

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : **25.02.2019**

Pronounced on : **04.10.2019**

Coram

THE HONOURABLE MR. JUSTICE **R.SURESH KUMAR**

O.P. Nos.36 and 38 of 2019

Shriprop Structures Pvt., Ltd.,
Rep. by its Authorised Signatory,
Lakshmi Neela Rite Chamber, 1st Floor,
New No.9, Bazullah Road, T.Nagar,
Chennai - 600 017,
Mr.Ravie Kumar.

... Petitioner in both the OPs

Vs.

Neerathulingam
K.Kabaleeshwaran

... Respondent in O.P.No.36 of 2019
... Respondent in O.P.No.38 of 2019

Prayer in O.P.No.36 of 2019 : Petition filed to appoint an Arbitrator to adjudicate all the disputes arising out of the Sale Agreement, dated 19.10.2012 and Construction Agreement, dated 19.10.2012 between the petitioner and the respondent.

Prayer in O.P.No.38 of 2019 : Petition filed to appoint an Arbitrator to adjudicate all the disputes arising out of the Construction Agreement, dated 04.03.2014 between the petitioner and the respondent.

For Petitioner : Mr.G.Balasubramanian
in both the OPs

For Respondent : Mr.P.Anand
for Mr.V.Balaji in both the OPs

COMMON ORDER

O.P.No.36 of 2019 has been filed under Section 11 (6) of the Arbitration and Conciliation Act 1996 to appoint an Arbitrator to adjudicate all the disputes arising out of the Sale Agreement, dated 19.10.2012 and Construction Agreement, dated 19.10.2012 between the petitioner and the respondent.

2. O.P.No.38 of 2019 has been filed under Section 11 (6) of the Arbitration and Conciliation Act 1996 to appoint an Arbitrator to adjudicate all the disputes arising out of the Construction Agreement, date 04.03.2014 between the petitioner and the respondent.

3. The facts of O.P.No.36 of 2019 in nutshell :

(i) That the petitioner is a Private Limited Company engaged in the business of real estate development including building of complete constructions or parts thereof to its customers across India. The petitioner seems to have developed a building complex called "Shriram Shankari" which is a residential project. While so, the respondent approached the petitioner and booked a flat for a total cost of Rs.37,08,581/- in Tower No.19, Unit No.201 in Block No.J1 on the second floor of a saleable area of 1230 Sq.ft along with car parking in the complex.

(ii) The respondent and petitioner had entered into a sale agreement on 19.10.2012 for purchase of 738 sq.ft of undivided land share and also entered into a construction agreement, dated 19.10.2012, i.e., on the same day, for the construction of the flat for the respondent.

(iii) As per the construction agreement, pursuant to the sale agreement, the respondent had paid a total sum of Rs.32,82,363/- on various dates between 2012 and 2014. According to the petitioner, those payments were made by the respondent at various time only after satisfying the stage of completion of the building / flat concerned. Ultimately at one point of time, according to the petitioner, the building construction was completed and the flat in question was ready for occupation, hence the petitioner claimed to have requested the respondent to pay the remaining amount as agreed in the construction agreement and to take possession of the flat.

(iv) It is the further case of the petitioner that, since the respondent had not responded, immediately, on 05.06.2018 the petitioner sent an electronic mail to the respondent informing the readiness of the building for taking possession, therefore requested the

respondent to pay the remaining amount and to take possession of the flat.

(v) It is the further claim of the petitioner that, after several round of intimation and communication, the respondent did not come forward, which shows his unwillingness to take possession of the flat after paying remaining construction cost, thus, a dispute arisen between the parties as per the sale agreement and the construction agreement dated 19.10.2012.

(vi) It is the further case of the petitioner that, therefore, as per the arbitration clause available in both the sale agreement as well as the construction agreement dated 19.10.2012, the petitioner had sent a communication on 29.09.2018 to the respondent, invoking the arbitration clause in the said agreement, by naming a former Judge of this Court as a sole Arbitrator and requiring the respondent to agree for the same or to come forward with his nomination of Arbitrator. However as the respondent has not come forward to respond to the said communication, dated 29.09.2018 of the petitioner, informing the intention and identification of the sole Arbitrator, having no other option, the petitioner filed this Original Petition under Section 11 of the

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Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") with aforesaid prayer for appointment of an arbitrator to adjudicate all disputes arising out of the sale agreement and construction agreement, dated 19.10.2012.

