

(2013) 06 MAD CK 0067

In the Madras High Court

Case No : Original Side Appeal No"s. 115 to 117 and 142 of 2013 and M.P. No"s. 1,1, 1 and 1 of 2013

Raajendira Namalwar

APPELLANT

Vs

T. Udayakumar
T. Udayakumar Vs Raajendira
Namalwar

RESPONDENT

Date of Decision : 12-06-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2013) 06 MAD CK 0067

Hon'ble Judges : M.M. Sundresh, J;M. Jaichandren, J

Bench : Division Bench

Advocate : R. Thiagarajan in OSA Nos. 115 to 117 of 2013 and respondent in OSA. 142/2013, for the appearing parties; S. Ramesh for Respondent in OSA Nos. 115 to 117 of 2013 and appellant in OSA. 142/2013, for the Appearing Parties

Judgement

M.M. Sundresh, J.—Original Side Appeal Nos. 115 to 117 of 2013 have been filed by the appellant/applicant challenging the common

order passed in O.A. No. 203 of 2011 and A. Nos. 1291 and 1292 of 2011 dated 21.02.2012. Original Side Appeal No. 142 of 2013 has been

filed by the appellant/respondent challenging the common order passed in O.A. No. 203 of 2011 dated 21.02.2012.

2. As the above Original Side Appeals have been filed against the common order between the very same parties, they have been taken up together

and common judgment is passed.

3. For the sake of brevity, the appellant in O.S.A. Nos. 115 to 117 of 2013 is arrayed as such covering all the appeals.

4. The appellant and the respondent entered into a Joint Development

Agreement pertaining to schedule ""A"" of the property mentioned in O.A.

No. 203 of 2011. It is the case of the appellant that the respondent, who is the promoter, has committed fraud and he has to pay a sum of Rs.

8,28,55,125/-. It is the further case of the appellant that the pent house allotted is unauthorised and unapproved. It was so done by the respondent

deliberately with the intention to cheat the appellant. The agreement between the parties contains an arbitration clause. Pending the invocation of

arbitration, the appellant filed applications u/s 9 of the Arbitration and Conciliation Act, 1996. Original Application No. 203 of 2011 has been filed

seeking an order of interim injunction restraining the respondent from alienating or otherwise dealing with the properties mentioned in schedule ""A

and ""B"". Application No. 1291 of 2011 has been filed for a direction, directing the respondent to deposit a sum of Rs. 8,28,55,125/- with interest.

Application No. 1292 of 2011 has been filed seeking an appointment of Advocate Commissioner to inspect and note down the physical features

of the properties mentioned in schedule ""A"" and ""B"" to the Judges summon.

5. The learned single Judge has ordered attachment of Item No. 2 of the ""B"" schedule property while dismissing the application for other

properties. Application No. 1291 of 2011 was dismissed and Application No. 1292 of 2011 was allowed in part restricting the prayer for

appointment of Advocate Commissioner to ""A"" schedule property alone. Challenging the partial rejection of Original Application No. 203 of 2011,

O.S.A. No. 115 2013 has been filed by the appellant. As against the dismissal of Application No. 1291 of 2011, O.S.A. No. 116 of 2013 has

been filed. Being aggrieved against the partial rejection of the prayer for Advocate Commissioner in Application No. 1292 of 2011, O.S.A. No.

117 of 2013 has been filed. Aggrieved against the order of Attachment granted in Original Application No. 203 of 2011 over Item No. 2 of ""B

schedule properties, the respondent has filed an appeal in O.S.A. No. 142 of 2013.

6. The learned counsel appearing for the appellant would submit that as found by the learned single Judge, there was a deviation caused at the

instance of the respondent and for the loss suffered by the appellant, the respondent will have to pay damages. Therefore, pending arbitration,

appropriate orders will have to be passed as the appellant has made out a prima

facie case. The appellant, after having parted with the property, is made to suffer substantial loss at the hands of the respondent. Hence, the learned counsel would submit that the appeals will have to be allowed.

