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

Judgment reserved on: May 04, 2012

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Judgment pronounced on: May 07, 2012

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RFA(OS) 47/2012

KHODAY INDIA LTD. & ANR. Appellants

**Represented by: Mr. Gopal Jain, Mr. Ankur Sood and
Ms. R. Chitra, Advocates**

versus

ASTRA NETCOM INDIA PVT. LTD. Respondent

**Represented by: Mr. Jayant Nath, Senior Advocate
instructed by Mr. Lalit Asthana and
Mr. Udit Gupta, Advocates.**

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. We shall be referring to the appellant as 'Khoday' and to the respondent as 'Astra'. The two were bound as per agreement dated November 13, 2000, when Khoday was known as 'M/s Khodayss Systems Ltd.' and the respondent was known as 'Astra Netcom (P) Ltd. The agreement was extended by another agreement dated January 05, 2001, incorporating change of name of the companies. Undisputedly, the jurial relationship between the parties was governed by the agreement dated November 13, 2000.

2. The agreement envisaged Khoday setting up a business venture to provide Call Centre Services to clients world over and for which technical know-how had to be provided by Astra.

3. Scope of work of Astra stands detailed in the agreement and the reciprocal obligation of Khoday to pay remuneration also stands adumbrated in the agreement. The various stages at which payment had to be made stand listed.
4. A dispute arose between the parties which led Astra to institute a petition seeking winding up of Khoday before the High Court of Karnataka, which was registered as C.P.No.88/2004. It was pleaded therein by Astra that Khoday had failed to pay debts in sum of ₹4,63,02,424/-, in spite of statutory notice being served. Notice was issued in C.P.No.88/2004 requiring Khoday to respond.
5. Obtaining adjournments in the winding up petition, informing the learned Company Judge that parties were trying to arrive at a mutual settlement, the parties clinched a settlement and recorded the same in a written memorandum dated April 02, 2005.
6. The written memorandum records that Khoday admits liability to pay ₹2,35,60,006/- under the agreement dated November 13, 2000 as extended by the agreement dated January 05, 2001 and that Astra acknowledges having received ₹1,28,00,000/- as of the date when the agreement was executed. The agreement records that the balance amount payable with respect to the full and final settlement of the accounts, i.e. ₹1,07,60,006/- would be cleared by means of 17 post-dated cheques issued in sum of ₹6,50,000/- (16 cheques) and of ₹3,60,006/- (1 cheque) over the next 17 months.
7. Needless to state, Astra withdrew C.P.No.88/2004 thereafter.
8. The 17 post-dated cheques were payable on the 15th day of each calendar month commencing from the month of April

2005 and ending on the 15th day of the month of August 2006. The cheques were dishonoured when presented for payment on various dates between the month of December 2005 till June 2007 and were replaced by demand drafts issued from time to time totaling ₹62,00,000/- and in this manner ₹45,60,006/- remained outstanding.

9. Astra instituted CS(OS) No.1367/2010 claiming decree in sum of ₹45,60,006/- together with pendente lite and future interest till realization @ 24% per annum.

10. On being served with the summons for settlement of issues in the suit, Khoday entered appearance and filed a written statement admitting the facts pleaded in the plaint, save and except to the validity of the settlement agreement dated April 02, 2005; alleging that under threat of winding up, Khoday had to buy peace and execute the settlement agreement. It was pleaded that no money was payable to Astra inasmuch as Astra had failed to comply with its obligations under the agreement dated November 13, 2000 as amended, due to change of name of the company, vide agreement dated May 05, 2001. In plain legal language, Khoday pleaded that it was coerced into signing the agreement dated May 01, 2001.

11. I.A.No.1902/2011 was thereupon filed by Astra praying that a decree be passed in its favour under Order XII Rule 6 of the Code of Civil Procedure. Astra highlighted that having admitted to have signed the settlement agreement dated April 02, 2005, the plea that Khoday had not to pay any amount to Astra on the strength of the allegation that the agreement dated April 02, 2005 was the result of a pressure brought upon it by Astra in the form of C.P.No.88/2004 being filed was a plea not available to be pleaded by way of defence by Khoday. It

was highlighted that if the plea of having executed the agreement as a result of undue pressure being not available to Khoday, there was no defence remaining and on account of the admissions made qua the remainder, the suit needs to be decreed on admission.

12. The learned Single Judge has concurred with Astra.

13. Now, Khoday does not dispute the fact that pertaining to the agreement dated November 13, 2000, there was a serious dispute between the parties and Astra had laid a claim in sum of ₹4,63,02,424/- and alleging inability to pay as also it being a debtor, i.e. winding up of Khoday was sought under C.P.No.88/2004. It is also not disputed by Khoday that during the pendency of the winding up petition, parties negotiated and recorded a settlement agreement dated April 02, 2005 as per which it was agreed that Khoday accepts Astra's claim to be paid ₹2,35,60,006/- out of which ₹1,28,00,000/- was paid, requiring ₹1,07,60,006/- to be paid. Khoday also admitted having paid ₹62,00,000/- to clear ₹1,07,60,006/- after the settlement agreement dated April 02, 2005 was executed.

