**IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH**

**Civil Revision No.239 of 2012**
**Date of Decision**: 27.10.2017

Punjab State Industrial Development Corporation Ltd.
…..Petitioner

versus

M/s Bhatinda Cotton Traders …..Respondent

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

Present : Mr. Chetan Mittal, Senior Advocate with
Mr. Vikas Mohan Gupta, Advocate, and
Mr. Udit Garg, Advocate, for the petitioner.

Mr. Ashok Aggarwal, Senior Advocate with
Mr. Sanjeev Sharma, Senior Advocate with
Mr. Mukul Aggarwal, Advocate and
Mr. Shekhar Verma, Advocate,
for the respondent.

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**S.J.VAZIFDAR, CHIEF JUSTICE**

This is a civil revision petition to quash an order dated 12.11.2011 passed by the learned trial Court, Barnala dismissing the petitioner's application under section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') in Civil Suit No. 137 of 2010 filed by the respondent.

2. The suit was filed for a declaration that the decisions taken by the petitioner vide its letter dated 30.06.2007 and 16/17.11.2007 are illegal and violative of the contractual terms finally settled between the parties under the "One Time Settlement Scheme" (OTS) of the year 2003 as modified by the OTS of the year 2004. The respondent also sought

enforcement of the agreement between the parties under the OTS Schemes which required the petitioner to transfer the shares of Abhishek Industries Ltd. in Unit-III on a pro-rata basis against the payment already made by the respondent together with interest and to transfer the remaining shares as per the terms of the OTS without the petitioner being entitled to charge any interest on the payment of the amounts due after 30.06.2007. The respondent sought a mandatory injunction directing the petitioner to transfer the remaining shares of Abhishek Industries Ltd. to the respondent at ₹ 16.27 per shares calculated on the basis of the terms of the OTS and after adjusting the amounts already paid together with interest w.e.f. 30.06.2007 and after adjusting the damages suffered by the respondent due to non-transfer of shares according to the terms of the OTS. The respondents also sought a declaration that a notification dated 06.02.2009 is not applicable between the parties as it does not have retrospective effect.

3. The petitioner filed the application under section 8 of the 1996 Act for referring the disputes to arbitration in accordance with the arbitration agreement contained in a “Financial Collaboration Agreement” (FCA) entered into between the parties. The learned Judge rejected the application on the ground that although the FCA contains an arbitration agreement, the same was abandoned under a fresh agreement arrived at between the parties under the OTS.

4. I will refer to the facts relevant to the application under section 8.

5. An agreement dated 29.03.1996 was entered into between the petitioner and one Rajinder Gupta in which the respondent was referred to as

the ‘Corporation’ and Rajinder Gupta was referred to as the ‘collaborator’. It is not necessary to refer to the agreement in any detail as it stood superseded by an agreement dated 09.11.2001 and in particular clause 35 thereof which I will set out shortly. Suffice it to note only a few provisions with a view to understanding the circumstances leading to the 09.11.2001 agreement. Clause-1 stated that the collaborator had incorporated M/s Abhishek Spinfab Corporation Ltd. Clause-2 stated that the terms of the agreement, as far as possible, would be reflected and incorporated in the Memorandum and Articles of Association of the Company. Clause-5 provided that the respondent would invest in the equity capital of the company on ‘proportionately matching basis’ only after the project had been financed by the Central/State Government and after the collaborator had contributed at least half of its share of equity. Clauses 6 required the petitioner, the collaborator and a foreign collaborator to hold 26 percent, 34.54 percent and 4 percent of the equity shares of the company. The balance 35.46 percent shares were to be held by the public. Clause 21 prohibited the petitioner and the collaborator from selling their shares for a stipulated period without the written consent of the others. Clause 22 contained detailed provisions regarding the petitioner and the respondents’ rights and obligations in connection with the buy back of the petitioner’s shares by the respondents. Clauses 32 and 33 contained an arbitration agreement.

6. Thereafter an agreement dated 09.11.2001 was entered into between the petitioner referred to therein as the ‘Corporation’ on the one hand and the said Rajinder Gupta, M/s Trident Infotech Corporation Ltd. and Trident Udyog Ltd. thereinafter referred to as the ‘first, second and third

collaborators' respectively on the other. The three collaborators were collectively referred to in the agreement as the "collaborators". Recital-C stated that in terms of the said agreement dated 29.03.1996, the respondent had invested an amount of ₹ 14.56 crores by subscribing to the equity share capital of the said company Abhishek Spinfab Corporation Ltd. (referred to therein as the ASCL). Recital-D stated that ASCL commenced production on 01.01.1998. Recital-G stated that ASCL had merged in Abhishek Industries Ltd. (therein referred to as 'AIL') and the scheme of merger and amalgamation was approved by this Court whereby 17 shares of AIL had been exchanged for every 27 shares of ASCL. Recital H reads as under:-

> "**H**. The COLLABORATORS had approached the CORPORATION for support in getting through the Scheme of Amalgamation of ASCL with AIL and for that they had agreed to enter into suitable arrangement to ensure that the shareholding of the CORPORATION allotted to it in amalgamated AIL in exchange for the shares of the CORPORATION in ASCL is purchased by them as envisaged in the Agreement dated 29th March, 1996 irrespective of the fact that ASCL has ceased to exist on its merger with AIL."

7. Under clause-3, the respondent and the collaborators and their associates were to subscribe 29.63% and 48.98% of the equity shares of AIL. The public and others were to subscribe to the remaining 21.39% of the equity shares. Clause 16 prohibits the parties from transferring their shares for five years from 01.04.1998 i.e. the date of commencement of commercial production. Clauses 17, 25, 26 and 35 of the agreement read as under:-

> "**17**(a) The COLLABORATORS shall have the option to buy at any time after the commencement of commercial production of the PROJECT of ASCL, such AIL shares allotted to the

CORPORATION in exchange of the ASCL shares previously held by it pursuant to the Scheme of Amalgamation or the total investment of the Corporation along with interest whichever is higher as per clause 17(b) hereof. However, upon the expiry of the period of five years from the date of commencement of commercial production by the ASCL i.e. 31st March, 2003 the COLLABORATORS shall be jointly and severally bound to purchase the said shares of the CORPORATION in AIL. (emphasis supplied).

