

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **I.A. No. 3132/2008 (u/O 7 R-11, CPC) in CS(OS) No. 58/2008**

Date of decision : 10.9.2008

IN THE MATTER OF :

MASTER ABHISHEK MEHRA & ORS. Plaintiffs
Through Mr. Kirti Uppal, Adv.

Versus

DLF COMMERCIAL DEVELOPERS LTD Defendant
Through Mr. Ajay Goyal and Ms Mandeep
Kaur, Advs.

CORAM

* **HON'BLE MS.JUSTICE HIMA KOHLI**

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

HIMA KOHLI, J. (ORAL)

1. The present application is filed by the defendant under Order VII Rule 11 of the Code of Civil Procedure (CPC), praying *inter alia* for rejection of the plaint, on the ground that the suit is barred by law.

2. It is stated by the counsel for the defendant that a bare perusal of the plaint filed by the plaintiffs discloses that the subject matter of the present suit is pending adjudication before the nominated Arbitrator to whom

a reference was made by this Court, vide order dated 13.10.2004. In this respect, he draws the attention of this Court to the averments made by the plaintiffs in paras 15 and 16 of the plaint, wherein they have admitted the fact that the subject matter of disputes between the parties, as raised in the present suit is also the subject matter of consideration before the learned Arbitrator. Counsel for the defendant states that as the learned Arbitrator is seized of the entire controversy between the parties, and the matter is pending adjudication before him, this Court is barred from trying the present suit. In this regard, he seeks to rely on the provisions of Section 9 of the CPC and Section 5 of the Arbitration and Conciliation Act, 1996 (in short '**the Act**'). Section 5 of the Act stipulates as under :

"5. Extent of judicial intervention – Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

Section 9 of the CPC contemplates as under :

"9. Courts to try all civil suits unless barred – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

3. On the other hand, counsel for the plaintiffs disputes the present application and asserts that the suit instituted by the plaintiffs is

maintainable. He submits that the defendant has failed to produce the original Commercial Space Buyers Agreement till date and in the absence of the said Agreement, there can be no arbitration clause, and hence the learned Arbitrator does not have any jurisdiction in the matter. He further submits that the present suit has been instituted by the plaintiffs by way of abundant caution, so as to ensure that the claims of the plaintiffs do not get time barred.

4. In rejoinder, counsel for the defendant draws the attention of this Court to the orders dated 21.9.2004 and 13.10.2004 passed in CS(OS) No. 734/2004, order dated 31.1.2006 passed by the learned Arbitrator on an application filed by the plaintiffs under Section 12 and 16 of the Act, and the order dated 21.5.2007 passed in OMP No. 431/2006. He states that in view of the aforesaid orders, the issue with regard to the existence of the arbitration clause is no longer open, having been duly adjudicated upon by the learned Arbitrator vide order dated 31.1.2006. He further submits that in view of the categorical finding of the learned Arbitrator to the effect that an Arbitration Agreement exists between the parties, the only remedy available to the plaintiffs is by way of challenging the final award made by the learned Arbitrator, in case the plaintiffs are still aggrieved. In this regard, counsel for the defendant relies on the judgments of the Supreme Court in the case of M.S. Commercial and others vs. Calicut Engineering Works Ltd, (2004) 10

SCC 656 and S.B. P & Co. vs. M/s Patel Engineering Ltd, **AIR 2006 SC 450**.

He also relies on the judgment of this Court in the case of BPL Ltd. Vs. Morgan Securities & Credits Pvt. Ltd. & Others, **149(2008)DLT 610** to submit that if the Arbitral Tribunal is constituted in accordance with the agreement between the parties, without having recourse to Section 11(6) of the Act, the said Tribunal will have jurisdiction to decide all matters contemplated by Section 16 of the Act.

5. I have heard the counsels for the parties and also perused the orders and documents placed on the record. In the first instance, it is necessary to refer to the undisputed facts of the case.