14. The question therefore would arise: *Whether in view of these admitted facts, is it permissible for Khoday to raise the plea that it signed the settlement agreement under pressure of C.P.No.88/2004 ?*

15. It assumes importance to note that C.P.No.88/2004 was pending when parties started negotiating and during negotiations Khoday paid ₹85,00,000/- to Astra in six installments, in sum of ₹20,00,000/-, ₹20,00,000/-, ₹15,00,000/-, ₹9,00,000/-, ₹6,00,000/- and ₹15,00,000/- on various dates between December 02, 2004 and April 02, 2005. It also assumes importance that acknowledging liability to further pay

₹1,07,60,006/-, Khoday issued 17 post-dated cheques and since the cheques were dishonoured, Khoday replaced nearly 60% of the payment by tendering demand drafts in sum of ₹62,00,000/- The dates when this sum of ₹62,00,000/- was paid is between the month of December 2005 and June 2007.

16. This admitted conduct of Khoday has to be kept in mind while deciding: Whether the plea that the settlement agreement was the result of a threat is available to Khoday?

17. Now, a legal proceeding instituted by a party cannot be called a threat amounting to coercion or undue pressure, compelling the opposite party to do something which it would ordinarily not have done.

18. Right or wrong, Astra was entitled to move the Company Court seeking winding up of Khoday, if Astra could make out a case for Khoday to be wound up. It was open to Khoday to oppose the winding up petition. It was for Khoday to decide whether it had a good defence to oppose the winding up petition. It was open to Khoday to charter a course of negotiated settlement. Khoday opted for the latter. Astra withdrew the winding up petition. During the pendency of the winding up petition, when parties were negotiating, as noted hereinabove, Khoday tendered payment in sum of ₹85,00,000/- to Astra on dates between December 02, 2004 and April 02, 2005. It acknowledged liability to pay ₹2,35,60,006/-. Astra acknowledged having received ₹1,28,00,000/-. Both parties thereafter recorded that balance outstanding is ₹1,07,60,006/-. Khoday tendered 17 post-dated cheques to clear the amount. As and when the date on which cheque(s) could be presented reached, Astra presented the cheque(s). On being dishonoured, Khoday replaced the same with demand drafts, and in this

manner cleared further liability in sum of ₹62,00,000/- from the acknowledge liability in sum of ₹1,07,60,006/- recorded as payable in the settlement agreement dated April 02, 2005.

19. Khoday's conduct till June 2007 with respect to the settlement agreement dated April 02, 2005 was without a whimper of it being coerced, under threat of winding up petition, to have executed the agreement.

20. Learned counsel for Khoday heavily relied upon a decision of the Supreme Court reported as (2010) 10 SCC 553 IBA Health (India) Private Limited vs. Info-Drive Systems Sdn.Bhd. to urge that the Supreme Court frowned upon Company Courts becoming recovery agencies and thus cautioned Company Courts to be guarded against vexatious abuse of its process; to bring home the point that C.P.No.88/2004 filed by Astra was a threat to extract money.

21. A perusal of the decision of the Supreme Court would reveal that the winding up petition in said case was premised upon a deed of settlement dated December 19, 2003 and a compromise entered into between the parties on March 18, 2006. The decision would reveal that the learned Company Judge before whom the winding up petition was filed recorded a prima facie conclusion that under the deed of settlement and the compromise, IBA Health (India) Pvt. Ltd. had undertaken to secure future payments with respect to a company incorporated in Malaysia known by the name M/s Solutions Protocol Sdn. Bhd.

22. Highlighting, in paragraph 20 that a dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived, the Supreme Court analyzed the terms of the deed of settlement and the compromise deed and recorded a prima facie finding, in

paragraphs 26 to 29, that there was a serious bona fide dispute with respect to future payments to be made by M/s Solutions Protocol Sdn. Bhd. and this in turn impacted the liability of IBA Health (India) Pvt. Ltd. It is apparent that the Supreme Court was concerned with a settlement agreement which had a futuristic commercial operation between the parties. The Supreme Court did not hold that the settlement agreement was the result of a pressure brought by a pending Court proceeding. In fact, the Supreme Court noted that the winding up petition was a subsequent action after the settlement agreement and the compromise agreement had been entered into. The Supreme Court was concerned with the issue: *Whether prima facie case was made out to issue a notice to the appellant before it with respect to the dispute emanating from the futuristic application of the settlement and the compromise agreement?*

23. In the instant case, the facts would evidence that pertaining to the agreement dated November 13, 2000, there were disputes. The parties had terminated their commercial dealings and Astra had a claim in sum of ₹4,63,02,424/-. It sought winding up of Khoday vide C.P.No.88/2004. During pendency of the winding up petition, the parties explored the possibility of a settlement. During discussions, Khoday paid ₹85,00,000/-. Settlement agreement dated April 02, 2005 was recorded in writing. Futuristic payments, crystallizing further liability to pay ₹1,07,60,006/- were tendered. Post-dated cheques were issues. On being dishonoured, cheques worth ₹62,00,000/- were replaced by demand drafts in between the month of December 2005 till the month of June 2007. There

was not even a whisper by Khoday that it was compelled to sign the settlement agreement.