17(b) The price to be paid as in accordance with the Financial Collaboration Agreement dated 29th March, 1996 shall be either the amount paid by the CORPORATION for the acquisition of the 1,45,60,000 shares in ASCL i.e. Rs.14,56,00,000.00 (Rupees Fourteen crores fifty six lacs only) plus simple interest at the rate equal to the rate at which the Central/State Financial Institution(s) Bank(s) have provided long term finance to the PROJECT of ASCL, calculated from the date of payment by the CORPORATION for the shares in question to the date of payment of the sale price by the COLLABORATORS, less dividend, if any, received by the CORPORATION in respect of the said shares in the intervening period, irrespective of the number of shares actually allotted to the CORPORATION in AIL against the Corporation's investment in ASCL as a result of merger, OR the highest price at which the shares of AIL were traded at the Stock Exchange(s) where AIL's share are listed, on the date of exercise of its option to purchase by the COLLABORATORS or the date on which the COLLABORATORS ought to purchase the shares held by the CORPORATION as provided in clause (a) above, which ever is higher and the amount of consideration would be actual number of shares allotted in AIL in exchange of ASCL as per merger scheme, multiplied by the market price determined above. In case, however, the shares of the AIL were not traded at any of the Stock Exchange(s) or any of the Stock Exchange(s) is closed on the said date, then and in that case, the highest price at which the shares of the AIL were traded in the preceding 10 days in that stock exchange from the date on which the option was exercised by the COLLABORATORS, will be taken into consideration to determine the highest market price of the shares at Stock Exchanges.

17(c) The CORPORATION shall be bound to sell its equity shareholding in AIL to the COLLABORATORS, as aforesaid.

17(d) The sale and purchase of the said shares, as aforesaid, payment of price therefor and delivery of share scrips and transfer deeds, relative thereto, shall be completed within one month of the exercise by the CORPORATION of its right to sell its said shares held by it in the AIL to the COLLABORATORS and/or by the COLLABORAORS of their right to buy the said shares from the CORPORATION. However, in case the COLLABORATORS fail to pay the consideration within one month from the date of exercise of option to purchase the shares held by the CORPORATION in the AIL, then and in that case, the CORPORATION shall transfer the shares to the COLLABORATORS at the highest market price prevalent on the date of payment of the consideration or the price of shares determined according to Clause 17(b) and interest thereon at the rate of 24% (Twenty four percent) per annum till the date of payment, whichever is higher.

17(e) In the event the COLLABORATORS fail to purchase the equity shares of the CORPORATION in AIL as provided in Clause 17(a) and (b) above, the CORPORATION shall have the option of recommending one of its nominees to be appointed as Managing Director by the Board of Directors of the AIL and the said nominee of the CORPORATION, after being appointed shall continue as Managing Director so long as the default on the part of the COLLABORATORS continues.

17(f) Immediately, upon the completion of the payment by the either or all COLLABORATORS of the full amount payable in respect of purchase of shares mentioned in Clause 17(a) hereinabove the rights of CORPORATION in so far as they flow from non payment as per clause 17(b) shall cease and the CORPORATION shall have no rights in management, this clause will cease to be operative and the management of the AIL will be carried on as before by a Managing Director who will be appointed by the Board of Directors.

17(g) Without prejudice to the provisions of Clause 17(f) above, the CORPORATION shall also, in the event of either all or any COLLABORATORS failing to purchase the equity shares of the CORPORATION in AIL as provided in Clause 17(a) to (d) above be entitled to sell its shares in the AIL at the risk and cost of the COLLABORATORS either by public auction or through recognized share brokers of the Stock Exchange where the shares are listed or private negotiations and the COLLABORATORS will be jointly and severally liable to meet any loss or damage that may be suffered by the CORPORATION."

**25**. All differences and disputes between the parties hereto on any clause or matter herein contained or their respective rights, claims or liabilities hereunder or otherwise, whatsoever, in relation to or arising out of this agreement, shall be referred to arbitration by two Arbitrators (one to be appointed by each party) who shall, before proceeding with the reference, appoint the Third Arbitrator and such arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force.

**26**. The venue of the arbitration shall be Chandigarh unless both the parties agree in writing for some other place as a venue of arbitration.

**35**. It is expressly understood that the Financial Collaboration Agreement dated 29th March, 1996 between the CORPORATION and the FIRST COLLABORATOR, which inter-alia provides for the buy back of equity investment in shares by the FIRST COLLABORATOR on the terms and in the manner set out therein shall stand superseded by the terms of this agreement."

8. On 01.04.2003 the Government of Punjab formulated a One Time Settlement Scheme. The relevant provisions of the scheme read as under:-

"➢ The Policy offers Single Tier Carrying 10% (8% for companies located in Border Districts as per the latest industrial Policy) simple rate of interest irrespective of the status of the unit. This OTS shall apply only to all the balance shares being held by the Corporation which have not yet been transferred back to the collaborator.

➢ xx xx xx xx xx

➢ The promoters shall have to deposit an amount equivalent to 10% of the consideration amount i.e. principal plus upto date simple interest as calculated above from the date of disbursement till the offer alongwith his application asking for OTS.

➢ xx xx xx xx xx

➢ The entire buy back is to be completed within a maximum two years (three years in case of units in Border Districts) from the date of acceptance. In case, the collaborator fails to complete the buy back during the said period, then the buy back shall be governed by the provisions of the FCA and the amount already received shall be adjusted against the interest accrued.

