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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 05.09.2023

+ **FAO (OS) 94/2023**

SUSHIL KUMAR SAHDEV

.....Appellant

Versus

KOHLI REALTORS PVT. LTD.

..... Respondents

Advocates who appeared in this case:

For the Appellant: Mr. Prosenjeet Banerjee, Ms. Shreya Singhal and
Mr. Sarthak Bhardwaj, Advocates.

For the Respondents: Mr. Sandeep Sharma, Mr. Amit Chjoudhary and
Ms. Kavya Dank, Advocates.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

CM. APPL. 45541/2023 (delay)

1. Issue notice. Notice is accepted by learned counsel appearing for the respondent.

2. In view of the averments made in the application, delay in filing the appeal is condoned.

FAO (OS) 94/2023 & CM. APPLS. 45542/2023 & 45582/2023

1. Appellant impugns order dated 19.07.2023, whereby parties have been referred to arbitration.

2. Issue notice. Notice is accepted by learned counsel for respondent.



3. With the consent of parties, the appeal is taken up for final disposal.
4. Respondent had filed a suit for recovery of a sum of Rs.4,27,70,000/- against the appellant and three other parties.
5. Appellant on receipt of summons of the suit entered appearance and filed an application under Section 8 of the Arbitration and Conciliation Act, 1996, contending that the entire claim of the respondent was based on a Memorandum of Understanding (MoU) dated 05.07.2012 for redeveloping the suit property. It was contended that the MoU contained an arbitration clause in clause 5. It was accordingly prayed in the said application that since there is an Arbitration Agreement between the appellant and respondent, the suit was barred and accordingly, the claim should be referred to arbitration as contained in the Arbitration Agreement.
6. The application was opposed by the respondent/plaintiff contending that after the MoU was executed, there was an oral understanding between the parties which superseded the majority of the terms of the MoU and as such the disputes could not be referred to arbitration.
7. The application filed by the appellant under Section 8 was dismissed on 22.11.2017 by a learned Single Judge. The contentions of the appellant were noted that there was an Arbitration Agreement. On the other hand, the contention of the respondent that the MoU stood superseded by the oral agreement. Learned single Judge was of the view that in view of the specific pleading that an oral agreement



had been executed between the plaintiff and defendants subsequent to the execution of the MoU and the Court could not at that stage reach the conclusion that there was no oral agreement between the parties and as such held that it was not possible to refer the parties to arbitration and consequently, the application was dismissed.

8. The case of the appellant is that proceedings were not taken any further and the order dismissing the Section 8 application became final and binding between the parties.

9. Learned counsel for appellant submits that since the application under Section 8 had been dismissed and thereafter, appellant had filed a written statement without taking an objection with regard to the Arbitration Agreement, the Court could not have referred the parties to arbitration by the impugned order.

10. *Per contra*, learned counsel for the respondent contends that though the application under Section 8 was dismissed, however, at the time when the application under Section 8 was taken up for consideration, there were three more parties to the suit i.e. defendants 2 to 4, who were not parties to the MoU, but were parties only to the oral agreement and the said three defendants have already been deleted from the array of parties and now the lis is only between the appellant and respondent and since both are the parties to MoU, the disputes could be referred to arbitration.

11. At first blush, there appears to be merit in the contention of learned counsel for the appellant that once the Section 8 application has been dismissed and is not thereafter pressed by the defendant, the



Court could not refer the parties to arbitration. However, a deeper examination of the impugned order shows that the learned single Judge in effect recorded a fresh submission on behalf of the respondent that parties be referred to arbitration and a consent being given by the appellant for reference to arbitration.

12. It is contended by learned counsel for appellant that the consent as recorded by the learned single Judge does not amount to consent to refer to arbitration and he never agreed to referring the disputes to arbitration.

13. We are unable to accept the contention of learned counsel for appellant. For appreciating the said submission, it may be necessary to extract the relevant portion of the order, which reads:-

“3. Learned counsel for the petitioner prays that in view of the arbitration clause contained in the Memorandum of Understanding (‘the MoU’) dated 05.07.2012 between the petitioner and defendant No.1 (now the sole surviving defendant), the Suit may be disposed off by referring the parties to arbitration as per clause 5 of the MoU.

4. Learned counsel for defendant no. 1 however vehemently opposes the said prayer by contending that the plaintiff having himself opposed the prayer for appointment of a sole Arbitrator in 2017, cannot now be permitted to urge that the matter be resolved through arbitration in accordance with the MoU. Furthermore, it is the plaintiff’s case before this Court that the MoU stands superseded by an oral agreement. He therefore prays that the plaintiff’s request for referring the dispute to arbitration be rejected.



5. *Before dealing with the submissions of the learned counsels for the parties, I may first note that during the pendency of the suit, the defendant no. 1 had moved an application under Section 8 of the Arbitration and Conciliation Act, 1996 ('the Act') claiming therein that in view of the arbitration clause contained in the MoU between the parties, the disputes between the parties were required to be adjudicated through arbitration. The said application was, however, opposed by the plaintiff who had stated that after the aforesaid MoU was entered into between the parties, a further oral agreement had been entered into between the plaintiff and all the four defendants. Consequently, this Court had rejected the application preferred by the defendant no. 1 on 22.11.2017. After passing of the said order, the plaintiff has since deleted defendant nos. 2 to 4 from the array of parties and therefore, learned counsel for the plaintiff submits that now that the other three defendants who were not a party to the aforesaid MoU stand deleted, it would be appropriate that the disputes between the parties are adjudicated through arbitration.*

6. *Having perused the order dated 22.11.2017, even though I find that the plaintiff had indeed opposed the appointment of a sole Arbitrator at that stage, I am not inclined to accept the defendant's plea that the plaintiff had urged before the Court that the MoU stood superseded by an oral agreement. On the other hand, it appears that the plaintiff's case, as recorded in the order dated 22.11.2017, was that after the execution of the MoU, an oral agreement had also been entered into between the plaintiff and the other defendants. It is an admitted position that defendants no. 2-4 were impleaded in the Suit only on the basis of the said oral agreement as they were not parties to the MoU. The said defendants now stand deleted from the array of*



parties, and defendant no. 1, who is the sole defendant is admittedly signatory to the MoU. In my considered opinion, now that both the parties before this Court are signatories to the MoU, it would be appropriate that the disputes between them are, in accordance with the MoU dated 05.07.2012, determined by a sole Arbitrator.

