

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

% **Judgment reserved on: 29.08.2012**
Judgment delivered on: 17.09.2012

+ **FAO (OS) No. 102/2012**

GURSHARAN SINGH Appellant
Through: Mr. B.K. Dewan and Mr. Bhavesh
Kumar Sharma, Advocates
versus

BHARAT PETROLEUM CORP. LTD. Respondent
Through: Mr. Anil Kumar Batra, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. This appeal is directed against the order dated 23.12.2011 passed by the learned Single Judge in I.A. Nos.9364/1991, 9046/2010 and C.S. (OS) No.3768A/1991 decided on 23.12.2011. By the impugned order, the learned Single Judge has allowed the objections preferred by the respondent in I.A. No.9364/1991 preferred under Section 30 and 33 of the Arbitration Act, 1940 (the Act) and consequently, the arbitral award dated 25.11.1991 passed by the learned arbitrators has been set aside.

2. The appellant was awarded the work for construction of road at LPG plant at Lucknow vide agreement dated 12.01.1988. The stipulated period of completion was four months, and the stipulated date of completion was 14.06.1988. However, the work was completed on 21.06.1988. The value of the work originally awarded to the appellant was Rs.13,64,400/-, which was increased and further time was granted to the appellant to complete the same till 25.11.1988.

3. Disputes arose between the parties in relation to the contracted work and, consequently, the appellant invoked clause 19 of the agreement which provided for resolution of disputes by arbitration. The arbitration agreement provided that any disputes or differences between the parties arising out of or connected with the contract shall, except where otherwise specifically agreed, be referred for arbitration in terms of that agreement. The parties appointed two arbitrators in terms of their agreement. The learned arbitrators made their unanimous award on 25.11.1991. The arbitrators awarded various claims made by the appellant alongwith interest. The counter claim preferred by the respondent was rejected. Eventually, the award was filed before this Court and objections were preferred by the respondent under section 33 read with section 16 of the Act vide I.A.

No.9364/1991.

4. It was, *inter alia*, contended by the respondent that the original work was completed on 21.06.1988 and a final bill was prepared. The respondent also contended that on 28.04.1989, a meeting was held between the parties after the completion of the work by the appellant when the record notes were prepared. As per these notes, instead of removing the defects of workmanship, the appellant agreed for deduction of Rs.1,07,301.50, and accordingly the full and final settlement of all the claims of the appellant was arrived at. A sum of Rs.2,05,724.01 was received and accepted by the appellant vide letter dated 10.07.1989, wherein the appellant stated “*I do not have any further claim*”.

5. According to the respondent, after fully and finally settling the account, the appellant raised claims before the arbitrator. The respondent contended that the claims raised by the appellant were not arbitrable in view of the full and final settlement arrived at between the parties. They contended that even in respect of a non speaking award, the Court could examine whether the arbitral tribunal had fallen into jurisdictional error. The contention of the appellant, obviously, was that the full and final settlement had been arrived at under pressure and coercion.

6. The respondent in the reply filed before the arbitral tribunal specifically raised the issue that the claim was not maintainable in view of accord and satisfaction. The preliminary objection raised in their reply by the respondent before the arbitral tribunal reads as follows:

“1. The claim is false and fabricated and vexatious. The record Notes dated 28.04.1989 (Annexure R-1) hereto clearly states that the net payable after deduction was Rs.1,37,911.10. It was further mentioned therein that the claimant would have no further claims after receipt of this sum. This sum was thereafter paid by the respondents to the claimant on 10.07.1989 and a receipt was executed by the claimant. This receipt clearly states, in the handwriting of the claimant himself, that the receipt of the said sum/cheque no further claims. The receipts is Annexure R-2 hereto. The false claim as mentioned in the claimant’s letter dated 10.07.1989, received in the Corporation Officer on 17.07.1989 was refuted by Corporation vide its letter No.AE.13.Con. LKO dated 20.07.1989, a copy of which is annexed hereto and marked Annexure R-3”.