➢ The scheme is also applicable to the cases where arbitration proceedings have started or have been initiated. However, the collaborator/promoter opting for OTS under the Policy has to come out of the arbitration to make him eligible for the OTS.

➢ The shares shall be transferred to the collaborator by PSIDC only after the entire amount is received by PSIDC and buy back concluded thereof.

➢ The scheme shall be in operation till 31st May, 2003 for the purpose of exercising an option."

(emphasis supplied).

On 02.04.2003, the respondent informed the petitioner about the scheme.

9. The collaborators inter-se by an agreement dated 19.05.2003 proposed M/s Trident Udyog Ltd. as the sole collaborator. The petitioner was not a party to this agreement. The agreement provided that Trident Udyog Ltd. would be the sole beneficiary of the shares to be purchased from the petitioner and would discharge all the obligations of the other collaborators and that the other collaborators have no rights or obligations under the Financial Collaboration Agreement dated 09.11.2001. Accordingly by a letter dated 21.05.2003 Trident Udyog Ltd. alone applied under the OTS dated 01.04.2003 on behalf of all the collaborators. Trident Udyog Ltd. stated that ₹ 23,75,99,000/- was due in terms of the OTS as per the calculations enclosed. As required by the OTS-2003, 10% thereof was forwarded as upfront consideration. The letter further stated as follows:-

> "………….Further, the transfer of consideration under the OTS are being made to PSIDC on the acceptance of the condition precedent that PSIDC shall transfer the shares on pro-rata basis in favour of Trident Udyog Limited within 10 days of the receipt of each transfer of consideration made by TUL under the OTS, so as to enable TUL 'to place & pledge' the shares and arrange to transfer the balance consideration under the OTS.
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> Please note that your consent to and acceptance of the inter se Agreement dated May 19, 2003 and terms of this application is a condition precedent to the encashment of the cheque enclosed herewith. Further, in the event that you encash the enclosed cheque, the same shall amount to your consenting, approving and accepting the said Interse Agreement dated May 19, 2003, and terms of this application.
>
> In the unlikely event of there being any dispute, we would also request that the matter be resolved by arbitration as per the Arbitration and Conciliation Act, 1996.

> We would request for a formal acknowledgement of this application and the Interse Agreement from PSIDC to enable us to enter into a fresh Agreement with PSIDC, and to make the transfer of balance consideration to PSIDC in terms of the OTS."

10. This brings us to the petitioner's letter dated 30/31.07.2003 addressed to the Trident Udyog Ltd. which is one of the most crucial documents in this case. A substantial part of the case turns on the interpretation of this letter. Though the letter has the heading "WITHOUT PREJUDICE", the parties are agreed that ultimately they acted upon it. The subject states: "Buy back of equity shares-OTS policy". The letter is with reference to the respondent's letter dated 21.05.2003. The petitioner's decision in respect of the respondent's letter dated 21.05.2003 was conveyed. Paragraphs 1, 5, 6 and the concluding part of the letter read as under:-

> "1. As regards your request (of-sic) to consider Trident Udyog Ltd. TUL, as the sole collaborator and absolve the other two collaborators viz., Trident Infotech Corporation Ltd. (now Tritech Corpn. Ltd.) and Mr.Rajinder Gupta from the rights and obligations given to them under the Supplementary Agreement dated 9th November, 2001 in view of the inter-se Agreement dated 19th May, 2003, a copy of which has been furnished to our Corporation. PAB (Project Approval Board of the petitioner) accepted Trident Udyog Ltd. as the Collaborator and absolved the other two parties as soon as the entire payment for buy-back of unit No.1 of AIL is completed by the end of August, 2003. However, in case, Trident Udyog Ltd. fails to complete the buy back of shares in respect of the other two investments in the company, the Collaborators shall be governed by the Equity OTS Policy announced by the Govt. of Punjab under the Industrial Policy, 2003.
>
> 2 to 4. xx xx xx xx

5. As regards acceptance of your request to the transfer of shares on pro-rata basis, the Board/PAB have agreed to the same subject to the following conditions:-

(i) It was felt that shares should be transferred only after receipt of a minimum payment of Rs.20 lacs against the OTS amount due, for convenience in PSIDC.

(ii) The transfer shall be made as per the OTS value of share as calculated upto the date of the transfer of shares.

(iii) In case the collaborator fails to complete the buy back of shares under the OTS, the same shall be governed by the Equity OTS policy announced by the Govt. of Punjab under the Industrial Policy, 2003.

(iv) The rights of the Corporation including the right to have nominee Directors/Chairman shall not be diluted till the Corporation holds any shares.

(v) The collaborator, if required to by PSIDC, shall have to enter into a supplementary agreement with the Corporation.

6. So far as your request for retaining of Arbitration Clause is concerned, the Board has felt that since the OTS policy has been floated with a view to avoid litigation and also to settle the already ongoing litigation with the collaborators, acceptance of arbitration in respect of the matters arising out of the OTS will be against the spirit of the OTS. Thus, the Board did not agree to the proposal of the collaborator for a provision of arbitration under the OTS.

In view of the above decision of the Board of Directors of PSIDC and the Project Approval Board of the State Government, we request you to deposit balance initial payment towards OTS offer (as per details given in Annexure-1) and give your unconditional acceptance to the above decision of the Corporation within 15 days from this letter to enable us to encash the cheques already given by you."

There is no reply to this letter. However, the learned counsel appearing on behalf of the petitioner and the respondent stated that the letter was acted upon and invited me to proceed on the basis that the terms and conditions thereof were accepted and constituted a contract under the OTS

Scheme of 01.04.2003. Mr. Mittal qualified his statement by stating that by this letter the petitioner accepted the offer under the OTS scheme of 01.04.2003 but subject to the terms and conditions contained in the letter. I will proceed on this basis.

