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

Date of decision: 20.02.2024

+ **CS(COMM) 266/2023**

SHARAD GUPTA & ORS.

..... Plaintiff

Through: Mr. Sanjeev Bahl, Sr. Adv. with Mr.
Rahul Malhotra and Ms. Shruti
Gupta, Advs.

versus

SHRI VINAYAK INFRALAND PVT. LTD. & ORS..... Defendant

Through: Mr. Arvind Dhingra & Gitesh
Chopra, Advs. for D-5.
Ms. Gurkamal Hora Arora, Adv. for
D-1 and 2.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

I.A. 9077/2023

1. This is an application on behalf of the defendant no. 1 under section 8 of the Arbitration and Conciliation Act, 1996 read with Section 151, CPC seeking dismissal of the captioned suit in view of the Arbitration Clause in the Agreement to Sell dated 22.11.2013.

2. The brief facts for adjudication of the application are that the plaintiffs have filed the present suit for partition, possession, permanent injunction and mandatory injunction on the ground that the plaintiffs are owner of Property No. 6B/1, Under Hill Road, Civil lines, Delhi by virtue of



a registered Memorandum of Family Settlement dated 07.06.2013, modified on 24.11.2014.

3. Defendant No.2 is the authorised signatory of defendant No.1 and defendant No. 4 is the authorised signatory of Defendant No. 3.

4. It is stated by the defendant no. 1 that the plaintiff had entered into an Agreement to Sell dated 22.11.2013 with defendant No. 1 and 3 in respect of undivided share to the extent of 640 sq yards in the said property. The Agreement to Sell dated 22.11.2013, included the arbitration clause in Clause 16, which reads as under:-

“16. That in case of any dispute that may arise between the parties pertaining to the present Agreement to Sell & Purchase of any nature whatsoever including but not limited to construction/ interpretation of the terms of the present Agreement, defining the rights and/or liabilities of the respective parties, mutual obligations of the respective parties etc. then the same shall be adjudicated through Arbitration in accordance with the provisions of The Arbitration and Conciliation Act, 1996 or any other subsequent / amended legislation and in these circumstances Sh. Rohit Aggarwal, S/o Sh. Vijay Aggarwal R/o 16/4, Alipur Road, Civil Lines, Delhi-110054 shall act as the Sole Arbitrator so as to adjudicate upon the disputes that may arise between the parties and the decision/award given by the said Sole Arbitrator namely Sh. Rohit Aggarwal shall remain final and binding upon all the parties. Both the parties agree, admit and acknowledge the fact that the said named Sole Arbitrator namely Sh. Rohit Aggarwal is known to both the parties as a totally unbiased person and no dispute whatsoever shall ever be raised by any of the parties with regard to the appointment of Sh. Rohit Aggarwal as the sole named Arbitrator. The place of conducting arbitration proceedings shall be at New Delhi.”



5. It is further stated by the learned counsel for the defendant no. 1 that since September, 2015 the defendants have been in continuous peaceful possession of the property admeasuring 450 sq.yards. Since the suit claims relief with regard to partition and possession out of the said 450 sq yards, it is stated by Ms. Arora, learned counsel for defendant No. 1 and 2, that the present suit is liable to be dismissed in view of the Arbitration Clause.

6. Mr. Bahl, learned counsel for the plaintiff in reply states that the captioned suit claims composite reliefs not only against defendant No. 1 to 4 but also against the defendant No. 5.

7. In this regard, he draws my attention to Para 32 and 36 of the plaint wherein averments against defendant No. 5 are made. It reads as under:-

“32. However, the Plaintiffs have come to know that the Defendants have sold the 80 Sq. Yds. of plot out of the total plot of 530 Sq. Yds. duly built up in the Property No. 6B, Under Hill Road, Civil Lines, Delhi vide Sale Deed dated 22.12.2022 registered as Document No.14998 in Book No.1, Vol. No. 9523 at pages 106 to 121 registered on 26.12.2022 in favour of the Defendant No.5, M/s Kasauli Nature Resort Pvt. Ltd. wrongly stating it to be divided plot.

....

