

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2020

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

C.M.A.No.2269 of 2016

and

C.M.P.No.15996 of 2016

EMAAR MGF LAND LTD

Represented by its Authorized Signatory

ECE House, No.28,

Kasturba Gandhi Marg,

New Delhi - 110 001.

... Appellant/Respondent

Vs.

1.M.Velamutha @ Easther

..1st Respondent/Claimant

2.Mr.Justice Arulraj (Retd)

Plot No.27, Sriram Nagar, 1st Main Road,

Vadakupati Main Road, Koot Road,

Chennai - 600 100.

..2nd Respondent/
Sole Arbitrator

Prayer : Civil Miscellaneous Appeal filed under Section 37(2) (b) of the Arbitration and Conciliation Act, 1996, to set aside the order passed by the 2nd respondent, dated 26.08.2016, in I.A.No.1 of 2016 in Arb.No.(Unnumbered) of 2016.

For Appellant : Mr.Kaushik N. Sharma

For R1 : Mr.P.V.Sudhakar

J U D G M E N T

This Civil Miscellaneous Appeal has been filed against the order passed by the Sole Arbitrator in I.A.No.1 of 2016, dated 26.08.2016, appointing an Advocate Commissioner along with Civil Engineer to inspect the subject property, viz., Flat No.T6-01-101/B1, Old No.7A, New No.75, Vythinatha Mudaliar Street, Tondiarpet, Chennai, to note down the physical features and present condition of the building and to verify whether the flat has been constructed in accordance with the specifications mentioned in the sale agreement.

2. For the sake of convenience, the Arbitration and Conciliation Act, 1996, shall hereinafter be referred to as "Original Act" and the Arbitration and Conciliation (Amendment) Act, 2015, shall hereinafter be referred to as "Amended Act".

3. Originally, reference was made by the 1st respondent/claimant to the Sole Arbitrator, a Retired District Judge, claiming damages of Rs.50,64,798/- for the alleged breach of the agreement by the appellant.

4. It is the case of the claimant/1st respondent before the Arbitrator that the appellant agreed to construct a flat, totally measuring a super built up area of 1693.25 sq.ft. inclusive of built up area of apartment and proportionate share of common utilities, for a total sum of Rs.43,36,415/-. As the appellant committed breach of the agreement and the building was not constructed in time, the 1st respondent/claimant suffered a loss and hence, preferred a claim before the Sole Arbitrator.

5. It is the further case of the claimant/1st respondent that an application was taken up before the Sole Arbitrator for appointment of an Advocate Commissioner to inspect the property with the help of a Civil Engineer to note down the physical features and present condition of the flat and also the materials used for construction.

6. After hearing either side, the Sole Arbitrator, vide his order dated 26.08.2016, allowed the application and appointed an Advocate Commissioner to inspect the property and to note down its physical features with the assistance of a Civil Engineer, and liberty was given to the appellant to depute a Civil Engineer of their choice.

7. Challenging the aforesaid order of appointment of Advocate Commissioner, the present appeal has been filed before this Court.

8. Though many grounds have been raised in this appeal by the appellant, the learned counsel appearing for the appellant mainly focused on the ground that the claim petition was filed by the 1st respondent/claimant before the Arbitrator on 04.05.2016, whereas, the agreement is dated 07.03.2008, and hence, the Original Act is alone applicable to this case. Section 17 of the Original Act does not confer powers on the Arbitrator to appoint Commissioner to inspect a property. The power to order interim measures was introduced only in the Amended Act with effect from 23.10.2015. Hence, it is the contention of the learned counsel that, without any power conferred under Section 17 of the Original Act, the learned

Arbitrator has appointed an Advocate Commissioner to inspect the property which is against the law. Hence, the learned counsel submitted that the order passed by the Sole Arbitrator is liable to be set aside.

9. The learned counsel appearing for the 1st respondent/claimant submitted that, though the provision of Section 17 of the Amended Act has been quoted, the application for appointment of Commissioner has been taken out only to aid the Arbitrator to arrive at a just conclusion in the adjudication process. Therefore, it cannot be construed as an interim measure of protection ordered by the Arbitrator. The learned counsel submitted that, mere quoting of wrong provision of law by the claimant will not take away the rights of the Arbitrator to seek aid of an expert. The learned counsel further submitted that, on account of pendency of this appeal before this Court, the Arbitrator could not proceed with the Arbitration Proceedings, and hence, prayed for dismissal of this appeal.

10. Heard the learned counsel appearing for the appellant and the 1st respondent/claimant and also perused the entire materials available on record.

11. In fact, the claim petition has been filed by the 1st respondent on 04.05.2016, before the Sole Arbitrator, claiming damages on the ground of alleged breach of construction agreement dated 07.03.2008 entered into by the parties. An application was taken out by the claimant/1st respondent to appoint an Advocate Commissioner to note down the physical features and present condition of the property. The Sole Arbitrator has allowed the application and has passed an order appointing an Advocate Commissioner to note down the physical features of the subject property with the aid of a Civil Engineer. These facts are not disputed.

12. On a perusal of the impugned order, it is seen that the Sole Arbitrator has clearly recorded a finding that the order appointing Advocate Commissioner is not in the nature of interim measure of protection or custody or preservation, etc., but only to aid the Arbitrator in the adjudication process, a Commissioner's report is required. The Commissioner has been appointed to inspect the property, to note down the nature of the materials used in construction of the building. Therefore, merely because a Commissioner is appointed, it cannot be said that he has been appointed only as an interim measure either for preservation or custody or sale of any goods.

13.The main contention of the learned counsel for the appellant is that the powers have been granted to the Arbitrator only under the Amended Act with effect from 23.10.2015, including the inspection of any property, and Sub Clause (c) of Section 17 of the Amended Act was no where available in the Original Act, and hence, the impugned order passed by the Arbitrator, appointing Commissioner, is not correct. This Court is not able to appreciate this contention of the learned counsel for the appellant. As per Section 17 of the Amended Act, interim measures of protection can be ordered by the Arbitrator as preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement and also the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. Therefore, merely because such power of inspection was granted as an interim measure only in the Amended Act, it cannot be said that the Arbitrator has no power to seek the aid of expert(s) in the field in order to get relevant information with regard to the subject matter in dispute. Moreover, under Section 26 of the Original Act, it is well within the powers of the Arbitrator to call for a report from expert(s) in respect of the subject matter for effective adjudication of the dispute between the parties.

14.Therefore, merely because the application was filed quoting wrong provisions of law and the same was ordered, it cannot be said that the appointment of an Advocate Commissioner to file a report with regard to the quality of construction, particularly with the aid of a Civil Engineer, is bad in law. Such a report, in fact, would help the Arbitrator for effective resolution of the dispute between the parties. Hence, I do not find any merits in this appeal.

As a result, this Civil Miscellaneous Appeal is dismissed. The impugned order passed by the Sole Arbitrator is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mkn

To

Mr.Justice Arulraj (Retd)

Plot No.27, Sriram Nagar, 1st Main Road,
Vadakupati Main Road, Koot Road,
Chennai - 600 100.

C.M.A.No.2269 of 2016

LN (CO)

RMP (23/11/2020)



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