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

% *Date of Decision: 10.12.2024*

\+ **FAO (COMM) 236/2024 and CM APPL. 71659/2024**

M/S GRANDSLAM DEVELOPERS PVT LTD .....Appellant

Through: Mr. Gautam Narayan, Sr. Advocate with Mr. Madhu Sudan, Ms. Sonal Sarda, Mr. Ankit Kakkar, Mr. Tushar Nair and Ms. Shreya Mehra, Advocates

versus

AKSHAY GANDHI PROPRIETOR OF PRAXIS DESIGN SOLUTIONS .....Respondent

Through: Mr. Nishit Kush, Mr. Siddharath Sikri and Ms. Kirti Singh, Advocates

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

VIBHU BAKHRU, ACJ *(Oral)*.

1. The appellant – a company incorporated under the Companies Act, 1956 – has filed the present appeal under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 13.11.2024 (hereafter *the impugned order*) passed by the learned Commercial Court in CS (COMM) No. 08/2024 captioned *Akshay Gandhi Proprietor of Praxis Design Solutions v. M/s Grandslam Developers Pvt. Ltd.*, whereby the appellant's application under Section 8 of the A&C Act for referring the parties to arbitration, was rejected.

2. The respondent had filed the aforementioned suit against the appellant seeking a recovery of a sum of ₹81,73,378.15/- along with *pendente lite* and future interest.

3. The respondent is an individual and claims that he is an Architect. He is the sole proprietor of a concern named Praxis Design Solutions, which is engaged in the business of interior designing and executing various projects on turnkey basis.

4. The appellant had issued three work orders related to the appellant's project site (Tower-B, Plot no. A-40, Sector-62, Noida, Uttar Pradesh).

5. The respondent claimed that there were initial delays on the part of the appellant in releasing mobilization advance and for making advance payment for bought-out items. Finally, after the delay of 134 days, an amount of ₹1,05,56,965.44/- was released to the respondent as mobilization advance. However, the same was less by ₹4,71,293/- than the amount as agreed. The respondent was also aggrieved on account of certain deductions made by the appellant.

6. The respondent claimed that he had achieved 80% completion by 21.01.2020 and even as on that date, the payment towards the first running bill dated 16.12.2019 was pending. The respondent states that a site inspection was conducted on 05.03.2020 and as on that date, a sum of ₹2.75 crores was outstanding, which the appellant agreed to pay in three tranches: ₹1 crore by 20.03.2020; ₹1 crore by first week of April 2020; and ₹75 lacs by 15.04.2020. The respondent claims that despite confirming the above schedule for making payments, the appellant failed to clear the outstanding

dues as agreed.

7. The respondent claims that by an email dated 06.02.2021, the appellant acknowledged that a sum of ₹65,51,806/- was outstanding in respect of the Work Orders. According to the respondent, he is also entitled to interest on the said amount. The respondent computed the total amount payable as on the date of filing of the suit at ₹81,73,378.15/-.

8. The appellant filed its written statement. The appellant claimed that the respondent was a contractor of one M/s Regus Paradigm Offices Pvt. Ltd., (hereafter referred to as *Regus*). Regus had approached the appellant for leasing space on the first floor in Tower-B, IThum Building situated at Plot no. A-40, Sector-40, Sector-62, Noida and the appellant had executed a lease deed in its favour.

9. The appellant claimed that he was required to ensure that the premises were fit out as per the specifications provided by Regus, which also retained the authority to monitor, review and audit works executed.

10. The appellant claimed that it paid a sum of ₹1.69 crores to the respondent on 11.05.2019. However, the respondent failed to complete the works against the said payment and also failed to provide the breakup for utilization of approximately ₹0.72 crores paid by it. The appellant claims that there was an inordinate delay on part of the respondent in completing the work and in the meanwhile, Regus also resiled from its agreement and proposed a new set of commercial terms.

11. The appellant states that in the given circumstances, the appellant was constrained to terminate its Agreement by a letter dated 15.12.2020.

12. The appellant alleges that the respondent was hand in glove with Regus. According to the appellant, it had made payments in excess of what was due to the respondent. It had also called upon the respondent to reconcile the accounts but the respondent had failed to do so.

13. The appellant also raised an objection regarding filing of the suit on the ground that the Work Order dated 05.07.2019 includes an Arbitration Clause and the disputes were required to be referred to arbitration. The appellant also filed an application under Section 8 of the A&C Act praying that the parties be referred to arbitration.