24. On the issue of accord and satisfaction being the result of undue pressure, and whether at all the said issue can be urged at a Civil Forum; noting that the decisions in question pertain to the domain of the law of arbitration, the Supreme Court had an occasion to consider the matter in five decisions being:-

- (i) AIR 1988 SC 1172 Union of India vs. L.K.Ahuja
- (ii) 1994 (Suppl) 3 SCC 126 M/s B.K.Ramaiah & Co. vs. Chairman & Managing Director, NTPC
- (iii) 1995 (Suppl) 3 SCC 324 Nathani Steels Ltd. vs. Associated Constructions
- (iv) 2000 (8) SCC 1 Union of India vs. Popular Builders, Calcutta
- (v) (2000) 10 SCC 178 Jayesh Engineering Works vs. New India Assurance Com. Ltd.

25. In L.K.Ahuja's case, the dispute pertaining to a claim was sought to be referred to arbitration. It was opposed on the strength that the contractor had issued a No-Due Certificate when it received payment under the final bill. The owner of the work pleaded that in view of the settlement, no arbitrable dispute arose. The Supreme Court opined that whether or not there was a binding settlement, is itself an arbitrable dispute.

26. Similar was the opposition to a dispute in B.K.Ramaiah's case (supra). The dispute was not referred to arbitration. The matter reached the Supreme Court. Noting that before the contractor had recorded full and final settlement, the dispute had surfaced between the parties and there were deliberations before the certificate was issued, the Supreme Court held that

plea pertaining to coercion is an obvious afterthought and thus declined to refer the dispute to arbitration.

27. In the third decision, being Nathani Steels Ltd. (supra), noting that before the final settlement agreement dated December 28, 1990 was executed, the parties had discussed the dispute which had arisen, the Supreme Court held that no arbitrable claim survives.

28. Similar was the view taken in Popular Builders' case.

29. In the fifth decision i.e. Jayesh Engineering's case (supra), the dispute was not referred to an arbitrator.

30. Noting the aforesaid five decisions of the Supreme Court, in the decision reported as 2003 (104) DLT 469 M/s Jain Refractory Erectors vs. Cement Corporation of India, a Division Bench of this Court opined as under:-

" What would be the legal position pertaining to the issue of accord and satisfaction culled out from the aforesaid five judgments of the apex court? The observations made in L.K.Ahuja's case have been explained in P.K.Raimaia's Case, followed in Nathani Steel's case and reiterated in Jayesh Engineering Works. If there is a considered endeavour made by the parties to settle the dispute and the dispute is settled between the parties resulting in an accord and satisfaction of the dispute, no dispute would subsist thereafter and as a result there would be no existing arbitrable dispute capable of being referred to arbitration."

31. On the subject of accord and satisfaction, in the decision reported as 2003 (106) DLT 708 Jindal Aromatic vs. South Coast Spices Exports Pvt. Ltd, noting various decisions on the subject matter of accord and satisfaction, a Division Bench of this Court observed as under:-

"The legal position which emerges from the aforesaid judgment is that an accord discharges the

performance of obligations under the contract. A dispute pertaining to satisfaction furnishes a fresh and independent cause of action, until and unless it is provided that the performance of the satisfaction was a condition precedent for discharge under the contract. If promise is received in satisfaction, it is good satisfaction, but if the performance and not the promise is intended to operate in satisfaction, then there will be no satisfaction without performance. Wherever there is an accord, obligations under the original contract would be discharged until and unless it is specifically provided that the performance of the satisfaction would discharge the obligations under the contract."

32. For the facts which we have highlighted hereinabove which evidence that the dispute between the parties pertaining to the agreement dated November 13, 2000 was simmering when C.P.No.88/2004 was filed seeking winding up of the appellant, upon notice being served, the parties started negotiating. During negotiations, appellant paid ₹85,00,000/- on various dates to the respondent, it becomes apparent that there was a free and fair discussion between the parties to try and resolve the dispute. The parties settled the dispute without any undue pressure or coercion and recorded the same in a written agreement.

33. The settlement agreement dated April 02, 2005 notes that as against total claim in sum of ₹4,63,02,424/-, Astra agreed to reduce the same to ₹2,35,60,006/- and having received ₹1,28,00,000/- obtained an acknowledgement of liability by Khoday to pay ₹1,07,60,006/-. This amount had to be paid by 17 post-dated cheques spread over 17 months. More than 60% of the liability was cleared by Khoday by paying ₹62,00,000/- to Astra.

34. There was not even a whisper of protest.

35. The law declared by the Supreme Court and as crystallized by a Division Bench of this Court in Jain Refractory Erectors' case squarely applies against Khoday and thus we concur with the view taken by the learned Single Judge.

36. The appeal is accordingly dismissed with costs payable by Khoday to Astra.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 07, 2012
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