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

+ **ARB.P. 774/2016 & IA Nos.15151/2016 & 2090/2017**

GSBA BUILDER PVT. LTD.

..... Petitioner

Through: Mr S. K. Jain, Ms Khushboo Bhardwaj, Ms Stuti Jain, Mr Ranjan Kumar Rai and Ms Reetika Wadhwa, Advocates.

versus

RADHA SOAMI SATSANG BEAS

..... Respondent

Through: Mr Anish Kapur and Mr Navroop Bakshi, Advocates.
Mr Vikas Dutta, Mr Siddhanth Silwal, Ms Neha Jain, Advocates for Impleader (Fortis Hospital Limited).

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 01.03.2017

VIBHU BAKHRU, J

1. The petitioner (hereafter 'GBPL') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') praying that an arbitrator be appointed to decide the disputes between the petitioner and the respondent in relation to the agreements dated 03.12.2010 and 03.03.2011 entered into between the parties.

2. The respondent (hereafter 'RSSB') disputes the existence of an arbitration clause as it claims that the agreements in question stand discharged and the arbitration clause contained therein has also perished.

GBPL had entered into a Memorandum of Understanding (hereafter 'MoU') dated 22.05.2014 with Fortis Hospitals Limited (hereafter 'Fortis'), which is stated to be the assignee of RSSB. RSSB claims that the effect of this MoU is that the agreements in question stood discharged by novation. RSSB has also opposed the present petition on the plea that this court does not have the jurisdiction to entertain the present petition as the construction works were executed in Ludhiana and the agreement dated 03.12.2010 expressly provided that the courts at Ludhiana would have the exclusive jurisdiction regarding the subject agreement.

3. Briefly stated, the relevant facts necessary to address the controversy in this petition are as under:-

3.1 GBPL is a private company and is, *inter alia*, engaged in the business of civil construction. RSSB is a society registered under the Societies Registration Act, 1860. RSSB awarded the work of a 200 bedded hospital at village Mundian Kalan, Ludhiana to GBPL on turnkey basis, by a letter of intent dated 01.09.2010. Subsequently, the parties entered into the agreement dated 03.12.2010 (hereafter 'the Agreement') for construction of the hospital. GBPL states that initially, the construction at Oncology Block was removed from the scope of works but subsequently, on 03.03.2011, the parties entered into an agreement - captioned as "Form of Contract" (hereafter 'FoC') - for construction of the said block. The FoC and the Agreement are hereafter collectively referred to as 'the agreements'.

3.2 GBPL claims that the work could not be completed in time on account of various reasons attributable to RSSB and Fortis. It is alleged that RSSB

committed a breach of the agreements which resulted in delay in completion of the works. GBPL further claims that in July, 2012, a team from Fortis took over the work which was earlier being monitored by Project Management Committee (PMC). It is further claimed that RSSB transferred the hospital to Fortis in a clandestine manner.

3.3 It is stated that RSSB wrongfully invoked one of the bank guarantees furnished by GBPL on 09.05.2013. GBPL further claims that it submitted a bill for a sum of ₹20,34,10,790/- under the cover of its letter dated 08.07.2013. However, the said bill was not settled and in retaliation, Fortis threatened encashment of the remaining bank guarantee.

3.4 It is claimed that the works were completed in September, 2013 and GBPL requested RSSB to issue the completion certificate but the same was not issued.

3.5 On 02.01.2014, GBPL filed a suit (being Suit No. 32/2014), arraying RSSB and Fortis as defendants, *inter alia*, praying as under:-

“a) to pass a decree for permanent injunction restraining the Defendants themselves or through their agents, associates, attorneys etc. to Sell the 200 Bed Hospital Building Constructed by the Plaintiff at the Site of Radha Soami Satsang Beas, Mundian, Chandigarh Road, Ludhiana, or enter into the deed of novation or any other transaction/contract whatsoever until and unless the bill of the Plaintiff is finalized and be paid, by the Defendant No.1 or

alternatively

Direct the Defendant No.1 to deposit a sum of ₹

22,83,31,788.15 (Rupees Twenty two crores eighty three lacs thirty one thousand seven hundred eighty eight and paisa fifteen only) and service tax thereto in this Hon'ble Court. ”

3.6 GBPL also filed another suit (C.S. No. 52199/2013) before the Civil Judge (Senior Division), Ludhiana, *inter alia*, praying for a decree of mandatory injunction directing RSSB to issue the completion certificate and further praying for an injunction restraining Canara Bank (arrayed as defendant No.2) from releasing the amount of bank guarantees (bank guarantee No. 42/2012 dated 08.09.2012 in the sum of ₹84,20,000/- and bank guarantee No. 12/2013 dated 28/2/2013 for ₹2,18,00,000/-).