4. The facts in nutshell in O.P.No.38 of 2019 :

(i) The facts in this case also similar to that of the earlier one. Here also the respondent had booked a flat at the very same "Shriram Shankari" Residential project of the petitioner, i.e., at Tower No.19, Unit No.104 in Block No.J2 on the 1st Floor of a saleable area of 1230 Sq.ft along with car parking space in the stilt car parking area in the complex, for a cost of Rs.40,99,351/-. Pursuant to which, a construction agreement was entered into between the parties on 04.03.2014 followed by a Sale Deed, which was executed on 20.03.2014 for the purchase of 738 sq.ft of undivided share of the land.

(ii) As per the construction agreement, the respondent had paid a sum of Rs.28,20,982.20/- on various dates in the year 2014. Thereafter on completion of the building, i.e., flat in question, the petitioner claimed to have sent a electronic mail communication to the

respondent informing him that, the unit was ready for possession and therefore requested him to pay the remaining due payable by him as per the construction agreement as well as sale deed and to take possession of the flat / unit.

(iii) As per the claim of the petitioner, since the respondent has not come forward to pay the remaining due and to take possession of the flat / unit which was claimed to have been constructed and completed, there has been a dispute arose between the parties arising out of the construction agreement, wherein under Clause 63, there is a provision for arbitration to refer the dispute.

(iv) It is the further case of the petitioner that, therefore, as per the arbitration clause available in the Construction Agreement, dated 04.03.2014, the petitioner had sent a communication on 29.09.2018 to the respondent invoking the arbitration clause in the said agreement by naming a former Judge of this Court as a sole Arbitrator and requiring the respondent to agree for the same or to come forward with his nomination of Arbitrator. However as the respondent has not come forward to respond to the said communication, dated 29.09.2018 of the petitioner, informing the intention and identification

of the sole Arbitrator, having no other option, the petitioner filed this Original Petition under Section 11 of the Arbitration and Conciliation Act, 1996 with aforesaid prayer for appointment of an arbitrator to adjudicate all disputes arising out of the construction agreement, dated 04.03.2014.

5. In both the O.Ps, the petitioner is one and the same but the respondents are different persons. The facts are similar, arguments were advanced by the learned counsel appearing for both sides combinedly in both the O.Ps and the issue raised in both the O.Ps are one and the same, therefore in order to resolve the said issue by disposing these O.Ps, this common order is passed in both these Original Petitions.

6. As against the said facts projected by the petitioner side as indicated above, the respective respondents in both the O.Ps have filed separate counter affidavit, where they raised a sole ground against the petitioner, which is that, the unit / flat constructed for the respective respondent, according to them, have not been up to the mark or on the agreed terms, therefore they alleged deficiency in the service rendered by the petitioner / developer / construction company,

therefore in order to remedy their grievances, they taken the route of adopting a special remedial measure provided under Consumer Protection Act, 1986 and thereby the respondents in both the cases claimed to have filed consumer complaint in C.C.No.90 of 2018 and C.C.No.94 of 2018 respectively before the State Consumer Dispute Redressal Commission at Chennai, alleging deficiency in services.

7. It is the further case of the respective respondents, in both OPs that, the petitioner entered appearance in the said complaints, filed by the respondents and they filed the version denying the allegations contained in the respective consumer complaint. According to the respondents, both the CC, before the State Dispute Redressal Commission, are still pending.

8. In this context, the ground urged by the respondents in their respective counter affidavit is that, as per the law declared by the Hon'ble Supreme Court in **EMAAR MGF Land Limited v. Aftab Singh**, reported in **I (2019) CPJ 5 (SC)**, the arbitration proceedings initiated by the petitioner by sending notices under the Arbitration clause available in the agreement between the parties cannot be proceeded further in view of the pendency of the consumer complaints

before the State Consumer Forum and therefore the parties cannot be relegated to an arbitration proceeding by the consumer forum and therefore the present attempt made by the petitioner in these two Original Petitions to get appointment of Arbitrator under Section 11(6) of the Arbitration Act is not entertainable and hence the respondents raised the said issue and prayed for dismissal of these Original Petitions.

