IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 24TH DAY OF SEPTEMBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

A.No. 6323 of 2017
and
A.No. 5823 of 2017
in
A. No.1954 of 2017

A. Nos.1954 & 6323 of 2017:-

In the matter of Arbitration & Conciliation Act, 1996
And
In the matter of Dispute between M/s.Consolidated Construction Consortium Limited and M/s.Ferdous Hotels Private Limited in Articles of agreement dated 01/09/2006 which includes General conditions of contract

M/s.Consolidated Construction Consortium Limited,
rep. by its authorised signatory,
Mr.Ravichandar,
No.5, 2nd Link Street,
C.I.T.Colony, Mylapore,
Chennai-600 004. ... Applicant

-Versus-

M/s.Ferdous Hotels Pvt. Ltd.,
rep. by its Managing Director,
Mr.Althaf Ahemed,
R-8, Mariana Square Basement,
No.26 & 27, Santhome High Road,
Mylapore, Chennai-600 004. ... Respondent

A. No.6323 of 2017:-

Application praying that this Hon'ble Court be pleased to direct the Registry to payment-out the sum of Rs.2,05,00,000/- (Rupees two crores and five lakhs only) deposited by the respondent/respondent herein vide demand draft (No.043892) dated 05.09.2017 drawn on Andhra Bank, Mowbrays Road Branch to the credit of A. No.1954 of 2017 in favour of the applicant.

A. No.5823 of 2017:-

M/s.Ferdous Hotels Pvt. Ltd.,
rep. by its Executive Director,
Mr.M.C.Ravikumar,
No.286, T.T.K.Road, Alwarpet,
Chennai-600 018. ... Applicant

-Versus-

M/s.Consolidated Construction Consortium Limited,
rep. by its authorised signatory,
Mr.M.Ravichandran,
No.5, 2nd Link Street,
C.I.T.Colony, Mylapore,
Chennai-600 004. ... Respondent

Application praying that this Hon'ble Court be pleased to permit the applicant to withdraw the undertaking given to this Hon'ble Court and recorded in the order dated 26.04.2017 and 17.07.2017 in A.No.1954 of 2017. For a sum of Rs.3,05,00,000/- payable to the respondent herein and allow the applicant to show cause in the application A.No.1954 of 2017, on merits.

These applications along with Cont. P. No.1742 of 2017 and Sub. Appln. No.351 of 2017 coming on this day before this court for hearing the court made the following order:-

The following applications/petition are being disposed by this common order:-

S.No.	Application No.	Applicant/Petitioner	Respondent
1	A.No.5823 of 2017 in A.No.1954 of 2017	M/s.Ferdous Hotels Pvt. Ltd.	M/s.Consolidated Construction Consortium Ltd.
2	A.No.6323 of 2017 in A.No.1954 of 2017	M/s.Consolidated Construction Consortium Ltd.	M/s.Ferdous Hotels Pvt. Ltd.
3	Cont.P.No.1742 of 2017	M/s.Consolidated Construction Consortium Ltd.	1.M/s.Ferdous Hotels Pvt. Ltd. 2.Haji Mohammed Haneefa 3.M.C.Ravi Kumar
4	Sub A.No.351 of 2017 in Cont.P.No.1742 of 2017	M/s.Consolidated Construction Consortium Ltd.	1.M/s.Ferdous Hotels Pvt. Ltd. 2.Haji Mohammed Haneefa 3.M.C.Ravi Kumar

2.Since these applications arise out of orders passed in A.No.1954 of 2017, the ranks of the parties in the said application shall be used to refer the parties in these orders to avoid confusion.M/s.Consolidated Construction Consortium Ltd. was the applicant in A.No.1954 of 2017 while M/s.Ferdous Hotels Pvt. Ltd. was the respondent in the said application.

3.A.No.5823 of 2017 in A.No.1954 of 2017 has been filed to withdraw the undertaking given to this Courtand recorded in the order dated 26.04.2017 and 17.07.2017 in A.No.1954 of 2017 wherein the respondent agreed to pay a sum of Rs.3,05,00,000/- to the applicant with a view to settle the dispute between them.