3.7 On 26.04.2014, the parties sought an adjournment to settle their disputes amicably.

3.8 Thereafter, on 22.05.2014, GBPL entered into the MoU with Fortis. In terms of the MoU, GBPL agreed that it shall raise a full and final bill amounting to ₹52,99,35,321/- and further acknowledged that it had already received a sum of ₹50,85,49,451/- out of the said amount. It was further agreed that the retention money amounting to ₹30,10,094/- deducted by RSSB and now lying with Fortis would be released after the expiry of the defect liability period. The MoU also recorded that GBPL would instruct its lawyers to withdraw the suits - Civil Suit No. 32/2014 titled as *Gurbakhsh Singh BA Builders Private Limited v. Radha Soami Satsang Beas & Fortis Hospitals Limited* and Civil Suit No. 52199/2013 titled as *Gurbakhsh Singh BA Builders Private Ltd v. Radha Swami Satsang Beas & Canara Bank*.

3.9 GBPL withdrew the aforementioned suits on 24.05.2014. Subsequent

thereto, GBPL sent a letter dated 09.06.2014 to RSSB alleging that the MoU was signed under duress. Approximately, three months thereafter, GBPL sent a legal notice dated 01.09.2014 to RSSB and Fortis alleging that GBPL had accepted the proposal under threat from Fortis and called upon RSSB and Fortis to pay a sum of ₹20,83,31,788/- along with interest at the rate of 18% per annum. This was followed by notices dated 13.11.2014 and 03.02.2015 to Fortis. After waiting for over a year, thereafter, GBPL issued a notice dated 08.02.2016 to RSSB invoking the arbitration clause contained in the Agreement.

Submissions

4. Mr Anish Kapur, learned counsel appearing for RSSB has made submissions broadly on two fronts. First, he contended that this court would have no jurisdiction to entertain the present petition. He submitted that in terms of clause 10 of the Agreement, the courts at Ludhiana would have the exclusive jurisdiction in respect of any matter under the Agreement; thus, the petition under Section 11 of the Act could be filed only before the High Court of Punjab and Haryana. Second, he submitted that the arbitration clause had perished and was no longer required to be performed in view of the MoU entered into between GBPL and Fortis. He drew the attention of this court to clauses 11 and 12 of the MoU which expressly recorded that the parties were discharged of all their rights, duties, liabilities and obligations with respect to the matters arising out of the hospital. He submitted that, consequently, the agreement to resolve the disputes by arbitration as included in the Agreement, also perished.

5. Mr Kapur, relied on the decisions of the Supreme Court in the case of National Insurance Company Limited v. Boghara Polyfab Private Limited: (2009) 1 SCC 267; Union of India v. KishoriLal Gupta and Brothers: AIR 1959 SC 1362; M/s Saraswati Industrial Syndicate Ltd. v. M/s Apollo Tyres Limited: (1986) ILR 1 Delhi 382 and Nathani Steels Limited v. Associated Constructions: 1995 Supp (3) SCC 324 in support of his contentions.

6. Mr S.K. Jain, learned counsel appearing for GBPL countered the aforesaid submissions. He submitted that GBPL had entered into the MoU under duress and coercion as RSSB had already encashed one bank guarantee and was threatening to encash the remaining bank guarantee. He submitted that at the material time, GBPL was not in a position to afford encashment of the bank guarantee and therefore, had no choice but to enter into the MoU with Fortis. He further submitted that after the introduction of sub-section (6A) in Section 11 of the Act, this court is required to only examine the existence of the arbitration agreement and the question whether the arbitration agreement was discharged could be examined only by the arbitrator and not by this court.

