



2025:DHC:2860-DB



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

Date of decision: 03<sup>rd</sup> APRIL, 2025

IN THE MATTER OF:

+ **FAO (COMM) 28/2024 & CM APPL. 8764/2024**

NEO DEVELOPERS PVT. LTD

.....Appellant

Through: Mr. Jitender Chaudhary, Ms. Shilpa Chohan, Ms. Pankhuri Nehra. Ms. Diksha Verma M, Ms. Aditi Singh and Mr. Shubham Pandey, Advocates.

versus

ASHOK SHARMA

.....Respondent

Through: Ms. Aparna Arun, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN**

**SHANKAR**

**JUDGMENT (ORAL)**

**SUBRAMONIUM PRASAD, J.**

1. The present appeal under Section 13(1)(A) of the Commercial Court Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "A&C Act"*) has been filed by the Appellant herein against the Judgment dated 05.10.2023 passed by the Ld. District Judge (Comm.), Central District, Tis Hazari Court, Delhi in CS (COMM) 1319/2022 whereby the Ld. District Judge has dismissed the application filed by the Appellant herein under Section 8(1) of the A&C Act and refused to refer the dispute to Arbitration.

2. Material on record indicates that the Respondent, evinced the interest



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in a project of the Appellant called 'Neo Square Mall' at Sector 109, Dwarka Expressway, Gurugram, Haryana, by expressing his desire for taking a space of 300 sq. ft. in Food Court on the third floor for a total consideration of Rs.29,61,966/- excluding other charges. It is stated that a sum of Rs.5,00,000/- was to be paid at the time of booking. It is stated that a further sum of Rs.5,00,000/- was to be paid in the month of July, 2019 and the balance amount was to be paid in August, 2019. Thereafter, a Memorandum of Understanding was entered into between the parties. The application form for allotment of unit/premises contains an arbitration clause which reads as under:

*"As already confirmed hereinabove I/we do hereby declare that I/we have gone through the terms and conditions of the Buyer's Agreement and the Maintenance Agreement made available to us/me in the Company's Office and that I/we agree and undertake to abide by the said terms and conditions to sign the Buyer's Agreement and the Maintenance Agreement as and when called upon to sign by the Company. The Applicant further accepts and confirms that the Allotment shall be subject to the Applicant adhering to the payment schedule and making various payments in respect of the said unit as well as amount payable under the Maintenance Agreement including but not limited to sinking funds & security deposit and non payment/delay payment of any such amount gives the full authority and power to the Company to cancel the Allotment. In case of any difference and/or dispute between the company and me/us, the same shall be referred to arbitration of a sole arbitrator appointed by the Company and the award of the sole arbitrator shall be final and binding on the parties. It is understood and accepted that only Courts/Tribunal at Delhi shall have the jurisdiction to entertain any dispute between the Company and me/us".*



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3. Material on record indicates that a suit was filed by the Respondent for recovery of Rs.10,00,000/- before the Ld. Trial Court. It is stated that under the said suit, an application under Section 8(1) of the A&C Act was filed by the Appellant before the Ld. Trial Court. Before the Ld. Trial Court, a contention was taken by the Respondent that the arbitration clause is not valid as it gives power to the Appellant to unilaterally appoint the Arbitrator and, therefore, is not a valid arbitration clause in the eyes of law. The Ld. Trial Court, vide Impugned Judgment dated 05.10.2023, rejected the application filed under Section 8(1) of the A&C Act by the Appellant holding that the arbitration clause is void. The Ld. Trial Court also held that the Appellant had replied to a legal notice issued by the Respondent and in the said reply, no averment was made by the Appellant regarding the reference of the dispute to arbitration and, therefore, there was no intention on the part of the Appellant to rely on the arbitration clause.

4. It is this Judgment dated 05.10.2023 which is under challenge in the present appeal.

5. Learned Counsel appearing for the Appellant places reliance upon the judgment passed by the Apex Court in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited, (2020) 20 SCC 760. He states that the effect of the said judgment is that there is no power to appoint an arbitrator unilaterally, however, that by itself does not make the entire arbitration clause bad in law. He states that ingredients of Section 8 of the A&C Act has been fulfilled by the Appellant inasmuch as the Appellant has filed the application under Section 8(1) of the A&C Act before submitting his first statement on the substance of the dispute.



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6. *Per contra*, learned Counsel appearing for the Respondent reiterates that the arbitration clause is not a valid clause. She places reliance upon the judgment of the Apex Court in Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1 to submit that if the arbitration clause is manifestly and ex facie non-existent and invalid, then the dispute cannot be referred to arbitration.