6. The plaintiffs had filed an earlier suit against the defendant in this Court, for the relief of specific performance of an agreement to sell, being CS(OS) No. 734/2004. The defendant entered appearance and filed an application under Section 8 of the Act being I.A. No. 4820/2004, praying inter alia that an Arbitration Agreement existed between the parties whereunder the claims of the suit were referable to Arbitration. An objection as to the territorial jurisdiction of the Court was also raised by the defendant. During the pendency of the aforesaid application, on 21.9.2004, an offer was made on behalf of the plaintiffs to the defendant before the court that the matter with regard to the interest on Rs.34 lacs claimed by the defendant against the plaintiff may be referred to arbitration. The aforesaid offer was duly

recorded in the order dated 21.09.2004 and counsel for the defendant was granted time to obtain instructions. A statement was also recorded on behalf of the plaintiffs that the plaintiffs would have no objection to the nominated Arbitrator under the agreement being appointed. On 13.10.2004, in view of the fact that counsel for the defendant gave his no objection to the proposal made on behalf of the plaintiffs to refer the remaining disputes between the parties to the nominated Arbitrator, the suit and pending application were disposed of, while directing the nominated Arbitrator to be appointed within three weeks and the parties were directed to appear before him on 09.11.2004 for their respective claims and counter-claims. Thereafter, the Arbitrator is stated to have entered upon reference and the matter is pending adjudication.

7. The plaintiffs filed an application before the learned Arbitrator under Sections 12 and 16 of the Act, which was disposed of vide order dated 31.1.2006. Two issues which were framed by the learned Arbitrator and decided by the aforesaid order included an issue as to whether any Arbitration Agreement existed between the plaintiffs and the defendant. The aforesaid issue was decided against the plaintiffs by holding that there was an agreement between the plaintiffs and the defendant, which contained an arbitration clause and hence, the objection of the plaintiffs that there did not

exist any arbitration clause was rejected. The relevant paras of the aforesaid order are reproduced hereinunder;

“Both the parties have argued the application at length. Two issues which arise from the oral arguments and the application of the parties are:-

- (i) Whether there is any arbitration agreement between the claimants and the respondent?
 - (ii) Whether the Arbitrator has jurisdiction to hear the application in view of Section 12 of Arbitration and Conciliation Act, 1996?
- .

Issue No. 1

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- (i) From the above it is clear that the order dated 13.10.2004 passed by the Hon'ble Court referring the dispute to the Arbitrator in an application under Section 8 of the Act is a judicial order and the Hon'ble Court has decided on the existence of arbitration agreement before directing that the nominated arbitrator as per agreement be appointed. The Arbitrator has got no jurisdiction to sit over the judicial order passed by the Hon'ble High Court. The Hon'ble Court has permitted the parties to take all objections in the arbitration proceedings except that there is no arbitration agreement.
- (j) Thus, it is clear that there is some agreement between the parties. In my view the submission of the claimants is not correct in view of the judicial order dated 13.10.2004 passed by the Hon'ble High Court and Section 7 of the Act read along with Section 16 of the Act. Section 16(1)(a) of the Act provides that the arbitration agreement is independent of the other terms of the contract. Section 7 of the Act provides that an arbitration agreement shall be in writing. From the documents on record, it is clear that the claimants have signed the agreement which was supplied by the respondent to them and the agreement contains an arbitration clause. Thus, there is complete compliance of Section 7 of the Act as there is an arbitration agreement (Clause 50) which is in writing and the claimants have accepted the same by signing

the agreement. Thus I am of the view that the objection of the claimants that there is no arbitration agreement lacks merit.

Hence, Issue No. I is decided against the claimants. “

8. Aggrieved by the aforesaid order, the plaintiffs filed a petition under Section 12(3)(a) and Section 13 of the Act, being OMP No. 431/2006, praying inter alia that an independent /neutral Arbitrator be appointed to decide the claims of the parties. The aforesaid petition was dismissed vide order dated 21.5.2007 whereunder, after taking note of the background of the case, the Court held that since the Arbitrator had already ruled on his jurisdiction, it will be open to the petitioners therein (plaintiffs herein) to raise all objections in case they are not satisfied with the award which may ultimately be passed by the Arbitrator.

9. The present suit was instituted by the plaintiffs on 09.1.2008, praying inter alia for recovery of a sum of Rs.1,48,45,668/- from the defendant along with interest. The details of the claims raised by the plaintiffs against the defendant have been reproduced in para 16 of the plaint. The said para begins by conceding that the plaintiff had filed the said claims before the Arbitrator as well.

