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

Reserved on: 15th March, 2019

Date of decision: 29th April, 2019

+ **CS (OS) 523/2018**

KRISHAN GOPAL

..... Plaintiff

Through: Mr. Yashpal Singh and Ms. Veronica
Shikha Johnson, Advocates.
(M:9999309400)

versus

PARVEEN RAJPUT

..... Defendant

Through: Mr. Ashok Mahajan, Advocate with
Defendant in person (M: 9811106159).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Plaintiff – Sh. Krishan Gopal entered into a Collaboration Agreement (*hereinafter 'agreement'*) dated 14th February, 2013 with the Defendant – Sh. Parveen Rajput in respect of property bearing no.1/7211, Gali No.1, Shivaji Park, Shahdara, Delhi-110032, measuring 200 sq. yds (*hereinafter 'suit property'*). At the time of the agreement, the property had only a single storey. As per the agreement, the Defendant had agreed to construct the stilt parking on the ground floor as also construct the upper ground floor, first floor, second floor and third floor. In consideration of the said construction, the Defendant was to become the owner of only the first floor and second floor without roof or terrace rights. The agreement was a detailed agreement. The demolition of the building was to be done by the Defendant. Skilled labourers and employees were to be engaged by the Defendant. The building was to be in conformity with the bye-laws of

structural safety and have a good standard of finishing. Lift facility was to be provided. In addition, the Defendant agreed to pay to the Plaintiff a sum of Rs.68,80,000/-. Construction was to commence on 1st March, 2013 and was to be completed by 28th February, 2014 i.e., a period of 12 months. The relevant clause in respect thereof is set out below:

“19. That the construction will commence wef 01.03.2013 & will be completed within 12 months i.e upto 28.02.2014 in every circumstances. If not completed then the Second Party i.e Builder will pay a sum of Rs. 2% on the total cost of Construction as penalty per month till he gives the possession. It is also agreed that the liability of any nature arising from deficiency/negligence during Construction / Collaboration shall be on second paid.”

2. As per Clause 19 above, if the construction was not completed within the stipulated period, a sum of Rs.2% on the total cost of construction was to be paid as penalty per month till possession was handed over. The agreement contained an arbitration clause which is reproduced below:

“20. That if at any time dispute arises between the parties in connection with construction of Building or use of materials and articles in the building and any other matter of the building, the same shall be referred to Arbitrator to be appointed with the concurrence of both parties. Sh. Ravinder Vij is the First Party nominee and Sh. Dharam Pal is the Second Party nominee. Arbitration for resolutions of disputes shall be in accordance with the provisions of Arbitration & Conciliation Act 1996, and subsequent changes / modifications made upto date. The venue of such Arbitration shall be New Delhi.”

3. According to the Plaintiff, the construction work came to a halt sometime in 2014-15. The Plaintiff had various grievances including that the

Defendant was using sub-standard material and not installing a well-known brand of lift. The Defendant also did not make the payments as agreed under the agreement. Since the Defendant did not complete the work, the Plaintiff who had moved out of his own property and who was paying rent, got the work completed out of his own funds. The Defendant also entered into an agreement to sell, for sale of the second floor and received a sum of Rs.46 lakhs from the said third party. This led to litigation being filed by the said third party – Mr. Jain against the Plaintiff. Various allegations have been made by the Plaintiff against the Defendant. Finally, vide notice dated 11th June, 2018, the Plaintiff terminated the agreement and also published a notice in two newspapers, that the agreement was terminated. The Plaintiff, claims compensation and punitive damages against the Defendant. The following reliefs are sought:

- “i. pass a decree in favour of the Plaintiff and against the Defendant for a sum of Rs. 2,27,72,286/- with pendent lite and future interest @ 18% per annum from the date of filing of the suit till the date of payment;*
- ii. pass a decree in favour of the Plaintiff and against the Defendant for permanent and mandatory injunction restraining the Defendant from entering into the property No. 1/7211, measuring 200 sq. yards at Gali No.1, Shivaji Park, Shahdara, Delhi-110032;*
- iii. costs of the suit and such other and further relief as the Court deems fit and proper in the circumstances may also be granted.”*

4. On 16th October, 2018, an ad-interim order was passed in the following terms:

I.A. 14344/2018 (u/O XXXIX Rules 1 & 2 CPC)

9. This is a suit filed by the Plaintiff who entered into a

collaboration agreement dated 14th February, 2013 in respect of property bearing No.1/7211, Street No.1, Shivaji Park, Shahdara, Delhi-110032 measuring 200 square yards (hereinafter 'suit property')