9. In view of the said stand taken by the respondents, which is the only ground they urged in their respective counter affidavits, this Court has to go into the justifiability of the said ground raised by the respondents in the Original Petitions.

10. As the respondents have very much relied upon the law declared by the Supreme Court in the said EMAAR MGF Land Limited case, the details and import of the said Judgment of the Hon'ble Apex Court has to be gone into.

11. The background facts of the EMAAR MGF Land Limited case before the Hon'ble Apex Court in nut shell :

(i) An appeal was filed before the Supreme Court in Civil Appeal

No.23512 - 23513 of 2017 challenging the order, dated 13.07.2017 passed by a larger Bench of the National Consumer Disputes Redressal Commission (hereinafter referred to as "NCDRC") holding that, the consumer disputes to be non-arbitrable.

(ii) The said appellant is a company which acquired and purchased land in District Mohali at Punjab to develop an integrated Township. The respondent in that case submitted an application for allotment of a villa in Sector 106, Mohali, pursuant to which, an agreement had been entered into between the parties on 06.05.2008, where there is an arbitration clause to settle the dispute between the parties.

(iii) On 27.07.2015, the respondent therein filed a complaint in Complaint No.701/2015 before the NCDRC against the appellant therein for various relief. On notice, the appellant who was the respondent before the NCDRC entered appearance and also filed an application under Section 8 of the Arbitration Act, seeking to refer the matter to arbitration, in view of the arbitration clause available in the agreement.

(iv) On 31.08.2016, a single Judge of the NCDRC taking into consideration of the vital importance of the issue raised in the said case filed before the NCDRC in a batch of cases, directed to refer the matter to a Larger Bench of NCDRC. Accordingly a Larger Bench was constituted in NCDRC and the Consumer Complaint No.701/2015 was referred to and heard by the Larger Bench of NCDRC.

(v) The Larger Bench of the NCDRC by Judgment, dated 13.07.2017 has answered the reference in the following terms :

"55. In view of the afore-going discussion, we arrive at the following conclusions: (i) the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable; (ii) there are vast domains of the legal universe that are non-arbitrable and kept at a distance from private dispute resolution; (iii) the subject amendment was meant for a completely different purpose, leaving status quo ante unaltered and subsequently reaffirmed and restated by the Hon'ble Supreme Court; (iv) Section 2(3) of the Arbitration Act recognizes schemes under other legislations that make

disputes non-arbitrable and (iv) in light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

(vi) Thereafter it seems that, the appellant in that case had approached the Delhi High Court. Since the Delhi High Court has dismissed the said appeal to present before the Appellate Court, the said Civil Appeal Nos.23512 - 23513 of 2017, challenging the Larger Bench decision of the NCDRC, dated 13.07.2017 as well as the consequential order dated 28.08.2017 were filed before the Hon'ble Apex Court. After hearing the parties, the Hon'ble Apex Court by their

decision, dated 13.02.2018 dismissed those appeals. In order to review the said order of dismissal made by the Hon'ble Apex Court, the Review Petitions Civil Nos.2629 - 2630 of 2018 in Civil Appeal Nos.23512 - 23513 of 2017 was filed with the following prayer :

"In the review petitions, following prayers have been made by the appellant:-

“(1)Allow the present review petition and review the Order dated 13.02.2018 passed by this Hon'ble Court in Civil Appeal No. 23512-23513 of 2017;

(2)Set aside the Order dated 13.07.2017 passed by the Larger Bench of the Hon'ble National Commission in C.C. 701/2015 holding consumer disputes to be non-arbitrable amongst other similar erroneous findings;

(3)Set aside the Order dated 28.08.2017 passed by the Single Judge of the Hon'ble National Commission in C.C. 701/2015 dismissing the Application u/S. 8 of the Arbitration and Conciliation Act, 1996;

(4)And pass such other or further order or orders as the Hon'ble Court may deem fit and proper in the interest of justice.”