7. A perusal of the award shows that the same is a non reasoned award made by the learned arbitrators. However, since the submission of the respondent was that arbitration was not at all maintainable on account of accord and satisfaction, the learned Single Judge looked into the relevant documents relied upon by the respondent. The most crucial document in this respect is the record note of 28.04.1989 signed by the parties jointly. The said document reads as follows:

“1. The above job was awarded to M/s Gursharan Singh as per Agreement No. AEM/87/102 dated 12.01.88.

2. The job was started on 15.02.88 and was completed on 25.11.88. Bill No. 1126 dated 12.01.89 for Rs.18,33,954.60 was submitted, which included drains, roads, earthfilling etc. out of which black carpet was of Rs. 4,03,261.44 @ 48/m² for an area 8401=28 m²) and quality complaint was found in this item only. On measurement at site, an average thickness of the black carpet was found varying 40 mm downwards.

3. The contractor has been asked to correct the thickness to which he expressed inability and has proposed for a prorate deductions of the carpet thickness as below:-

4. (i) For average 40 mm thick carpet for an area of 6082.80 m, for 12 mm thick carpet which comes to Rs. 67,378.70 (48/52x12x6082.80)

(ii) For average 26 mm thick carpet for an area of 1663.45 m², a deduction for balance 26 mm thick carpet which comes to Rs. 39,922.80x(48/52x26x1663.45)

(iii) Thus, total deduction is of Rs. 1,07,301.50.

(iv) The balance area of 655.03 m² is having correct carpet thickness of 52 mm.

(v) The contractor had proposed a deduction of Rs. 1,07,301.50 against above bill and to treat it as the final bill and confirms that he has no further claims beyond the quantities mentioned in the bill.

(vi) The contractor proposed to release the balance payable amount of Rs.1,37,911.10 with details as below:-

Total amount of bill: Rs. 18,33,954.63

Say Rs. 18,33,954.60

Less already paid: Rs. 15,12,000.00

<i>Balance</i>	<i>Rs. 3,21,954.60</i>
<i>Less Retention money</i>	
<i>(as per agreement clause)</i>	<i>Rs. 63,349.00</i>
<i>Less 2% income tax</i>	<i>Rs. 6,439.00</i>
<i>Less 8% S/C on I.Tax</i>	<i>Rs. 515.00</i>
<i>Less 2% UPS Tax</i>	<i>Rs. 6,439.00</i>
<i>Payable</i>	<i>Rs. 2,45,212.60</i>
<i>DEDUCTIONS</i>	<i>Rs. 1,07,301.50</i>
<i>Net payable after deductions</i>	<i>Rs. 1,37,911.10</i>

6. The contractor has confirmed that there will be no further claims against the aforesaid contract for which net payable is Rs. 1,37,911.50.

H.P. GUPTA
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For Bharat Petroleum
Corp. Ltd.

For M/s Gursharan Singh

8. The learned Single Judge also takes note of the letter dated 10.07.1989 sent by the respondent to the appellant forwarding the cheque for Rs.2,05,724.12 in full and final settlement of the works in question. The said letter also has an endorsement made on behalf of the appellant acknowledging receipt of the cheque in full and final settlement. The

learned Single Judge also takes note of the further communication dated 20.07.1989 of the respondent refuting the appellant's allegations and demanding interest @ 18% p.a. and raising claim for Rs.5,19,774.47 and also stating that no further amounts are payable by the respondent.

9. The learned Single Judge, while deciding the issue whether there was accord and satisfaction, has referred to and dealt with the decisions of the Supreme Court in *Nathani Steels Limited v. Associated Constructions*, 1995 Supp (3) SCC 324 and *P.K. Ramaiah & Co. v. Chairman and Managing Director, National Thermal Power Corporation*, 1994 Supp (3) SCC 126. The learned Single Judge also takes note of the various steps taken by the appellant to scuttle the hearing before the Court. The learned Single Judge also notes that the aforesaid plea was raised by the appellant after getting wind of the respondents submission founded upon the objections to the award.

