

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

+ **FAO No. 387/2006**

% **7<sup>th</sup> July, 2017**

UNION OF INDIA ..... Appellant

Through: Mr. Jaswinder Singh, Advocate.

versus

M/s. BAGA BROTHERS & ANR. .... Respondents

Through: Mr. Virender Kumar Sharma,  
Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE VALMIKI J. MEHTA**

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J (ORAL)**

1. This first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 impugns the judgment of the court below dated 17.8.2006 whereby the objections filed by the appellant/objector under Section 34 of the Arbitration and Conciliation Act have been dismissed.

2. Disputes and differences between the parties arose on account of a contract work of construction given to the respondent/contractor by the appellant under the contract agreement no. 01/EE/CD-VII/96-97 for execution of certain construction work in 136 numbers additional chambers for Supreme Court lawyers at plot

nos. AB 20-21 of Bhagwan Das Road, New Delhi. The contract work entailed fixing of Aluminum Doors and Windows, Ventilators Partition, pre-laminated particle Board Glazed Shutters, Fibre Glass Reinforced Shutters, etc. The contract in question was completed on 1.9.1997 and the final bill finalized on 19.1.1998. Disputes were referred to arbitration in terms of the order dated 4.4.2002 of a Division Bench of this Court in a writ petition and by which order the issues of arbitability of disputes was left open. The issues of arbitability of the disputes were the issues as regards Clauses 9 and 25 of the contract and these issues were dealt with by the arbitrator in terms of his interim award dated 27.9.2002 holding that disputes were alive/not finally settled and hence arbitrable. Final award was thereafter passed by the arbitrator on 15.12.2004 allowing some of the claims of the respondent/contractor. These two awards being the interim award dated 27.9.2002 and the final award dated 15.12.2004 were the subject matter of the objections filed by appellant before the court below and which has been dismissed in terms of the impugned judgment dated 17.8.2006.

3. Two arguments are urged on behalf of the appellant for setting aside the award and the impugned judgment dated 17.8.2006. The first argument which is raised is in view of with Clause 9 of the

contract between the parties. On the basis of Clause 9 it is argued that once a final bill is prepared and amount of the final bill is released to the contractor/respondent, then no disputes survive which are live disputes and which will require adjudication in arbitration. The second argument which is urged is as per the Clause 25 of the contract and which specifies that arbitration cannot be invoked unless the procedure of conciliation provided as a pre-condition is resorted to, and since in the present case, it is argued, that the preliminary procedure of conciliation was not resorted to before invoking of arbitration, hence, the disputes in question were not arbitrable.

4. The main argument as regards Clause 9 have been dealt with by the court below in paras 19 and 20 of the impugned judgment, and these paras read as under:-

“19. Further in the present case, it has been submitted on behalf of the petitioner that final award dated 15.12.2004 passed by the Id. Arbitrator is illegal and wrong and is against the terms and condition of the contract/agreement between the parties. It is further submitted that the aforesaid final award dt. 15.12.2004 is also violative of the section 34 of the Arbitration and Conciliation Act and is also against the substantive law. It has been submitted on behalf of the petitioner that while passing the impugned award dt. 15.12.2004 Id. Arbitrator has not taken into consideration the clause 9 of the agreement/contract which stipulates that the claimants were required to submit final bill within three months of the physical completion of works and that all the claims made by the contractor after submission of the final bill shall be deemed to have been waived and extinguished. It has been submitted on behalf of the petitioner that Id. Arbitrator has failed to appreciate that the final bill was accepted by the claimant/respondent without any objection and as such after the submission of the final bill, the claim made by the contractor is deemed to have been waived and extinguished in terms of clause 9 of the contract.

20. On the other hand, it has been submitted on behalf of the respondent that there was no question of final bill being accepted by the respondent without any objections. It is submitted that after receipt of the payment and looking into final bill the respondent within time stipulated in clause 25 of the agreement sought invocation of the Arbitration Clause and appointment of the Arbitrator. It has been further submitted on behalf of the respondent that so called acceptance of the final bill cannot be held against the respondent because the respondent could do nothing but to sign on dotted lines to recover its admitted dues which would have been denied by the petitioner otherwise. In support of his contention, Id. Counsel for the respondent has relied upon the case law cited as 2004 (1) Arb. LR 156 (SC). In the aforesaid case title as “Chairman and M.D. NTPC Ltd. Vs. Reshmi Constructions Builders and Contractors” (cited as 2004 (1) Arb. LR 156 (SC), it has been laid down by the Hon’ble Supreme Court of India that:

