

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

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Decided on: 23.08.2017

+ **CS(OS) 3205/2015**

AHUJA BUILDERS

..... Plaintiff

Through: Mr. Alok Mahajan, Advocate and Mr.
Rajesh Arya, Advocate.

versus

DOONVALLEY TECHNOPOLIS PVT. LTD

..... Defendant

Through: Mr. Rishi K. Awasthi, Advocate.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

I.A. 13871/2016 (U/S 5 & 8 of the Arbitration and Conciliation Act)

1. This order shall dispose of the application of the defendant under Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 for referring the dispute to the Arbitrator.

2. The undisputed facts relevant for the determination of the present application is that the defendant had awarded the Balance Civil & Structural Works, of Radisson Hotel & Metropolis Mall at Plot No. 'A', SIDCUL N.H. 87, IIE Pantnagar, Rudrapur, Uttarakhand, to the plaintiff vide Contract Agreement dated 08.12.2008. The said agreement contains

the arbitration clause no. 13, pursuant to which, all the disputes arising out of the Contract had to be referred to the Arbitrator.

3. On the completion of the said work and after a discussion between the parties, the defendant determined a sum of Rs. 2,72,04,349/- as due and payable by them to the plaintiff. The defendant wrote a letter dated 01.04.2013 confirming the aforesaid outstanding amount towards running bills of the plaintiff and undertook to clear it by 15.05.2013. The plaintiff did not dispute the said amount and waited for the payment. The defendant, however, did not pay the said sum within the stipulated time and thereafter, the plaintiff served a legal notice dated 25.04.2015, calling upon the defendant to pay the said sum along with the interest at the rate of 18% per annum.

4. Upon failure of the defendant to make the payment pursuant to the legal notice, the present suit under Order XXXVII of the CPC has been filed.

5. Learned counsel for the defendant has argued that even if the liability to make the payment has been admitted, still the suit does not lie in view of Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 and the dispute need to be referred to the Arbitrator. Reliance has been placed on

the findings in the case of *ION Exchange (India) Ltd. vs. MSK Projects (India) Ltd*, 2005 (4) MhLj 921 and *Novelty Jewellers vs. MMTC Limited (IA 2944 & 2945/2000)*, in CS(OS) No.1391/1999 decided on 23.08.2004.

It is further argued that Section 8 of the Arbitration and Conciliation Act would have the primacy over Order XXXVII of CPC and if the conditions laid down in Section 8 of the Arbitration and Conciliation Act are fulfilled, the jurisdiction of the Civil Court is barred.

6. It is submitted that even on termination of a Contract, the arbitration clause does not get perished nor becomes inoperative rather it survives for resolution of disputes. Reliance is placed on the findings in the case of *The Branch manager, Magma Leasing and Finance Limited and Anr. vs Potluri Madhavalata and Anr*, (2009) 10 SCC 103. It is further argued that even if there is a settlement agreement or a discharge voucher executed by one party, the arbitration clause does not cease to be effective and the remedy available is only under Arbitration and Conciliation Act and the proceedings before Civil Court are barred. Reliance is placed on *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd*, (2009) 1 SCC 267 and it is argued that in this case, *Nathani Steels Ltd. vs. Associated Constructions*, 1995 Supp (3) SCC 324 was discussed and differentiated.

The applicant/defendant has also relied on the findings of the Supreme Court in the case of *Chairman and M.D., N.T.P.C Ltd. vs. Reshmi Constructions, Builders and Contractors, (2004) 25 SCC 663* and argued that even in cases where there is full and final settlement between the parties, and there is an arbitration clause binding the parties, the Civil suits are barred by virtue of Section 5 of the Arbitration Act and the remedy available is to raise the dispute under Section 8 of the Arbitration and Conciliation Act.

7. On behalf of the plaintiff, it is argued that the case laws relied upon by the defendant/applicant are not applicable on the facts of this case. It is submitted that in all those cases, there was an existing dispute between the parties.

8. It is submitted that in none of the cited cases, the party who had to make the payment under the terms of the Contract had determined the payable amount and offered the same and the party who had to receive the payment has accepted it unconditionally. It is submitted that there is no dispute as regards the amount payable under the agreement. The defendant had to pay the money to the plaintiff under the Contract on its completion and has calculated the payable amount and conveyed it in writing with

undertaking to clear the said amount of Rs. 2,72,04,349/- on 01.04.2013 and this calculation of the defendant was accepted and not disputed by the plaintiff and since there is no dispute existing between the parties, there is nothing to be referred to the Arbitrator as so no dispute exist for referral and so the arbitration clause cannot be invoked and the plaintiff is within its right to file the present suit under Order XXXVII of the CPC on the basis of the promissory note i.e. letter dated 01.04.2013 by which the defendant promised to pay the dues to the plaintiff.

