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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 24th October, 2017

Pronounced on: 7th November, 2017

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FAO 395/2017 & CM No. 37063-37064/2017

EMAAR MGF LAND LTD & ANR Appellants

Through: Mr. A.S Chandhiok, Sr. Adv.
with Mr. Aditya Narain, Mr.
Jugal Wadhwa, Mr. Arnav
Narain, Ms. Anushree Narain,
Mr. Arjun Jain, Ms. Sweta
Kakkad, Mr. Gaurav Sharma,
Mr. Mishra Rajshekhar, Mr.
Mr. Anukrit Gupta and Ms.
Pallavi Kumar, Advs.

versus

AFTAB SINGH

..... Respondent

Through: None

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FAO 396/2017&CM Nos. 37065-66/2017

EMAAR MGF LAND LTD & ANR Appellants

Through: Mr. A.S Chandhiok, Sr. Adv.
with Mr. Aditya Narain, Mr.
Jugal Wadhwa, Mr. Arnav
Narain, Ms. Anushree Narain,
Mr. Arjun Jain, Ms. Sweta
Kakkad, Mr. Gaurav Sharma,
Mr. Mishra Rajshekhar, Mr.
Mr. Anukrit Gupta and Ms.
Pallavi Kumar, Advs.

versus

TANU BATRA

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

1. These appeals have been brought before this Court invoking Section 37(1)(a) of the Arbitration and Conciliation Act, 1996, as amended by Arbitration & Conciliation (Amendment) Act, 2015, to assail two orders of the National Consumer Disputes Redressal Commission (NCDRC), one dated 13.07.2017 of a larger bench (of three members) answering a question of law on a reference earlier made by a bench presided over by a single member and the other dated 28.08.2017 of the bench which had earlier made the said reference, thereby dismissing the identical applications of the appellants herein seeking a reference under Section 8 of Arbitration and Conciliation Act, 1996 of the disputes which are the subject matter of consumer complaints of the respondents against the appellants, presently pending consideration.

2. It may be mentioned here that the consumer complaints were instituted by the respective respondents before the NCDRC with reference, *inter alia*, to similar buyer's agreements that had been entered upon by the parties wherein the said complainants have raised consumer disputes primarily on the ground of failure on the part of the appellants to deliver timely possession of the residential villas (flats /

plots, etc.) being developed by it in Mohali (and other places) seeking directions either for immediate delivery and possession or, in the alternative, for other reliefs including compensation. It appears that upon being served with the notices, the appellants submitted the applications under Section 8 of the Arbitration and Conciliation Act, 1996 referring to an arbitration clause in each such buyer's agreement and praying for a reference accordingly. The bench presided over by a single member had referred, to the larger bench, the question of law as to whether Section 8(1) of the Arbitration and Conciliation Act, 1996, as amended by Arbitration & Conciliation (Amendment) Act, 2015 mandates the consumer forum constituted under the Consumer Protection Act, 1986 to refer the parties to arbitration in terms of a valid arbitration agreement notwithstanding other provisions of both the said enactments. The larger bench, by its order dated 13.07.2017, answered the said question of law in the negative holding that the arbitration clause in such agreements between the complainants and the builder cannot circumscribe the jurisdiction of consumer fora notwithstanding the amendment made in Section 8 of Arbitration and Conciliation Act, 1996. Following the said decision of the larger bench, the bench presided over by the single member, by identical orders passed on the two said complaints, on 28.08.2018 dismissed the applications of the appellants under Section 8 of the Arbitration and Conciliation Act, 1996 thereby declining to make such reference.

3. The first and foremost issue that needs to be considered at the threshold is as to whether these appeals can be maintained before this

Court. The learned senior counsel for the appellants has been heard at length and the record has been perused.

4. Section 37 of the Arbitration and Conciliation Act, 1996, to the extent relevant here, reads as under:-

“(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) refusing to refer the parties to arbitration under Section 8;

xxx”

5. It may be mentioned here that clause (a) of sub-section (1) of Section 37, as quoted above, was inserted (besides other clauses) by amendment of the statute, with retrospective effect from 23.10.2015, by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016).

6. NCDRC is a forum established by the Central Government under Section 9(c) of the Consumer Protection Act, 1986. It exercises jurisdiction envisaged in Section 21 wherein it may, *inter alia*, entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore. [Section 21(a)(i)]. The orders passed by NCDRC in exercise of such jurisdiction are subject to appeal before the Supreme Court and for this reference may be made to Section 23 which, to the extent relevant, may be quoted as under:-

“Appeal. — Any person, aggrieved by an order made by the National Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 21,

may prefer an appeal against such order of the Supreme Court within a period of thirty days from the date of the order:

xxx”

7. It is the contention of the appellants that Section 37 of the Arbitration and Conciliation Act, 1996 was amended in 2015 so as to permit the remedy of appeal against an order of the judicial authority declining to make a reference of the dispute to Arbitration under Section 8 so as to mirror it with the existing provision contained in Section 50. It may be mentioned here that Section 50 finds place in the first chapter of the second part of the Arbitration and Conciliation Act, 1996 and relates primarily to the enforcement of Foreign Awards (New York Convention Awards). It is the submission of the appellants that while considering an application for reference under Section 8 of the Arbitration and Conciliation Act, 1996, the judicial authority exercises powers conferred upon it by the said statute and not such powers as are exercisable by it in terms of the enactment under which the proceedings or the *lis* has been initiated before it. Arguing that the Arbitration and Conciliation Act, 1996 constitutes self-contained, exhaustive and comprehensive code, it has been submitted that the provisions only of the said enactment could be looked into to ascertain whether an order declining to make a reference (to arbitration) can be challenged thereunder. It is the contention of the appellants that Section 37(1)(a) of the Arbitration and Conciliation Act 1996 vests, in the appellants, a statutory right to prefer an appeal before this Court and correspondingly confers, upon

this court, the appellate jurisdiction to entertain such an appeal, notwithstanding the remedy of appeal before the Supreme Court under Section 23 of the Consumer Protection Act 1986 for the reason that NCDRC, while passing the impugned orders, has exercised jurisdiction conferred on it not by the Consumer Protection Act 1986 but by virtue of Section 8 of the Arbitration and Conciliation Act, 1996.