4.A.No.6323 of 2017 in A.No.1954 of 2017 has been filed to direct the Registry for payment-out a sum of Rs.2,05,00,000/- (Rupees Two Crores and five lakhs only) deposited by the respondent vide Demand Draft (No.043892) dated 05.09.2017 drawn on Andhra Bank, Mowbrays Road Branch to the credit of A.No.1954 of 2017 in favour of the applicant.

5.Contempt Petition No.1742 of 2017 has been filed to punish the respondents for wilful violation of the undertaking given by the respondent before this Courton 26.04.2017.

6.Sub Application No.351 of 2017 has been filed to grant interim injunction restraining the respondents from in any creating any third party interest on the first respondent company and or its assets by alienation or transfer of shazres or the property.

7.By an order dated 21.09.2017 in A.No.5823 of 2017 in A.No.1954 of 2017 this Courtappointed Mr.V.Subramanian, as the sole arbitrator to resolve the dispute between the parties with the consent of both the counsel.

8.These applications are taken up together for final disposal after hearing the parties to their respective counsel.

9.The applicant was engaged by the respondent for construction of a Star Hotel. As payments were delayed by the respondent, Application No. 1954 of 2017 came to be filed to direct the respondent to furnish security to an extent of Rs.6,52,76,375/- (Rupees Six Crores Fifty Two Lakhs Seventy Six Thousand Three Hundred and Seventy five only) within time, failing which, to pass an order of attachment of the schedule property.

10.Notice were ordered on 28.03.2017 in the said applications to show cause as to why the respondent should not be called upon to furnish security for the admitted amount of Rs.2,08,65,034/- to the respondent in their communication.

11.While the above application was pending, the parties herein signed a Memorandum of Understanding dated 25.04.2017 and filed the same before this Court.

12.The applicant agreed to receive a sum of Rs.3,05,00,000/- (Rupees Three Crores and five lakhs only) in full and final settlement of all claims and undertook the pay the same by 20.06.2017. The respondent also undertook not to alienate the property detailing the schedule until the disputes are settled with the applicant.

13.It was further agreed that if any proposal arises for sale of schedule property before settling the above amount, the respondent would inform the applicant about the same and pay the above sum before the execution of sale deed in favour of any third party.

14.If any dispute arises on account of the failure of the respondent to comply with the above undertaking, it is open for the applicant to recover the entire amount in the manner known to law including that of continuing the arbitration process initiated. Thus, it is the applicant who has the option to initiate arbitration proceeding in case there is a default in complying with the conditions of the undertaking given by the respondent in the Memorandum of Understanding dated 25.4.2017.

15.It is quite clear from the reading of the said Memorandum of Understanding, the respondent was in a hurry to dispose the schedule property which would have otherwise been subjected to an attachment order by this Courtif the respondent failed to provide the security directed to be furnished by an order dated 28.3.2017 in A No. 1954 of 2017.

16.The Courtrecorded the understanding reached in its order dated 26.04.2017 and adjourned A.No.1954 of 2017 to 21.06.2017 for reporting settlement and for passing consequential further orders.

17.However, the respondent could not arrange the amount and sought for extension of time till 20.06.2017 and therefore, filed an affidavit giving liberty to the applicant to submit to an arbitration proceeding for the entire amount if the agreed amount was not paid by them.

18.The respondent thereafter issued cheque No.151772 dated 15.07.2017 for the agreed sum of Rs.3,05,00,000/- to the applicant through their counsel. Recording the same, on 21.06.2017 the case was adjourned to 17.07.2017 for recording compliance.

19.It appears that the cheque was presented by the applicant which was returned and the applicant was debited by the bankers. On 17.07.2017, the respondent's counsel also submitted that the cheque presented by the applicant would be returned due to insufficient fund in the respondent's account.

20.Under these circumstances, by an order dated 17.07.2017, this Court ordered as follows in para-3 :-

> i) The respondent is directed to pay a sum of Rs.1,00,00,000/- on or before 31.07.2017.
> ii) The balance of an amount of Rs.2,05,00,000/- will be paid on or before 31.08.2017.

