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

% *Order delivered on: 29th August, 2014*

\+ **I.A. No. 19089/2013 & 13811/2014 in CS(OS) No. 73/2005**

J.B. KOHLI ..... Plaintiff
Through Mr.Gaurav Duggal, Adv. for plaintiff Mr.J.B.Kohli as well as for D-2 Mr.M.M.Kohli.

versus

RAMESH KOHLI & ANR. .....Defendants
Through Mrs.Nalini Chidambaram, Sr.Adv. with Mr.Varun Kumar & Ms.Saloni Chaudhry, Advs. for applicant/D-1.
Mr.Vineet Jhanji, Adv. with Mr.Imran Moulaey, Adv. for Mrs.Krishna Sawhney (Sister).
Mr.Shivair Vaidialingam, Adv. for Mrs.Usha Chatrath (Sister).

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. By way of this order I propose to decide both the applications being I.A. No. 19089/2013 and I.A. No. 13811/2014 under Section 151 CPC filed by the defendant No.1 in this suit for permanent and mandatory injunction filed by the plaintiff against the defendants.

2. Brief facts of the case are that the plaintiff and defendants are the sons of Late Shri B.C.Kohli. The parties herein along with their father were members of a Hindu Undivided Family ('HUF'). The HUF was the owner of property bearing No. 31, Golf Links, New Delhi -

110003 admeasuring about 1250 sq. yards which comprises of a ground floor, first floor and a Barsati on the terrace (hereinafter referred to as the "suit property"). The said HUF was dissolved soon after the demise of Shri B.C.Kohli on 15th April, 1978 and was survived by three sons namely, defendant No.1, defendant No.2, plaintiff and 5 daughters.

3. The suit as well as interim applications were listed before Court on 20th January, 2005 and the summons in the main suit and notice in the interim applications were issued. The Court also passed the interim order. The suit was disposed of with the consent of the parties by 27th April, 2007 by referring the parties to the arbitration.

4. The learned Arbitrator Tribunal passed an interim award dated 18th October, 2012 whereby it was held that the daughters of deceased Shri B.C. Kohli were entitled to a share in the entire HUF property of which the deceased Shri. B.C.Kohli was the Karta in the same manner as the sons as no partition has been effected by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a Court prior to 20th December, 2004 as envisaged in Section 6(5) Explanation of the Hindu Succession Act,1956.

5. By way of the application being I.A. No. 19089/2013 for *inter alia*, declaration that the order dated 18th October, 2012 is *non est* in the eyes of law.

6. It is stated in the application by the defendant No.1 that reference was made to the Arbitral Tribunal to decide the disputes between the parties and the sisters were admittedly not parties to the suit and thus, the sisters could not have been made party to the

arbitration proceedings. It is stated that the Arbitral Tribunal has exceeded its jurisdiction by impleading the daughters of Late B.C.Kohli and passed an interim award directing division of the suit property equally among all the children of Late B.C.Kohli treating them as co-parceners relying upon the Section 6(5) of the Hindu Succession Act,1956. Thus, the interim order dated 18th October, 2012 is *non-est* in the eyes of law having been passed in excess of the jurisdiction.

7. Defendant No.1 filed an application under Section 16(3) of the Arbitration and Conciliation Act (hereinafter referred to as the "Act") seeking passing of the final award without reference to the order dated 18th October, 2012 which was dismissed by the Arbitral Tribunal on an erroneous reasoning that he has no power of review.

8. It is stated that the disputes as raised by the plaintiff against the defendant No.1 regarding construction activity carried out in suit property, denying access to the terrace of the suit property and causing hindrance to the free ingress and egress to the first floor of the suit property which were subject matter of the instant suit, have been duly settled by the parties to the suit.

9. It is further stated that the repair work as alleged by the plaintiff was duly finished much before when the suit was filed in 2005 which included white wash etc. of the suit property which was carried out by the defendant No.1 in the area within the exclusive possession of the defendant No.1. It is also stated that no inconvenience was caused to the plaintiff and defendant No.2 by such repair work and renovation work and there is no debris lying in the suit property and the same was removed after completion of the repair work.