10. *The Plaintiff's case is that the defendant is a builder who entered into a collaboration agreement dated 14th February, 2013 but did not comply with all the conditions therein. In fact it is the case of the Plaintiff that the Plaintiff being an ex-serviceman and 88 years of age has been subjected to enormous mental harassment and torture at the hands of the builder who has abandoned the site without complying with all the obligations. The construction as per the agreement was to be completed within one year. However, despite five years having lapsed, the collaboration agreement has still not been given complete effect.*

11. *It is clear that prima facie, the Defendant is in violation of the terms and conditions of the collaboration agreement. The Plaintiff has in fact now terminated the agreement. Till the next date of hearing, the Defendant shall maintain status quo as to title and possession in respect of the suit property and shall not enter into any agreement in respect of any portion of the suit property. The Defendant is also restrained from entering the suit property or claiming rights under the collaboration agreement dated 14th February, 2013.*

5. On the next date, a submission was made that parties are willing to explore mediation. However, mediation failed between the parties. On 20th February, 2019, the following order was passed:

Mediation has failed between the parties. Counsel for the Defendant states that there is an arbitration clause in the matter and the disputes are liable to be referred to arbitration. Counsel for the Plaintiff seeks an adjournment to address arguments, as he submits that disputes are not arbitrable.

List on 15th March, 2019.”

6. The case of the Defendant is that there is an arbitration clause in the agreement and the parties ought to be referred to arbitration. The Defendant mentioned the existence of the arbitration clause on the first date when he put in appearance i.e. on 4th December, 2018. Thereafter, the Defendant filed the written statement and took the objection in paragraph 10 that the suit is not maintainable in view of the arbitration clause.

7. The Ld. Counsel for the Defendant relies upon the judgment of the Supreme Court in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others (2011) 5 SCC 532*** to the effect that it is sufficient for the party to show an intention to submit to arbitration. The Defendant also relies upon ***Rashtriya Ispat Nigam Ltd. & Anr. v. M/s Verma Transport Company AIR 2006 SC 2800*** to argue that unless the party has waived the right to invoke the arbitration clause, disputes are liable to be referred to arbitration. On the other hand, Ld. Counsel for the Plaintiff has vehemently objected for referring the disputes to arbitration. His objections are as under:

- a. That the Defendant did not file an application under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference;
- b. That Defendant has failed to file the original or certified copy of the agreement;
- c. That the Defendant has already filed the written statement and the affidavit of admission/denial, hence, the Defendant has waived the right to seek reference to arbitration;
- d. That the Plaintiff is claiming punitive and exemplary damages, which cannot be granted by an Arbitrator;

- e. That the Plaintiff is also praying for a mandatory injunction which cannot be granted by an Arbitrator;
 - f. That the damages being sought by the Plaintiff being in the nature of tortious claims and not arising out of the agreement, the disputes are not arbitrable;
 - g. That the agreement has been terminated and hence the arbitration clause does not survive.
8. As per ***Sukanya Holdings Pvt. Ltd. v Jayesh H. Pandya 2003 (4) SCC 531***, if part of the dispute is arbitrable and another part is not, the dispute ought not to be bifurcated by the Court.
9. The Plaintiff has relied on the following judgments:
- ***Vishal Retail Ltd. v. Achhar Singh Bhumber 2012(1) RAJ 392***
 - ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya 2003(4) SCC 531***
 - ***P. Anand Gajapathi Raju v. P.V.G. Raju 2000 (4) SCC 539***
 - ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. 2011(5) SCC 532***
 - ***Jonson Rubber Inc. Ltd. v. Shree Conveyor System Pvt. Ltd. 2014(6) RAJ 661 (Delhi)***
 - ***Bougainvillea Multiplex and Entertainment Center Pvt. Ltd. v. Shankar Rai 154(2008) DLT 687***
10. Ld. Counsel for the Defendant has on the other hand relied on ***Mrs. Hema Khattar and Anr. v. Shiv Khara AIR 2017 SC 1793*** to argue that even if the agreement is terminated, the arbitration clause survives between the parties.
11. The Court has heard the Ld. Counsels for the parties. The first and

