

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 06.09.2017

Pronounced on:24.10.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P. No.469 of 2017

M.Harikumar

.. Petitioner

Versus

M/s.Akshaya Private Limited,
Chennai-600 020.

.. Respondent

Prayer: Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator to resolve the dispute between the petitioner and respondent as per Sale Agreement dated 03.12.2011.

For petitioner

: Mr.A.R.Nixon

For Respondent

:

Mr.Mani Sundar Gopal

ORDER

This is a petition in terms of Section 11(6) of the Arbitration and Conciliation Act 1996 ('the Act') praying for the appointment of a Sole Arbitrator to resolve disputes between the parties arising out of Sale Agreement dated 03.12.2011.

2.Heard Mr.A.R.Nixon, learned counsel for the petitioner and Mr.Mani Sundar Gopal, learned counsel for the respondent.

The petitioner and the respondent entered into an agreement dated 03.12.2011 for purchase of an apartment in a complex being developed by the respondent called 'January'. The project was to be commenced and completed within 30 months from the date of sanction of plan, being 02.02.2011 with a grace period of three months. Thus, the project ought to have been completed on or before 01.09.2013. The petitioner would allege that there was a delay of two years and eight months in handing over the vacant possession on 27.04.2016 though the respondent had received the entire payment as early as on 29.11.2014.

4. Various other defects and deficiencies were also present according to the petitioner that were liable to be resolved by resort to the Alternate Dispute Resolution ('ADR') mechanism provided in the Agreement. Clauses 55 and 56 of the Memorandum of Agreement dated 03.12.2011 provide as follows:

'55.ALTERNATE DISPUTE RESOLUTION

In the event of any dispute or difference of opinion arising between the parties hereto with regard to any matter either due to interpretation, execution, of carrying out the objects and implementing the terms of this Agreement, or anything relating to or connected with this Agreement, or the construction of the Apartment, the same shall first be resolved among the parties by mutual discussions. In the event of a deadlock, both parties shall submit the matter for Mediation by a Sole Mediator to be appointed by "Confederation of Real Estate Developers Association of India – Tamil Nadu" (CREDAI-TN).

56.ARBITRATION

Any dispute, controversy, claim or disagreement of any kind whatsoever between or among the parties in connection with or arising out of this agreement or any of the Project Agreements or the breach, termination or invalidity thereof, which is not resolved among the parties by mutual discussion or by Mediation as stated herein above, then it shall be referred to and finally resolved by Arbitration irrespective of the amount involved in the dispute or whether such disputes would otherwise be considered justifiable for resolution by any Court. Both parties shall nominate an Arbitrator of their choice and the nominated Arbitrators shall appoint a presiding Arbitrator. The panel of Three Arbitrators shall decide the dispute so referred in accordance with the Arbitration and Conciliation Act, 1996 (26 of 1996), or any amendments thereto.

The seat of the Arbitration shall be at Chennai and shall be in English language. The parties agree that the Arbitration Award so passed by the presiding Arbitrator shall be final and binding on both the parties.'

5.The ADR mechanisms were invoked by the petitioner vide letter dated 08.02.2017 wherein the following is sought in conclusion:

'Please appoint as mediator as per clause 55 or alternatively inform me about your intention to enter into Arbitration. In that case I will name my Arbitrator. I am expecting your speedy reply within 7 days on receipt of this letter.'

6. Though duly received, there was no response to the aforesaid letter by the respondent. Thus a Lawyer's Notice dated 09.03.2017 was issued calling upon the respondent to do the following:

'15) Redressal of my client's grievance against you he sent a registered letter on 08-02-2017, you have been served with the said letter. Having received the letter you have neither comply with the same nor replied for that letter.

Under these circumstances I hereby call upon you on behalf of my client to pay:

- (a) a sum of Rs.1,60,000/- towards the rent as compensation;*
- (b) completion of the car parking area, club house and other amenities within 5 days on receipt of this legal notice or pay Rs.5,00,000/- as compensation until you complete the same;*
- (c) If you have failed to comply with a, b of the demand you may give consent for arbitration or mediation within 5 days on receipt of this legal notice, failing which I have instructions to take appropriate legal action against you at your cost.'*

7. To this an interim reply dated 23.02.2017 was issued by the respondent through counsel denying all allegations made and stating that a detailed reply was being prepared that would be issued within a period of four weeks.

