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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA 354/2008

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Date of Order: 10.11.2008

D.D.A

..... Appellant

Through: Mr.Ajay Verma, Adv. and
Mr.Amit Mehra, Adv.

versus

HAPPY HIMALAYA CONSTRUCTION CO. ... Respondent

Through: Mr.B.M.Sehgal, Adv.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE J.R. MIDHA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.(Oral)

1. Heard learned counsel for the parties for final disposal.
2. The dispute centers on the interpretation of Section 89 of the Code of Civil Procedure, 1908 which reads as under:-

“89. Settlement of disputes outside the Court.–

(1) Where it appears to the Court that there exists elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for–

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including settlement

through Lok Adalat, or

(d) mediation.

(2) Where a dispute has been referred–

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.”

3. Needless to state, resolution of disputes through Alternative Dispute Resolution Mechanism has to be encouraged and hence every attempt has to be made to interpret Section 89 of the Code of Civil Procedure, 1908 which broadens the span of the sweep of the words of the section but with caution. It would be impermissible for a Court to violate the mandate of the legislature, by, under the garb of interpretation re-write a statute.

4. A perusal of the language of Section 89 of the Code

of Civil Procedure, 1908 reveals that the *sine qua non* for referring the parties to an Alternative Dispute Resolution Mechanism is the opinion recorded by the Judge concerned that there exists elements of a settlement which may be acceptable to the parties followed by the formulation of the terms of the settlement. After so doing, the Court has to take the observation of the parties on the terms of the settlement formulated by the Court and thereafter re-formulate the possible terms of the settlement followed by a reference to an Alternative Dispute Resolution Mechanism.

5. No doubt, the language of the Section does not mandate that the consent of the parties has to be taken, but that does not mean that a Court can resort to a short-cut and without forming an opinion and formulating the terms of the possible settlement refer the subject matter of the dispute to an Alternative Dispute Resolution Mechanism.

6. On facts, it may be noted that the suit filed by the respondent for recovery was being litigated between the parties before a Civil Court. Pleadings have been pleaded. Issues have been framed. Witnesses of the respondent/plaintiff were being examined. It was the date fixed for PW-1 to be cross-examined. On 19.11.2007, after PW-1 was partly cross-examined, an application was filed by the respondent under Section 89 of the Code of Civil Procedure, 1908 which resulted in the impugned order being passed which reads as under:-

“Present : As before.
Sh.B.M.Sehgal, Advocate, Ld. counsel

for plaintiff.

PW-1 Sh.Kuldeep Kumar Thakur partly recorded. His examination in chief recorded and partly cross-examined. On the joint request of Ld.counsel for parties, his further cross-examination is deferred.

An application u/s 89 CPC for referring the matter to Arbitrator has been moved by plaintiff through counsel. Copy supplied. Ld.counsel for plaintiff has also filed the photocopy of certified copy of order dated 11/10/2007 passed by Hon'ble Mr.Justice Sanjay Kishan Kaul, Judge, Delhi High Court in CS(OS) No.808/1997 & CS(OS) No.2015/1997 wherein the judgment of Hon'ble Mr.Justice A.K.Sikri, Judge Delhi High Court in CS(OS) No.134/2006 has also been referred.

Heard. Perused the record.

In these circumstances, in view of submissions and record and in view of Judgment dated 22/3/2007 passed by Hon'ble Mr.Justice A.K.Sikri, Judge, Delhi High Court in case titled M/s.Sukumar Chand Jain No.CS(OS) No.134/2006 and judgment dated 23.05.2007 passed by Hon'ble Ms.Justice Gita Mittal, Judge, Delhi High Court in Suit No.941/2001 titled DDA vs. S.S.Jetley, I am of the considered view that this case be also referred to Arbitrator u/s 89 of the CPC.