foremost issue is the scope of the arbitration clause. The arbitration clause is widely worded and includes disputes “*in connection with construction of building or use of materials and articles in the building*” as also **“any other matter of the building”**. The latter phrase i.e. “*any other matter of the building*” is broad enough to encompass any and all disputes arising between the parties in respect of the suit property. The agreement dated 14th February, 2013 is an admitted document between the parties. The first two objections i.e., non-filing of a Section 8 petition seeking reference as well as the non-filing of the original or certified copy of the agreement are therefore not valid objections, as the Plaintiff himself has filed the agreement on record. The agreement being an admitted document and the existence of the arbitration clause in it, being also admitted, the non-filing of the certified copy of the agreement does not preclude the Defendant from seeking reference to arbitration. The filing of a certified copy of the agreement with a Section 8 application is for the purpose of ensuring that the agreement is not a forged or a fabricated document and that the person seeking reference authenticates the copy of the agreement being filed. When the Plaintiff himself has filed the agreement, which contains the arbitration clause, the filing of another certified copy becomes nothing but an empty formality. Every provision has a purpose and the provision has to be read in the light of the purpose behind it. The agreement being admitted, the certified copy of the agreement is not required [See *Cash and Gain Finance and Investments v. Manjula Udaya Shankar* 2009 (2) CTC 234 & *AEZ Infratech Pvt. Ltd. v. SNG Developers Ltd.* 2014 (143) DRJ 616]. Recently, in *Parasramka Holdings Pvt. Ltd. v. Ambience Private Ltd. & Anr.* 2018 (167) DRJ 637 , a Ld. Single Judge of this Court has held that a formal

application under Section 8 of the Act, seeking reference of disputes to arbitration is not required. The observation of the Court is as under:

“33. Keeping in view the aforesaid judgments as well as the judgment in Eastern Medikt (supra) and judgments of the learned Single Judge and Division Bench of this Court in Sharad P. Jagtiani (supra), this Court is of the view that the party invoking the arbitration clause does not have to file a formal application seeking a specific prayer for reference of the dispute to arbitration as long as it raises an objection in the written statement that the present suit is not maintainable in view of the arbitration clause in the agreement.

34. In the present case, the defendants in para 5 of the preliminary objections in the written statement filed on 20th May, 2017 specifically stated that there exists an arbitration agreement between the parties. The said para is reproduced hereinbelow.

"5. That there are separate Arbitration Clauses between the Plaintiff and Defendant No.1 and the Plaintiff and Defendant No.2. all disputes and differences arising between the Plaintiff and Defendant No.1 and the Plaintiff and Defendant No.2 are liable to be referred to the separate arbitration of a Sole Arbitrator to be nominated by Defendant No.1 and Defendant No.2 respectively. The Plaintiff without invoking Arbitration has filed the above suit. The above written statement is being filed without prejudice of the rights of the Defendants to refer the disputes to the Arbitration." (emphasis supplied)

35. Accordingly the aforesaid objection of the defendants contained in the written statement can be treated as an application under Section 8 of the Act.

36. Consequently, present applications are allowed and the parties are referred to arbitration in accordance with Section 8(1) of the Act.”

12. The third objection of the Plaintiff i.e. that the Defendant has submitted to jurisdiction by filing the written statement may not be completely accurate. The settled position is that the party has to express an intention to arbitrate as held in ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (supra)*** in the following terms:

25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as “submission of a statement on the substance of the dispute”, if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.

13. In the present case, when the Plaintiff issued a notice to the Defendant on 19th June, 2018, the Defendant mentioned the arbitration clause in reply to the said notice. Further, on the first date when the Defendant entered appearance in Court, a submission was made to the following effect as recorded in the order dated 4th December, 2018:

“The Defendant has put in appearance in the matter and submits that there is an arbitration clause in the collaboration agreement dated 14th February, 2013. The disputes between the parties appear to be in a narrow compass. Parties submit that they would like to explore settlement.”

14. Thereafter, in the written statement, in para 10, the Defendant has

pleaded as under:

"10. That the suit of the plaintiff is not maintainable and is liable to be dismissed in view of the clause 20 of the said Collaboration Agreement dt. 14.02.13 which reads as under:

"That if at any time dispute arises between the parties in connection with construction of Building or use of materials and articles in the building and any other matter of the building, the same shall be referred to Arbitrator to be appointed with the concurrence of both parties. Sh. Ravinder Vij is the First Party nominee and Sh. Dharam Pal is the Second Party nominee. Arbitration for resolutions of disputes shall be in accordance with the provisions of Arbitration & Conciliation Act 1996, and subsequent changes/modifications made upto date. The venue of such Arbitration shall be New Delhi."

15. From the above, it is clear that the Defendant has not waived his right to seek arbitration and has relied upon the same since inception. The fact that the Defendant may not have relied on the arbitration clause in response to the criminal complaints cannot be held against the Defendant as, in the said complaints, the mention of the arbitration clause may not have been found to be relevant. In order for the Court to hold that the arbitration clause has been waived, there has to be unimpeachable conduct to this effect on behalf of the Defendant, which is absent. In fact, the Defendant has, as mentioned above, taken the objection at all relevant points in time. Thus, it is held that Defendant has not waived the arbitration clause.