9. Learned counsel for the plaintiff has relied on the findings of the Supreme Court in the case of *Nathani Steels (supra)* wherein three Judge Bench of Supreme Court has held that when a dispute is amicably settled between the parties finally, the arbitration clause cannot be invoked by the party to resolve the same on ground of mistake in the settlement unless the settlement is set aside in proper proceedings.

10. I have heard the arguments and perused the file.

11. The question for determination thus is whether there is any dispute between the parties, which needs to be referred to Arbitrator and the suit is barred in view of the arbitration clause, contained in Contract Agreement.

12. There is no dispute to the fact that there was an arbitration agreement between the parties and any dispute arising under the Contract is needed to be referred to the Arbitrator. Clause 13 is reproduced as under:

“That all disputes arising out of or in any way connected with this Contract Agreement shall be resolved through arbitration as mentioned in the Tender Documents and that the same shall be deemed and that the same shall be deemed to have arisen in New Delhi and the courts at New Delhi alone shall have the jurisdiction to determine the same.”

(emphasis supplied)

13. Section 8 of the Arbitration and Conciliation Act 1996, reads as under:-

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.;

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for

reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

(emphasis supplied)

14. Under Clause 13 of the said Contract Agreement, what is referable is ‘*a dispute arising out of or in any way connected with Contract Agreement*’. The contention of the plaintiff is that there is no dispute arising out of or relating to the agreement and hence Arbitration clause cannot be invoked in the present scenario. The defendant, in the application, has also not contended that there exists any dispute between parties relating to the Contract Agreement.

15. Under Section 8 of the Arbitration and Conciliation Act, 1996 a judicial authority is mandated to refer “the dispute”. For referral the existence of ‘Dispute’ is *sine qua non*. The plaintiff contends that since the money payable under the Contract was calculated by the defendant and the calculation is accepted by the plaintiff as it is, there exists no dispute

between them in relation to the terms of Contract. The applicant/Defendant has also not contended anywhere that there is any dispute between the parties relating to the amount payable under the Contract or of any other nature. Its plea is based on mere existence of arbitration clause 13 in the Contract.

16. The defendant has not denied its letter dated 01.04.2013 which is reproduced as under:-

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Date: 1st April 2013

*To
M/s Ahuja Builders
X-3 Hauz Khas
New Delhi 110016*

Sub: Party Account balance confirmation

Dear Sir,

We wish to confirm that as on 31/03/13 we have an outstanding of Rs. 2,72,04,349/- (Rs. Two crore seventy two lac four thousand three hundred & forty nine only) towards you running bill for the civil work of Hotel & Mall.

We wish to undertake that these dues shall be cleared by us latest by 15th May, 2013.

Thanking you,

Yours sincerely

For Doonvalley Technopolis Pvt. Ltd.

Sd/-

(Sanjeev Srivastava)

Director”

17. From the letter of defendant/applicant it is evident that the defendant acknowledged its liability to pay the sum of Rs.2,72,04,349/- towards the running bill raised by the plaintiff in terms of the Contract. The plaintiff accepted the said calculation and did not dispute the payable amount and waited for its payment within the stipulated time i.e. 15.05.2013 but the defendant failed to pay. The present suit is filed for the recovery of the said amount under order XXXVII of CPC. It is a simple case of recovery of money based on acknowledgement and undertaking to pay.

18. In view of these facts, it is clear that none of the parties has raised any dispute arising out of the said Contract. When there is no dispute between the parties relating to the contract containing an arbitration clause, the arbitration clause cannot be invoked. There has to be dispute arising out of the contract for invoking the arbitration agreement. The findings in the cases relied upon by the defendant are given on different set of facts. The facts in *ION* case (*supra*), relates to liabilities under a letter of intent, containing arbitration clause. There arose a dispute between the parties as to the acceptance or non-acceptance of the liability or the acknowledgment of the liability and it was on these facts that the Court held that the suit

under Order XXXVII was not maintainable. In ***Branch Manager*** case (*supra*), the Court laid down the proposition of law that even on termination of the Contract Agreement, the Arbitration Agreement survives and binds the parties and where the conditions mentioned in Section 8 of Arbitration and Consultation Act are satisfied, the matter needs to be referred for Arbitration and the Civil suits are not maintainable. The Court discussed Section 8 of Arbitration and Conciliation Act and has laid down the principle of law as under:-