7. Per contra, the learned counsel appearing for the respondent would submit that the appellant is in possession of the ""A"" schedule

property, which has been allotted to him. Items 1 and 3 of the ""B"" schedule properties do not belong to the respondent. As the claim is

substantially one for damages, it is a matter to be decided by the learned Arbitrator. The learned single Judge has correctly rejected the relief for an

appointment of Advocate Commissioner over the ""B"" schedule properties which cannot be the subject matter of the arbitration. Further more, the

Advocate Commissioner is not required to visit and file his report over the ""B"" schedule properties. In so far as O.S.A. No. 142 of 2013 is

concerned, the learned counsel would submit that the learned single Judge has gone beyond the prayer sought for in ordering attachment and

therefore, the same is required to be interfered with. The learned counsel has also filed an affidavit of undertaking to the effect that the Item 2 of the

B"" schedule properties, which is the residential house, will not be alienated or encumbered any further.

8. At the time of hearing, both the counsels have submitted before the Court that they have no objection for appointing the Honourable Mr. Justice

K. Sampath as the sole Arbitrator. The statement made by the learned counsel appearing for the parties is recorded and accordingly, this Court

hereby appoints Honourable Mr. Justice K. Sampath as the sole Arbitrator to decide all the disputes between the parties, touching upon the Joint

Development Agreement dated 03.04.2006.

9. It is seen from the records that the dispute has arisen in the construction and development of the property situated in Schedule ""A"". There is

nothing to prove that Items 1 and 3 of the ""B"" schedule properties belong to the respondent. Therefore, in the absence of any concrete materials,

we do not find any reason to interfere with the order passed by the learned single Judge in this regard. We also agree with the findings of the

learned single Judge in declaring the relief in the ""A"" schedule property as most of the portions have already been sold to the third parties and one

portion is in possession of the appellant and therefore, there cannot be an order

of injunction for the same.

10. Similarly with respect to the orders passed in Application No. 1291 of 2011 and 1292 of 2011 are concerned, we are of the view that they

also do not require any interference. The question of making any payment by the respondent does not arise at this stage. Admittedly, there are

certain money transactions between the parties to the effect that the respondent has made some payment to the appellant. Further more, the award

can only be executed after it reaches finality. In so far as the rejection of the request of the appellant for the appointment of the Advocate

Commissioner is concerned, we respectfully agree with the reasoning of the learned single Judge. Admittedly, the ""B"" schedule properties are not

the subject matter of dispute before the learned Arbitrator. These properties also do not form part of the Joint Development Agreement between

the parties. Therefore, we feel that the appointment of Commissioner is quite unnecessary. Accordingly, O.S. Nos. 115 to 117 of 2013 are hereby

dismissed.

11. Insofar as O.S.A. No. 142 of 2013 is concerned, the prayer sought for in the application filed is for one of injunction regarding alienation or

encumbrance. Therefore, the learned single Judge ought not to have ordered the attachment over the Item No. 2 of the ""B"" schedule property.

Even though there is a subsisting mortgage between the appellant in O.S.A. No. 142 of 2013 and the Bank, we feel in the interest of justice that he

should be restrained from alienating or further encumbering the said properties, subject to the mortgage already made. The affidavit of undertaking

dated 29.03.2013 given by the appellant in O.S.A. No. 142 of 2013 regarding the alienation is hereby recorded. Accordingly, the order passed

by the learned single Judge in O.S.A. No. 203 of 2011 is modified to the effect that subject to the pending mortgage, there shall be an order of

interim injunction restraining the respondent therein from alienating or further encumbering Item No. 2 of the ""B"" schedule property in the Judge's

summon pending disposal of the arbitration proceedings. In fine, Original Side Appeal Nos. 115 to 117 are dismissed. Original Side Appeal No.

142 of 2013 is allowed in part. No costs. Consequently, connected miscellaneous petitions are closed.