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

+ **ARB.P. 347/2016**

JINDAL STAINLESS LIMITED

..... Petitioner

Through: Mr Abhimanyu Bhandari and Ms
Kartika Sharma, Advocates.

versus

DAMCO INDIA PRIVATE LTD.

..... Respondent

Through: Mr Virender Ganda, Senior Advocate
with Mr Vipul Ganda, Mr Mohit Oommen and Mr
Raghav Kakkar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

14.12.2016

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VIBHU BAKHRU, J

1. M/s Jindal Stainless Limited (hereafter 'JSL') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in connection with a contract dated 01.07.2013 (hereafter 'the Logistics Contract').

2. JSL had entered into the Logistics Contract with respondent (hereafter 'DAMCO') to provide inbound and outbound logistics and supply chain management services for import of raw materials and export of stainless steel coils, plates and sheets, etc. from its site. The term of the Logistics Contract was for a period of two years: 01.07.2013 till 30.06.2015.

3. JSL alleges that it was coerced to make a payment of ₹12.38 crores to DAMCO for release of the shipments and documents. It is stated that the said payment was made on 11.03.2015 under duress. JSL claims that on reconciliation of accounts, it was observed that JSL had made an excess payment of ₹3,36,84,814/- to DAMCO. It is further stated that JSL sent several e-mails for recovering the aforesaid amounts but DAMCO did not respond to any of the said e-mails. It is further alleged that on 21.05.2015, DAMCO had de-stuffed 469 tons of Cargo at Vizag Container Freight Station, which was not delivered to JSL.

4. JSL claims that it signed a No Due Certificate (NDC) on 12.03.2015, after succumbing to the pressure of DAMCO.

5. Thereafter, on 28.10.2015, JSL issued a notice of demand calling upon DAMCO to hand over the cargo of 469 tons of material having cumulative value of ₹5,60,34,123/- and to refund the excess amount of ₹3,36,84,814/- received by DAMCO from JSL. However, DAMCO did not respond to the aforesaid notice of demand. Thereafter, JSL issued a notice dated 07.01.2016 invoking the arbitration clause and called upon DAMCO to consent for appointment of an arbitrator but DAMCO did not respond to the said notice either.

6. The Logistics Contract includes an arbitration clause, which is set out below:-

"24. DISPUTE RESOLUTION & ARRBITRATION:

Each of the parties herein agrees that in the event of any dispute or difference arising or occurring between the parties

in relation to or any matter arising out of or under this Contract, the parties shall attempt to resolve the same amicably within 30 days from the receipt of a notice of such dispute or difference, failing which it will be referred for arbitration to a sole Arbitrator to be mutually appointed by JSL and DAMCO. The arbitration shall be conducted as per the provisions of the Arbitration and Conciliation Act, 1996 as may be amended or re-enacted from time to time.

Services under the Contract shall be continued by DAMCO during the arbitration proceedings, unless otherwise directed in writing by JSL or unless the matter is such that the Services cannot possibly be continued until the decision of the Sole Arbitrator, as the case may be, is obtained. The Seat of arbitration shall be at New Delhi, India. The language of arbitration shall be English. The award of the sole arbitrator shall be final, conclusive and binding on the parties."

7. DAMCO does not dispute the Logistics Contract, however, submits that the said contract is no longer in existence and the arbitration clause has also perished by "accord and satisfaction". DAMCO claims that it had performed all obligations under the Logistics Contract as amended and a sum of ₹15,15,60,052/- was payable by JSL to DAMCO, which JSL had failed to pay. It is stated that after protracted discussions between JSL and DAMCO, a settlement arrangement was agreed between them in a meeting held on 17.02.2015. It is stated that as per the settlement agreement, DAMCO agreed to give a concession to the extent of ₹2,35,00,000/- to settle all pending issues raised by JSL including those in respect of loose cargo shortage and pending debit notes. It is stated that as against the sum of ₹12,80,60,052/-, JSL paid an amount of ₹12,38,00,000/- and DAMCO accepted the same in full and final settlement thereby providing a further concession of ₹42,60,052/-. It is stated that JSL executed the NDC and

simultaneously DAMCO also executed a NDC in favour of JSL.

8. Mr Bhandari, the learned counsel appearing for JSL submitted that the question whether the No Due Certificate (NDC) issued by JSL was obtained under duress and undue influence is a matter to be decided by the Arbitrator. He referred to the decision of the Supreme Court in **National Insurance Company Limited v. Boghara Polyfab Private Limited**: (2009) 1 SCC 267 in support of his aforesaid contention.