21.On 31.07.2017, the respondent paid an amount of Rs.1,00,000/- to the applicant.

22.On 01.09.2017, this Court ordered the respondent to maintain status-quo of the schedule property and directed the respondent to deposit the balance amount of Rs.2,05,00,000/-

to the credit of A.No.1954 of 2017 on or before 05.09.2017.

23.Reluctantly, the respondent deposited the balance amount of Rs.2,05,00,000/- on 05.09.2017 with “The Registrar General” High Courtas directed by this Courtand reported compliance thereof on 06.09.2017. The case was adjourned to 07.09.2017.

24.On 6.09.2018, the respondent filed A.No.5823 of 2017 to withdraw the undertaking given on 26.4.2017 and 17.07.2017.

25.At about this time, not only the Management of the respondent company had changed hands but also the old counsel was replaced with present counsel. The said application has been filed to renege from the commitments given by way of an undertaking before this Courtand to direct the applicant to pay back Rupees One Crore to the respondent paid on 31.07.2017.

26.During the pendency of the above proceedings,Mr.Mohammed Haneefa the original deponent of dependent of the affidavit who filed the affidavit and signed for the respondent Memorandum of Understanding was asked to file an affidavit.

27.Accordingly,Mr.Mohammed Haneefa,filed an affidavit dated 17.11.2017 wherein he affirmed that was authorized by the Board of the respondent company to give undertaking before this Court. Board Resolution dated 01.06.2016 authorizing him to file an affidavit on behalf of the respondent was also filed.

28.The Counsels mention that Mr.Mohammed Haneefa has now deceased.

29.Mr.M.C.Ravikumar, the deponent in the affidavit filed in support of A.No.5823 of 2017 after the respondent was taken over by the new management has also filed a copy of the Board Resolution which authorized Mr.Mohammed Haneefa, erstwhile Director (now deceased) confirming the position.

30.The elaborate arguments were advanced on behalf of the respective parties. For the applicant learned counsel Mr.S.S.Rajesh made his submissions while Mr. K Shakespeare appeared and made detailed submissions.

31.The case of the applicant/petitioner is that the respondent cannot resile from the undertaking given to the Courtby filing A.No5823 of 2017. An undertaking cannot be withdrawn and therefore, prayed for payment out as prayed for in A.No.6323 of 2017.

32.The learned counsel for the applicant has relied upon the following decision of the Hon'ble Supreme Court.:-

i) **Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Ltd.,** (2011) 10 SCC 420.

ii) **National Insurance Co., Ltd., vs. BogharaPolyfab Private Ltd.,** (2009) 1 SCC 267.

iii) **M/s.P.K.Ramaiah and Company vs. Chairman & Managing Director, National Thermal Power Corpn.** 1994 Supp(3) SCC 126.

33.The respondent would submit that the undertaking was given by mistake and therefore the respondent is entitled to withdraw the same and therefore the respondent was entitled to the relief in A.No.5823 of 2017.

34.The learned counsel for the respondent has relied upon the following decision of the Hon'ble Supreme Court.:-

i) **The Sales Tax officer, Banaras and Others vs. Kanhaiya Lal Makund Lal Saraf,** AIR 1959 SCC 135.

ii) **M/s.Jain Exports Pvt.Ltd.,and another vs. Union of India and others,** AIR 1996 SCC 2739.

iii) **Madhucon Projects Ltd., vs Indian Oil Corporation Ltd.,** CDJ 2007 DHC 817.

iv) **Orissa Manganesse and Minerals Ltd., vs. Synergy Ispat Private Ltd.,** (2014) 16 SCC 654.

v) PanchdeoNarain Srivastava vs. Km.Jyoti Sahay and another, AIR 1983 SCC 462.

vi) ***Kanwar Singh Saini vs. High Courtof Delhi,****(2012) 4 SCC 307*

vii) **Bhajju alias Karan singh vs. State of Madhya Pradesh,** (2012) 4 SCC 327.