21. xxx xxx xxx xxx

22. *An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied: (a) that there exists an arbitration agreement; (b) that action has been brought to the court by one party to the arbitration agreement against the other party; (c) that the subject matter of the suit is same as the subject matter of the arbitration agreement; (d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.*

23. *Section 8 is in the form of legislative command to the court and once the pre-requisite conditions as aforesaid are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfillment of conditions of Section 8, no*

(emphasis supplied)

option is left to the court and the court has to refer the parties to arbitration.

19. In this case, the defendant/applicant has not so far raised any dispute relating to the terms and conditions of the Contract Agreement. The facts in ***Branch Manager case (Supra)*** are also distinguishable. In that case, Bank had entered into a hire purchase agreement for purchase of motor vehicle with respondent no.1 (Smt. Potluri) and when she defaulted in making payment of EMIs, the Bank terminated the agreement and seized the vehicle. The agreement contained an Arbitration clause. Respondent no. 1 filed a civil suit seeking recovery of seized vehicle and sought restrain order against Bank from transferring the said vehicle. It was on those facts the Court held that civil suit is barred. In ***Novelty Jewellers (supra)*** case, the Court after discussing the provisions of law held that where there is dispute between the parties, then for addressing the said dispute/grievances, the matter has to be referred to the Arbitration where there is an Arbitration Agreement and the proceedings before the Civil Courts are not maintainable. In ***National Insurance Co. Ltd case (supra)***, the Supreme Court after discussing and distinguishing the findings of ***State of Maharashtra vs. Nav Bharat Builders, AIR 1999 SC11*** and ***Nathani Steels (Supra)*** held as under :-

22.3 Nathani Steels related to a dispute on account of non-completion of the contract. The Court found that the said dispute was settled by and between the parties as per deed dated 20.12.1980 signed by both parties. The deed referred to the prior discussions between the parties and recorded the amicable settlement of the disputes and differences between the parties in the presence of the Architect on the terms and conditions set out in clauses 1 to 8 thereof. In view of it, the Court rejected the contention of the contractor that the settlement was liable to be set aside on the ground of mistake. A three-Judge Bench of this Court, after referring to the decisions in *P. K. Ramaiah and Nav Bharat Builders*, held thus:

...that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicable settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause.

22.4 What requires to be noticed is that in *Nav Bharat Builders and Nathani Steels*, this Court on examination of facts, was satisfied that there were negotiations and voluntary settlement of all pending disputes, and the contract was discharged by accord and satisfaction. In *P. K. Ramaiah*, the Court was satisfied that there was a voluntary acceptance of the measurements and full and final payment of the amount found due, resulting in discharge of the contract, leaving no outstanding claim or

pending dispute. In those circumstances, this Court held that after such voluntary accord and satisfaction or discharge of the contract, there could be no arbitrable disputes.

(Emphasis supplied)

20. The law propounded in both *Nathani case (supra)* and *National Insurance case (supra)* by the Supreme Court is that on voluntary settlement between the parties leaving no outstanding claim or pending disputes, the Contract stands discharged as to the satisfaction of both the parties and there exists no arbitable dispute.

21. From the facts of this case which are akin to *Nathani Steels case (supra)* and *National Insurance case (supra)*, it is clear that on completion of the Contract between the parties after negotiation, the defendant/applicant calculated the payable amount as 2,72,04,349/- and the said calculation of the payable amount was accepted by the plaintiff. There is thus a voluntary settlement between the parties and the letter dated 01.04.2013 of defendant clearly shows that there was no outstanding claim or pending dispute between the parties. On the settlement of accounts, there is no existing dispute or outstanding claim under the contract and so the contract stands discharged to the satisfaction of both the parties. It therefore is apparent that there is no arbitrable dispute arising out of the contract.

22. In view of the above facts and circumstances of the case, there exists no dispute to refer for arbitration in terms of Section 8 of the Arbitration and Conciliation Act.

23. The application has no merit and the same is dismissed.

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Matter be put up before the Roster Bench for 01.09.2017.

**DEEPA SHARMA
(JUDGE)**

AUGUST 23, 2017

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