11. From time to time certain amounts were paid and the proportionate numbers of shares were transferred by the petitioner to the respondent. By a letter dated 27.08.2003, the respondent stated that it was making payment of the balance 10% consideration inspite of certain issues not having been reconciled and that the payment was subject to the petitioner agreeing to an immediate transfer of the proportionate share holding. By a letter dated 30.06.2004 the respondent referred to certain outstanding issues and requested that the issue of tentative transfer of shares against the payment of ₹ one crore be resolved through arbitration clause 8 of the supplementary agreement dated 09.11.2001. The petitioner, however, by its reply dated 26.07.2004 stated that the OTS policy cannot be a subject matter of arbitration. The letter requested the respondent to convey its unconditional consent to the OTS policy within 10 days to enable it to encash the cheque/demand draft sent by the respondent.

12. The correspondence thus far certainly indicates that there was no concluded contract till this stage. However, as stated earlier both Mr. Mittal, the learned senior counsel for the petitioner and Mr. Aggarwal, the learned senior counsel for the respondent stated that the letter dated 30/31.07.2003 was acted upon and agreed to between the parties by conduct. I have, therefore, proceeded on that basis.

13. A Public Interest Litigation (PIL) being Civil Writ Petition No. 8592 of 2006 was filed by one Sarabjit Singh challenging the OTS inter-alia in so far as it was made applicable even to profit making organizations. The respondent is also a profit making organization.

14. The respondent contends that it was ready and willing to pay the amounts and buy back the shares in terms of the OTS. However, the petitioner informed it that it would defer the transfer of shares as the Public Interest Litigation (PIL) was pending in this Court challenging the validity of the OTS scheme insofar as it was applicable to profit making organizations as well. The respondent's grievance is that this stand was unjustified as there was no order in the PIL restraining the respondent from acting on the agreement. As the OTS was expiring on 30.07.2007, the respondent submitted a bank guarantee of ₹ 35 crores to show its readiness and willingness to make the entire payment. The correspondence in this regard is as follows:-

14(A) By a letter dated 22/23.06.2007, the petitioner had infact called upon the respondent to pay the balance amount:-

> "Due to challenge to grant of OTS to profit making concerns as well as pendency of applications for impleading of all collaborators/promoters who had opted for OTS in respect of equity buy back as a party to the public interest petition i.e. CWP No.8592/2006 in case titled as Sarabjit Singh v. State of Punjab and others, balance 90% amount alongwith interest @ 12.5% p.a. payable by you will be accepted conditionally subject to your submitting undertaking as per attached proforma with the clear and unequivocal acceptance of the condition that in view of the pendency of the PIL/case in the Hon'ble High Court, PSIDC shall not transfer the shares till the decision of the case and that the act of encashing the cheques/D.Ds by PSIDC does not bind

> it to implement the OTS Scheme and that the decision of the Hon'ble High Court/Government in this regard will be binding. In the circumstances, you are requested to forthwith make balance payment of dues as per OTS policy along with accompanying undertaking duly signed by you as per the proforma enclosed alongwith this letter so as to enable the PSIDC to process the matter."

(B) By a letter dated 27.06.2007, the respondent stated that the petitioner had failed to transfer the equity shares on a pro-rata basis against its payment and had also failed to resolve the pending issues between the parties as accepted in a letter dated 24.06.2005 and that, therefore, the petitioner had defaulted under the contract. Despite the same, the petitioner to establish its willingness and ability to complete the buy back of the equity shares within the stipulated time, forwarded a bank guarantee in the sum of ₹ 35 crore stating that the same was as per the petitioner's calculation.

(C) A letter dated 30.06.2007 addressed by the petitioner to the respondent was tendered in Court. The petitioner contended that what the respondent had submitted was a conditional guarantee and that the respondent had failed to furnish the undertaking as per the proforma required by the letter dated 22.06.2007. Ultimately by a letter dated 16/17.11.2007 the petitioner cancelled the OTS inter-alia on the ground that the respondent had failed to make the payment by the due date namely 30.06.2007. The petitioner contended that it was, therefore, entitled to revert to the Financial Collaboration Agreement (FCA) and called upon the respondent to remit an amount of ₹ 6358.95 lac. The respondent by a letter dated 18.10.2008 reiterated its contentions.

15 (A) As mentioned earlier, a Public Interest Litigation (PIL) being Civil Writ Petition No. 8592 of 2006 was filed by one Sarabjit Singh challenging the OTS inter-alia in so far as it was made applicable even to profit making organizations. During the pendency of the petition, the Government of Punjab issued a notification dated 06.02.2009 amending the clause 9.3.4 of Industrial Policy, 2003, by substituting the words "*irrespective of the status of the unit*" to be as "*to collaborators/promoters of companies other than profit making companies*". Clause-3 of the notification further stated that "*in view of the above, the Governor of Punjab is further pleased to withdraw the OTS offer earlier given to the collaborators/promoters of profit making companies*".

The petitioner being a profit making company was affected by the notification.

(B) In view of the above notification, the PIL was disposed of by an order and judgment dated 10.02.2009 as it redressed the grievance in the PIL that the OTS ought not to be made available to profit making entities.

16. This brings me to the present proceedings:-

On 09.06.2010 the respondent filed the said civil suit with which we are concerned. It is in this suit that the petitioner filed an application under section 8 of the Arbitration and Conciliation Act, 1996 which was rejected by the impugned judgment dated 12.11.2011. In the suit the respondent had challenged the said letters dated 30.06.2007 and 16/17.11.2007 claiming that it is entitled to the transfer of shares as per the OTS of 2003 read with the OTS of 2004 without further interest after 30.06.2007 and that the transfer ought to be at the price of ₹ 16.27 per share. The petitioner has also sought a declaration that the notification dated 06.02.2009 cannot be applied retrospectively to its detriment and, therefore, is not applicable to it.