(vii) The Hon'ble Apex Court after hearing the Review Petitions in detail enumerated the following principles as emerged :

"12. From the submissions of the learned counsel for the parties and pleadings of the parties following are the principal issues which arise for consideration in these petitions:

(i) Whether NCDRC committed error in rejecting the application of the appellant filed under Section 8 of 1996, Act praying for reference to the arbitrator as per Arbitration clause in the builders agreement?

(ii) Whether after the amendments made in Section 8 by the Arbitration and Conciliation (Amendment) Act, 2015 the application filed under Section 8 by the appellant could not have been rejected in view of substantial changes brought in the statutory scheme by inserting the words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" in sub-section (1) of Section 8?

(iii) Whether NCDRC as well as this Court committed error in not advertent to the above statutory amendment which completely changed the legal position as was earlier existing prior to the aforesaid amendment?

(iv) Whether by the insertion of words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" under Section 8(1) by the (Amendment) Act, 2015 legislature intended to do away with the decision of judgments of Supreme Court laying down that Consumer Protection Act being special remedy can be initiated and continued despite there being any arbitration agreement between the parties?"

(viii) In a threadbare consideration with wide ranging of case laws including the Judgment of the Apex Court in M/s.Duro Felguera S.A v. Gangavaram Port Limited reported in VII (2017) SLT 656. The Hon'ble Apex Court has given its ultimate findings and conclusion at para 52 to 56 which are extracted hereunder :

"52. The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds

Corporation Limited(supra) is no more a good law cannot be accepted. The words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning. Reference is also made to the judgment of this Court in Vimal Kishor Shah and others vs. Jayesh Dinesh Shah and others, (2016) 8 SCC 788. This Court in the above case had occasion to consider the provisions of Section 8 of the Act, 1996 in reference to special remedy provided under Trusts Act, 1882. This Court noticed the judgment of this Court in Booz Allen and Hamilton Inc.(supra) with approval in paragraphs 40 and 42 which is to the following effect:

"40. Before we examine the scheme of the Trusts Act, 1882, we consider it apposite to take note of the case law, which has a bearing

on this issue. The question came up for consideration before this Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* as to what is the meaning of the term "arbitrability" and secondly, which type of disputes are capable of settlement by arbitration under the Act. Their Lordships framed three questions to answer the question viz.: (SCC p. 546, para 34) (1) Whether the disputes having regard to their nature could be resolved by a private forum chosen by the parties (Arbitral Tribunal) or whether such disputes exclusively fall within the domain of public fora (courts)?; (2) Whether the disputes are covered by the arbitration agreement?; and (3) Whether the parties have referred the disputes to arbitrator?"

42. The question to be considered in this appeal is whether the disputes relating to affairs and management of the Trust including the disputes arising inter se trustees, beneficiaries in relation to their appointment, powers, duties, obligations, removal, etc. are capable of being settled through arbitration by taking recourse to the provisions of the Act, if there is a clause in the trust deed to that effect or such disputes have to be decided under the

Trusts Act, 1882 with the aid of forum prescribed under the said Act?”

53. After noticing the issues which have arisen in the above case this Court laid down following in paragraphs 51 and 53:

“51. The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke while examining the question of bar in filing civil suit in the context of remedies provided under the Industrial Disputes Act (see G.P. Singh, Principles of Statutory Interpretation, 12th Edn., pp. 763-64). We apply this principle here because, as held above, the Trusts Act, 1882 creates an obligation and further specifies the rights and duties of the settlor, trustees and the beneficiaries apart

from several conditions specified in the trust deed and further provides a specific remedy for its enforcement by filing applications in civil court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.

53. We, accordingly, hold that the disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. A fortiori, we hold that the application filed by the respondents under Section 11 of the Act is not maintainable on the ground that firstly, it is not based on an "arbitration agreement"

within the meaning of Sections 2(1)(b) and 2(1)(h) read with Section 7 of the Act and secondly, assuming that there exists an arbitration agreement (Clause 20 of the trust deed) yet the disputes specified therein are not capable of being referred to private arbitration for their adjudication on merits."

54. This Court held that disputes within the trust, trustees and beneficiaries are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. This Court held that the remedy provided under the Arbitration Act for deciding such disputes is barred by implication. The ratio laid down in the above case is fully applicable with regard to disputes raised in consumer fora.

55. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are

provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.

56. We, thus, do not find that any error has been committed by the NCDRC in rejecting the application filed by the appellant under Section 8. No exception can be taken to the dismissal of the appeals by this Court against the judgment of NCDRC. No ground is made out to review the order dated 13.02.2018. The review petitions are dismissed."

12. Only in that context, by heavily relied upon the said law declared by the Hon'ble Apex Court in EMAAR MGF Land Limited case, the learned counsel appearing for the respondents urged that, in view of the admitted fact that, the parties have already been before a special fora, namely the State Consumer Disputes Redressal Forum at Chennai, where version have been filed by the petitioner in response to the complaint filed by the respondents and the matters are pending consideration before the said State Consumer Forum, the jurisdiction of an Arbitrator / Arbitral Tribunal to be appointed to decide the issue between the parties under the provisions of the Arbitration Act does not arise.

13. In this context, it is to be noted that, in the respective agreements between the parties, i.e., the agreement, dated 19.10.2012, i.e., construction agreement as well as the sale agreement between the parties in O.P.No.36 of 2019, there is a clear arbitration clause available. To appreciate the same, the relevant clause is extracted hereunder. In construction agreement, dated 19.10.2012, clause 62 reads thus :

"62. All disputes or differences between the parties under or in accordance with this Agreement or any breach thereof shall be amicably settled between the parties and in the event of failing to reach a settlement, the same shall submitted to arbitration of a sole Arbitrator who will be appointed mutually by both the parties. The Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The language of the arbitration shall be English. The seat of arbitration shall be in Chennai. The expenses of the Arbitration proceedings shall be borne equally by the parties or as may be decided by the Arbitrator. The decision by the Arbitrator shall be final and binding between both the parties and will be capable of

enforcement before the competent court having jurisdiction."

14. Like that, in the sale agreement between the parties, dated 19.10.2012 in the same O.P.No.36 of 2019, clause 20 speaks about arbitration, which reads thus :

"20. All disputes or differences between the parties under or in accordance with this Agreement or any breach thereof shall be amicably settled between the parties and in the event of failing to reach a settlement, the same shall submitted to arbitration of a sole Arbitrator who will be appointed mutually by both the parties. The Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The language of the arbitration shall be English. The seat of arbitration shall be in Chennai. The expenses of the Arbitration proceedings shall be borne equally by the parties or as may be decided by the Arbitrator. The decision by the Arbitrator shall be final and binding between both the parties and will be capable of enforcement before the competent court having jurisdiction."

15. Like that in respect of O.P.No.38 of 2019, since the sale has been effected in respect of the undivided land, the petitioner relied upon construction agreement, dated 04.03.2014, where similar arbitration clause available in clause 63, which reads thus :

"63. All disputes or differences between the parties under or in connection with this Agreement or any breach thereof shall be amicably settled between the parties and in the event of failing to reach a settlement, the same shall submitted to arbitration of a sole Arbitrator who will be appointed mutually by both the parties. It is clarified that the sole Arbitrator, to be appointed shall be one among the retired Judges of the Madras High Court. The Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The language of the arbitration shall be English. The seat of arbitration shall be in Chennai. The expenses of the Arbitration proceedings shall be borne equally by the parties or as may be decided by the Arbitrator. The decision by the Arbitrator shall be final and binding between both the parties and will be capable of enforcement before the competent court having jurisdiction."

16. Though it was claimed by the petitioner in both the O.Ps that, as per the arbitration clause in the respective agreements, the issue shall be referred to a sole arbitrator to be appointed, shall be one among the retired Judges of the High Court, the said content, i.e., "Shall be one among the Retired Judges of the Madras High Court" is not form part of the relevant arbitration clause referred to above in the agreements in O.P.No.36 of 2019.

17. Be that as it may, it is a fact that, there is an arbitration agreement between the parties in both the cases, where there is a written arbitration clause and the agreement has been signed by both parties and it is not in dispute as to the existence of the arbitration clause.