8. Section 8 of the Arbitration and Conciliation Act, 1996, to the extent relevant here, may be quoted as under :-

“8(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. xxx”.

9. Noticeably, while conferring the jurisdiction to refer the parties to a dispute to arbitration, the law refers to the forum as a “judicial authority”, and not a “court”. It is trite that the expression “judicial authority”, also used in Section 5, may encompass within its fold not only a court but also a tribunal. [see *SBP & Co. Vs. Patel Engg. Ltd.*, (2005) 8 SCC 618; *Morgan Securities & Credit (P) Ltd. Vs. Modi Rubber Ltd.*, (2006) 12 SCC 642; *Modi Korea Electro Communication Ltd. Vs. Eppcon Consultants Pvt. Ltd.* 2000 (supp.) Arb. Law Reporter

618 and *Sudershan Chopra & Ors. vs. Vijay Kumar Chopra & Ors.* (2003) 117 Comp. Cases 660].

10. There can be no quarrel with the proposition that while considering an application for the parties to a dispute to be referred to arbitration on the ground that it is subject to an arbitration agreement in terms of Section 8(1), the judicial authority exercises the jurisdiction conferred upon it by the Arbitration and Conciliation Act, 1996 and not the jurisdiction it exercises under the law whereunder it has been established. [see *Sundaram Finance Ltd. vs. T. Thankam* (2015) 14 SCC 444; *State of Goa Vs. Praveen Enterprises*, 2012 (12) SCC 581; *Today Hotels (New Delhi) Pvt. Ltd. Vs. Intecture India Designs Pvt. Ltd.*, 2016 (154) DRJ 567 (DB); and *Cornos Steels Pvt. Ltd. (Mumbai) Vs. Lu Qin (Hong Kong)*, AIR 2015 Bom. 206 (FB)].

11. Reference to Section 50 of the Arbitration and Conciliation Act, 1996, in the opinion of this court, in the present context, is mis-placed. Sections 45 and 48 which fall in the first chapter of second part of the enactment relate to power of a judicial authority to refer parties to arbitration and the conditions for enforcement of foreign awards, refusal on the part of the judicial authority or the court respectively to exercise such jurisdiction being amenable to appeal to the court “*authorised by law to hear appeals from such order*”. Unlike Section 50, for purposes of the remedy of appeal under the first part of the Arbitration and Conciliation Act, 1996, as envisaged in Section 37 (1), the appellate court is described as the one “*authorised by law to hear appeals from original decrees of the court passing the order*”.

12. From the context in which the expression “*court authorised by law to hear appeals*” has been used in Section 37(1), it is clear that it cannot be a reference to the “court”, the meaning of which word is defined in Section 2(1)(e) in as much as the said definition clause relates to the forum of first instance (original jurisdiction) and not the forum which is authorized to hear the appeals.

13. The remedy of appeal was provided in Section 37(1) till 2015 Amendment against orders of a court with reference to the jurisdiction conferred on the “court” (as defined in Section 2) for “*interim measures*” (under Section 9) or to consider “*setting aside an arbitral award*” (under Section 34) only. The law then did not conceive of appeal against order making or refusing a reference to arbitration (under Section 8). This is why the provision in Section 37(1) prior to its amendment was not concerned with act of any forum except a “court”. After 2015 amendment, when the reference or refusal to make over to arbitration has been additionally made subject to appeal, the words “*the court passing the order*” appearing in Section 37(1) acquire new dimension and need to be properly construed so as to harmonise them with Section 8 which confers the jurisdiction to pass the order that may be challenged in appeal. Since Section 8 does not restrict such a power to a “court” but extends it to every “judicial authority”, the forum conceived by the expression “*the court passing the order*” under the amended law – Section 37(1)(a) – has to be read contextually and understood to connote “*the judicial authority*” which passed the order making or refusing the reference. The reference to “*original decrees*” in the opinion of this court, is meant to convey a

decision taken by a court of first instance in exercise of its original jurisdiction.

14. If construed as above, the appeal against the order of NCDRC (making or) refusing the reference of the dispute to arbitration cannot be brought before this court since appeals against orders of said forum lie before the Supreme Court. NCDRC is a tribunal and not a court. This court is not authorised by the law to hear appeals from the orders passed by NCDRC in exercise of its original jurisdiction. By virtue of Section 23 of the Consumer Protection Act, 1986, such appeal is available under the said law, as noted earlier, only before the Supreme Court. Therefore, the words “*the court authorised by law to hear appeals*” in present cases essentially mean “the Supreme Court”.

15. For the foregoing reasons, this court holds that these appeals under Section 37(1) of the Arbitration and Conciliation Act, 1996 have been wrongly brought before this court. The same, therefore, cannot be entertained here and are consequently hereby returned to be presented before the appropriate appellate court.

न्यायमेव जयते

(R.K. GAUBA)
JUDGE

NOVEMBER 07, 2017

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