7. Insofar as the question of jurisdiction is concerned, Mr Jain submitted that the Agreement was entered into between the parties at New Delhi and, therefore, this court would have the jurisdiction to entertain the present petition notwithstanding that the venue of arbitration was at Ludhiana. He also drew the attention of this court to the General Conditions of the Contract ('GCC') and referred to clause 4.24, which expressly provides that the courts at Delhi would have jurisdiction to determine the disputes.

8. I have heard learned counsel for the parties.

9. At the outset, it is observed that there is no clarity as to the agreements that were entered into between the parties. Although, it is submitted that GBPL and RSSB had entered into the Agreement and the FoC, a perusal of the FoC indicates that there are other agreements dated 03.05.2011 and 01.02.2011. However, it is clear that GBPL had filed the suits before the Civil Judge, Ludhiana in respect of the subject matter that is now sought to be agitated by GBPL. Thus, *prima facie*, GBPL had elected to abandon the arbitration agreement and pursue its remedy before the Civil Courts. Mr Jain sought to rely on the application filed by RSSB under Order VII Rule 10 of the Code of Civil Procedure, 1908 (hereafter 'the CPC') before the Civil Court. In the said application, RSSB had pleaded that in terms of clause 4.24 of the GCC, only the Courts at Delhi would have jurisdiction to entertain the disputes between the parties. Mr Jain submitted that GBPL had withdrawn the suits in view of the objection taken by RSSB and, therefore, RSSB could not raise any objection regarding jurisdiction of this court to entertain the present petition. In my view, the aforesaid contention is not merited because a perusal of the application filed by RSSB under Order VII Rule 10 of the CPC indicates that RSSB had relied upon clause 4.24 of the GCC. Mr Jain had also relied on the said clause and contended that this court has the jurisdiction to entertain the present petition. It is relevant to refer to clause 4.24 of the GCC, which reads as under:

“4.24 Settlement of Disputes

All disputes and differences of any kind whatsoever arising out of or in connection with this contract will be

amicably settled by mutual discussion between Employer and Contractor. There will not be any arbitration under the provisions of the Arbitration and Conciliation Act, 1996. The Contractor may approach the civil court for resolution of disputes. All disputes arising out of or in any way connected with this agreement will be deemed to have arisen in Delhi and only the Delhi Courts of competent jurisdiction will have jurisdiction to determine the same.”

10. A plain reading of the aforesaid clause indicates that the parties had specifically agreed that disputes between the parties would not be resolved by arbitration. Thus, it is not open for GBPL to rely on the said clause to contend that this court has jurisdiction and yet insist that the parties be referred to arbitration; the contentions are contradictory and mutually destructive.

11. At this stage, it is also relevant to refer to clauses 9 and 10 of the Agreement, which reads as under:-

“9. This Agreement shall be governed in accordance with the laws of India. In the event of a dispute arising from the validity, interpretation or performance of this Agreement such dispute shall be referred for arbitration by the Parties and settled in accordance with the Arbitration and Conciliation Act, 1996. The disputes arising under this Agreement shall be referred to a Sole Arbitrator appointed mutually by the Parties. The venue of such arbitration shall be Ludhiana.

10. Subject to Article 9 above, the courts of Ludhiana shall have exclusive jurisdiction on any matter under the Agreement.”

12. In view of the above, even if it is accepted that an arbitration

agreement existed between the parties (in the form of clause 9 of the Agreement), the parties had also expressly agreed that (i) the Courts at Ludhiana would have the exclusive jurisdiction and (ii) that the place of arbitration would be at Ludhiana. Indisputably, if GBPL was to agitate its grievance by filing a suit, only the Courts at Ludhiana would have the jurisdiction. Thus, Courts at Delhi would not fall within the definition of “Court” as per Section 2(1)(e) of the Act. Further, since the place of arbitration is also at Ludhiana, the High Court of Punjab and Haryana would have the supervisory jurisdiction over the arbitration proceedings.

13. The next question to be addressed is whether an arbitration agreement exists between the parties in view of the MoU entered into between GBPL and Fortis. In terms of the MoU, GBPL agreed that it shall raise a final bill amounting to ₹52,99,35,321/- and further acknowledged that it had received ₹50,85,49,451/- out of the aforesaid amount. The MoU specifically recorded that the parties have reconciled their books of accounts to arrive at the aforesaid figure. Further, GBPL agreed to clear all accounts with its vendors and close the books of accounts after paying full and final amount as per the terms and conditions of the respective agreements with the vendors so as to maintain after sales backup for services. GBPL also handed over four post dated cheques aggregating ₹13,85,870/- in favour of certain vendors.

