a panel of Arbitrators as per clause 16.1 of the agreement. The allegation that the second respondent has commenced arbitration proceedings, has been denied as false and illegal. It is further submitted that the parties are free to agree on a procedure for appointment of sole Arbitrator and the Hon'ble Chief Justice or his nominee is vested with the powers of appointment of sole Arbitrator only when the parties failed to agree on Arbitrator as per agreement

and sub-section (6) of Section 11 of the Act provides for a request to the Hon'ble Chief Justice to take necessary measure on happening of one of the three contingencies mentioned therein. Thus, it is the contention of the first respondent that the present petition is pre-mature and the petitioner is seeking a prayer, which is beyond the scope of the arbitration clause in the construction agreement dated 07.03.2008.

6. Heard the learned counsels appearing for the parties and perused the materials placed on record.

7. Section 11 of the Act deals with 'Appointment of Arbitrators'. Sub-section (2) of Section 11 states that subject to sub-section (6) the parties are free to agree on a procedure for appointing the Arbitrators or Arbitrators. In terms of sub-section (6), failing any agreement referred to in sub-section (2), in a arbitration with three Arbitrators, each party shall appoint one Arbitrator, and the two appointed Arbitrators shall appoint the third Arbitrator who shall act as the Presiding Arbitrator. In terms of sub-section (4), if the appointment procedure in sub-section (3) applies i.e., in cases where the arbitration with the three Arbitrators, a party fails to appoint an Arbitrator within

thirty days from the receipt or a request to do so, from the other party; or the two appointed Arbitrators fail to agree on the third Arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request to a party, by the Chief Justice or any person or institution designated by him. In terms of sub-section (6) of Section 11 failing any agreement referred to under sub-section (2) , in an arbitration of the sole Arbitration, if the parties fail to agree on the Arbitrator within 30 days from the receipt of request by one party from the other party, a request could be made to the Chief Justice for appointment of an Arbitrator. In terms of sub-section (6) where under appointment procedure agreed upon the parties, a party fails to act as required under that procedure; or the parties, or the two appointed Arbitrators, fail to reach an agreement expected of them under that procedure; or a person including an institution, fails to perform any function entrusted to him or it under that procedure; a party may request the Chief Justice or any person or institution designated by him to take a necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

8. In ***Datar Switchgear vs. Tata Finance Ltd., & Anr.***, reported in **(2000) 8 SCC 151**, it was held that if one party demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days and if the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient and only then the right of the opposite party ceases. It was further held in the said decision that the Court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it and when the party has not disputed against the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

9. The purpose for which Section 11(6) of the Act enacted has been explained in ***Datar Switchgear*** (supra), by stating that the party to whom a demand for appointment of an Arbitrator is made, forfeits his right to do so, if he does not appoint an arbitrator within 30 days being the reasonable time for such purpose. The scope of sub-sections (6) and (8) of Section 11 was explained by the Hon'ble

Supreme Court in ***Northern Railway Administration vs. Patel Engineering Company Ltd.***, reported in ***(2008) 10 SCC 240***, among other things, it was pointed out that the Court must first ensure that the remedies provided for are exhausted and it is not mandatory for the Chief Justice to appoint the named Arbitrator or Arbitrators, but at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. The expression “due regard” was explained to mean that proper attention to several circumstances have been focused. The expression “necessary” as a general rule was explained to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act and it can also be stated to be the reasonable steps required to be taken.

10. Bearing the above legal principle in mind to examine the case on hand, it would be first necessary to look into the arbitration clause as contained in the construction agreement, dated 07.03.2008, which reads as follows:-

Article 16 – Dispute Resolution Procedure

16.1. Any dispute or difference arising out of or in connection with this Agreement, including any questions regarding its existence, validity or termination shall be referred to and finally resolved by Arbitration in accordance with the

provisions of the Arbitration and Conciliation Act, 1996. Arbitration will be conducted by a sole Arbitrator to be mutually agreed or failing such agreement, by one Arbitrator to be appointed by each party, which Arbitrators shall then appoint an Umpire. The Umpire/Arbitrators will have summary powers. The proceedings will be conducted in the English language.

