

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPEAL NO.7 OF 2023
WITH
CIVIL APPLICATION NO.5738 OF 2023

Fusion Developer
Through its Proprietor
Mr. Sanjay Panikar

.... Appellant

Versus

Holy Family Marry Matha
Service Society,
Shamshabad Road, Agra (U.P.)

.... Respondent

.....

Mr. Uday S. Malte, Advocate for the Appellant
Mr. Shailesh P. Brahme, Advocate for the Respondent

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 28th APRIL, 2023

ORDER :

1. By relying on Clause 11 of the agreement dated 15/10/2018, the appellant filed Civil Miscellaneous Application No.518 of 2022 under Section 9 of the Arbitration and conciliation Act, in the District Court, praying that the respondent be temporarily restrained from forcefully evicting the appellant from construction site, without following due procedure of law till the final disposal of the arbitration proceeding or till another date, and for direction to the respondent to deposit Rs.1,30,90,123/- in the Court till final

disposal of arbitration proceeding or until further orders. An injunction is sought restraining the respondent from appointing new contractor for completion of remaining construction till final disposal of arbitration proceeding.

2. In nutshell, undisputed facts are that, the appellant is a proprietary concern, running business of construction and development of project. The respondent is a registered Trust engaged in social and religious work. On 15/10/2018, the respondent entered into an agreement with the appellant for construction of two storied building. The estimated cost of construction is Rs.6,38,00,000/-. On 14/09/2022, the appellant preferred Civil Misc. Application No.518 of 2022 under Section 9 of Arbitration and Conciliation Act, 1996, for interim measures including injunction against the respondent. The respondent by filing detail say, strongly opposed the said application, and controverted the statements made in the application. After hearing the parties, the District Court has rejected the said application. Hence, the present appeal.

3. Heard the learned advocate for the petitioner and the learned advocate for the respondent. Perused the appeal memo, annexures thereto, and the documents placed on record by the appellant and by the respondent.

4. Dispute arose between the parties in respect of outstanding of completed work.

5. In these facts, as dispute arose between the parties, in respect of outstanding payment of completed work, the appellant approached District Court by filing application under Section 9 of the Arbitration and Conciliation Act, for interim measures. District Court has rejected the said application observing that during the pendency of the said proceeding, application Exhibit-22 is moved by the appellant for appointment of Court Commissioner. Appointment of two Architects as Court Commissioner and inspection was sought. Accordingly, order was passed and two Architects were appointed as Court Commissioners. They have submitted report Exhibit-26 along with report, they also produced cost of completed work and rough notes regarding their inspection. The appellant has partly accepted and partly denied the contents of the report. The appellant has failed to take steps for appointment of Arbitrator. Section 9 provides remedy as a breathing time till appointment of Arbitrator. Though the application before the District Court was filed on 14/09/2022, till the date of decision of District Court, the appellant has not taken steps for appointment of Arbitrator. The District Court

further noted that construction work is held up since more than one year, and the respondent intends to run the School in the building under construction. As construction work is stalled, one academic year is lost. The District Court, therefore, recorded a finding that there is no satisfactory explanation of the appellant as to why steps are not taken for appointment of Arbitrator, if at all, the appellant wants to resolve the dispute through Arbitrator.

6. It is further held that, consideration for granting temporary injunction as contemplated under Order XXXIX Rule 1, 2 and 3 of the Code of Civil Procedure are applicable to the application. Considering that the dispute is regarding payment of construction work, which is already completed that means it is for recovery of amount of work done by the appellant, the cost of work done can be counted in terms of money.

7. Taking into consideration peculiar facts of the present case, and particularly a fact that the appellant has failed to appoint the Arbitrator since long, and construction of School and hostel building is stalled, and as the reasons assigned by District Court are cogent and proper, this Court is not inclined to interfere in the order passed by the District Court as there

is no illegality or perversity in the order impugned in the present appeal.

8. At this stage, Mr. Malte, learned advocate, on instructions from the appellant, who is present in the Court suggested the name of Architect Mr. Mahesh V. Kulkarni as Arbitrator. Mr. Brahme, learned advocate, on instructions from the respondent, who is present in the Court suggested the name of Architect Mr. Rajesh Parekh as Arbitrator. Both the Architects are from Jalgaon, and admittedly, Clause 11 in the agreement dated 15/10/2018 is a arbitration clause, which contemplates appointment of two Architects, one Architect each by the parties, and they both have to appoint third Arbitrator.

9. In view of the aforesaid, the Arbitration appeal is disposed of with following directions.

10. Architect Mr. Mahesh V. Kulkarni and Architect Mr. Rajendra Parekh are appointed as Arbitrators.

11. Both the Arbitrators shall suggest the name of third Arbitrator, and appoint him as Principal Arbitrator, within one week from uploading of this order.

12. All the respective contentions of both the parties are kept open.

13. Needless to mention that this Court has not expressed any opinion on the merit of the matter.

14. Civil Application is also disposed of.

[NITIN B. SURYAWANSHI]
JUDGE

S.P Rane