

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 5 of 2016 (O&M)

Date of Decision: 22.07.2016

G.S.Developers & Contractors Pvt. Ltd.

..Petitioner

Versus

Concepts International India LLP.

..Respondent

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.

Present : Mr. Mohit Chaudhary, Advocate and
Mr. Kunal Sachdeva, Advocate, for the petitioner.

Mr. Sanjeev Sagar, Mr. Karan Bhardwaj and
Mr. Sourabh Goel, Advocates, for the respondent.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE

This is an application filed under section 11 of the Arbitration & Conciliation Act, 1996 (for short 'the Act') for the appointment of an Arbitrator.

2. The respondent invited tenders for civil construction works. Clause 52 relates to settlement of disputes by way of arbitration. Clause 52.3 in so far as is relevant reads as under:-

“52.3 Subject as aforesaid in clauses 52.1 and 52.2, all disputes and differences whatsoever, which shall at any time hereafter arise between the parties here touching or concerning this agreement or its interpretation of effect or as to the rights, duties, obligations and liabilities of the parties hereto or either of them under or by virtue of this Agreement or otherwise as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to the Arbitration in accordance with the provisions of Arbitration & Conciliation Act, 1996. The parties agree that the reference of the disputes and differences between the

parties would be made to the Sole Arbitrator, to be appointed jointly.

The jurisdiction and arbitration venue shall be at Gurgaon. The procedure for the arbitration shall be determined by the Arbitrator. Costs of such arbitration shall be equally shared between the owner and the contractor. The parties undertake to abide and remain bound by the award of the Arbitrator so rendered.”

3. The petitioner’s tender was accepted and the parties entered into an agreement dated 30.10.2010. Disputes and differences arose between the parties. The petitioner by a letter dated 05.04.2014 claimed that an amount of about ₹ 8.72 crores was due and payable by the respondent to it and invoked the arbitration and settlement clause 52 as also clause 32.5. The question that arises for consideration is whether the arbitration agreement survives in view of what transpired between the parties thereafter.

4. A letter dated 10.12.2014 was addressed by the petitioner to the respondent with the caption “*Final Settlement of Claims*”. The subject of the letter is ‘*Full and final settlement of claim for the execution of the said contract*’. The letter refers to various meetings held between the parties to resolve the issue relating to the petitioner’s claim and “*the payment finally agreed to be payable*”. The letter further states as under:-

“After detailed discussions and deliberations, it has been finally agreed that total sum of Rs.218.15 lacs is quite reasonable and payable. The details of payment found to be payable against the various claims raised by us are brought out as under:-

Sr. No.	Description of claims	Amount claimed by GSDPL (in lacs)	Approved /Payable (in lacs)	Cheque amount being paid now	Cheque No.	Balance payable Due
1.	Final Bill (Full & Final)	75.38	67.07	14.00 32.22	000172 000166	20.85
2.	Service tax on owners supplied stocks & interest on till date Service tax on owners supplied stocks.	42.95 22.37	42.95 7.73	48.51	000081	2.17
3.	Variation in accounts	5.00	0.00	0.00	----	0.00

4.	Co-ordination charges for work got done by other agency and taken out of GSDPL scope (façade work i.e. 5% of rs. 17163767/- as per schedule of quantities of agreement of façade work)	25.90	8.50	8.50	000167	0.00
5.	Variation in labour & material of work done after stipulated period (3cr) labour+material + fuel	158.04	18.00	18.00	000168	0.00
6.	Retention	37.91	37.90	37.90	000169	0.00
7.	Amount of resale of scrap	14.72	0.00	0.00	----	0.00
8.	Compensation for 9.5 months of delay	340.50	0.00	0.00	----	0.00
9.	Idealing charges for Aug.2010 to Dec.2010 (on account of court order restricting water from borewells and installation of STP during construction) & Miscellaneous expenses.	156.29	25.00 11.00	25.00 11.00	----	0.00
			218.15	195.13		23.02

Although we have suffered a great financial loss considering the view point of Concept International India Management and to maintain our good relations with the company, we hereby agree to accept the above amount (i.e. Rs.218.15 lacs) towards full and final settlement.

With reference to the final settlement, we undertake that:-

1. We accept measurements and bill payment certificate dated 29.09.2014 as full and final.
2.
3. We will not raise any further/new claim and also shall not invoke any arbitration clause or go for any litigation in any court of law being governed by law of land.
4.
5.
6.
7.
8.

In view of the above, you are, therefore, requested to kindly settle our final bill and release the agreed payments immediately.”

5. The respondent in turn addressed a letter also dated 10.12.2014 which expressly refers to the petitioner’s letter dated 10.12.2014. The letter called upon the petitioner to acknowledge the receipt of the cheques mentioned therein “*against the full and final settlement claim for execution ofthe work*”. The petitioner

endorsed the receipt of the cheques at the foot of the letter. Seven cheques are dated 13.11.2014 and one cheque is dated 05.09.2014. The dates of the cheques, therefore, are before the dates of the said letters dated 10.12.2014. This is probably because the cheques were prepared in anticipation of the settlement to be arrived at.

