

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**APPELLATE SIDE CIVIL JURISDICTION****ARBITRATION APPEAL NO. 3 OF 2017**

Mr. Sagarmal Chunnilal And Anr.

....Appellants

V/S

Mr. Bhagwandas S. Gupta And Ors.

....Respondents

Mr.Swapnil Bangur a/w Varsha Shah i/by Yatin Rasiklal Shah for Appellants.
Mr.Ajay Panicker i/by Ajay Law Associates, For Respondents Nos.1 to 13.

CORAM : A.A. SAYED, J.

DATED : 7 FEBRUARY 2017

P.C.:

This Appeal under section 37 of the Arbitration & Conciliation Act, 1996 ('Arbitration Act' for short) impugns an order passed by the learned Arbitrator allowing the Application filed by the Respondent/original Claimants for appointment of an expert i.e. Architect/Civil Engineer for the site inspection to identify whether or not any incomplete works remained in the building/flats in question in the arbitral proceedings.

2 The case of the Respondent/original Claimants in their Statement of claim and the Application was that the Appellants/Original Respondent, who had constructed/developed the building had not completed various works in the said building. It is an admitted position that in the meeting of the Arbitral Tribunal dated 29 January 2015, the Appellants had stated before the

Arbitral Tribunal that they had no objection to the appointment of the expert, which has been recorded by the Arbitral Tribunal. The said no objection, however, according to the Appellant, was withdrawn at a later stage in view of the subsequent events when the BMC official have carried out inspection and submitted their Report which is on record and there was no need to appoint an Architect for inspection. The case of the Appellants in their reply was that there was no incomplete work and it was the Respondents/original Claimants who had carried out unauthorized alterations in their flats because of which the Corporation was not granting occupation certificate.

3. I have heard the learned Counsel for the parties.

4. The expert was appointed pursuant to the Application which can be said to have been made under section 26 of the Arbitration Act. Section 26 of the Act reads as under:

26. Expert appointment by arbitral tribunal. –

(1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) Appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) Require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall,

after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

5. It will be seen from a bare perusal of the Application, which seeks appointment of an expert for inspection, that the same does not fall within the meaning of the expression “interim measure of protection” as contemplated in section 17, as sought to be suggested by the learned Counsel for the Appellant, but the same would clearly fall under section 26. The Appeal, which is a creation of statute, would not be maintainable under section 37, as the impugned order is passed on an Application under section 26.

6. Section 37 of the Arbitration Act reads as under:

“37-Appealable orders. –

(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely: -

- (a) Granting or refusing to grant any measure under section 9;
- (b) Setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal--

- (a) Accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
- (b) Granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

7. Even assuming that the Appeal were maintainable, it is noticed that the learned Arbitrator has, after hearing the learned Counsel for the parties, recorded in para 7 as follows:

“7. Further Issue No.(vi) is as follows: Whether Respondent No.1 has left any work which is incomplete and if so, whether the Claimant is entitled to any directions for completion of the same?” This is a specific issue and will require the Architects report. It is the Respondents' case that the Claimants have carried out unauthorized alteration and there is no breach by the Respondents. If that is so, the report, when submitted would be of assistance to the Respondents to prove its case. No prejudice will be caused to the Respondents. The expert report will only assist the Tribunal in identifying whether or not there are any incomplete works.”

(emphasis added)

From the aforequoted para, it is apparent that the learned Arbitrator has clearly recorded that the expert report will only assist the Arbitral Tribunal in identifying whether or not there are any incomplete works. This, notwithstanding the argument on behalf of the Appellants that in view of the

subsequent event i.e. the report by the BMC, it would not be necessary to appoint an expert. As a matter of fact, Section 26(2), contemplates that an expert can be appointed by the Arbitral Tribunal even suo-motu. It is pointed out that after the impugned order was passed, the expert i.e. Chawla Architects & Consultants Pvt.Ltd. had carried out inspection and have already submitted their report to the Arbitral Tribunal. In these circumstances, even otherwise no interference is warranted in the impugned order.

8. The Appeal is dismissed with no order as to costs.

(A.A. SAYED, J.)