*“Disputes as regards final bill arose prior to its acceptance thereof in view of the fact that the same was prepared by the respondent but was not agreed upon in its entirety by the appellant herein, the appellant has not pleaded that upon submission of the final bill by the respondent herein any negotiation or settlement took place as a result whereof the final bill as prepared by the appellant was accepted by the respondent unequivocally and without any reservation therefore. The respondent herein immediately after receiving the payment of the final bill, lodged its protest and reiterated its claims. The appellant never made out a case that any novation of the contract agreement took place or the contract agreement was substituted by a new agreement. Only in the event, a case of creation of new agreement is made out the question of challenging the same by the respondent would have arisen. The finding of the High Court that a prima facie in the sense that there are triable issues before the Arbitrator so as to invoke the provisions of Section 20 of the Arbitration Act, 1940 cannot be said to be perverse or unreasonable so as to warrant interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India.”*

In the present case also, the acceptance of final bill cannot be held against respondent as respondent has no option but to accept the final bill otherwise the admitted dues would not have been released by the petitioner to the respondents. Further, immediately after the acceptance of the final bill the respondent sought invocation of the arbitration clause and appointment of the Arbitrator at the first available opportunity and hence in my considered opinion the acceptance of the final bill cannot be held against the respondent and the said acceptance cannot waive or extinguish the claims of the respondent in terms of clause 9 of the contract.

Thus in view of the aforesaid discussion and observations and having regard to the submissions made by Id. Counsel for the respondent and in view of the aforesaid case law cited as 2004(1)Arb.LR 156(SC), I am of the considered opinion that the provision of clause 9 of the contract/agreement are non-applicable in the present case.” (underlining added)

5. Clause 9 of the contract between the parties reads as under:-

**“CLAUSE 9**

The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-In-Charge whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-In-Charge, will, as far as possible be made within the period specified hereinunder, the period being reckoned from the date of receipt of the bill by the Engineer-In-Charge or his authorised Asstt. Engineer, complete with account of materials issued by the Department and dismantled materials.

i) If the Tendered value of work is 3 months upto Rs.5 lacs.

ii) If the Tendered value of work is 6 months exceeds Rs. 5 lacs.”

6. A reading of Clause 9 of the contract between the parties, and the discussion of the court below in paras 19 and 20 of the impugned judgment, shows that the court below has rightly arrived at a conclusion that merely because a final bill is paid would not mean that the respondent/contractor has received the amount of final bill in full and final satisfaction of its dues and that there would remain no live disputes for adjudication by arbitration. I may note that the argument of the appellant by placing reliance upon Clause 9 is *ex-facie* misconceived because in case final bill is prepared by the respondent/contractor himself containing amounts which as per the respondent/contractor are due and payable and such a final bill prepared by the respondent/contractor is processed and thereafter paid

by the appellant, then the appellant may rightly contend that on payment of the final bill amount in terms of the final bill prepared by the respondent/contractor in such eventuality no arbitrable disputes remain live and i.e no disputes will remain, however, in the facts of the case the admitted position is that the final bill was not prepared by the respondent/contractor but the final bill was prepared by the appellant. The appellant after preparing the final bill has paid the amount under the final bill. Merely because respondent/contractor has written the expression “accepted” in the final bill for receiving the amount would not mean that the amount received will be taken as full and final satisfaction of all dues of the respondent/contractor. For there existing a full and final settlement or an accord and satisfaction a specific language is necessary and which specific language must also show that the accord and satisfaction has taken place without any coercion or undue influence. It is well known, and rightly observed by the court below that in case a contractor does not sign the final bill then obviously even the admitted payment would not be released to the contractor, and therefore the respondent/contractor has signed the final bill so as to receive payment. Also, it has now been consistently held by the Supreme Court that even an issue of full and final settlement, if disputed by the contractor, becomes an arbitrable dispute and whether

or not there is full and final settlement i.e there is accord and satisfaction, has to be decided as a dispute in the arbitration proceedings after leading evidence by the parties. Accordingly, in my opinion, in the facts of the present case, both for the reason that the final bill has not been prepared by the respondent/contractor and also that there is no full and final settlement clause or a clause of accord and satisfaction in the final bill showing that the respondent/contractor received the amount under the final bill as full and final satisfaction so as to show that no disputes remain, the arbitrator by his interim award dated 27.9.2002 has rightly held that it cannot be successfully argued by the appellant that merely on account of payment of the final bill prepared by the appellant there was a full and final settlement or accord and satisfaction and that consequently there remained no disputes which could be subject to adjudication in the arbitration proceedings.

