

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

% **Date of decision: 29th August, 2019**

+ **CS(COMM) 33/2019 & IA No.6649/2019 (u/S 8 of the Arbitration & Conciliation Act, 1996)**

KRISHNA CONSTRUCTION Plaintiff

Through: Mr. Anil Panwar & Mr.
Tanishq Panwar, Advs.

Versus

**FAKHRUDDIN MEMORIAL COOPERATIVE GROUP
HOUSING SOCIETY (REGD.) Defendant**

Through: Mr. Sunil Narula, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for recovery of principal amount of Rs.4,12,89,792/- together with pre-suit interest of Rs.2,11,04,794/- i.e. for a total sum of Rs.6,23,94,586/- from the defendant towards remaining dues of the plaintiff for construction of flats for the members of the defendant, a Co-operative House Building Society.
2. The suit was entertained and summons thereof ordered to be issued. The defendant filed a written statement and to which a replication has been filed by the plaintiff. While the plaint and the replication are on record, the written statement is not on record and the Court Master informs that the same has been returned under objection.
3. The defendant, besides filing the written statement, has also filed IA No.6649/2019 under Section 8 of the Arbitration & Conciliation Act, 1996 and to which a reply has been filed by the plaintiff.

4. The counsel for the parties have been heard on the application under Section 8 of the Arbitration Act.

5. The counsel for the defendant has drawn attention to the tender, at page 6 of Part-III(A) file, floated by the defendant society for the development work of 240 dwelling units in multi-storeyed apartment blocks and other allied works, at Plot No.18, Sector-10, Dwarka (Pappankala) Phase-I, New Delhi and to page 31 of Part-III(A) file, being the Appendix-II-6 to the said tender, prescribing the format of agreement to be entered into by the defendant with the successful bidder. Attention is next invited to pages 77 and 78 of Part-III(A) file, to Clause 69 of the said agreement, and which is as under:

“69.0 ARBITRATION

69.1 All questions, disputes or difference of any kind whatsoever arising out of or in connection with the contract at any time whether during the progress of the work or after its completion or whether before or after the determination of the contract other than questions, disputes or differences for the decision of which specific provisions have been made in the foregoing clauses of this conditions (hereinafter referred to as ‘Excepted Matters’ and the decision on such ‘Excepted matters’ according to the said specific provisions shall be final and binding on the contractor and shall not revert or attempted to be re-opened on the ground of any infirmity, omission, delay or on any other ground whatsoever) shall be submitted in writing by the contractor, to the Society and the Society shall within a reasonable time after the submission of the same make and notify its decision thereon in writing.

69.2 In-case the contracting agency is a Private party the following procedure shall be fulfilled for the settlement of disputes:-

69.3 Except where otherwise provided for in contract all questions, disputes or differences whatsoever arising out of or relating to or in

connection with the contract shall be referred to the Arbitration of Indian Council of Arbitration and such reference will be governed by the Rules of Arbitration framed by the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.”

6. The counsel for the defendant has stated that though the plaintiff had raised a claim of Rs.4,62,89,792/- on the defendant, but on 27th November, 2016, an agreement was entered into by the defendant, then acting through the Administrator appointed by the Registrar of Co-operative Societies, Government of India, and the plaintiff, whereunder the plaintiff agreed to accept a sum of Rs.2,75,00,000/- crores in full and final settlement of its claim.

7. It is further stated, that the plaintiff, prior to institution of the suit, served a legal notice dated 23rd May, 2018 on the defendant (at page 646 of Part-III(A) file) and in which the plaintiff claimed as under:

“In view of the facts and circumstances as stated above, you are requested to either repay the **entire outstanding dues of ₹2,35,00,000/-** as it stands against the Settlement Agreement dated 27.11.2016 **within extended period of 15 days, ending on 10.6.2018** or else the said Settlement Agreement shall stand null and void for breach of terms at your end, and consequently, you are **liable to pay full amount ₹4,62,89,792/-** as dues against architect letter dated 5.2.2016 (subject to adjustment of amount already being paid till 10.6.2018) with interest @18% p.a. retrospective w.e.f. 5.2.2016 and incidental charges and damages thereon as outstanding dues.”