36. The Plaintiffs are constrained to file the present suit against the Defendants for the following reliefs: -

- a) Partition of the built up suit property measuring 450 square yards by metes and bounds from the built up property measuring 80 square yards in Plot no. 68, Under Hill Road, Civil Lines, Delhi so purchased by the Defendant No.5 from the Defendant No.1 who had in turn purchased the same from Mr. Vikas Gupta;*
- b) Handing over the vacant physical possession of the suit property to the Plaintiffs by the Defendants;*
- c) Permanent injunction against the Defendants from creating*



any third party rights, interest and title in respect of the suit property and not to misuse the suit property for commercial purposes;

d) Mandatory injunction against the Defendants to remove/shift the registered office addresses of the companies of the Defendants as enumerated above from the suit property;

e) Mesne profits/damages towards the illegal and unauthorized occupation of the suit property by the Defendants w.e.f. January, 2018.”

8. The learned counsel for the plaintiff states that it is defendant No. 5 who is in possession of the 80 sq yards out of 530 sq yards and it is shown as one composite property. Hence, the property needs to be partitioned by metes and bounds.

9. In addition, he also states that the defendants had previously invoked the Arbitration Clause in the year 2018, however took no steps thereafter to refer any dispute to arbitration. Therefore, their claims are also barred by limitation.

10. I have heard learned counsels for the parties.

11. A perusal of Para 32 and 36 of the plaint shows that there are substantial claims being made against the Defendant No. 5. The Defendant No. 5 is neither a signatory to the Agreement to Sell nor a party to the Arbitration Clause.

12. In the present case, the prayers made in the suit include relief against the defendant No. 5 as well. Under the Arbitration and Conciliation Act, 1996 there is no provision for splitting of parties and referring part of the subject matter to arbitration. Reliance is placed on the judgment of the Hon'ble Supreme Court in "*Gujarat Composite Limited vs. A Infrastructure Limited & Ors,*" 2023 LiveLaw(SC) 384, the operative portion read as



under:-

“10. In the case of Sukanya Holdings (supra), while dealing with the question of applicability of Section 8 of the Act, as then existing, this Court underscored the requirements of correlation of subject-matter of the suit and subject-matter of the arbitration agreement and, inter alia, held as under: -

“13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is: “in a matter which is the subject of an arbitration agreement”. The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of “a matter” which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced — “as to a matter” which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words “a matter” indicate that the entire subject-matter of the suit should be subject to arbitration agreement....”



17. Thus, except the principal agreement dated 07.04.2005, none of the other agreements contained any arbitration clause, even if they related to the same property and also involved the appellant and the respondent No. 1. The later transactions involved other parties too like the tripartite agreement dated 06.07.2006 whereby the respondent No. 2 bank sanctioned loan to the respondent No. 1 and then, supplemental to the said tripartite agreement for dealing with the deposit of title deeds. Similarly, the other deeds of conveyance dated 23.01.2015 involve the appellant and the other defendants.

17.1. The aforesaid position of the dealings of the parties, when examined with reference to the reliefs claimed in the suit and the cause of action pertaining to the said reliefs, as extensively noticed by the High Court and extracted hereinabove, we are clearly of the view that the submissions made by the appellant with reference to the amendment of Section 8 of the Act of 1996 and the later decisions of this Court in interpretation of the amended Section 8 do not inure to the benefit of the appellant. This is for the simple reason that no such conjunction can be provided to the original licence agreement dated 07.04.2005 and the tripartite agreement involving the Bank dated 06.07.2006 and 23.01.2008, whereby the arbitration clause could be held applicable to the tripartite agreement too. This is apart from the fact that in the frame of the suit and various other reliefs claimed, involving subsequent purchasers too and the allegations of fraud, the dispute cannot be said to be arbitrable at all. The present one cannot be said to be a case involving any “doubt” about non-existence of arbitration agreement in relation to the dispute in question.

17.2. There being no doubt about non-existence of arbitration agreement in relation to the entire subject-matter of the suit, and when the substantive reliefs claimed in the suits fall outside the arbitration clause in the original licence agreement, the view



taken by the High Court does not appear to be suffering from any infirmity or against any principle laid down by this Court.

...

20. For what has been discussed hereinabove, on the facts and in the circumstances of the present case and in the nature of transactions as also the nature of reliefs claimed in the suit, the view taken by the Commercial Court and the High Court in declining the prayer of the appellant for reference to arbitration cannot be faulted.”