17. This judgment falls broadly into two parts. The first arises on the facts narrated thus far. The second arises on account of a judgment of a Division Bench of this Court dated 23.12.2015 in a group of writ petitions the first of which was Civil Writ Petition No.8338 of 2009 *V.K.Indrayan v. State of Punjab and another*. The petitioners therein who are similarly placed as the respondents before us challenged the notification dated 06.02.2009. Before dealing with the case relating to the first part I will refer to this judgment. The Division Bench had framed the following questions:-

> "(i) Whether the State was permitted to alter the terms of the OTS on the ground that it being a public policy, could be modified?
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> (ii) If question No. (i) is answered in favour of the State, whether the said decision could be with retrospective effect in the absence of any statutory provision?
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> (iii) Whether the State and the Corporation are bound by the principle of promissory estoppel and can go back on the terms of the OTS agreement which had been duly acted upon by the petitioner by materially altering its position?"

Paragraph Nos. 49, 50 and 51 of the aforesaid judgment read as under:-

> "49. Resultantly, issue no. (iii) is answered in favour of the petitioners that the State and the Corporation were bound by the principle of Promissory Estoppel and could not go back on the terms of the OTS which had already been offered and accepted by the collaborators/petitioners. The said persons had made payments in pursuance of the OTS and entered into agreements and acted on the promise held out by the State and the Corporation and the State was, thus, bound by the OTS agreement entered into. Having acted upon the said agreement, the petitioners had paid the amounts and were thus, entitled for the benefits of the lesser interest rate as per the OTS scheme. The said petitioners might not have taken offer of making the payment and the Corporation would have been left with litigation in hand by way of

> arbitration and for enforcement of the buy back agreements. However, after having given the offer and the petitioners having accepted the same and the Corporation having received the payments in satisfaction of the contract entered into, could not turn around and submit that they were not bound by the terms of the OTS. The pendency of the public interest litigation and the decision therein would not be of any assistance to the State since the writ petition was disposed of that the Corporation would take appropriate decisions in view of the modified policy. The petitioners were also left free to seek appropriate redressal in case adverse decision was taken and the petitioners were also given liberty to challenge the notification. Thus, the Division Bench has not opined on the said issue and it was a policy decision of the State as such. Consequently, issue no. (iii) is answered against the State and the Corporation.
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> 50. Accordingly, keeping in view the cumulative discussions made above, in our opinion, the State could alter the terms and conditions of the OTS on the ground of public interest. A valid criteria has been made to restrict the OTS to the profit making companies. However, in the absence of any statutory power, the said decision making could not be done with retrospective effect and could only have been limited from the date of notification of the decision. <u>The persons who had altered their position by making payment in pursuance of the OTS</u>, could not be denied the final fruits of the concluded contract of the agreement entered into after they had made payments, as per the OTS. The said decision could not have been taken with retroactive effect and the State and the Corporation are bound by the principle of promissory estoppel.
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> 51. As a necessary corollary, the present writ petitions and LPA No.1635 of 2010, are disposed of, with a direction to the Corporation to give the necessary effect to the OTS, <u>in the cases where the petitioner had made the payments</u>, in pursuance of the OTS and the OTS had been duly acted upon. The amounts paid under the said OTS would, accordingly, be accepted by the Corporation, which would further be acted upon by the State Government. <u>However, where the complete amounts have not been paid, it would be open to the Corporation to proceed as per the terms of the OTS and fall back on the FCA</u>." (emphasis supplied).

The Division Bench, therefore, held that the notification would not apply only in cases where the OTS had been accepted and the entire payment thereunder had been made. It further held that where the entire payment had not been made, it would not be open to the petitioner to proceed as per the terms of the OTS and that it would be open to the petitioner to proceed as per the terms of the OTS and fall back on the Financial

Collaboration Agreement. Thus where the earlier payment is not made, the petitioner is not even entitled to proceed as per the OTS. It must proceed as per the terms of the OTS and fall back on the FCA. This is obviously a reference to the terms in the OTS-2003 which stipulates that where the collaborator (i.e. the petitioner) does not complete the buy back, the buy back would be governed by the FCA.

18. I will deal with the first part which involves the facts other than the effect of the judgment in Civil Writ Petition No.8338 of 2009. This involves essentially a consideration of the effect of the letter dated 30/31.07.2003.

19. The entire amount under the OTS had admittedly not been paid. The respondent had merely furnished a bank guarantee and that too a conditional bank guarantee which was valid only for three days upto 30.06.2007. The respondent contends that although it was ready and willing to pay the balance amount under the OTS, it did not do so on account of the petitioner having refused to transfer the shares even upon receiving the full payment which was contrary to the terms of the OTS. It contends that the petitioner cannot take advantage of its own wrong. The petitioner on the other hand contends that it took the stand to protect itself in the event of the OTS in respect of the profit making enterprises being struck down in the PIL. In that event the petitioner would have parted with its only security namely the shares. By the petitioner retaining the amount the respondent was not prejudiced in any manner whatsoever. I presume that the respondent on the other hand would contend that having made the entire payment it would be entitled to the return of the shares and that it was prejudiced on account of the

shares not being returned to it. For instance, that would have prevented the respondent from raising further capital which in turn would hamper its business.

20. In the facts and circumstances of the present case, I am not inclined to express any opinion on the merits of the contentions between the parties. The rival contentions raise disputed questions of law and of fact. The merits of these contentions must be reserved for the arbitral tribunal. I do not say so as a matter of form but as a matter of substance for the case is not open and shut either in law or on facts. What I am concerned with is whether even these disputes are arbitrable under the arbitration agreement contained in the FCA of 09.11.2001 or whether they are not arbitrable in view of the agreement contained in the letter dated 30/31.07.2003 and in particular paragraph 6 thereof. I think they are.