14. In terms of clause 4 of the MoU, GBPL agreed to issue instructions in writing to its lawyers to withdraw the aforementioned two civil suits filed before the Civil Judge, Ludhiana. It also undertook to send its authorized representative to make a statement for withdrawal before the court on the

next date of hearing - 24.05.2014. GBPL agreed to receive a sum of ₹2,00,00,000/- in full and final settlement for the work done relating to the Fortis Hospital. Clauses 4, 5, 9, 11 & 12 of the MoU are important and the relevant extracts of the said clauses are set out below:-

“4. That the Contractor with the execution of this MoU shall issue instructions in writing to its Lawyers, with a copy to FHsL, to withdraw the following legal cases:-

- Civil Suit : CS – 32/2014 titled as Gurbaksh Singh BA Builders Pvt. Ltd. Vs. Radha Soami Satsang Beas & Fortis Hospital Limited, in the Court of Ms Ekta Sahota, Civil Judge (Jr. Div.), Ludhiana;
- Civil Suit : CS – 52199/2013 titled as Gurbaksh Singh BA builders Pvt. Ltd. Vs. Radha Soami Satsang Beas & Canara Bank in the Court of Ms. Himanshi Galhotra, Civil Judge (Jr. Div.), Ludhiana;

The Contractor shall send its Authorized Representative to the above mentioned Courts to make the statement of withdrawal before or on the next date of hearing, i.e. 24.05.14 and make available the certified copy of the Statement made before, and of the Order passed by, the Hon’ble Courts.

5. That subsequent to the withdrawal of the above said legal cases, FHsL shall release the agreed settlement amount of Rs.1,84,00,000/- (Rupees One Crore, Eighty Four Lacs Only) after deduction of TDS and WCT as per Govt. rates on Rs.2,00,00,000/(Rupees Two Crores Only), towards the agreed full and final payment after deduction of tax as per prevailing Govt. rules through the cheque no. 000360 dated 22.05.14 for Rs.1,84,00,000/- drawn on HDF Bank, K.G. Marg, New Delhi, in favour of Gurbakhsh Singh BA Builders Pvt. Ltd, i.e. the Contractor. The remaining amount of Rs.30,10,094/- (Rupees Thirty Lacs Ten Thousand Ninety Four Only) shall be kept as retention money for the defects liability period as mentioned in

clause 2 hereinabove and shall be released after the expiry period of the same subject to the submission of requisite documents as required by FHsL as mentioned in clause 3 of this MOU.

9. The Contractor hereby assures and confirms that the final agreed amount of Rs.2,00,00,000/- (Rupees Two Crore Only) is full & final, is inclusive of all the contract fee, all taxes. The amount shall be payable after deduction of tax as per prevailing Govt. rules by FHsL.

11. Upon execution of this MoU, both the parties hereto shall be deemed to have discharged and extinguished all its rights, duties, liabilities and obligations with respect to the matters arising out of hospital.

12. This MoU constitutes the entire agreement between the Parties hereto with respect to the subject matter of this Deed and supersedes all prior agreements and undertakings, written or oral, with respect to the subject matter hereof except as otherwise expressly provided herein or therein.”

15. As indicated above, in terms of clause 12, GBPL and Fortis had agreed that the MoU would supersede all prior agreements in respect of the subject matter of the MoU. GBPL does not dispute that the subject matter of the MoU covered the Agreement and the FoC. Thus, concededly, the agreements - the Agreement and the FoC - stood novated with the GBPL and Fortis entering into the MoU.

16. In ***Union of India v. Kishorilal Gupta and Bros.*** (*supra*), the Supreme Court examined the question whether an arbitration clause in an

agreement would survive novation of the said agreement. After referring to earlier decisions, Justice Subba Rao speaking for majority, held as under:-

"10. The following principles relevant to the present case emerge from the aforesaid discussion : (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.

11. We have held that the three contracts were settled and the third settlement contract was in substitution of the three contracts; and, after its execution, all the earlier contracts were extinguished and the arbitration clause contained therein also perished along with them. We have also held that the new contract was not a conditional one and after its execution the parties should work out their rights only under

its terms. In this view, the judgment of the High Court is correct. This appeal fails and is dismissed with costs."