18. Therefore after the 2015 amendment, the courts must see only whether there is an arbitration agreement in writing signed by both parties, where there is a clear arbitration clause available and nothing more nothing less. If that is available, parties can be relegated to arbitration proceedings by invoking Section 11(4), (5) or (6) of the Arbitration Act.

19. In the present case, it is not in dispute that, there is an arbitration agreement, where there is a written arbitration clause signed by both parties. However it is the case of the respondents in both the O.Ps that, under the provisions of the Consumer Protection Act, the respective respondents are entitled to avail the special remedy available under the said Consumer Protection Act, which is a special remedy under which, being a consumer, their grievances can be redressed. If deficiencies of service on the part of the petitioner is ultimately found out, they will be entitled to get compensation also and therefore, in order to avail the said special remedy, they have already approached the State Dispute Redressal Commission at Chennai, which, having entertained the CC, i.e., respective consumer complaints, as referred to above, had issued notices to the respondent therein, who is the petitioner herein, who, on receipt of notice, entered appearance and filed version denying the averments made in the respective CCs thereby the petitioner submitted himself to the jurisdiction of the consumer fora.

20. That apart, the said Consumer Fora, having seized of the matter, has started hearing the same, thereby notice was issued, opposite party entered appearance and filed version. It is not known

whether Section 8 application under the Arbitration Act had been filed by the petitioners herein in the respective consumer complaints before the State Consumer Forum. Assuming that, if an application under Section 8 of the Arbitration Act is filed, whether the consumer forum is obliged to accept Section 8 application of the Arbitration Act and as a sequel, relegate the parties to approach the Arbitral Tribunal to proceed in accordance with the provisions of the Arbitration Act, in view of the explicit agreed arbitration clause in the agreement between the parties, also to be looked into.

21. Only in this juncture, the law declared by the Hon'ble Apex Court in the said EMAAR MGF Land Limited case cited supra can very well be pressed into service.

22. It was originally the decision of the Larger Bench of the NCDRC in its Judgment, dated 13.07.2017 that, the disputes which are to be adjudicated and governed by statutory enactment established for specific public purpose to sub-serve a particular public policy, are not arbitrable. They also decided that, in light of the over all architecture of the Consumer Act and court evolved jurisprudence, amended sub-section (1) of Section 8 of the Arbitration Act cannot be construed as a

mandate to the Consumer Forums, constituted under the Consumer Protection Act, to refer the parties to arbitration in terms of the Arbitration Agreement.

23. The sustainability of the said decisions made by the Larger Bench of the NCDRC, dated 13.07.2017 was questioned before the Hon'ble Apex Court, which decided the same by dismissing the Appeals filed by the parties therein on 13.02.2018.

24. However not satisfied with the same, the appellant in the said case, filed the Review Petitions as cited supra in EMAAR MGF Land Limited case, where the Hon'ble Apex Court found certain principles emanated, where it was specifically pointed out at para 12(4) of the said Judgment, which has been extracted herein above, that, by the insertion of the words "not withstanding any Judgment, decree, order of the Supreme Court or any Court", under Section 8(1) by the amendment Act 2015 of the Arbitration Act, whether the legislature intended to do away with the decisions of the Judgments of the Supreme Court laying down that, the Consumer Protection Act, being the special remedy can be initiated and continued despite their being any arbitration Agreement between the parties.

25. It seems to have been vehemently contended before the Hon'ble Apex court in the said case that, especially after the amendment made to Section 8 of the Arbitration Act in the 2015 amendment and based on the earlier interpretation given by the Apex Court, especially in Duro Felguera case referred to above, it was obligatory for the consumer commission to refer the dispute to arbitration in view of the specific arbitration clause available in the agreement between the parties.

26. The said contention has been exhaustively discussed with plethora of case laws by the Hon'ble Apex Court and ultimately it has held in unequivocal terms in para 54 and 55 as well as 56 that, the Supreme Court does not find any error on the decision of the Larger Bench of the NCDRC in rejecting the application filed by the appellant in that case under Section 8 of the Arbitration Act.