16.2 Subject to the foregoing clause on Arbitration, the Courts in Chennai, Tamil Nadu will have exclusive jurisdiction on any matter concerning this Agreement.

11. The procedure contemplated under the arbitration clause contains three components, (i) arbitration to be conducted by a sole Arbitrator to be mutually agreed; (ii) failing such agreement, one Arbitrator to be appointed by each party; (iii) the two Arbitrators so appointed, will appoint an umpire. The venue of the arbitration is at Chennai and the first respondent has no grievance about the same.

12. It has to be seen as to whether the parties have acted in accordance with the procedure prescribed under the agreement and they have exhausted the remedies provided to them, which are in the stages mentioned above.

13. The respondent issued a notice for arbitration on 14.05.2013 and nominated the second respondent as the sole Arbitrator. On

receipt of the said notice, two options were available for the first respondent, firstly to accept the nomination of the petitioner or to suggest some other name or to nominate some other person and request the acceptance of the petitioner. The first respondent sent a reply on 13.06.2013. On a perusal of the reply, it is evident that the first respondent has misconstrued the scope of the request made by the petitioner vide her letter dated 14.05.2013. The first respondent construed the nomination of the second respondent by the petitioner to be an appointment as a sole Arbitrator, when the letter dated 14.05.2013, only nominated the second respondent as a sole Arbitrator. This fundamental error has led to the breach of the procedure required to be adhered to by the first respondent under the agreement and consequently, the nomination done by the first respondent suggesting the names of one of the Former Judges of the Hon'ble Supreme Court and two Former Judges of the Delhi High Court and J & K High Court respectively, is of no consequence due to non-adherence of the procedure under the agreement.

14. In the light of the same, the petitioner was justified in filing this petition for appointment of an Arbitrator. Though the prayer sought for is to nominate a second Arbitrator, it is seen that the

petitioner does not agree with the names suggested by the first respondent not on any personal grounds, but being inequitable and even suspects the reason for suggesting such names stating that the same is an intention to mulct the petitioner with heavy expenditure and procedures considering the scope of the dispute. Thus, the petitioner also has reservations against the names suggested by the first respondent.

15. In the light of the above, this Court is of the view that the first respondent has forfeited his right to nominate an Arbitrator, since the first respondent wrongly construed the nomination made by the petitioner as an "appointment" and in the light of the deviation in the procedure, it is clear that neither the first respondent nor the petitioner could claim that an Arbitrator has to be appointed by following the procedure under the agreement, when on facts, this Court has found that there was breach of procedure at the first instance by the first respondent.

16. As explained in ***Patel Engineering Co., Ltd.***, (supra), apart from qualification of the Arbitrator other considerations as are likely to secure appointment of an independent and impartial arbitration shall

be given due regard. The claim made by the petitioner is in respect of the cost payable for a flat, which was agreed to be constructed by the first respondent and handed over to the petitioner. The flat is located in a densely populated area in Chennai city. The construction agreement was executed at Chennai and the first respondent has an office at Chennai, which is evident from the seal of the first respondent company affixed in the bottom of each page of the construction agreement. Thus, the dispute falls in a very narrow compass as to whether there was any breach of the payment schedule, whether the first respondent is entitled to claim interest and whether the claim made by the first respondent at Rs.70,45,937/- is correct, when the admitted liability of the petitioner is Rs.56,03,063/-. Thus taking into all these facts, and to ensure that a speedy resolution is made to the dispute, this Court is of the view that an independent sole Arbitrator should be appointed to adjudicate the dispute between the parties and resolve the same as expeditiously as possible.

17.In the result, I appoint

Mr.D.Arul Raj

District Judge (Retired),

No.36, Circular Road

Amman Nagar

Ramapuram, Chennai 600 089.

Mobile No.9444145289

as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally. In the event of respondents not entering appearance, the same may be borne by the petitioner at the initial stage to form part of the main cause.

The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

25.09.2015

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Index :Yes/No

T.S.SIVAGNANAM J.
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Pre-Delivery Order in
O.P. No.579 of 2013

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