8. It is argued that once the plaintiff himself has given up the agreement dated 27th November, 2016 and made a claim under the original agreement dated 9th August, 2000, the arbitration clause

contained therein would be kicked in and this Court would have no jurisdiction to adjudicate the claim and the claim of the plaintiff has to be referred to arbitration.

9. I have perused the agreement dated 27th November, 2016 in which the defendant is described as 'First Party' and the plaintiff as the 'Second Party' and find the same to be *inter alia* providing as under:

"That after due deliberation an agreement has been reached that the First party will have to pay a net amount of Rs.2,75,00,000/- (Rupees Two Crore seventy five Lakhs only) to the Second party and no obligation is left of the First party towards the Second party in respect of all the agreements signed between them (visible or invisible).

That if any claim, raised by the Third party i.e. M/s. Jialal Kishorilal & Company Pvt. Ltd. in respect of construction work of 28 Dwelling units in Block-E towards payment against work awarded to them by virtue of a tripartite agreement, the First party shall not be liable to own any responsibility for settling any claim of the Second party in respect of the tripartite agreement signed by the First, Second and Third parties.

First and Second party also mutually agree that the mode of payment has been set with mutual consent that the First party shall release a sum of Rs.10.00 Lakhs (INR Ten Lakhs) to the Second party as an initial amount within 30 (Thirty) days of signing this agreement and the subsequent balance payment of Rs.2,65,00,000/- (Rupees Two Crore sixty five lakhs only) shall be paid in instalments, but not later than 18 (eighteen) months from the date of signing the agreement.

That on signing of this agreement, all other previous agreements, and liabilities against work order(s) awarded by First party to Second party, claims of Second party on First party and / or binding of First party in any form shall stand nullified. That the terms and conditions and settlement amount, i.e. Rs.2,75,00,000/- (Rupees Two Crore seventy

five Lakhs only), specified in this agreement shall supersede all other commitments under previous agreement(s) entered by First party with Second party, (whether individually or jointly as triparty) and / or any liabilities, claims, etc. against First party by / of Second party.

There shall not be any further claim, whatsoever shall be entertained by the First party in any shape or kind i.e. all the liabilities on the First party towards the Second party shall stand discharged as per this agreement.”

10. I have enquired from the counsel for the plaintiff, whether there is a Clause in the agreement dated 27th November, 2016 entitling the plaintiff to revert to his entire claim in the event of the defendant not paying the settlement amount of Rs.2,75,00,000/-.

11. The counsel for the plaintiff replies in the negative.

12. I have next enquired from the counsel for the plaintiff, that if it is so, how is the plaintiff entitled to claim anything in excess of Rs.2,75,00,000/- with interest and whether not the claim of the plaintiff stands pegged at Rs.2,75,00,000/-.

13. The counsel for the plaintiff states that he gives up the claim for principal amount in excess of Rs.2,75,00,000/-.

14. Supreme Court, in *Union of India Vs. Kishorilal Gupta* AIR 1959 SC 1362, in the context of a settlement agreement superseding the earlier agreement between the parties, held that the arbitration clause perished with the original contract and it was inconceivable that the parties intended its survival after the contract was mutually rescinded and substituted by a new agreement. It was further held that even though a contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it

solely governing their rights and liabilities thereunder. In such a case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it.

15. Therefore the intention of the parties to keep alive the arbitration clause in the earlier agreement between them has to be examined on the basis of the new and substituted contract. Reference in this regard may also be made to ***Young Achievers Vs. IMS Learning Resources Pvt. Ltd.*** (2013) 10 SCC 535 and ***Ansal Housing & Construction Ltd. Vs. Samyak Projects Pvt. Ltd.*** 2018 SCC OnLine Del 12866 (appeal preferred whereagainst has been dismissed by the Division Bench of this Court vide judgment reported as ***Samyak Projects Pvt. Ltd. Vs. Ansal Housing & Construction Ltd.*** 2019 SCC OnLine Del 7067 and SLP(C) No.7071/2019 preferred whereagainst has been dismissed vide order dated 1st April, 2019)

16. Applying the aforesaid law, it is found that the parties, in the agreement dated 27th November, 2016 having expressly agreed that all previous agreements stand nullified, the parties intended not to be bound by anything contained in the earlier agreement dated 9th August, 2000, including the arbitration clause therein. Admittedly, the agreement dated 27th November, 2016 does not have any arbitration clause.