17. There is no dispute that the subject matter of the MoU and of the agreements is the same - that is, construction of Fortis Hospital - and Fortis was the assignee of RSSB; therefore the agreements stood novated and by virtue of Section 62 of the Indian Contract Act, 1872, were not required to be performed. Consequently, the arbitration clause contained therein also ceased to be applicable and has perished.

18. The Supreme Court in a recent decision in **Young Achievers v. IMS Learning Resources Private Limited**: (2013) 10 SCC 535, has stated the above principle in the following words:-

"An arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement".

19. Although it was not disputed that the arbitration clause in an earlier agreement would perish on novation, Mr Jain states that the MoU is invalid on account of being induced by undue influence, coercion and economic duress. This court is unable to accept this contention for several reasons. First of all, GBPL had already taken recourse to legal remedies and filed suits before the Civil Judge, Ludhiana including to restrain RSSB from invoking the bank guarantees. It is during the course of those proceedings that GBPL and Fortis had agreed to resolve their disputes. On 26.04.2014, the learned counsel for the parties had appeared before the Civil Judge, Ludhiana and had sought adjournment to explore the possibilities of a

compromise. This is clearly evident from the order passed by the court, which reads as under:-

“The Ld. Counsel for both the parties have stated that there are chances of compromise between the parties. On joint request, case is adjourned to 24.05.2014 for compromise.”

20. It is apparent from the above that GBPL and Fortis entered into the MoU after negotiations and both parties had sufficient time to understand the ramifications of the proposed settlement.

21. Secondly, GBPL and Fortis acted on the MoU and GBPL withdrew the suits unconditionally.

22. Thirdly, GBPL had the assistance of legal advice and GBPL cannot be heard to state that it entered into the MoU without free consent. It is possible that GBPL may have agreed for what it considered to be less than a fair settlement, but whether to settle or litigate was entirely upto GBPL; and, that does not mean that GBPL entered into the MoU without free consent, rendering the MoU as void.

23. It is relevant to observe that the MoU clearly records Fortis to be the assignee of RSSB and it is not disputed that in terms of the Agreement, it was open for the RSSB to assign its rights to a third party without the consent of GBPL. In the circumstances, it is clear that the MoU was entered into after due deliberation and negotiation and this court is unable to accept that the same should be ignored on a mere allegation that the MoU was entered into under duress.

24. Lastly, it is not disputed that the GBPL has enjoyed the benefit of the MoU. In **Double Dot Finance Limited v. Goyal MG Gases Limited And Anr.:** 2005 (1) Arb. LR 324 (Delhi), this Court had considered the question whether the party was entitled to raise the issue of coercion and undue influence after accepting payments in full and final settlement of its dues. In the aforesaid context, this Court had observed as under:-

“9. Coming to the question as to what is "coercion" or "duress" in commercial contracts, we may refer to the case of Privy Council case "**Pao On and Ors. v. Lau Yiu and Anr.**" reported in 1979 (3) of England Reporter Page-65. Economic duress in commercial context was dealt with by their Lordships and it was held that in contractual relations, a mere financial pressure is not enough. It was also held that the question as to whether at the time the person making a contract allegedly under coercion had not any alternative course open to him which could be an adequate legal remedy and whether after entering into the contract, he took steps or not to avoid it are matters which are relevant for determining as to whether he acted voluntarily or not. It was also held that the compulsion has to be of a nature which deprives a party of his freedom of exercising free will leaving no alternative course open to him. Therefore, the 'coercion' or 'duress' required for vitiating 'free consent' has to be of the category under which the person under 'duress' is left with no other option but to give consent and is unable to take an independent decision, which is in his interest. Bargaining and thereafter accepting an offer by give and take to solve one's financial difficulties cannot be treated as 'coercion' or 'duress' for the reason that in trade and commerce every day such situations arise and decisions are taken by parties some of which they might not have taken but for their immediate financial requirements and economic emergencies.”

25. In view of the above, GBPL's claim that there exists an arbitration agreement between the parties, cannot be accepted. Accordingly, the petition and the pending applications are dismissed.

VIBHU BAKHRU, J

MARCH 01, 2017

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