10. It is stated that the plaintiff has no legitimate concern or right to claim access to the terrace. The terrace has been in continuous lawful possession of the defendant No.1 for more than three decades and consequently, the plaintiff and the defendant No.2 would need prior written approval for accessing the terrace of the suit property. It is also stated that the defendant No.1 had never attempted to enlarge his possession in the suit property or create any kind of nuisance or acrimony.

11. Further, the plaintiff also sought demolition of the construction on the Barsati floor. It is stated that the defendant No.1 carried out the construction in the portion which has been in the exclusive possession of the defendant No.1 for the last more than three decades and the defendant No.1 being the co-owner of the suit property is entitled to carry out the same, subject to the compliance with the local and municipal laws, byelaws and regulations. The defendant No.1 had applied to the NDMC seeking approval of the extension made on the Barsati floor and the NDMC vide order duly allowed the extension done by the defendant No.1 and stated that the Delhi (Special) Provision Act covers for all such construction erected prior to 2007.

12. Reply has been filed to the application by the one of the sisters of defendant No.1 namely, Mrs.Usha Chatrath denying the contents of the same.

13. Rejoinder has been filed to the reply by one of the sisters of defendant No.1 namely, Mrs. Krishna Sawhney wherein it is stated that the Arbitrator has erred by exceeding its jurisdiction by including more properties than the one that was in dispute in the suit filed.

Further, the suit was filed by two brothers against the defendant No.1 for restraining him from carrying on construction at the suit property. It is stated that the Tribunal was constituted only for this limited purpose so it could not have enlarged the scope of the reference nor could have it impleaded the sisters to the proceedings as they were not a party to the suit. No consent can confer jurisdiction on Tribunal to enlarge the scope as "what is without jurisdiction will remain so".

14. It is stated that the Tribunal failed to note the distinction between the prayer to treat an order as *non est* in the eyes of law and a prayer to review the order. It is further stated that this Court has not decreed the suit as per Section 2(2) CPC and disposed of the matter for the Arbitration to commence as per law. It is stated that the Arbitral award has to be filed before this Court for enforcement in terms of Section 36 of the Act and thereafter, this Court may pass a decree and judgment.

15. The application being I.A. No.13811/2014 filed by defendant No.1 for *inter alia*, declaration that the subsequent order dated 23rd September, 2013 be declared as illegal and liable to be set aside, almost reiterated the contents of the above said application.

16. Reply has been filed to the application by the one of the sisters of defendant No.1 namely, Mrs.Krishna Sawhney contending as under :

(i) The application is barred under Section 5 of the Act. This Court vide its order dated 27th April, 2007 with the consent of the parties referred all disputes between the parties to Arbitration in terms of Section 8 of the Act, as such this Court has no jurisdiction to entertain the application which

has been filed in relation to the orders and the interim award passed by the Arbitrator.

(ii) The application is not maintainable for the reasons as the same has been filed in a suit which was disposed of with the consent of the parties vide order dated 27th April, 2007 referring the parties to the arbitration.

(iii) The defendant No.1 suppressed material facts and documents including various consent orders and statements made by him before this Court and before the Arbitrator.

(iv) The sisters were impleaded and made parties to the arbitration with the consent and the knowledge of the defendant No.1 which was recorded in the order dated 4th October, 2007.

(v) The defendant No.1 filed an application under Section 15 of the Act seeking to withdraw his consent for impleading his sisters which was dismissed by the Arbitrator by a detailed order dated 17th January, 2009 which has attained finality.

(vi) The application is liable to be dismissed on the ground that the defendant No.1 by way of this application is seeking to set aside the order dated 23rd September, 2013 passed by the Arbitrator which is contrary to the procedure as laid down in the Act. The order dated 23rd September, 2013 was passed by the Arbitrator on an application of the defendant No.1 seeking to review the interim award dated 18th October, 2012 as he admittedly did not file any appeal against the same as contemplated under Section 34 of the Act. In fact, no appeal now can be filed against the said interim award

and the order dated 23rd September, 2013 as the same are barred by limitation.

(vii) The defendant No.1 accepted the order dated 23rd September, 2013 dismissing his application under Section 16 of the Act as he failed and chose not to file an appeal against the said order as contemplated under Section 37 of the Act. The defendant No.1 not having filed any appeal against the said order is now barred and estopped from raising any dispute and/or grievance in relation to the said order.