16. The next objection of the Plaintiff that the agreement has been terminated and hence the arbitration clause does not survive, is also not tenable. As held in ***Mrs. Hema Khattar and Anr. (supra)***, even if the agreement has come to an end, the arbitration clause is not perished. The

Supreme Court observed in ***Mrs. Hema Khattar and Anr.*** as under:

“26) In P. Anand Gajapathi Raju & Others vs. P.V.G. Raju (Dead) and Others (2000) 4 SCC 539, it was held as under: -

“5. The conditions which are required to be satisfied under sub- sections (1) and (2) of Section 8 before the court can exercise its powers are:

(1) there is an arbitration agreement;

(2) a party to the agreement brings an action in the court against the other party;

(3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.”

In view of the above, where an agreement is terminated by one party on account of the breach committed by the other, particularly, in a case where the clause is framed in wide and general terms, merely because agreement has come to an end by its termination by mutual consent, the arbitration clause does not get perished nor is rendered inoperative. This Court, in the case of P. Anand Gajapathi Raju (supra), has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.”

Thus, the termination of the agreement does not annihilate the arbitration clause.

17. The next objection of the Ld. Counsel for the Plaintiff is that the Plaintiff is claiming a mandatory injunction as also damages under torts, which is not arbitrable. The Plaintiff has relied on ***Bougainvillea Multiplex and Entertainment Center Pvt. Ltd. v. Shankar Rai 154 (2008) DLT 687*** (hereinafter 'Bougainvillea') in support of this submission. The Ld. Single Judge in this case held as under:

*“7. In the present case the facts as enunciated by the respondent/plaintiff in the suit make it clear that the plaintiff has not only claimed relief under the agreement but has also filed a suit for damages under tort and has claimed damages for the losses suffered by him because of rise in the cost of equipment he was to install and loss of business. The Term Sheet Agreement entered into between the parties is only a sketchy agreement which does not have detailed terms and conditions of the lease, neither it provides for any obligation on the part of the petitioner in respect of consequences of not handing over possession to the lessee/respondent. It is settled law that an Arbitrator is bound by the terms of agreement between the parties and therefore, cannot travel beyond the agreement entered into between the parties. Where a suit is filed by a party for damages under tort and beyond the terms and conditions of the contract, the matter cannot be referred to the Arbitrator under the terms of the agreement. **Had the agreement contained detailed provisions as to the consequences of breach of contract on both the sides, the Arbitrator would have jurisdiction to entertain the claim in the suit.**”*

18. What is important to note is that in ***Bougainvillea (supra)***, the agreement between the parties which was in the form of a term sheet was quite sketchy. It did not have any detailed terms and conditions and also did not provide for the mutual obligations of the parties. That is not so in the

present case. The agreement is quite detailed, in fact the terms are clear and categorical. The obligations of each of the parties is explicitly provided. In fact, in Clause 19, compensation for delay is also dealt with. The mere fact that the compensation may have been provided for delay in construction does not itself mean that the owner - Plaintiff cannot claim any damages over and above the penalty stipulated. It is for the Plaintiff to raise such claims before the Tribunal which will deal with them in accordance with law.

19. The entitlement or otherwise to exemplary/punitive damages is an issue to be determined by the Tribunal. So long as such claim arises in respect of the building which is the subject matter of the collaboration agreement, the dispute is arbitrable. Damages are one form of compensation which can be awarded in a civil dispute. An arbitral tribunal has all the trappings of a civil court, including the power to award all forms of injunctions and damages, where a case is made out. Even in *Bougainvillea (supra)*, the Court has held that compensation, when provided for in a contract, can be granted by an Arbitral Tribunal. In the present case, the contract provides for some form of compensation. The Plaintiff wishes to claim punitive and exemplary damages over and above the same. In the arbitration clause all disputes relating to the building are referable to arbitration. The question as to whether the Plaintiff can claim compensation or exemplary/punitive damages or whether the same is awardable depends on the interpretation of the contract, breaches by either party, the evidence adduced to support a plea for damages and whether the same is permissible in law. Merely by arguing that there is a tortious claim for exemplary damages, the Plaintiff cannot be permitted to wriggle out of the arbitration

clause. If such a course of action is permitted, then in each and every case, the party to a contract containing an arbitration clause could escape arbitration by claiming that it is seeking damages under torts or claiming punitive damages. The compensation or damages, if any awardable for breach of the collaboration agreement including conduct of the defendant incidental thereto, is liable to be adjudicated in arbitration. There have been instances of cases where arbitrators have awarded damages towards mental tension, agony, harassment etc., and the same has been upheld by this Court [*See Tejpal Singh v. Surinder Kumar Dewan OMP (Comm) 178/2018 dated 9th August 2018*]. Accordingly, it is held that the Plaintiff would be entitled to raise all his claims before the Arbitral Tribunal and the same shall be dealt with in accordance with law.