7. Section 8 of the A&C Act reads as under:

***“8. Power to refer parties to arbitration where there is an arbitration agreement.—[(1)A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]***

*(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:*

*[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]*



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*(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”*

8. It is now well settled that Section 8 of the A&C Act is mandatory in nature. Section 8 postulates that a judicial authority, before which any case is pending which is the subject of an arbitration agreement and any person claiming through or applies not later than the date of submitting his first statement on the substance of the dispute then it is mandatory on the part of the judicial authority to refer the dispute to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

9. The Ld. Trial Court in the impugned judgment has observed that there does exist an arbitration agreement, however, since under the arbitration agreement only the Appellant has power to appoint the arbitrator, the arbitration agreement is not valid. This Court is not in agreement with the said reasoning. The Apex Court in Perkins Eastman Architects DPC (supra) has only held that unilateral appointment of Arbitrator is not permissible and the same does not lead to the proposition that the arbitration agreement itself is bad in law. The arbitration agreement is defined under Section 7 of the A&C Act. Section 7 of the A&C Act reads as under:

***“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.***

*(2) An arbitration agreement may be in the form of an*



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*arbitration clause in a contract or in the form of a separate agreement.*

*(3) An arbitration agreement shall be in writing.*

*(4) An arbitration agreement is in writing if it is contained in—*

*(a) a document signed by the parties;*

*(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*

*(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

*(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”*

10. Thus, an Arbitration agreement is only an agreement between the parties to refer their dispute to arbitration which has arisen between them. Mode of appointment of the Arbitrator can also be a part of the arbitration agreement but the fact that the mode of appointment of the Arbitrator is contrary to the judgments passed by the Apex Court or in view of the Seventh Schedule of the A&C Act, that alone will not make the arbitration agreement completely invalid.

11. The Apex Court in Vidya Drolia (supra) has observed as under:

*“132. The courts at the referral stage do not perform ministerial functions. They exercise and*



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*perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term “prima facie”, in *Nirmala J. Jhala v. State of Gujarat* [*Nirmala J. Jhala v. State of Gujarat*, (2013) 4 SCC 301 : (2013) 2 SCC (L&S) 270] , this Court had noted : (SCC p. 320, para 48)*

*“48. ‘27. ... A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.’ [Ed. : As observed in *Martin Burn Ltd. v. R.N. Banerjee*, AIR 1958 SC 79, p. 85, para 27.] ”*

**133.** *Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would*



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*compel the parties to abide unless there are good and substantial reasons to the contrary. [ The European Convention on International Commercial Arbitration appears to recognise the prima facie test in Article VI(3): “VI. (3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.”]*

12. A perusal of above shows that, what the Courts, under Section 8 and 11 of the A&C Act, have to see is the existence of an arbitration agreement between the parties. The Ld. Trial Court has come to the conclusion that there does exist an arbitration agreement between the parties, however, it has declared the arbitration agreement invalid only because the mode of the appointment of the Arbitrator is contrary to the judgment passed by the Apex Court in Perkins Eastman Architects DPC (supra) and other subsequent judgments passed by the Apex Court.

13. The fact that in reply to the legal notice issued by the Respondent, the Appellant did not make any averment regarding the reference of the dispute to arbitration will not have any bearing on the application filed by the Appellant under Section 8(1) of the A&C Act. All that Section 8 postulates is that after an action is initiated by the judicial authority which is also a subject matter of an arbitration agreement between the parties and the dispute raised before the judicial authority forms part of the arbitration



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agreement and an application under Section 8(1) of the A&C Act is filed by the Applicant before submitting his first statement on the substance of the dispute then the judicial authority has no other option but to refer the dispute to arbitration.

14. In view of the fact that *prima facie* there does exist an arbitration agreement between the parties where the parties have decided to refer the dispute to arbitration, this Court is inclined to set aside the Impugned Judgment dated 05.10.2023 passed by the Ld. Trial Court. The Impugned Judgment dated 05.10.2023 is set aside.

15. Resultantly, the appeal is allowed. Pending applications, if any, stand disposed of.

16. It is open for the parties to take recourse to the provisions of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator and if and when the Arbitrator is appointed, it is always open for the Respondent to raise the question of the arbitrability of the dispute before the Arbitrator which is not a matter to be looked into while adjudicating an application filed under Section 8 of the A&C Act.

**SUBRAMONIUM PRASAD, J**

**HARISH VAIDYANATHAN SHANKAR, J**

**APRIL 03, 2025**

*S. Zakir*