17. Once the plaintiff has confined the claim in this suit to that under the agreement dated 27th November, 2016, axiomatically the application of the defendant under Section 8 of the Arbitration Act is infructuous and is disposed of.

18. I have next enquired from the counsel for the defendant, the defence if any of the defendant to the claim of the plaintiff for Rs.2,75,00,000/-.

19. The counsel for the defendant has read out from his copy of the written statement, paragraph 16 of the parawise reply, and has also handed over a copy of the written statement, which is taken on record and be tagged to Part-I file, and which paragraph 16 is as under:

“16. Contents of para 16 as stated are wrong and denied. It is denied that the Administrator took the lead to act as an Arbitrator / mediator and asked the Society members to come forward to settle the issue in the presence of Administrator. It is submitted that the Plaintiff was in default in execution of the work and his quality of work was also not in accordance with the stipulations contained in the agreement and said facts were duly brought to the notice of the Administrator. Subsequently, without the concurrence of the Society members and without the redressal of grievances of the members of the society in respect of faulty work executed by the Plaintiff, the Administrator is stated to have entered into agreement which was not acceptable to the members of the Society until the work was executed in accordance with the terms of the agreement.”

20. I have perused the copy of the written statement handed over in the Court and do not find the defendant to have pleaded any other defence to the claim of the plaintiff under the agreement dated 27th November, 2016, save that the defendant, in paragraph 21 of the written statement, has reiterated what is stated in paragraph 16 above, of the written statement.

21. I have enquired from the counsel for the defendant, whether the Administrator of the defendant was required to enter into the

agreement dated 27th November, 2016 with the concurrence of the members of the defendant.

22. The counsel for the defendant fairly states that the Administrator had no such requirement and was competent to enter into the agreement.

23. I have perused the agreement dated 27th November, 2016 and do not find the same to be containing any clause, requiring the plaintiff to carry out any work, as a pre-condition for payment by the defendant of Rs.2,75,00,000/-.

24. Thus, there is no defence in fact or in law of the defendant, to the claim of the plaintiff under the agreement dated 27th November, 2016 for Rs.2,75,00,000/-.

25. The counsel for the plaintiff states that the plaintiff has pleaded payment by the defendant, of Rs.50,00,000/- out of the said Rs.2,75,00,000/-, and states that the balance amount payable under the said agreement is Rs.2,25,00,000/- only.

26. The counsel for the defendant confirms.

27. There is thus no impediment to a decree being passed, in favour of the plaintiff and against the defendant, of recovery of the principal amount of Rs.2,25,00,000/- with interest.

28. The counsel for the defendant seeks adjournment to consult his client. However, in the same breadth, it is informed that the defendant Society is again under an Administrator.

29. Once the plaintiff, in law is found entitled to a decree, no ground for adjournment is made out. Moreover, experience shows

that in a body as the defendant, no instructions are generally forthcoming.

30. The counsel for the defendant then states that the defendant has no money.

31. The same is also not an impediment to a decree being passed. It will be for the plaintiff to seek execution thereof.

32. In the facts and circumstances, it is deemed appropriate to award interest to the plaintiff, against the defendant, *pendente lite* and for a period of six months from today to enable the defendant to collect the monies from its members, at the rate of 6% per annum and thereafter at the rate of 9% per annum.

33. A decree is accordingly passed, in favour of the plaintiff and against the defendant, of recovery of Rs.2,25,00,000/- with interest at 6% per annum with effect from the date of institution of the suit till a period of six months from the date of this order and with interest at 9% per annum from the expiry of the said period of six months herefrom and till the date of payment / realization.

34. The suit having been disposed of expeditiously, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

AUGUST 29, 2019

‘gsr’