17. Mrs.Nalini Chidambaram, learned Senior counsel appearing on behalf of the defendant No.1, states that since the Arbitrator was appointed with the consent of the parties in the present suit by order dated 27th April, 2007, therefore, the present applications for setting aside the interim award dated 18th October, 2012 as well as order passed on 23rd September, 2012 are maintainable. The Arbitrator cannot enlarge the scope of the reference beyond the reference made in the present suit and entertain the fresh claims without further order of reference from the Court. It is fundamental principle of law that an adjudicatory body has to function within the confines of its jurisdiction. Anything done by it in excess of its jurisdiction is void. The interim order passed by the learned Arbitrator in the present case as well as dismissal of the application of the defendant No.1 under Section 16 of the Act is without jurisdiction and both orders are inoperative in the eyes of law. If a tribunal has no jurisdiction in law to entertain a dispute which was not referred, the decision passed would be null and void. Therefore, the dispute is to be decided by the

same Court who has appointed the learned Arbitrator and passed the order of reference.

18. As far as merit of the case is concerned, I am of the view that once the disputes are referred for arbitration then the procedure under the Act has to be followed by the parties. It is the admitted position that the suit was disposed of with the consent of the parties and the disputes of the parties were referred to arbitration. In case the interim award and subsequent order passed by the learned Arbitrator are contrary to the reference, the defendant No.1 has to take the appropriate remedies under the Act as there is no *lis pendens* before this Court after the disposal of the suit.

19. Reference in this regard be made to Section 89 CPC which reads as under:

> "89. Settlement of disputes outside the Court. - (1) Where it appears to the Court that there exist elements of settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for-
> (a) arbitration;
>
> (b) conciliation;
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> (c) judicial settlement including settlement through Lok Adalat; or
>
> (d) mediation."

20. In ***Sukanya Holdings Pvt. Ltd vs. Jayesh H. Pandya,*** (2003) 5 SCC 531 it was held as under:

> 18. "Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration.

Further, for that purpose, the Court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the Court is required to follow the procedure prescribed under the said Section."

21. In ***Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd.*** (2010) 8 SCC 24 wherein it was held as under :

"11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award."

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"15. Section 89 has to be read with Rule 1A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to Section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes."

22. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the Act. The Act makes it clear that there can be reference to arbitration only if there is an

'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 CPC, the matter would have stood referred to arbitration either by invoking Section 8 or Section 11 of the Act, and there would be no need to have recourse to arbitration under Section 89 CPC. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. Even if there was no preexisting arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under Section 89 CPC. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the Court, or by record of the agreement by the Court in the order sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under Section 89 CPC; and on such reference, the provisions of Act will apply to the arbitration, and as noticed in ***Salem Advocate Bar Association vs. Union of India,*** AIR 2003 SC 189*,* the case will go outside the stream of the court permanently and will not come back to the court.

23. If there is no agreement between the parties for reference to arbitration, the Court cannot refer the matter to arbitration under Section 89 CPC. This is evident from the provisions of the Act. A Court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though Section 89 CPC mandates reference to ADR processes, reference to arbitration under Section 89 CPC could only be with the consent of both sides and not otherwise.

In ***Salem Advocate's*** case *(supra)* this Court held :

"It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation."

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"If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

24. In the present case, the interim award as well as subsequent order passed by the learned Arbitrator has not been challenged by the defendant No.1 either by filing the objection under Section 34 of the Act against the order of interim award or filing of an appeal after dismissal of the application under Section 16 of the Act on 23rd September, 2012 under Section 37 of the Act. The time for filing the objection as well as appeal has elapsed.

25. This Court after disposing of the suit on 27th April, 2007 with the consent of the parties has no more jurisdiction to entertain the dispute of arbitration as such application or fresh suit, if filed, is barred under Section 5 of the Act. The arbitration proceedings in the present case are still pending. No doubt the grievance of the defendant No.1 can be challenged by filing the objection under Section 34 of the Act when the final award is passed in the present case in accordance with law. However, the prayers in both the applications as sought by the defendant No.1 cannot be allowed. The same are hereby dismissed.

(MANMOHAN SINGH)
JUDGE

AUGUST 29, 2014