20. The claims raised by the Plaintiff in this suit being arbitrable in nature, there is no requirement to bifurcate the same. Thus, *Sukanya Holdings Pvt. Ltd. (supra)* is not applicable in the facts of the present case.

21. The objection that the disputes involve a right *in rem* is incorrect. The title of the Plaintiff to the property is not in dispute. The issue of ownership of the various floors is intricately connected to the collaboration agreement and hence there is no right *in rem* that needs to be adjudicated.

22. Thus, the disputes do not fall under any of the excepted subject matter as held in *Booz Allen and Hamilton Inc. (supra)*.

23. The disputes raised by the Plaintiff and the claims raised therein are thus liable to be referred to arbitration. From the legal notices and the replies exchanged, one of the party nominated Arbitrators who was approached, did not enter upon reference. Recently in *Union of India v. Parmar Construction Company [SLP(Civil) No. 2166/2018 decided on 29th March,*

2019], the Supreme Court has observed that where the Arbitral Tribunal as provided for in the arbitration agreement has not functioned and it becomes necessary to make a fresh appointment, the Court is not powerless to make an appropriate alternative arrangement. The Supreme Court, considered the judgment of ***Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523***, wherein it was held that if the constitution of the Tribunal in the manner provided in the agreement has not become possible and it becomes necessary to make a fresh appointment, the Court is entitled to do so. Thereafter, the Supreme Court has held as under:

“41. This Court has put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible.

43. In the given circumstances, it was the duty of the High Court to first resort to the mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties and the default procedure was opened to be resorted to if the arbitrator appointed in terms of the agreement failed to discharge its obligations or to arbitrate the dispute which was not the case set up by either of the parties.”

24. Thus, if any of the parties had approached the Arbitrator named in the agreement, who failed to discharge his obligations, then the Court is empowered to appoint an independent Arbitrator. In the reply dated 19th June, 2018 given by the Defendant, the Defendant stated as under:

“6. That thereafter my aforesaid client approached Sh.

Dharam Pal, one of the arbitrators as named in the Collaboration Agreement dt.14.02.13 and apprized him of all the facts with request to get the matter amicably settled but your client & his son namely Sh. Dayal Chand have now flatly refused to allow my aforesaid client to enter the said property and have also dishonestly refused to execute the Sale Deed of first floor & second floor in favour of my aforesaid client.”

25. From the above, it is clear that the named Arbitrator in the agreement did not enter upon reference and the Plaintiff did not nominate his Arbitrator as per the agreement. The Plaintiff thereafter chose to file the present suit, completely abdicating the arbitration clause which he could not have done. The Plaintiff claims that he is an ex-serviceman being 88 years of age and prays for expeditious adjudication. Under these circumstances, this Court has come to the conclusion that the disputes are arbitrable but the same are liable to be referred to an independent Arbitrator. The disputes between the parties are accordingly referred to **Justice K. Ramamoorthy (M:9810529889) D-17, G.K. Enclave Part-1, Delhi 110048**. The fee of the Arbitrator shall be as per the provisions of the Arbitration and Conciliation Act, 1996. The Ld. Arbitrator would be bound by the timelines as prescribed in the Act as amended in 2015. Parties are directed to appear before the Arbitrator on 10th May 2019 at 4pm. The Arbitrator is free to adjudicate upon all the claims and counter claims which may be raised by the parties in accordance with law.

26. In view of the provision of Section 89 CPC and considering the status of the Plaintiff who is an ex-serviceman and a senior citizen, following the judgment in **Nutan Batra v. Buniyaad Associates (2018) 255 DLT 696**, the

Court fee deposited is directed to be refunded to the Plaintiff. Refund be processed within four weeks.

27. Suit is disposed of in the above terms.

28. Registry is directed to send a copy of this order to Ld. Arbitrator, so appointed.

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29. The interim order granted on 16th October, 2018 shall continue to operate until further orders by the Arbitrator. Parties are permitted to approach the Ld. Arbitrator for interim relief. I.A. is disposed of.

APRIL 29, 2019
Rahul

PRATHIBA M. SINGH
JUDGE