8. Admittedly, no reply has been issued by the respondent till 27.07.2017 forcing the petitioner to approach this Court by way of the present petition. After the issue of notice by this court on 07.07.2017, received by the

respondent on 15.07.2017, the respondent issues a letter dated 27.07.2017 denying all allegations made on merits, With regard to the invocation of the ADR mechanisms the respondent states:

'8. With regard to para 15(c) of your notice my client states that giving consent for arbitration at this stage does not arise since as per cl.55 of the agreement the recourse to mediation for resolution of disputes should be exhausted prior to initiating arbitration proceedings by a panel of 3 arbitrators.'

9. Having heard both learned counsel and carefully considered the written submissions filed and case law circulated by the respondent, I am of the categorical view that the defence put forth by the respondent is unacceptable.

10. The agreement provides for resolution of disputes by Alternate Dispute Resolution by way of a two tier mechanism, firstly, by mutual discussions, secondly and in the event of deadlock, Mediation by a Sole Mediator to be appointed by the Confederation of Real Estate Developers Association of India – Tamil Nadu (CREDAI-TN), failing which it shall be referred to Arbitration by an Arbitral Tribunal, each party appointing an Arbitrator of its choice and both arbitrators appointing an Umpire.

11. The case of the respondent is that the requirement for arbitration would only arise when a claim has been made by one party and denied by the other. According to the respondent, since the matter was not referred to

Mediation, there was no occasion for it to have failed and as such reference to arbitration would be pre-mature.

12.I do not agree. The factum of dispute inter se the parties is not disputed by the respondent. As such what remains to be seen is only whether the procedure followed by the petitioner leading to the present petition is in accordance with the terms of the contract. The interpretation of a joint reading of clauses 55 and 56 appears to me to be as follows - to begin with, mutual discussions, then mediation and thereafter arbitration by an arbitral tribunal. In the present case, the petitioner has, on two occasions, 8.2.2017 as well as 9.3.2017, made its intention clear to the effect that there is a dispute. The factum of disputes has, as noticed by me earlier, not been denied. In both communications, the petitioner seeks the appointment of a Mediator. The first letter though received by the respondent, has been ignored. To the second letter, an interim reply was sent on 22.03.2017 stating that a detailed reply was being prepared and would be sent in four weeks time. It is thus impossible to have complied with the second limb of dispute resolution, Mediation, since clause 55 requires both parties to submit the matter for mediation. In this case, while the petitioner was willing, the respondent was clearly not. Though in its letter dated 22.3.2017, the respondent states that it is in the process of issuing a detailed reply, none was issued till July 2017 and even then, only subsequent to receipt of notice on the present petition. Thus, I am of the view that the time for mediation is long gone and the petitioner has rightly approached this court

seeking of an appointment of Arbitrator in terms of Clause 56 of the agreement.

13.The argument of the respondent is that the request for mediation communicated on 8.2.2017 and 9.3.2017 has not been denied and thus, this petition is premature. The argument has merely to be stated to be rejected. Clauses 55 and 56 provide for a composite mechanism for alternate dispute resolution that the parties have agreed to, to provide a quick and efficacious remedy. The long silence pursuant to both letters issued by the petitioner clearly reveals the mind of the respondent and its dis-inclination to appoint a Mediator. This, in itself, is reason enough to conclude that the invocation of clause 56 providing for arbitration is timely and proper. Letter dated 27.7.2017 issued by the petitioner is clearly only a counterblast, intended to frustrate the present petition.

14.Learned counsel for the respondent has relied on the following judgments:

(i). *Indian Institute of Planning and Management and another vs. M/s.AK & I Advertising Private Limited* 2016 (1) R.A.J 18 (SC), paras 7 and 9:

7.During the course of hearing, learned counsel for the appellants, relied upon Section 11 of the Act to assail the validity of the impugned order dated 10.05.2011. It was the contention of the learned counsel for the appellants, that the mandate of sub-section (5) of Section 11 required a party to a dispute, to enjoin the other party to the contract, to agree to appoint an arbitrator, to settle their disputes and only on the presentation of such

request, the other party fails to agree to aggrieved party can approach the jurisdictional High Court under Section 11 of the Act, with a request to appoint an arbitrator.....

...