7. *At this stage, learned counsel for the plaintiff submits that instead of compelling the plaintiff to now move an application under Section 11 of the Act for seeking appointment of an Arbitrator, this Court itself may appoint a sole Arbitrator for adjudication of disputes between the parties. Though learned counsel for the defendant has no objection to this limited prayer made by the plaintiff, he submits that the defendant respondent is presently not in a position to bear the expenses of arbitration. He, however, submits on instructions that while the plaintiff may be directed to pay the entire fees of the learned Arbitrator for adjudication of the claim, the defendant will pay the requisite differential fees for raising the counter claim before the learned sole Arbitrator. This suggestion is acceptable to the learned counsel for the plaintiff.*

8. *In the light of the aforesaid, while disposing of the suit as not pressed, Justice Najmi Waziri, former Judge of this Court (Mobile No. 9810097311), is appointed as the Sole Arbitrator for adjudication of disputes between the parties arising out of the MoU dated 05.07.2012, making it clear that it will be open for the learned Arbitrator to fix his own fees in consultation with the parties.*

9. *While disposing of this suit, it is made clear that it will be open for the learned Arbitrator to take into consideration the period which was spent by the plaintiff in prosecuting the suit which*



is now being disposed of as not pressed on account of the parties being referred to arbitration. It is further made clear that the plaintiff will for the present bear the entire fees towards the claim and the defendant will bear the fees only for the counter claim, which amount would thereafter be governed by the directions as may be issued in the award.

10. Before entering upon reference, the learned Arbitrator will make a disclosure under Section 12 of the Act. It is made clear that since this Court has not expressed any opinion on the rival claims of the parties, it will be open for the parties to file claims/counter claims and raise all pleas as permissible in law before the learned Arbitrator, which will be decided by the learned Arbitrator in accordance with law. Needless to state, in case any of the parties move any interim applications including an application under Section 17 of the Act, the learned Arbitrator will deal with the same expeditiously.

11. Furthermore, taking into account that vide order dated 12.03.2019, the erstwhile defendant nos. 2 & 3 were directed to deposit a sum of Rs.1.15 crores alongwith 3% interest with the Registry of this Court, which amount alongwith accrued interest is still lying with the Registry, it will be open for the learned Arbitrator to pass appropriate orders in this regard at any stage of the proceedings as deemed appropriate, after hearing the parties.”

14. No doubt, in para 3 and 4 there is a vehement opposition on behalf of the appellant to referring the disputes to arbitration primarily on the ground that the application under Section 8 stood dismissed and the order was not carried forward and thereafter, no steps were taken



by the defendant prior to filing the written statement for referring the disputes to arbitration.

15. However, paragraph 6 of the impugned order notes the observation of the learned single Judge with regard to deletion of the defendants who were not parties to the MoU and records that in the view of the Court, it would be appropriate that the disputes be referred to and determined by a Sole Arbitrator. Thereafter, in paragraph 7 contention of the learned counsel for respondent/plaintiff is noticed that instead of relegating the plaintiff to moving an application under Section 11, the Court could itself appoint a Sole Arbitrator for adjudication of the disputes of the parties.

16. At that juncture, there is no opposition recorded on behalf of the appellant that the disputes could not be referred to arbitration. Learned counsel for appellant has given his no objection to the prayer made by the plaintiff of being relegated to moving an application under Section 11, however, contended that he would not be in a position to bear the expenses of arbitration. Thereafter, under instructions, learned counsel for appellant had stated before the learned Single Judge that the plaintiff may be directed to pay the entire fee of the Arbitrator for adjudication of the claim and the appellant would pay the differential fee for raising the counter-claim before the Sole Arbitrator. This suggestion of apportionment of the fee was accepted by the learned counsel for respondent/plaintiff.

17. Thereafter, paragraphs 8, 9 and 10 of the impugned order record the appointment of the Arbitrator and conduct of proceedings by the



Arbitrator. At no point has the appellant raised any objection to the reference of disputes to arbitration.

18. We are of the view that paragraph 7 is an unequivocal consent given by the appellant for referring the disputes to arbitration. Further, there is no merit in the contention of the learned counsel for appellant that because the application under Section 8 had been dismissed, the Court could not have referred the disputes to arbitration. Even if there is no arbitration agreement between the parties, it is open to the parties at any stage of the proceedings to consent to reference of the disputes to arbitration. Even if the Court could not have referred the parties to arbitration under Section 8, however, it was open to the parties to consent to referring the disputes to arbitration. In our view, paragraph 7 of the impugned order records an agreement between the parties to once again refer the disputes to arbitration.

19. The reference of the disputes to arbitration and appointment of an arbitrator is a consent order and does not warrant any interference.

20. In view of the above, we find no merit in the appeal. The appeal is consequently dismissed.

21. Dasti under signature of the Court Master.

SANJEEV SACHDEVA, J

SEPTEMBER 05, 2023/NA

MANOJ JAIN, J.