The Vice-Chairman, DDA is directed to appoint an Arbitrator within a fortnight from the date of this order. The plaint and written statement and replication on record shall be treated as statement of claim, counter statement of fact and rejoinder before the Arbitrator. The Arbitrator shall give his decision on the issues already framed. He shall be paid fee of Rs.40,000/- and shall give his award within a period of six months from today. The fee and expenses incurred by the Arbitrator shall be equally shared by the parties.

Parties are directed to appear before the Vice-Chairman, DDA on 23.11.2007 at 02.00 PM, as prayed.

Copy of this order be given dasti to both the parties for compliance.

The application u/s 89 CPC moved today stands disposed off.

The suit stands disposed of accordingly.

File be consigned to Record Room.”

7. Grievance of the appellant is that being a body incorporated under the Delhi Development Act 1957, the Vice-Chairman, DDA has to grant necessary permissions, sanctions and consents and that it was impermissible for the learned Trial Judge to have not even permitted DDA to file a response to the application. Counsel urges that only when an opportunity to file a reply was granted to the appellant the counsel concerned could obtain the necessary instructions from the Vice-Chairman, DDA.

8. Second grievance urged is that the Court has not applied its mind to whether there is a possibility of settlement, and if yes, what was in the contemplation of the Court as a terms of the possible settlement. Counsel urges that the essential requirement of Section 89 of the Code of Civil Procedure, 1908 have been violated.

9. Learned counsel for the respondent urges that the counsel for DDA never sought for time to file a reply.

10. We note that the impugned order does not record that counsel for DDA has not sought time for filing the reply. No doubt, the order does not even record that the counsel seeks time to file the reply. But the fact that the order records that parties have been heard throws light on the fact that counsel for DDA had opposed the application. Had he not done so, where was the question for the Judge to have heard learned

counsel for the parties.

11. We are satisfied that the learned Trial Judge has acted in haste.

12. Before concluding we may note that the impugned order does not record as to what was the ratio of law laid down in the two decisions noted in the impugned order.

13. The two decisions referred to by the learned Trial Judge have been shown to us. The decision of A.K.Sikri, J. is reported as 2007 (2) RAJ 519 Eastern Medicate Ltd. vs. R.S.Sales Corporation.

14. The facts of the case were that in the bills raised by the defendant a clause was printed to the effect that disputes would be referred to an arbitrator. In the written statement filed, a defence was predicated that the suit was not maintainable inasmuch as there existed an arbitration clause between the parties. An application under Order 7 Rule 11 of the Code of Civil Procedure 1908 was filed seeking rejection of the plaint.

15. The learned Single Judge held that notwithstanding the written statement having been filed did not prohibit the Court from treating the application under Order 7 Rule 11 of the Code of Civil Procedure 1908 as one under Section 8 of the Arbitration and Conciliation Act, 1996. Learned Judge gave reasons as to why he was treating the application as one under Section 8 of the Arbitration and Conciliation Act, 1996 and while so doing referred to the legislative intent while enacting Section 89 of the Code of Civil Procedure, 1908. View taken by the learned Judge is that where ever it is possible, attempt has to be made to construe existing pleadings which furthers the resolution of the dispute through an Alternative Dispute Resolution Mechanism.

16. Cutting through the technicality of the written statement being filed before an application under Section 8 of the Arbitration and Conciliation Act 1996 was filed, in view of the fact that there existed an arbitration clause in the commercial contract between the parties, the dispute was referred to an arbitrator.

17. In the instant case, admittedly there is no arbitration clause in the contract between the parties.

18. The other decision referred to, pronounced by Sanjay Kishan Kaul, J. in CS(OS) No.808/1997 and CS(OS) 2015/1997 clearly records an agreement between the parties for reference of the dispute to an arbitrator.

19. There is no option but to set aside the impugned order dated 19.11.2007.

20. The appeal is allowed. Impugned order dated 19.11.2007 is set aside.

21. The suit is restored for decision as per law.

22. No costs.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

NOVEMBER 10, 2008
Dharmender