6. The said cheques were dishonoured upon presentation.

7. The learned counsel appearing on behalf of the petitioner contended that the fresh agreement stood frustrated on account of the cheques having been dishonoured. The respondent's contention on the other hand is that it was agreed between the parties that the payment would be made by 31.03.2015 and that the petitioner was not entitled to present the cheques before that date.

8. In this regard it is important to note that part payments were made on 16.12.2014, 02.01.2015, 09.01.2015, 16.01.2015, 29.01.2015 and 16.02.2015 in the sum of ₹ 45.11 lacs, 20 lacs, 10 lacs, 10 lacs, 10.20 lacs and 10.00 lacs respectively aggregating to ₹ 105.31 lacs out of the total amount of ₹ 2,18,15,000/- payable under the fresh agreement. The petitioner accepted the same unconditionally. Even assuming that the petitioner's case that the payment was to be made immediately upon the execution of the letter dated 10.02.2014 is correct and that the time for payment was of the essence of the contract it ceased to be so on account of the petitioner having accepted the part payment unconditionally. This militates against the petitioner's case that payment was to be made immediately.

9. On 16.02.2015, the petitioner addressed a letter to the respondent stating that the cheques had been dishonoured on 12.12.2014 and again on 10.02.2015 for the reasons that the funds were insufficient.

The petitioner stated that as per the final settlement ₹ 195.13 lacs was to

be released immediately and the balance amount of ₹ 23.02 lacs was to be released within a week. The petitioner further stated that the same frustrated the settlement agreement rendering it null and void. It is important to note that the petitioner nevertheless requested the respondents "one last time to transfer the aforesaid balance amount of ₹ 1,13,03,861/-" as a one time payment by 20.02.2015. The letter concluded by stating that if the respondent failed to make the payment it would have no option but to adopt appropriate measures to safeguard its interest.

10. Thus, in any event, the time to make the payment admittedly stood extended at least to 20.02.2015. As I will now demonstrate the entire payment was offered by 31.03.2015.

11. The respondent on the very next day i.e. 17.02.2015 *inter-alia* stated that the parties had agreed that the payment under the settlement was to be made on or before 31.03.2015. On 30.03.2015, the respondent paid a further amount of ₹ 37.16 lacs. Further, by a letter dated 11.06.2015 addressed to the petitioner, the respondent referred to the telephonic discussions held and the e-mails sent by it to the petitioner on 30.03.2015, 01.04.2015, 10.05.2015 and 09.06.2015 respectively requesting it to collect the demand draft for the balance sum of ₹ 50.68 lacs. The respondent had infact arranged the demand draft dated 30.03.2015. These e-mails have not been denied. The fact that the demand draft dated 30.03.2015 was issued is admitted. That the petitioner did not accept the demand draft or the cheque issued in lieu thereof on 27.07.2015 is irrelevant. The entire amount under the settlement was paid and in any event offered by 31.03.2015.

12. Even assuming that the petitioner's case that the payment was to be made immediately upon execution of the fresh agreement is

accepted it would make no difference so far as this application for appointment of an Arbitrator is concerned. The original agreement stood substituted and the rights of the parties stood crystallized in terms of the fresh settlement contained in the petitioner's letter dated 10.12.2014. Thus, if there was a delay in payment, the petitioner's right, if any, would be under the fresh agreement which does not contain an arbitration agreement. The arbitration agreement contained in the original agreement was not applicable to the fresh agreement.

13. The contention that the fresh agreement was entered into fraudulently is totally unsustainable and an afterthought. The contention is based on the payments not having been made immediately upon the execution of the settlement agreement dated 10.12.2014. As I have already noted, the petitioner in any event accepted substantial payments even thereafter. There is nothing whatsoever to even remotely indicate that the agreement was entered into fraudulently or on a fraudulent misrepresentation. The fresh agreement cannot, therefore, be said to be void. Even assuming that it was fraudulent, it would be voidable at the instance of the petitioner. The petitioner not only did not avoid the agreement but acted on it by accepting payments even after it discovered the alleged fraud.

14. As held by the Supreme Court in *National Insurance Company Limited v. Boghara Polyfab Private Limited* 2009(1) Supreme Court Cases 267 whether the parties have concluded the contract/transaction by recording satisfaction of their material rights and obligations or by receiving final payment without objection is an issue which may be decided in an application under section 11 of the Act. Thus even though a reference to this question may be made before the Arbitral Tribunal, the issue can also be decided in an application under section 11 of the Act.

15. As the documents are admitted it is a fit case for the Court to choose to decide the issue in this application under section 11 of the Act.

16. In the circumstances, the petition is dismissed.

22.07. 2016
'ravinder'

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

To be referred to the reporter	√Yes	No.
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