10. One of the submissions of the appellant raised in I.A. No.9046/2010, which was also disposed of by the impugned order, was that the petition be transferred to the District Court as the jurisdiction in the matter is less than Rs.20 lacs. The learned Single Judge has considered the said contention and rejected the same by holding that the claim made by the

appellants before the arbitral tribunal was more than Rs.30 lacs and consequently, this Court had jurisdiction in the matter. No submission has been made by the appellant to challenge the said finding before us.

11. The issue with regard to the cases in which the Court would accept accord and satisfaction, and thus hold that the arbitration agreement does not survive have been dealt with in the decision of the Supreme Court in ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267***. The Supreme Court, in this decision, held as follows:

“52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the Conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no claim certificate/full and final receipt. After the contract is

discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter”. (emphasis supplied)

12. More recently, a Division Bench of this Court while dealing with two cross appeals, titled, *The Oriental Insurance Co. Ltd V. Mercury Rubber Mills*, reported as 2012 (127) DRJ 650, authored by one of us (Sanjay Kishan Kaul, J) had the occasion to deal with the issue of accord and satisfaction. The Court considered various earlier pronouncements of various High Courts and the Supreme Court. We are guided by the principles noticed therein as well.

13. As noticed herein above, in the present case, the parties entered into the settlement on 28.04.1989. This settlement, on its plain reading, does not show the exercise of any coercion or duress upon the appellant. In fact, it shows that the appellant negotiated with the respondent with regard to deductions to be made on account of defective work. In para 4 (v), the appellant agreed to a deduction of Rs.1,07,301.50/- against the bill No.1126 dated 12.01.1989 for Rs.18,33,954.60/-. This settlement also records as to how much amount has already been released i.e. Rs.15,12,000/-. It also reflects the various other deductions to be made on account of retention

money, 2% income tax, 8% surcharge on income tax and 2% U.P. sales tax. Thereafter, an amount of Rs.1,07,301.50/- has been deducted as agreed between the parties leaving the net payable balance amount of Rs.1,37,911.50/-.

14. After about 2 ½ months of the recording of the aforesaid settlement, the respondent released an amount of Rs.2,05,724.13/- in full and final settlement. It would thus be seen that a larger amount was released than what was initially settled. Even at that stage the respondent clearly stated that the amount was being paid in full and final settlement, and the same was also received by the appellant in full and final settlement.

15. The appellant, it appears, invoked the arbitration agreement only thereafter. In our view, in the light of the aforesaid facts coupled with the pronouncement of the Supreme Court in *Boghara Polyfab* (supra), there is absolutely no error in the decision of the learned Single Judge in concluding that there was no surviving disputes remaining between the parties which could be referred to arbitration in view of the full and final settlement of the accounts of the appellant.

16. Reliance placed by the appellant on the decision in *Prasun Roy v.*

Calcutta Metropolitan Development Authority & Anr., AIR 1988 SC 205, does not in any way advance the case of the appellant. In this case, the Supreme Court observed that a party which participates in the arbitration proceedings, despite being aware of the disability, cannot be permitted to question the arbitration proceedings only because the award has gone against the party. In the present case, the respondent had raised a preliminary objection in their written statement with regard to maintainability of the arbitration proceedings on account of accord and satisfaction. It was the obligation of the learned arbitrators to go into the said issue and determine the same. Merely because the arbitrators had the authority to make an unreasoned award, did not mean that they could have avoided the said fundamental issue which had a bearing on their jurisdiction.

17. In light of the aforesaid, we find no merit in this appeal and dismiss the same with costs quantified at Rs.20,000/-.

(VIPIN SANGHI)
JUDGE

(SANJAY KISHAN KAUL)
JUDGE

SEPTEMBER 17, 2012

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