7. So far as the second argument urged on behalf of the appellant by placing reliance upon Clause 25, this aspect has already been considered by this Court and rejected in the judgment in the case of *Ravindra Kumar Verma Vs. M/s. BPTP Ltd. and Anr. 2015 (147) DRJ 175; 2015 (1) RLR 624*, wherein this Court has held that issue of resorting to conciliation procedure is only a directory provision and not

a mandatory provision. This Court has also given reasons that merely because of existence of conciliation procedure it cannot be that the main arbitration petition should be allowed to become time barred because it is very much possible that arbitration petition may be filed just around the expiry of the period of limitation and there may not be sufficient time, therefore, to go through the conciliation procedure. This Court in ***Ravindra Kumar Verma's*** case (*supra*) has held that in any case the procedure of conciliation at best will mean that the arbitration proceedings are not barred but that the arbitration proceedings would be stayed till a conciliation otherwise takes place between the parties and during which period arbitration proceedings will remain adjourned. The relevant paras in the judgment in the case of ***Ravindar Kumar Verma (supra)*** are paras 5 to 12 and these paras read as under:-

“5. Learned counsel for the petitioner argues that as per the agreed arbitration clause, before going in for arbitration there was a pre-condition of taking place a mutual discussion between the parties and since no mutual discussion took place, arbitration clause/agreement could not have been invoked by the respondents/defendants. Reliance is placed by the petitioner upon the judgment of the learned Single Judge of this Court in the case of ***M/s Haldiram Manufacturing Company Pvt. Ltd. Vs. M/s DLF Commercial Complexes Limited 193 (2012) DLT 410***. It is argued that the trial court has committed an illegality in ignoring this binding judgment in which it is held that an application under Section 8 of the Act has to be dismissed if the application under Section 8 of the Act does not comply with the pre-condition of entering into mutual discussion before invoking the arbitration clause/agreement. Paras 14 to 16 of the judgment in the case of ***M/s Haldiram Manufacturing Company Pvt. Ltd. (supra)*** are relied upon by the petitioner and which paras read as under:-

“14. The controversy in hand does not come to an end here as the arbitration clause under consideration has another dimension. It would be manifest on perusal of the above arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, clearly the first step stipulated in the said clause is the settlement of disputes through mutual discussion and second step is the settlement through arbitration. The Forum of Arbitration was, therefore, made dependent on the outcome of the first step that is of mutual settlement.

15. Indisputably, no mutual discussion between the parties has taken place, prior to the filing of the present suit. Surprisingly, the defendant in their reply dated 14th August, 2009, to the legal notice of the plaintiff dated 13th July, 2009 had neither called upon the plaintiff for such mutual discussions as envisaged in Clause-34 of the application form and nor had specifically reminded the plaintiff of the Clause for adjudication of the disputes through arbitration.

16. On a holistic reading of the said arbitration clause, it is decipherable that the first option given by the defendant to the plaintiff is for settlement of the disputes through mutual discussion and the option of arbitration would come at the second stage. The defendant has admittedly not called upon the plaintiff for any mutual discussion and therefore, the defendant itself has ignored Clause-34 of the said application form and having ignored the said clause itself, this Court does not find the defendant has any right to move the present application to seek rejection of the present plaint based on the alleged arbitration agreement. The defendant cannot be allowed to rely on the said clause for invoking arbitration proceedings and at the same time ignore the course of action of 'mutual discussion' contrived in the said clause. The conduct of the defendant clearly is contrary to the mandate of the said clause and thus the stage to invoke arbitration proceedings before exhausting the first stage of mutual discussion does not arise. However, at this stage the defendant cannot be allowed to take shelter under the said clause for invoking the arbitration proceedings when it has retracted from the same. The defendant cannot be allowed to approbate and reprobate and thus in the facts of the case at hand is not entitled to relief.”