21. Paragraph 6 must be read with paragraph 5(iii). Paragraph 5(iii) of the letter dated 30/31.07.2003 is for convenience reproduced again:-

> "5. As regards acceptance of your request to the transfer of shares on pro-rata basis, the Board/PAB have agreed to the same subject to the following conditions:-
> (iii) In case the collaborator fails to complete the buy back of shares under the OTS, the same shall be governed by the Equity OTS policy announced by the Govt. of Punjab under the Industrial Policy, 2003."

If the respondent failed to complete the buy back of shares under the OTS, the rights of the parties would be governed by the OTS policy of 2003. The OTS policy of 2003 in turn provides: "In case the collaborators fail to complete buy back during the said period, the buy back shall be governed by the provisions of the FCA and the amount already received would be adjusted against the interest accrued".

The letter dated 30/31.07.2003 did not discharge the respondent's liabilities unconditionally. The respondent's liabilities and obligations under the FCA would have stood discharged only if it had performed its obligation as per the terms of the letter dated 30/31.07.2003. Thus the parties would be governed by the FCA dated 09.11.2001 including the arbitration clause contained therein. The issue whether the respondent completed the buy back of the shares under the OTS or not or must be deemed to have done so or not would fall within the ambit of the arbitration clause. This view is supported by a judgment of the Supreme Court I will refer to shortly. Before referring to the judgment I would mention that I will deal with the effect of paragraph 6 of the letter dated 30/31.07.2007 later. For now I will construe the letter without reference to paragraph 6. Suffice it to mention that paragraph 6 does not affect this view to wit the effect of the arbitration clause at all.

22. Mr. Mittal's reliance upon the judgment of the Supreme Court in *National Insurance Company Limited v. Boghara Polyfab Private Limited (2009)1 Supreme Court Cases 267*, is well founded. The Supreme Court held:-

> "**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.* [(2005) 8 SCC 618] 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).

(*ii*) Merits or any claim involved in the arbitration.

**27.** While discharge of contract by performance refers to fulfilment of the contract by performance of all the obligations in terms of the original contract, discharge by "accord and satisfaction" refers to the contract being discharged by reason of performance of certain substituted obligations. The agreement by which the original obligation is discharged is the *accord*, and the discharge of the substituted obligation is the *satisfaction*. A contract can be discharged by the same process which created it, that is, by mutual agreement. A contract may be discharged by the parties to the original contract either by entering into a new contract in substitution of the original contract; or by acceptance of performance of modified obligations in lieu of the obligations stipulated in the contract.

**36.** In *Damodar Valley Corpn.* [(1974) 1 SCC 141] the question that arose for consideration of this Court was as follows: (SCC p. 144, para 4)

"*4.* … where one of the parties refers a dispute or disputes to arbitration and the other party takes a plea that there was a final settlement of all claims, is the Court, on an application under Sections 9(*b*) and 33 of the Act, entitled to enquire into the truth and validity of the averment as to whether there was or was not a final settlement on the ground that if that was proved, it would bar a reference to the arbitration inasmuch as the arbitration clause itself would perish."

In that case the question arose with reference to a claim by the supplier. The purchaser required the supplier to furnish a full and final receipt. But the supplier did not give such a receipt. Even though there was no discharge voucher, the purchaser contended that the payments made by it were in full and final settlement of the bills. This Court rejected that contention and held that the question whether there has been a settlement of all the claims arising in connection with the contract also postulates the existence of the contract which would mean that the arbitration clause operates. This Court held that the question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising "upon" or "in relation to" or "in connection with" the contract; and where there is an arbitration clause in a contract, notwithstanding the plea that there was a full and final settlement between the parties, that dispute can be referred to arbitration. It was also observed that mere claim of accord and satisfaction may not put an end to the arbitration clause. It is significant that neither *P.K. Ramaiah* [1994 Supp (3) SCC 126] nor *Nathani Steels* [1995 Supp (3) SCC 324] disagreed with the decision in *Damodar Valley Corpn.* [(1974) 1 SCC 141] but only distinguished it on the ground that there was no full and final discharge voucher showing accord and satisfaction in that case.

**42.** We thus find that the cases referred to fall under two categories. The cases relied on by the appellant are of one category where the Court after considering the facts, found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence. Consequently, this Court held that there could be no reference of any dispute to arbitration. The decisions in *Nav Bharat* [1994 Supp (3) SCC 83] and *Nathani Steels* [1995 Supp (3) SCC 324] are cases falling under this category where there were bilateral negotiated settlements of pending disputes, such settlements having been reduced to writing either in the presence of witnesses or otherwise. *P.K. Ramaiah* [1994 Supp (3) SCC 126] is a case where the contract was performed and there was a full and final settlement and satisfaction resulting in discharge of the contract. It also falls under this category.

**43.** The cases relied on by the respondent fall under a different category where the Court found some substance in the contention of the claimants that "no-dues/claim certificates", or "full and final settlement discharge vouchers" were insisted and taken (either in a printed format or otherwise) as a condition precedent for release of the admitted dues. Alternatively, they were cases where full and final discharge was alleged, but there were no documents confirming such discharge. Consequently, this Court held that the disputes were arbitrable.

**44.** None of the three cases relied on by the appellant lay down a proposition that mere execution of a full and final settlement receipt or a discharge voucher is a bar to arbitration, even when the validity thereof is challenged by the claimant on the ground of fraud, coercion or undue influence. Nor do they lay down a proposition that even if the

> discharge of contract is not genuine or legal, the claims cannot be referred to arbitration. In all the three cases, the Court examined the facts and satisfied itself that there was accord and satisfaction or complete discharge of the contract and that there was no evidence to support the allegation of coercion/undue influence. (emphasis supplied)."

