IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. No. 15 of 2014

ASCENT CONSTRUCTION PVT. LTD. ………… Petitioner
Through: Mr. Vishal Khattar and
Mr. Tileshwar Prasad, Advocates.

versus

PARSVNATH BUILDWELL PVT. LTD. ..... Respondent
Through: Mr. Vijay Nair with
Mr. Rajat Joneja and
Ms. Neeharika Agarwal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
7.01.2015

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (‘Act’) filed by Ascent Construction Private Ltd. (‘ACPL’) seeking reference of the disputes that has arisen between the parties to arbitration.

2. The background to the present petition is that the Respondent Parsvnath Buildwell Pvt. Ltd. (‘PBPL’), a subsidiary of Parsvnath Developers Limited, entered into an agreement dated 10th May 2011 with ACPL for execution of certain works at Parsvnath Exotica, Mohan Nagar, Ghaziabad, UP. The value of the contract on the basis of the bill of quantity was Rs. 21,70,76,177. Clause 4.7.2.1 of the 'conditions of contract', which were treated as part of the agreement, is the arbitration clause.

3. In the present petition under Section 11 of the Act, it is stated by ACPL that they sent notice dated 8th October 2013 to the Respondent PBPL informing that they had already appointed an Arbitrator in terms

of the agreement and called upon PBPL to nominate its Arbitrator in terms of clause 4.7.2 of the agreement. It is stated that PBPL failed to appoint any Arbitrator on its behalf. Para 7 of the petition sets out the details of the disputes that had arisen between the parties. Para 8 of the petition gives the value of the subject matter of the disputes and states that the cause of action had arisen in Delhi.

4. The petition was filed on 20th December 2013 along with four documents i.e. the copy of the agreement, copy of the notice dated 28th October 2013, copy of the proof of service and a copy of the board resolution. Notice was issued in the petition on 13th January 2014. In response to the notice, a reply was filed by PBPL on 24th May 2014 in which, *inter alia*, in para 5 of the preliminary submissions it was stated as under:

> "5. The Petitioner herein has approached this Hon'ble Court with a malafide intent as documents relevant for the adjudication of the present 'lis' have not been placed on the record of this Hon'ble Court by the Petitioner. It is submitted that there has been protracted correspondence exchanged between the parties in the subject matter and the Petitioner herein has, after accepting the full and final settlement, has also received the amount accepted as fully and finally as payable to the Petitioner. The Petitioner herein, after receipt and realization of the full and final settlement amount, has illegally invoked the arbitration clause in order to attempt and gain wrongfully from the Respondent herein. It is submitted that the Petitioner herein had in a meeting dated 26th February 2013 agreed to a full and final payment of an amount of Rs.47,10,230 (Rupees Forty Seven Lakh Ten Thousand Two Hundred and Thirty Only) and has thereafter also received the aforementioned full and final amount. In view of the aforementioned, it is clear that the contract has been fully and finally discharged by performance of all obligations and accord and satisfaction and the claims sought to be raised by the Petitioner by virtue

> of the present petition is therefore not liable to be referred to arbitration. A copy of the reconciliation sheet prepared in the meeting on 26th February 2013, wherein the Petitioner has acknowledged the aforementioned amount of Rs.47,10,230 (Rupees Forty Seven Lakhs Ten Thousand Two Hundred and Thirty Only) as full and final amount payable to the Petitioner is annexed hereto and marked as Annexure R-2. Copy of Payment Proof is annexed hereto and marked as Annexure R-3."

5. It was further stated in para 8 of the preliminary submissions as under:

> "8. That the present petition is also liable to be dismissed for non-disclosure of true and correct facts before this Hon'ble Court. The Petitioner herein has concealed from this Hon'ble Court, the fact that an amount of Rs.47,10,230 (Rupees Forty Seven Lakh Ten Thousand Two Hundred and Thirty Only) has already been received by the Petitioner in the subject matter after issuance of full and final discharge and the petition is liable to be dismissed on this ground alone."

6. Copies of the documents and correspondence referred to were also enclosed with the reply. It is after the aforementioned reply was filed that on 16th September 2014 ACPL filed a list of documents including the emails exchanged between the parties both prior to and after the aforementioned 'settlement' between the parties on 26th February 2013.

7. In the rejoinder filed by ACPL on 19th December 2014 it was asserted in reply to para 5 of the preliminary submissions raised by PBPL as under:

> "5. That the contents of Para No.5 are wrong. It is vehemently denied that the Petitioner has approached this Court with malafide intentions. The relevant documents have been placed on record by the Petitioner and additional documents were also filed

which were taken on record by the Hon'ble Court. It is pertinent to mention that it was only due to the coercive and unprofessional tactics adopted by the Respondent that the Petitioner was forced to accept the said amount under duress but not as full and final amount as alleged by the Respondent. The amount of Rs.47,10,230 (Rupees Forty Seven Lakh Ten Thousand Two Hundred and Thirty Only) was accepted by the Petitioner due to acute cash crunch as the Petitioner was unable to off load their huge market liabilities and it had no option than to accept the offered amount under duress. The Petitioner never agreed to this arbitrary amount which is not even half of the outstanding amount payable by the Respondent. The Petitioner has rightly and with bonafide intentions invoked the arbitration clause in order to claim and recover the outstanding amount from the Respondent to which it is lawfully entitled to. It is denied that the contract has been fully and finally discharged as the Respondent is obligated to clear his dues and the claims which the Petitioner seeks to make are correct and legitimate therefore liable to referred to arbitration. The Petitioner has filed documents pertaining to the correspondence exchanged between the parties both prior and post to 26th February 2013 and the same would reveal that the Respondent is in breach of the terms of contract from starting. It is submitted that the said amount was never intended to be the full and final amount as the Petitioner was not conveyed at that time that the Respondent shall not be continuing the said project with it."