6. No doubt, the observations in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. (supra)* does help the petitioner/plaintiff inasmuch as it is held in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. (supra)* that if no mutual discussion takes place prior to filing of the application under Section 8 of the Act then the arbitration clause cannot be invoked, however, the issue is that whether the proposition of law laid down in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. (supra)* is correct or that the same goes against the earlier judgments of different Single Judges of this Court.

7. The issue is that is the arbitration clause not capable of being invoked if a prior requirement contained in the arbitration clause is not complied with. This issue as to whether requirement of a particular procedure to be followed before the arbitration clause can be invoked is directory or mandatory has been decided in the judgment of a learned Single Judge of this Court in the case of ***Saraswati Construction Co. Vs. Co-operative Group Housing Society Ltd.*** 1995 (57) DLT 343: 1994 RLR 458. In the case of ***Saraswati Construction Co. (supra)*** as per the arbitration clause the same could only be invoked in a particular manner by calling upon the architect to refer the disputes to arbitration and since notice was not given through the architect, it was argued that the arbitration clause could not be invoked. The learned Single Judge of this Court in the case of ***Saraswati Construction Co. (supra)*** held that the prior requirement as stated for invoking arbitration even if not complied with, the same cannot prevent reference to arbitration, because, the procedure/pre-condition has to be only taken as a directory and not a mandatory requirement. The learned Single Judge in the case of ***Saraswati Construction Co. (supra)*** relied upon the earlier judgment of a learned Single Judge of this Court in the case of ***M/s Sikand Construction Co. Vs. State Bank of India ILR (1979) I Delhi 364***. Paras 2 to 5 of the judgment in the case of ***Saraswati Construction Co. (supra)*** are relevant and the same read as under:-

“2. There has been a contract between the parties which contains an arbitration clause to the following effect.

"All disputes and differences of any kind whatever arising out of or in connection with the conduct of the carrying out of the works (whether during the progress of the works or after their completion, and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the architects who shall state their decision in writing .Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without Appeal as stated in Clause No. 33. But if either the Employer or the Contractor be dissatisfied with the decision of the Architect or any matter, question or the dispute of any kind (except any of the excepted matters) or as to the withholding by the Architect of any certificate to which the contractors may claim to be entitled, then and in any such case either party(the Employer or the Contractors) may within 28 days after receiving notice to such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement to the appointment of a single arbitrator, to the arbitration of two Arbitrators being both Fellow of the Indian Institute of Engineers of equivalent one to be appointed by each party, which

arbitrators shall before taking themselves the burden of reference appoint an Umpire."

3. This petition is contested by the respondent on the sole ground that the petitioner has not invoked the arbitration clause in accordance with the terms of the said clause and thus the petition is not maintainable. It is pointed out that the arbitration clause contemplates that petitioner has to give a notice in writing in which the disputes sought to be raised for arbitration were to be detailed out and such a notice was to be given through the architect to the respondent and this step has not been taken by the petitioner, thus the arbitration clause cannot be invoked by filing a petition under Section 20.

4. Similar arbitration clause came up for consideration before this Court in the case of *Mis. Sikand Construction Co. v. State Bank of India*, 2<sup>nd</sup> (1979) 1 Delhi 364. The Court held that writing a letter to the architect is directory provision in an arbitration clause and in the said case despite no such letter being written by the party for invoking the arbitration clause in the manner contemplated in the arbitration clause, still the Court held that in view of the provisions of Section 20 of the Arbitration Act what the Court has to consider is whether the parties have entered into an arbitration agreement and if so, whether there is any sufficient ground for not referring the matter for arbitration and if it is proved that there is an agreement for arbitration then the Court has to direct the filing of the arbitration agreement and appoint the arbitrator in accordance with the arbitration clause.

5. In that case also the directions were given to the parties to appoint an arbitrator in consonance with the arbitration clause. In the present case, admittedly, the contract out of which the disputes arise contains the arbitration clause and thus I hold that the matter is liable for reference in accordance with the arbitration clause. In the present case, the petitioner had on his own appointed his arbitrator and had sent a communication to the respondent to appoint his arbitrator. the arbitration clause did not contemplate that in the very first instance, the petitioner could appoint his own arbitrator. As was required by the arbitration clause that parties have to agree for appointment of a single arbitrator who is Fellow of the Indian Institute of Architects failing which each party was to nominate its arbitrator who was also to be a Fellow of the Indian Institute of Architects and those two arbitrators were then to appoint an Umpire."