13. Further, the judgment of Hon’ble Supreme Court in *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*, 2023 SCC Online SC 1634 will not be applicable to the facts of the case since Defendant no. 5 is a separate and distinct entity. There is also no contractual relationship between the plaintiff and defendant no. 5.

14. Another aspect is that the Defendant No. 1 issued a Legal Notice dated 04.08.2018. Para 20 and 21 of the said legal notice are reproduced hereunder:

“20. That the said Agreement to Sell dated 06.11.2013 contains an Arbitration Clause which is reproduced as under:

“16. That in case of any dispute that may arise between the parties pertaining to the present Agreement to Sell & Purchase of any nature whatsoever including but not limited to construction/ interpretation of the terms of the present Agreement, defining the right and/ or liabilities of the respective parties, mutual obligations of the respective parties etc. then the same shall be adjudicated, through Arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other subsequent / amended legislation and in these circumstances Sh. Rohit Aggarwal, S/o Shri Vijay



Aggarwal, R/o 16/4, Nipur Road, Civil Lines, Delhi-110054 shall act as the sole Arbitrator so as to adjudicate upon the disputes that may arise between the parties and the decision/award given by the said Sole Arbitrator namely Shri Rohit Aggarwal shall remain final and binding upon all the parties. Both the parties agree, admit and acknowledge the fact that the said named Sole Arbitrator namely Shri Rohit Aggarwal is known to both the parties as a totally unbiased person and no dispute whatsoever shall ever be raised by any of the parties with regard to the appointment of Shri Rohit Aggarwal as the sole named Arbitrator. The place of conducting arbitration proceedings shall be at New Delhi.”

21. That in case you all the addresses fail to execute the sale deed within a period of 30 days from the receipt of this notice or incase you have intention to perform your obligations under the Agreement to Sell dated 06.11.2013, then in that event in order to avoid any further delay in the matter, this notice be considered as a notice of invocation of Arbitration clause of the Agreement to Sell dated 06.11.2013 as mentioned above. A copy of this notice is also being sent to the Sole Arbitration Shri Rohit Aggarwal.

In view of the aforesaid facts and circumstances, We, on behalf of Our Clients call upon you to execute the sale deed of 450 square yards, the possession of which has already been handed over to or clients by you, the addressees, within thirty days (30) of receipt of this notice, failing which this notice be considered as a notice of Invocation of Arbitration clause of the Agreement to Sell dated 06.11.2013 as mentioned above and in that event Shri Rohit Aggarwal, Sole Arbitrator is requested to enter into the reference and decide/ adjudicate the disputes between the parties in accordance with law.”

15. The period of limitation under the Limitation Act, 1963 for invoking



Arbitration is given in Article 137 of the Schedule, which reads as under:-

<i>Description of Suit</i>	<i>Period of Limitation</i>	<i>Time from when period begins to run</i>
<i>137. Any other application for which no period of limitation is provided elsewhere in this Division.</i>	<i>Three years.</i>	<i>When the right to apply accrues.</i>

16. The Hon'ble Supreme Court in *M/s B & T AG vs. Ministry of Defence*, 2023 LiveLaw(SC) 466 held the following:-

“64. In Panchu Gopal Bose v. Board of Trustees for Port of Calcutta reported in (1993) 4 SCC 338, this Court had held that the provisions of the Act 1963 would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question was when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for a long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing of the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was



*allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after a considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(b) of the Act. [See: **State of Orissa v. Damodar Das, (1996) 2 SCC 216**]*

17. What is evident from the above is that within three years of issuing notice under Section 21, the parties invoking arbitration must take steps for appointment of an Arbitrator.

18. Admittedly, pursuant to issuance of Legal Notice dated 04.08.2018, no steps were taken by the defendant no. 1 to invoke the process of Arbitration, except for filing of the present application dated 08.05.2023.

19. According to me, the said application is also barred by limitation.

20. For the said reasons, the application u/s 8 of the Arbitration and Conciliation Act, 1996 is dismissed.

CS(COMM) 266/2023, IA. 8433/2023, IA. 20038/2023

21. List before Joint Registrar on 08.04.2024.

JASMEET SINGH, J

FEBRUARY 20, 2024/NG

Click here to check corrigendum, if any