14. The respondent resisted the application on the ground that there is no dispute between the parties and therefore, the parties were not required to be referred to arbitration. The respondent mainly relied on the email dated 06.02.2021 and claimed that the appellant had acknowledged an amount of ₹65,51,806/- as payable to the respondent. The respondent contended that since the amount claimed by him was acknowledged by the appellant, there was no dispute, which was required to be referred to arbitration.

15. The learned Commercial Court accepted the contention advanced by the respondent. The learned Commercial Court noted that the appellant had, in its email dated 06.02.2021, mentioned that the amount due and outstanding was ₹65,51,806.14/-, which was accepted by the respondent. In the aforesaid circumstances, the learned Commercial Court passed the impugned order rejecting the appellant's application under Section 8 of the A&C Act on the ground that there was no dispute that is required to be adjudicated.

16. We have heard the learned counsel for the parties.

17. At the outset, it is material to note that there is no cavil that the Work Order contained an Arbitration Clause whereby the parties had agreed to refer the disputes, relating to the Work Order to arbitration. Clause 19 of the Work Order dated 06.07.2019 [Work Order for Interior Fit Out Works for Ithum, Tower-B, First Floor for (Regus), Plot No. A40, Sector-60, Noida] embodies a dispute resolution clause. The said clause is reproduced below:

> "19. Governing Law and Legal Forum
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> i. The contractual relationship between Client and the Contractor shall be governed by the laws of India.
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> ii. If the Parties are unable to resolve the dispute within the thirty (30) days of a meeting involving the Parties senior representatives, then, either Party may submit such dispute to arbitration in
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> Accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any subsequent enactment or amendment thereof. The arbitration tribunal shall be held in Chennai and shall consist of three arbitrators. Each of the parties shall be entitled to appoint one arbitrator with the third arbitrator to be elected by the two arbitrator appointed by the parties, who shall serve as the chairman of the tribunal. The arbitral proceedings shall be conducted in English. The arbitration award will be final and binding upon both parties. Cost of the arbitration shall be determined by the final award, Judgement upon the award may be entered in any court of competent jurisdiction for execution."

18. It is clear from the above that the parties had agreed that if they are

unable to resolve their disputes, the same would be referred to arbitration in accordance with the provision of the A&C Act. The contention that the respondent could maintain the suit notwithstanding, the arbitration agreement on the ground that there is no dispute is plainly erroneous. The very import of an arbitration agreement is that the parties will not take recourse to instituting an action in court but refer their disputes to arbitration. It is erroneous to suggest that a party to an arbitration agreement can avoid the contractual forum and maintain a suit in respect of the subject matter, which is covered under the arbitration agreement. If a remedy for a cause of action falls within the scope of an arbitration agreement, the counter party cannot be compelled to defend the same in a suit. It is entitled to insist that the matter be referred to arbitration.

19. The term 'dispute' in the context of the A&C Act must necessarily be understood as a cause of action. The Supreme Court in ***Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement & Anr.: (2010) 4 SCC 722*** observed as under:

> "26. The word 'any dispute' is somewhat akin to 'any order' or 'any decision'. Any dispute, occurring in Section 51 of Arbitration Act 1975, has been interpreted to have a wide meaning to cover all situations where one party makes a request or demand and which is refused by the other party [See Ellerine Bros (Pty) Ltd and another vs. Klinger, 1982 (2) AER 737]."

20. Thus, in a case where a party declines to satisfy the demand raised by the claimant, the matter is required to be adjudicated by an Arbitral Tribunal. If the arbitration agreement covers a dispute regarding any

contractual payment, the question whether such payment is admittedly due is also required to be considered by an Arbitral Tribunal appointed in accordance with the agreement between the parties, and not in a suit unless the non-claimant consents otherwise.

21. It is relevant to refer to sub-section (1) of Section 8 of the A&C Act. The same is set out below:

> "**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."
>
> [Emphasis added]

22. It is important to note that sub-section (1) of Section 8 of the A&C Act mandates that a judicial authority before which an action is brought would "refer the parties to arbitration" if the action is subject of an arbitration agreement. It is relevant to note that the judicial authority does not require to refer disputes to arbitration but the parties to arbitration. The learned Commercial Court had referred to Section 8 of the A&C Act and had observed as under:

> "10. A perusal of Section 8 of the Act, shows that it mandates that a Judicial Authority, before whom a suit has been filed, with respect to the dispute, subject matter of the

> arbitration agreement, must refer the matter to the Arbitrator on fulfillment of the conditions mentioned therein i.e. the party is required to apply not later than submitting first statement on the substance of the dispute and for that purpose, an application is required to be filed accompanied by the original arbitration agreement or duly certified copy thereof."