10. For the purposes of deciding the present application filed by the defendant under Order 7 Rule 11, CPC, this Court is required to confine itself

to examining the averments contained in the plaint alone, and not go beyond the same. In fact, with regard to exercise of power under the provisions of Order 7 Rule 11, CPC, the law is well settled. It has been held that there cannot be any segregation and dissection of the cause of action or of the various paragraphs in the plaint and that the entire plaint as exists on the record has to be considered and not any particular plea taken therein. (Refer: Roop Lal Sathi vs. Nachhattar Singh Gill **(1982) 3 SCC 487**). It is not permissible to cull out a sentence and to read it out of the context in isolation (Refer: M/s Raptakos Brett & Co. Ltd. vs. Yanesh Property, **(1998) 7 SCC 184**) and Popat and Kotecha Property vs. SBI Staff Association **(2005) 7 SCC 510**). It has also been held that while dealing with the application under Order 7 Rule 11 CPC, the question which is to be decided is whether a real cause of action has been set out in the plaint or something illusory has been stated (Refer: I.T.C Ltd. vs. Debts Recovery Appellate Tribunal, **(1998) 2 SCC 70**).

11. In the present case, having regard to the fact that the plaintiffs themselves concede in the plaint that the disputes, subject matter of the present suit are pending adjudication before an Arbitral Tribunal, and further having regard to the fact that the plaintiffs themselves made an offer for referring the pending disputes between the parties to an Arbitrator, which

was duly recorded in the order dated 21.9.2004 and thereafter, as per the order dated 13.10.2004, the parties were directed to appear before the learned Arbitrator, this Court cannot examine the contention of the counsel for the plaintiffs that there exists no arbitration clause governing the parties and that the entire proceedings being held before the Arbitrator are void. As held by the Supreme Court in the case of S.B.P & Co. (supra), the Arbitral Tribunal has the power and jurisdiction to rule 'on its own jurisdiction' under sub-Section (1) of Section 16 of the Act. Where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award and a remedy available to the aggrieved party, is to challenge the award in accordance with Section 34 or Section 37 of the Act. Similar stand was taken by the Supreme Court in the case of M.S. Commercial & Ors (supra), where it was observed that once the Arbitrator had taken a decision that there was an Arbitration Agreement, then he was bound to continue with the arbitration proceedings and make an arbitral award. Hence, the remedy of the aggrieved party is clearly delineated by the Supreme Court in the aforesaid judgments. It is therefore, not within the scope of this Court to decide the said issue, raised on behalf of the plaintiffs in reply to the present application, in the present proceedings. The plaintiffs may have to seek their remedies elsewhere.

12. In the present case, interestingly, the Arbitrator was not appointed on the basis of any application filed by either of the parties under Section 11(6) of Act. Instead, it is the undisputed position that during the pendency of the earlier suit instituted by the plaintiffs against the defendant, wherein the defendant filed an application under Section 8 of the Act for referring the parties to arbitration, it was the plaintiffs who proposed that the parties be referred to arbitration in respect of the pending disputes, which offer was accepted on behalf of the defendant on the next date i.e. 13.10.2004 and accordingly, the nominated Arbitrator, as per the agreement was directed to be appointed to adjudicate the disputes between the parties.

13. In view of the aforesaid factual background and taking into consideration the judgments in the case of S.B.P. & Company (supra) and Mohan Traders (supra), the counsel for the defendant is justified in stating that as the parties have submitted their disputes to the Arbitral Tribunal, the same disputes cannot be permitted to be agitated simultaneously in a civil suit and the bar laid down under Section 5 of the Act and Section 9 of the CPC comes into play.

14. In the aforesaid facts and circumstances, in view of the bar contemplated in the provisions of Section 5 of the Arbitration and Conciliation Act read with Section 9 of the CPC, it is held that the present suit is liable to be rejected under the provisions of Order 7 Rule 11 (d) of the CPC.

Consequently, the present application filed by the defendant is allowed. The plaint is rejected on the ground that the subject matter of the suit is already a subject matter of reference to an Arbitral Tribunal, which is seized of the matter.

15. Needless to state that the aforesaid findings are only for the purpose of deciding the present application filed by the defendant, and they shall not be treated as an observation on the merits of the disputes between the parties, including those decided by the learned Arbitrator vide order dated 31.1.2006.

HIMA KOHLI,J

SEPTEMBER 10, 2008
KA/S/sk