8(i) In my opinion, there are two other reasons, and which are in addition to the reasoning given in the case of *Saraswati Construction Co. (supra)*, for holding that a prior requirement to be complied with before seeking reference of disputes to the arbitration is only directory and not mandatory.

(ii) The first reason is that if the arbitration clause is read in a mandatory manner with respect to prior requirement to be complied with before invoking arbitration, the same can result in serious and grave prejudice to a party who is seeking to invoke arbitration because the time

consumed in conciliation proceedings before seeking invocation of arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963 including its Section 14. Once there is no provision to exclude the period spent in conciliation proceedings, it is perfectly possible that if conciliation proceedings continue when the limitation period expires the same will result in nullifying the arbitration clause on account of the same not capable of being invoked on account of bar of limitation i.e when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years of arising of the disputes and hence the petition for reference may be barred by limitation. Another example would make this position clear that suppose on the last date of limitation period of three years a party wants to invoke an arbitration clause but the arbitration clause contains the requirement of invoking the pre-condition of 'mutual discussion'. Surely, on the last date if a notice has to be given for invoking mutual discussion, no mutual discussion or conciliation can take place on the same date of the notice itself i.e no mutual discussion can take place before expiry of the period of limitation which expires on that very day on which the notice for mutual discussion is given. Therefore, if the pre-condition of mutual discussion is treated as mandatory, valuable rights of getting disputes decided by arbitration will get extinguished and which is not a position which should be acceptable in law.

9(i) Any doubt on this aspect as to whether conciliation proceedings as required by an arbitration clause are directory or mandatory is removed when we refer to Section 77 of the Act, and which is the second reason that the pre-condition of mutual discussion is only a directory requirement and not a mandatory one. Section 77 of the Act states that in spite of conciliation proceedings going on, the existence of the same will not prevent any of the parties to exercise its rights in accordance with law. Section 77 of the Act reads as under:-

**“Section 77. Resort to arbitral or judicial proceedings.-** The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.” (underlining added)

(ii) Section 77 of the Act specifically uses the expression proceedings which are necessary for preserving rights and therefore if rights are to be preserved on account of limitation expiring, because after expiry of the period of limitation arbitration clause cannot be invoked either by filing of a petition under Section 8 of the Act or under Section 11 of the Act, therefore, existence of conciliation proceedings or mutual discussion should not be a bar for enforcing rights to arbitration either by filing a petition under Section 11 of the Act or by seeking to get the suit dismissed by filing an application under Section 8 of the Act because such proceedings are necessary to preserve rights of getting the disputes decided by arbitration.

10. It may be noted that the judgment of the learned Single Judge of this Court in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. (supra)* does not refer to the binding provision of Section 77 of the Act

which provides that existence of conciliation proceedings would not be a bar for filing of proceedings to preserve rights. It has been held by the Supreme Court in the judgment in the case of *N. Bhargavan Pillai (dead) by LRs and Anr. Vs. State of Kerala (2004) 13 SCC 217* that a judgment of a court rendered without taking note of the relevant provision of a statute is *per incuriam* and also the settled law is that an earlier judgment in the case of *Saraswati Construction Co. (supra)* will prevail either and the later judgment in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. (supra)*. However, in my opinion, the conflict can be resolved by taking the middle path approach and which is stated hereinafter.

11. Whereas the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and which is necessary for preserving rights as envisaged by Section 77 of the Act, however, since in many contracts there is an effective need of conciliation etc in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc.

12. In view of the above, though this petition is dismissed and the impugned order is sustained by which the application under Section 8 of the Act has been allowed, it is however directed that before arbitration proceedings are effectively pursued, parties must resort to mutual discussions within a time bound reasonable period. In case, mutual discussions or conciliation proceedings do not successfully conclude within the time bound reasonable period of say three months, thereafter arbitration proceedings for determination of the rights can be continued. I note that I am fixing a period in this case because contractually no period has been prescribed for mutual discussion/conciliation procedure. This petition is accordingly dismissed and disposed of subject however to the aforesaid observations with respect to mutual discussion/conciliation procedure.”

8. In view of the above discussion, I do not find any merit in the appeal, and the same is dismissed, leaving the parties to bear their own costs.

**JULY 07, 2017/ AK**

**VALMIKI J. MEHTA, J**