23. The above conclusion is erroneous and is not supported by the plain language of Section 8 of the A&C Act. As noted earlier, the judicial authority before whom an action is brought in a matter, which is the subject matter of arbitration, does not refer "the matter" to the arbitrator but only refers the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

24. The language of Section 8 of the A&C Act is a departure from the language of Section 20 of the Arbitration Act, 1940, which required the court to make "an order of reference to the arbitrator".

25. The scope of examination in an application under Section 8 of the A&C Act is limited to *prima facie* examining the validity and existence of the arbitration agreement. Once it is accepted that a valid arbitration agreement exists between the parties, the court is necessarily required to allow the application under Section 8 of the A&C Act and refer the parties to arbitration.

26. We also consider it relevant to refer to the following extract of the recent decision of the Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning: 2024 SCC OnLine SC 1754***:

> "108. Section 11 of the Act, 1996 is provided to give

effect to the mutual intention of the parties to settle their disputes by arbitration in situations where the parties fail to appoint an arbitrator(s). The parameters of judicial review laid down for Section 8 differ from those prescribed for Section 11. The view taken in *SBP & Co.* (supra) and affirmed in *Vidya Drolia* (supra) that Sections 8 and 11 respectively of the Act, 1996 are complementary in nature was legislatively overruled by the introduction of Section 11(6-A) in 2015. Thus, although both these provisions intend to compel parties to abide by their mutual intention to arbitrate, yet the scope of powers conferred upon the courts under both the sections are different.

109. The difference between Sections 8 and 11 respectively of the Act, 1996 is also evident from the scope of these provisions. Some of these differences are:

i. While Section 8 empowers any 'judicial authority' to refer the parties to arbitration, under Section 11, the power to refer has been exclusively conferred upon the High Court and the Supreme Court.

ii. Under Section 37, an appeal lies against the refusal of the judicial authority to refer the parties to arbitration, whereas no such provision for appeal exists for a refusal under Section 11.

iii. The standard of scrutiny provided under Section 8 is that of prima facie examination of the validity and existence of an arbitration agreement. Whereas, the standard of scrutiny under Section 11 is confined to the examination of the existence of the arbitration agreement.

iv. During the pendency of an application under Section 8, arbitration may commence or continue and an award can be passed. On the other hand, under Section 11, once there is failure on the part

> of the parties in appointing the arbitrator as per the agreed procedure and an application is preferred, no arbitration proceedings can commence or continue."
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> (Emphasis added)

27. The aforesaid decision, authoritatively concludes the question involved in the present appeal.

28. The learned Commercial Court had referred to the decision of the learned Single Judge of this Court in ***Maruti Udyog Ltd. v. Mahalaxmi Motors Ltd. & Anr.: 95 (2002) DLT 290***, whereby the learned Single Judge had observed that an application under Section 8(1) of the A&C Act cannot be allowed as the arbitration clause is not invocable in respect of an admitted liability. The said view is, erroneous, given the limited scope of examination under Section 8 of the A&C Act as explained by the Supreme Court in several decisions including the recent decision in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** (*supra*). The said decision is, accordingly, overruled.

29. After some arguments, the learned counsel for the parties, on instructions, request this court to refer the parties to arbitration before a sole arbitration. They requested the court not to relegate the parties to the learned Commercial Court for considering a decision afresh or to take further steps for constitution of the Arbitral Tribunal. They request that the parties be referred to the Delhi International Arbitration Centre (DIAC) for constitution of the Arbitral Tribunal comprising of a Sole Arbitrator. Although the scope of the present proceedings does not entail the

appointment of an arbitrator, however, to obviate any delay, we consider it apposite to accede to the request of the parties and refer them to DIAC. DIAC shall appoint a Sole Arbitrator for adjudicating the disputes between the parties. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules. The said order is passed with the consent of the parties.

30. The impugned order is set aside and the appeal is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, ACJ

TUSHAR RAO GEDELA, J

DECEMBER 10, 2024
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Click here to check corrigendum, if any