9.....No document was brought to our notice during the course of hearing by the learned counsel for the respondent indicating that M/s.AK & I Advertising Pvt. Ltd. had ever approached the appellants requiring the appellants to agree to the appointment of an arbitrator, for the settlement of their monetary disputes, emerging out of their contractual relationship, with regard to handling of the advertisement, work of the appellants.'

2. Iron & Steel Co. Ltd. vs. Tiwari Road Lines 2007 (5) SC 703, portions of paras 6 and 7:

6.It is not disputed that the respondent did not make any effort to have the dispute settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. On the contrary, it straightaway moved an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the City Civil Court, Hyderabad, which was the Designated Court, in accordance with the scheme framed by the High Court of Andhra Pradesh. The principal question, which requires consideration is, whether such as application moved by the respondent was maintainable.

.....

7.Sub-section (2) of Section 11 of the Act provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator. The opening part of sub-sections (3)

and (5) of Section 11 of the Act use the expression “failing any agreement referred to in sub-section (2)”. Therefore, sub-sections (3) and (5) will come into play only when there is no agreement between the parties as is referred to in sub-section (2) of Section 11 of the Act viz. that the parties have not agreed on a procedure for appointing the arbitrator or arbitrators. If the parties have agreed on a procedure for appointing arbitrator or arbitrators, sub-sections (3) and (5) of Section 11 of the Act can have no applications. Similarly, under sub-section (6) of Section 11 request to the Chief Justice or to an institution designated by him to take the necessary measures, can be made if the conditions enumerated in clause (a) or (b) or (c) of this sub-section are satisfied. Therefore, recourse to sub-section (6) can be had only where the parties have agreed on a procedure for appointment of an arbitrator but (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure.’

15. The Bench, in the case of Indian Institute of Planning (supra) notes that no document was filed indicating that the petitioner had ever approached the respondent to seek agreement for the appointment of the arbitrator for the settlement of disputes. It is in the light of this position that the Bench holds that the jurisdiction invoked by the High Court under Section 11 was incorrect. In the present case, the petitioner has, not once, but twice, specifically requested for the appointment of Mediator, failing which arbitration. While the respondent

22.4.2017 and a letter seeking recourse to mediation on 27.7.2017, after receipt of notice of the present petition under Section 11. Thus, in addition to the fact that the petitioner has made two attempts to seek recourse to Mediation, the conduct of the respondent in avoiding a timely response leads to the inescapable conclusion that the present petition is liable to be allowed. As regards the case of Iron and Steel Co Ltd (supra) the Bench records as a fact that it was admitted that the petitioner had not followed the agreed procedure for reference to arbitration. In the present case and in the light of the facts as I have noticed, I conclude that the procedure agreed upon has been correctly followed by the Petitioner.

16. In this view of the matter, this petition is allowed. On behalf of the petitioner Mr.K.Harishankar, Advocate is suggested as the nominee and on the part of the respondent Mr.Suhrith Parthasarathy, Advocate is appointed as Arbitrator. The two Arbitrators will appoint the Presiding Arbitrator within four weeks from the date of receipt of a copy of this order in terms of clause 56. The Tribunal shall enter upon reference and endeavour to adjudicate upon the disputes inter se the parties as expeditiously as possible and in any event within a period of six months from the date of first sitting. The Tribunal is at liberty to fix their remuneration as well as schedule of expenses and both parties shall bear the same equally.