23. The judgment though under Section 11 of the Act applies equally to cases under section 8 as one of the questions in an application under either section is whether the disputes are arbitrable or not.

24. The present case falls in the second category referred to in paragraph 22(ii) of the judgment cited supra albeit with a difference. This is a case where according to the respondent the parties had concluded the contract by accord and satisfaction of the mutual rights and obligations by entering into a contract contained in the letter dated 30/31.07.2003 and by the respondent allegedly having made full and final payment thereunder or having offered to make the full and final payment thereunder. Accord there is by virtue of the letter dated 30/31.07.2003. Whether there was satisfaction or not is a seriously disputed question of fact and of law. The letter dated 30/31.07.2003 did not discharge the FCA unconditionally. By its very terms it did not. Under paragraph 5(iii) of the letter dated 30/31.07.2003, if the respondent failed to complete the buy back of the shares under the OTS, the parties are to be governed by the equity OTS policy announced by the Government of Punjab under the Industrial Policy of 2003 which in turn provides that if the collaborator fails to complete the buy back, the buy back would be governed by the provisions of the FCA. The obligations under the FCA would therefore be discharged only if the respondent completed the buy back as per the accord contained in the letter dated 30/31.07.2003.

Paragraph 51 of the judgment entitles the Chief Justice in such a case under section 11 to decide the issue himself or alternatively to refer the matter to arbitration with a direction that the question should be decided in the first instance. To such a question in an application under Section 8 the judgement applies with equal force.

25. Whether there was satisfaction or not is an issue which in the facts of the present case I am inclined to leave for the decision of the Arbitrator. It would require an examination of the accounts and computation of interest. It would also require evidence as to whether the respondent made or offered to make the payment as per the terms of the agreement and the validity of the petitioner's insistence upon the undertaking and retention of the shares pending the PIL despite the alleged offer of full payment. I, therefore, see no reason to permit the respondent to avoid the arbitration agreement.

26. Under paragraph 5(iii) of the letter dated 30/31.07.2003, if the respondent failed to complete the buy back of the shares under the OTS, the parties are to be governed by the equity OTS policy announced by the Government of Punjab under the Industrial Policy of 2003 which at the cost of repetition in turn expressly provided:-

> "The entire buy back is to be completed within a maximum two years (three years in case of units in Border Districts) from the date of acceptance. In case, the collaborator fails to complete the buy back during the said period, then the buy back shall be governed by the provisions of the FCA and the amount already received shall be adjusted against the interest accrued."

Thus, in the event of the respondent failing to complete the buy back of the shares, the parties would be relegated to the FCA.

27. One of the issues that the arbitral tribunal would have to decide is whether the respondent had failed to complete the buy back of the shares under the OTS agreement. I have already referred to the rival contentions in that regard. It is not for me to adjudicate whether the respondent failed to complete the buy back under the OTS agreement or whether the petitioner prevented it from doing so. The nature of the arbitration clause in the FCA is wide enough to cover this dispute:-

> "**25**. All differences and disputes between the parties hereto on any clause or matter herein contained or their respective rights, claims or liabilities hereunder or otherwise, whatsoever, in relation to or arising out of this agreement, shall be referred to arbitration by two Arbitrators (one to be appointed by each party) who shall, before proceeding with the reference, appoint the Third Arbitrator and such arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force.
>
> **26**. The venue of the arbitration shall be Chandigarh unless both the parties agree in writing for some other place as a venue of arbitration."

Clause 25 of the supplementary agreement dated 09.11.2001 refers to arbitration all differences and disputes between the parties on any clause or matter contained therein or the parties respective rights, claims or liabilities contained therein or otherwise whatsoever. The words "or otherwise whatsoever" make the ambit of the clause wider. The ambit is further widened on reading the words "or otherwise whatsoever" with the words that follow "in relation to or arising out of this agreement". These words are of the widest amplitude. They would cover the disputes as to whether the payment under the agreement or any modification thereto has been made or not. It would, therefore, cover the issue as to whether the payments under the OTS settlement were made or not.

28. The respondent’s contention is that the settlement of 30/31.07.2003 constituted an accord and satisfaction and therefore, the FCA stood novated and the arbitration clause contained therein, therefore, ceased to exist. It must be noted here that the respondent’s case is not that the letter dated 30/31.07.2003 by itself resulted in a novatio bringing to an end the FCA dated 09.11.2001. The respondent’s case is one of accord and satisfaction. I will presume that the agreement constituted an accord. This, however, is not a clear case of the accord having been satisfied. In other words, this is not a clear case of accord and satisfaction. It cannot be said with any degree of certainty that there was accord and satisfaction. In a given case where accord and satisfaction are clearly established it could be said by a Court under section 8 and even under section 11 of the Act that there is no claim or dispute which can be referred to arbitration. However, where there is a dispute in that regard, it is open to the Court to leave it to the arbitral Tribunal to decide the same.

29. The question then is whether paragraph 6 of the letter dated 30/31.07.2003 makes a difference. Mr. Aggarwal stated that the letter must be read as a whole and paragraph 5(iii) must be read with paragraph 6. I agree. He submitted that if Mr. Mittal’s submission is accepted, clause-6 would be clumsy if not otiose. I cannot agree.

30. Paragraphs 5(iii) and 6 of the letter dated 30/31.07.2003 can be easily reconciled. I will assume that paragraph 6 applies to the OTS-2003 as well as to the agreement contained in the letter dated 30/31.07.2003. I will also assume, therefore, that as far as the OTS agreement is concerned, there is no arbitration clause. That, however, would make no difference. On the contrary it is a factor entirely in the petitioner's favour. Had there been a separate arbitration clause in respect of the OTS of a different nature, it would have been necessary to decide which of the arbitration clauses would be applicable – the one in the FCA or the one in the OTS agreement.