27. The Hon'ble Apex Court, very specifically made at para 54 of the Judgment that, the ratio laid down in a case related to Trust Act, is fully applicable with regard to the disputes raised in Consumer Fora, which means disputes within the Trust, Trustees and beneficiaries are not capable of being decided by the Arbitrator despite existence of

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Arbitration Agreement to that effect between the parties as held by the Hon'ble Apex Court and that principle would squarely applies to the disputes raised in consumer fora also. However in para 55 of the said Judgment, the Hon'ble Apex Court has made it clear that, for such an exclusion of the arbitration proceedings in the teeth of the special or specific remedies provided under Special Act like the Consumer Act, the party must have opted for availing such special / specific remedy. In other words, even though a special or specific remedy like the Consumer Protection Act is available to an aggrieved person, unless and until such aggrieved person invoked such special law and enter into a litigation by approaching the Consumer Forum under the said Act by way of special remedy, the exclusion of Arbitration proceedings under the Arbitration and Conciliation Act, in the presence of an Arbitration Agreement between the parties, is not possible.

28. Therefore from the aforesaid Judgment of the Hon'ble Apex Court in EMAAR MGF Land Limited case, it has been explicitly and unambiguously made clear that, the special or specific remedy available to a consumer / aggrieved party under the Consumer Protection Act, if it is invoked and availed, which remedy cannot be 'taken away or abrogated by the provision of the Arbitration Act,

especially under Section 8 of the said Act, despite there has been a written arbitration agreement signed by both parties.

29. Here in the case in hand, no doubt, there is an Arbitration Agreement signed by both the parties, where there is a clear arbitration clause available, under which, dispute between the parties is referable to arbitration proceedings, for which a sole Arbitrator can be appointed by both parties jointly and in case of failure of appointing Arbitrator by either party, issue can be referred to this Court by invoking Section 11 of the Arbitration Act and in that case, this Court can exercise its power to appoint an Arbitrator under Section 11 of the Arbitration Act. However, in the present case, no arbitrator has so far been appointed in the manner known to law, as the Arbitration Agreement makes it clear that, a sole arbitrator has to be appointed jointly by both parties, otherwise, the parties had no option except to approach this Court under Section 11(6) of the Arbitration Act. Therefore, as of now, there is no Arbitrator appointed in the eye of law and no arbitration proceeding is commenced.

30. However, one of the party to the arbitration agreement has already availed the special / specific remedy provided under the

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Consumer Protection Act, where the consumer complaint filed by the respondents before the State Consumer Disputes Redressal Forum, Chennai, having been entertained, notice was issued, where the petitioner herein, who is the respondent in the consumer complaints had entered appearance and filed version and the complaints, admittedly are pending before the State Consumer Forum.

31. Therefore it is a case where the aggrieved party has already opted to avail the specific / special remedy under the Consumer Protection Act. Therefore, the jurisdiction of the arbitration proceedings stands excluded in view of the law declared by the Hon'ble Apex Court in the aforesaid Judgment in EMAAR MGF Land Limited case.

32. In that view of the matter, this Court has no hesitation to hold that, the petitioner cannot seek remedy for appointment of an Arbitrator under Section 11 of the Arbitration Act as has been sought for in these Original Petitions and they can work out their remedy by contesting the consumer complaints filed before the State Consumer Redressal Forum at Chennai, where they have admittedly entered appearance and started contesting.

33. Therefore the present remedy of appointment of Arbitrator as has been sought for in these Original Petitions cannot be granted by this Court, accordingly, these Original Petitions are deserved to be rejected.