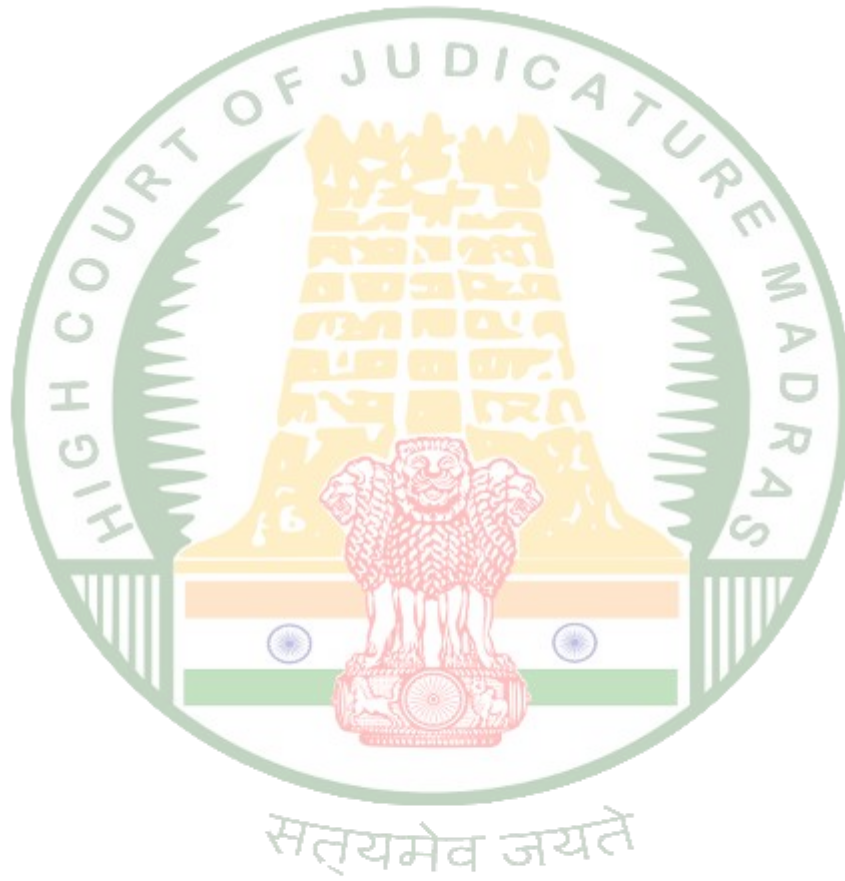
17. The petition is allowed with no order as to costs.

24.10.2017

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Speaking order/Non speaking order

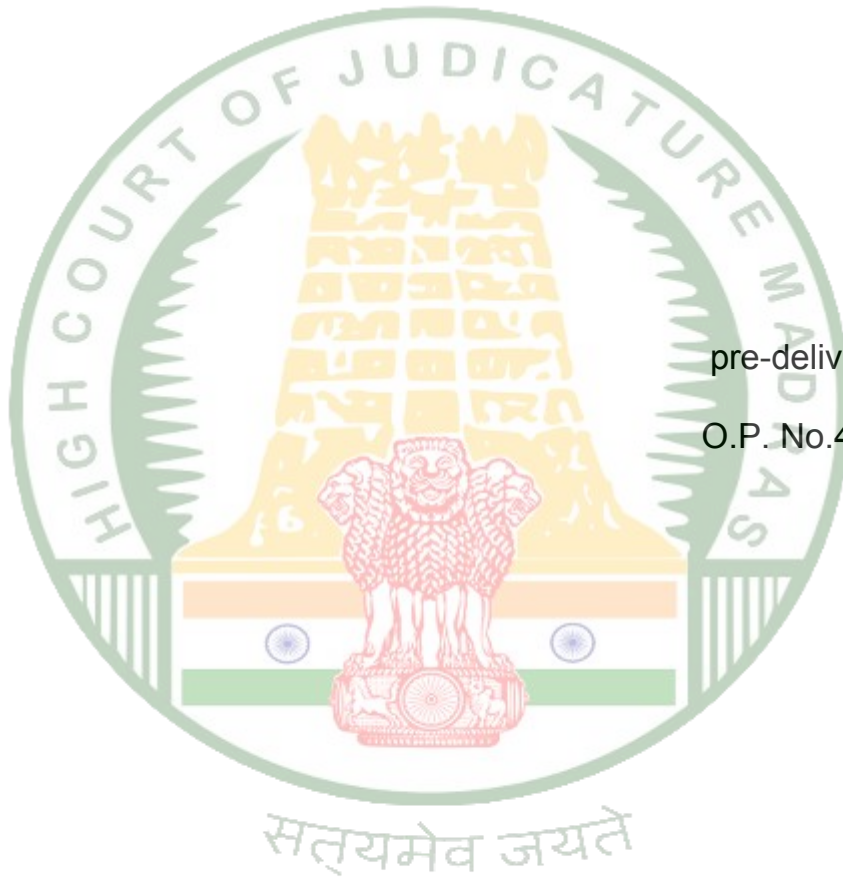
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DR.ANITA SUMANTH,J.

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pre-delivery order in
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