31. The petitioner rightly and understandably did not agree to the respondent's suggestion to introduce an arbitration clause in the settlement contained in the letter dated 30/31.07.2003. This is because the letter did not discharge the obligations under the FCA absolutely. That was contingent upon the respondent completing the buy back. The terms of the letter would have substituted those of the FCA upon the respondent fulfilling all its obligations especially by completing the buy back as per the letter. The respondent's failure to buy back would result in the parties reverting to the FCA. There was, therefore, no question of such a conditional agreement contained in the letter being subject to an arbitration agreement. That would have been clumsy and in any event demanded a convoluted route of a reference to arbitration on one question under the OTS and thereafter a reference to the other questions to arbitration under the FCA. By refusing to subject the agreement contained in the letter to a separate arbitration clause the petitioner in fact streamlined the entire matter and made it workable.

32. I am unable to accept Mr. Aggarwal's submission that the prayers in the suit cannot be entertained by an arbitral Tribunal. The letters dated 30.06.2007 and 16/17.11.2007 addressed by the respondent do not fall outside the ambit of the arbitration clause. By the letter dated 30.06.2007, the petitioner contended that the bank guarantee was a conditional bank guarantee and was valid only upto 30.06.2007 and that the conditions were contrary to the undertaking sought by the petitioner. It was further contended that the undertaking in the proforma stipulated by the petitioner had not been submitted. The petitioner called upon the respondent to make the payment and to submit the proforma. The respondent admittedly did not do so. Whether the petitioner's insistence upon retraining the shares and demanding payment in the facts of the case including the pendency of the PIL justified the respondent's refusal to pay the amount for the buy back and instead furnishing a guarantee in lieu thereof constitutes satisfaction of the terms of the agreement contained in the letter dated 30/31.07.2003 or not are some of the serious disputes between the parties and there is no reason why the same ought not to be referred to arbitration.

33. For the same reason the contentions raised in the petitioner's letter dated 16/17.11.2007 are those which fall within the ambit of the arbitration clause. The petitioner reiterated what was stated in the letter dated 30.06.2007. The petitioner further stated that the payment had not been made as per the OTS and the petitioner, therefore, cancelled the OTS and demanded payment of the entire amount as per the terms of the FCA. The petitioner raised a demand of ₹ 63.59 crores which according to the petitioner was due

as on 31.10.2007 alongwith further interest till payment. I cannot see how these disputes do not fall within the ambit of the arbitration clause.

34. The contention that in view of the letter dated 30/31.07.2003 and in particular pargraph 6 thereof the arbitration agreement in the FCA ceased to exist is, therefore, rejected.

35. This brings me to the notification dated 06.02.2009 issued by the Government of Punjab amending clause 9.3.4 of the Industrial Policy-2003 by making it inapplicable to the collaborators/promoters of the profit making companies. The petitioner's contention that it is not bound by the same as it does not have retrospective effect can always be raised as a defence before the arbitral Tribunal, construing the notification falls within the arbitrator's jurisdiction.

36. The learned Judge held that once the terms of the FCA underwent change/modification which amount to novation of the contract as the terms under which the equity shares are to be bought back had been changed. The learned Judge construed the judgments of various Courts as holding that where there are material or substantial changes going to the root of the agreement, it is to be recorded in law as a new agreement and the rate of payment is a material part of the agreement to sale and a change in the payment thereof constitutes a new agreement. The learned Judge essentially relied upon paragraph 6 to hold that the petitioner had itself decided to give up the arbitration under the OTS. He held that it was not necessary in view thereof to go any further as the arbitration clause ceased to exist.

37. With respect I am unable to agree with the judgment. Firstly, a mere change in the agreement does not constitute a novatio. The learned

Judge has not considered the effect of clause 5(iii) of the letter dated 30/31.07.2003 read with the term in the OTS of 2003 reverting the parties to the FCA in the event of the respondent failing to buy back the shares as per the said letter. I cannot, however, fault the learned Judge for what I have held may not have been placed before the learned Judge.

38. There is yet another reason why the civil revision ought to succeed. I referred to the order and judgment of the Division Bench of this Court dated 23.12.2015 in Civil Writ Petition No.8338 of 2009 *V.K.Indrayan v. State of Punjab and another*. The Division Bench has clearly held that the amendment introduced by the notification dated 06.02.2009 would be inapplicable only in cases where the OTS had been accepted and the entire payment thereunder had been made. Admittedly, the respondents had not made the full payment. Furnishing a bank guarantee does not constitute payment of the amount guaranteed. It only constitutes security for the payment which may be found to be due. The guarantee of ₹ 35 crores, therefore, did not constitute the payment of that amount. At the cost of repetition the issue whether the respondent failed to make the payment or whether the respondent was prevented from making payment is another matter and can be decided by the arbitrator. The Division Bench expressly held that where the profit making companies have not made full payment, the rights and contentions between the respondent and such companies would be governed by the Financial Collaboration Agreement and not by the OTS.

39. This judgment in effect prohibits the petitioner from extending the facility under the OTS to profit making enterprises. The judgment does not operate only against the petitioners therein. It is a judgment that declares

the rights and obligations of all parties similarly situated as the petitioners therein. The respondent has not taken any steps to have the judgment set aside.

40. In any event, the least that must be said is that the effect of this judgment falls for the consideration of the arbitral tribunal.

41. In the circumstances, the Civil Revision is allowed. The impugned judgment and order is set aside. The application under Section 8 is allowed. The parties are at liberty to take steps for the constitution of the arbitral tribunal. There shall be no order as to costs.

**(S.J. VAZIFDAR)**
**CHIEF JUSTICE**

**27.10 .2017**
*ravinder sharma*

| | |
|---|---|
| Whether speaking/reasoned | √Yes/No |
| Whether reportable | √Yes/No |