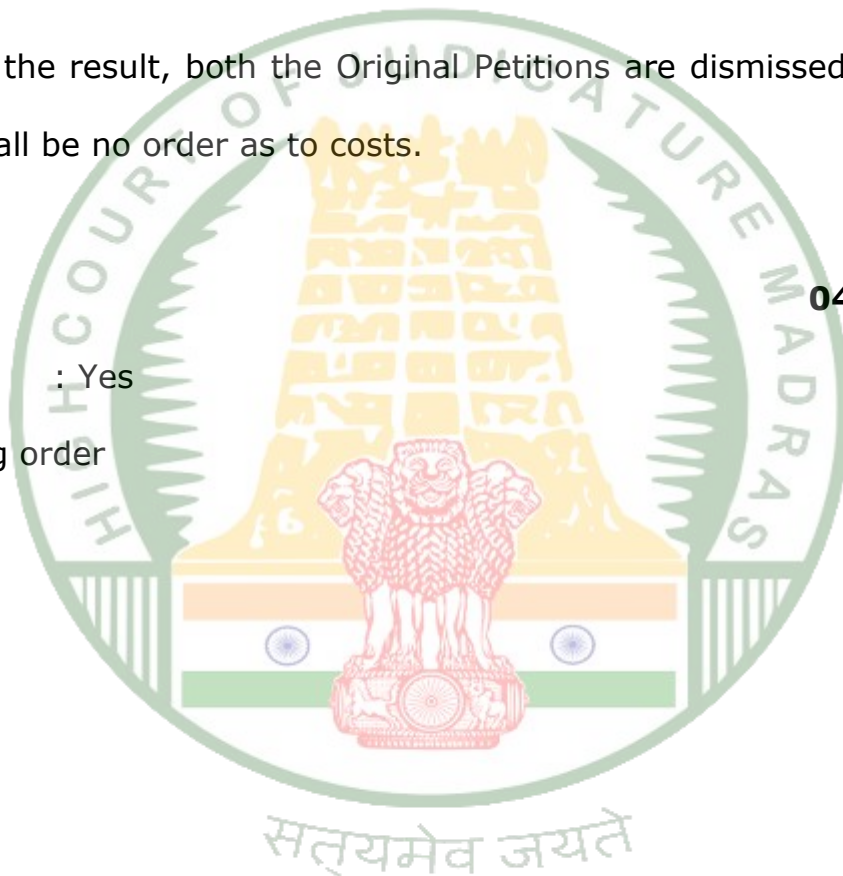
In the result, both the Original Petitions are dismissed. However there shall be no order as to costs.

04.10.2019

Index : Yes

Speaking order

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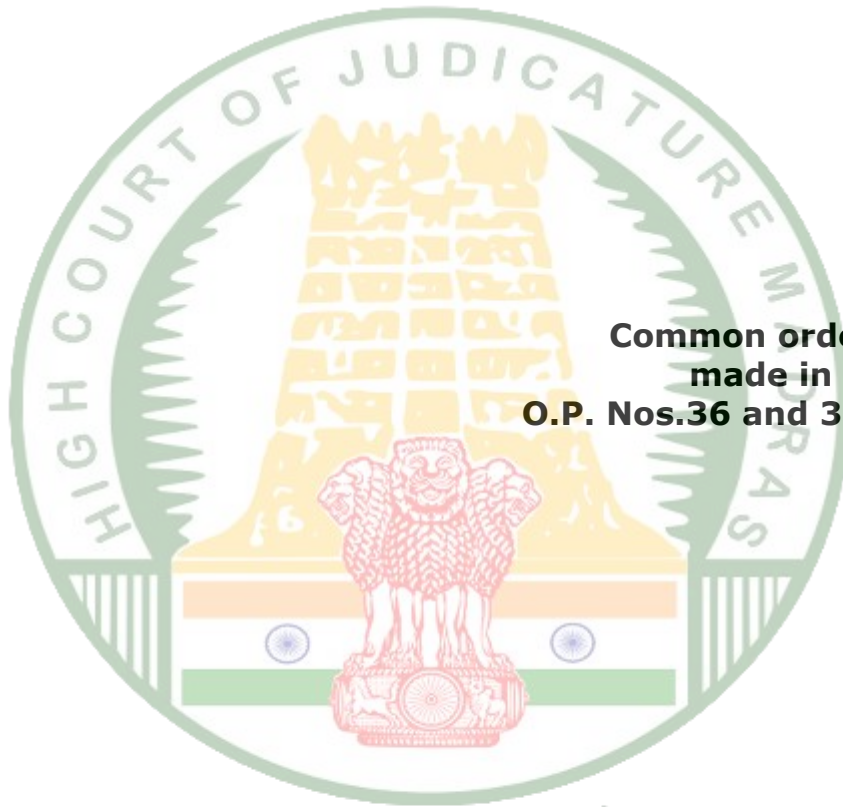


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O.P.Nos.36 and 38 of 2019

R.SURESH KUMAR, J.

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**Common order
made in
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04.10.2019