9. Mr Ganda, the learned counsel appearing for DAMCO countered the submissions made on behalf of JSL and submitted that No Dues Certificate issued by both the parties discharged the Logistics Contract and the arbitration clause being an integral part of the said contract also stood extinguished. He contended that NDCs constituted a separate and independent contract between the parties and the same did not include an arbitration clause. He relied upon the decision of the Supreme Court in **M/s Young Achievers v. IMS Learning Resources Pvt. Ltd.**: (2013) 10 SCC 535 support of his contention.

10. I have heard the learned counsel for the parties.

11. At the outset, it is necessary to observe that there is no dispute as to the existence of the arbitration clause. The only question raised is whether the disputes between the parties were settled by accord and satisfaction. In **National Insurance Company Limited v. Boghara Polyfab Private Limited** (*supra*), the Supreme court had - after referring to its earlier decision in **S.B.P. & Co.v. Patel Engineering. Ltd.and Anr.** : (2005) 8 SCC 618 - identified and segregated issues that come up for consideration in petitions

under section 11 of the Act, into three categories. The relevant extract is set out below:-

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are :

- (a) Whether the party making the application has approached the appropriate High Court.
- (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

- (a) Whether the claim is a dead (long-barred) claim or a live claim.
- (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

- (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for

final decision of a departmental authority and excepted or excluded from arbitration.

23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co.*, that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Whether allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.”

12. In the present case, the dispute whether the parties have concluded their contractual arrangement by accord and satisfaction - as noted in paragraph 22.2(b) of the decision in *National Insurance Company Limited v. Boghara Polyfab Private Limited* (*supra*) - falls into the category which the court may choose to decide.

13. It is also relevant to mention that there has been a material change in the Act by introduction of sub-section 6A in Section 11 of the Act, by virtue of the Arbitration and Conciliation (Amendment) Act, 2015. The scope of examination is now confined only to the existence of the arbitration agreement.

14. Thus, the only question that needs to be considered is whether there exists an arbitration agreement between the parties which in this case is not disputed. It may be possible that in some cases, the parties by a subsequent contract, nullify prior contract containing an arbitration clause. There may be cases where an arbitration agreement perishes by a subsequent contract between the parties. However, the dispute in the present case relates to whether the contract between the parties stood discharged by accord and satisfaction. This question, as explained by the Supreme Court in ***National Insurance Company Limited v. Boghara Polyfab Private Limited*** (*supra*) can be examined by an arbitral tribunal and it is not necessary for the Court to do so. Considering that the scheme of the Act is to minimise the role of courts, it would be expedient if the said issue is decided by the arbitral tribunal in the first instance.

15. The decision of the Supreme Court in ***M/s Young Achievers v. IMS Learning Resources Pvt. Ltd*** (*supra*) does not further the case of the respondent. In that case, the parties had entered into another agreement which novated/ superseded the earlier agreements. In the said case, the Supreme Court held that "*An arbitration clause in an agreement cannot survive if the agreement containing the arbitration clause has been superseded/novated by a later agreement*". It is important to note that Supreme Court also held that "*We are of the view that the high Court is right in taking the view that in the case on hand, is not a case involving assertion by the respondent of accord and satisfaction in respect of the earlier contracts....*" In the present case, the NDCs *prima facie* establish discharge of the Logistics Contract by accord and satisfaction.

16. The contention that the question as to the legality and the validity of the arbitration agreement must be decided by the Court while appointing an arbitrator is not sustainable. Plainly the earlier decisions to the said effect are no longer be applicable because by virtue of Section 11 (6A) of the Act, the role of the Courts while considering an application under Section 11 is now confined to examining the existence of the arbitration agreement.

17. Accordingly, Justice Sunita Gupta (Retired), a former Judge of this Court is appointed as the sole Arbitrator to adjudicate the disputes between the parties. The aforesaid appointment is subject to the necessary disclosure being made under Section 12 of the Act and the arbitrator not being ineligible under Section 12(5) of the Act.

18. The Arbitrator shall consider the controversy relating to accord and satisfaction in the first instance.

19. The petition is disposed of. No order as to costs.

DECEMBER 14, 2016
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VIBHU BAKHRU, J