8. As regards the preliminary objection in para 8 it is stated as under:

> "8. That the contents of Para No.8 are wrong. It is denied that the petition is liable to be dismissed for non-disclosure of true and correct facts. The Petitioner has placed all material facts relevant to this petition before the Hon'ble Court. It is craved that the relevant contents in the aforesaid paras be read as part and parcel of this para as well."

9. Although it is not denied by ACPL that it received the amount in

terms of the settlement reached on 26th February 2013, it asserted in its rejoinder to preliminary submission of PBPL in para No.6 of the reply that "there was no settlement made between the parties as the Petitioner had accepted the aforementioned amount under duress and not as full and final payment." It further submitted that even "the said payment as committed by the Respondent was not paid within the agreed time of one week from 26th February 2013 and the Petitioner was pushed further to financial burden." It also asserted that "even after the said meeting there were dues under various heads which were payable to the Petitioner by the Respondent and the same remain unpaid even till date."

10. What emerges from the above rejoinder of ACPL is that there was indeed a settlement reached between the parties on 26th February 2013, a copy of which was enclosed with the reply of PBPL. The said document contains the endorsement of ACPL: "accepted as full and final settlement." There is no explanation offered by ACPL as to why this fact was not stated in the petition filed before the Court in the first instance.

11. Mr. Vishal Khattar, learned counsel for ACPL, referred to the notice dated 28th October 2013 sent by ACPL to PBPL where, in para 4, a reference is made to an earlier letter dated 24th August 2013 addressed by ACPL to PBPL for release of the outstanding amount due and payable. According to Mr. Khattar the said letter dated 24th August 2013 referred to the settlement between the parties on 26th February 2013. However, this fact is not mentioned in the petition under Section 11 of the Act. Further, neither a copy of the letter dated 24th August 2013 or the reply sent thereto by PBPL on 6th September 2013 have been placed on record by ACPL.

12. The fact remains that the Court has been offered no convincing explanation by ACPL as to why the vital fact about there having been a settlement between the parties on 26th February 2013 was not disclosed by ACPL.

13. Mr. Khattar referred to the decision of the Supreme Court in ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd. AIR 2009 SC 170*** to urge that ACPL was compelled under duress and coercion to agree to receive Rs. 47,10,230 in full and final settlement of the dues owed to it by PBPL. The actual dues, according to him, were more than double that amount at that stage. He states that although it is not expressly stated in the document dated 26th February 2013, but there was an implied understanding between the parties that the amount should be paid within one week. Since the payment of the settled amount was not made within one week but in instalments ending on 6th July 2013, ACPL could lodge a protest only thereafter. It is accordingly submitted that the so-called settlement cannot be held against ACPL to deny it the right to seek a reference of the disputes to arbitration. It is further submitted that the question whether in respect of the 9 items mentioned in the document dated 26th February 2013 there has been a full and final settlement can also be referred to the Arbitrator for adjudication.

14. Mr. Vijay Nair, learned counsel for PBPL, on the other hand, submitted that there was no justification for ACPL suppressing material facts. He submitted that it was PBPL which placed the relevant documents on record along with its reply. He denied that there was any understanding between the parties that the payment of the settlement amount would be made within one week. Referring to the statement of accounts enclosed as Annexure R-3 to the reply, Mr. Nair pointed out

that pursuant to the settlement between the parties, payments were made to ACPL by PBPL in instalments on 31st March 2013, 18th June 2013 and lastly on 8th July 2013. It is submitted that after waiting for more than a month thereafter on 24th August 2013, for the first time, ACPL wrote to PBPL claiming that "due to acute cash crunch we were not able to off load the huge market liabilities and we had no option than to accept the offered amount under duress but not as full and final settlement." The said plea was therefore belated and an afterthought. Referring to the decisions in ***Boghara Polyfab Pvt. Ltd.*** (supra) ***Union of India v. Master Construction Co. (2011) 12 SCC 349*** and the decision of this Court in ***Essar Projects (India) Ltd. v. Gail (India) Ltd.*** (decision dated 21st April 2014 in Arb. P. No. 424 of 2012), Mr. Nair submitted that even otherwise there has been no material placed on record by ACPL to show that it was subject to coercion or duress by PBPL at any time prior to the settlement. It is submitted that ACPL took a conscious business decision to accept the reduced amount in full and final settlement of its claims.

15. The Court is not inclined to entertain the submissions of ACPL for the reason that it has not come to the Court with clean hands. It has suppressed the material fact concerning the settlement between the parties on 26th February 2013. It has also failed to produce with the petition the said document and the correspondence between the parties. It was PBPL which placed the relevant documents on record with its reply. Even if, according to ACPL, the said settlement was under duress, there was no excuse for ACPL not mentioning it in the petition. It was an important and relevant fact upon which the decision in the petition under Section 11 of the Act was dependent. The right course for ACPL would have been to place on record the complete facts and then make out a case why the disputes should be referred to arbitration

notwithstanding the settlement between the parties. The assertion by ACPL in its rejoinder that all the relevant correspondence with PBPL were placed on record with its petition in the first instance is false and unacceptable to the Court.

16. A party coming to the Court seeking relief, in the context of Section 11 of the Act, has to place on record the complete facts and relevant documents to enable the Court to arrive at a proper decision. ACPL has failed to comply with this basic requirement. Consequently, the Court is not persuaded to consider its plea that the question whether there was indeed a full and final settlement of the disputes between the parties, or whether ACPL was subject to duress or coercion, should be referred to arbitration.

17. The petition is dismissed.

S. MURALIDHAR, J.

JANUARY 7, 2015
dn