35.The short point that arises for consideration in the factual matrix of the case are as follows:-

i. Whether the undertaking given before the Courtby the respondent on record can be resiled by the respondent by invoking the jurisdiction of the Courtunder Section 9 Arbitration and Conciliation Act, 1996? and

ii. Whether the applicant can convert the proceedings for enforcing the Memorandum of Understanding and the orders of this Courtdirecting the respondent to deposit the amount by invoking the jurisdiction under section 9 of the Arbitration and Conciliation Act, 1996?

iii. Whether the respondents can be punished for contempt of Court?

36.The Memorandum of Understanding dated 25.4.2017 is a detailed memorandum of understanding in terms of which the respondent agreed to pay the aforesaid sum of Rs.3,05,00,00/-.

37.However, due to the respondent’s inability to pay the amount in time on or before 20.6.2017, the time for payment of the same was extended. After the cheque was dishonoured , the Courtby an order dated 17.7.2017 made the following order:-

> **i. respondent is directed to pay a sum of Rs.1,00,00,000 on or before 31.7.2017;**
>
> **ii. the balance amount of Rs.2, 05, 00, 000/-will be paid on or before 31.8.2017.**
>
> **Call on 1.9.20 17.**

38.On 1.9.2017, the respondent reported payment of Rs.1,00,00,000/-. The respondent thereafter remitted an amount of Rs.2,05,00,000 on 5.09.2017 pursuant to an order dated 1.9.2017.

39.By an Order dated 14.3.2018, the Courtdirected the Registry to invest the above amount in an interest-bearing fixed deposit in the Indian Bank, High CourtBranch.

40.According to the applicant, there is an accord and satisfaction of the claim and therefore the attempt of the respondent to resile from the same cannot be countenanced. An undertaking given before the Courtcannot be withdrawn as same has been acted upon. In other words, the respondent cannot approbate and the reprobate the position.

41.The decision of the Courtin **Kanhaiya Lal Makund Lal Saraf** referred to by the learned counsel for the respondent dealt with the situation as to whether estoppal under section 115 of the Indian Evidence Act, 1872 will apply were both the parties to the transaction are labouring under mistake of law. Therefore, the said decision is of no relevance to the facts of the present case.

42.The decision of the Supreme Courtin **Jain exports Private Limited** dealt with the situation where it was held that an undertaking given to the Courtis not an obligation imposed by the court. It is a promise voluntary made to the court. Acting on its own undertaking given to Courtcreates no equity in favour of the party giving it.

43.The appellant there had obtained a stay by giving an undertaking and thereby were able to sell the permitted quantity on the condition that they furnished security to the collector of customs for the difference of duty between 10% and 92.5% and in the event the collector was not satisfied with the security, appellants furnished bank guarantee for the said difference.

44.The interim order recorded that the appellant’s undertook “not to sell caustic soda imported under the license at a higher rate than ? 5 132 only per metric ton”. The said decision is of no significance in favour of the respondent to canvass their case.

45.The decision of the Delhi High Courtin **Madhucon projects Ltd versus Indian oil Corporation Ltd**. CDJ 2007 DHC 1817 holding that where there is doubt as to whether there is accord and satisfaction between the parties, legal notice should be referred to arbitration.

46.In the aforesaid case, it was observed that the legal phrase “accord and satisfaction” is an elementary concept of contract jurisprudence normally discussed under Section 63 of the Contract Act, 1872. It was observed that it is axiomatic that the precursor of such receipt is existence of the contract which has given rise to a colliding claims and that rare exceptions, the courts would be ill-advised to trespassing into and transgress upon the arbitrators duty in such circumstances.

47.The decision in **Orissa Manganese and Minerals Ltd versus Synergy Ispat Private Limited** (2014) 16 SCC 654 that interim relief cannot amount to granting of full and final release claimed under section 9 of the act.

48.However, in the present case the undertaking was recorded pursuant to the Memorandum of Understanding and was intended to put an end to the dispute between the parties. Only time was extended on account of the inability of the respondent to comply with the terms of the said Memorandum of Understanding.

49.The Memorandum of Understanding which was filed before the Courtunfortunately was not recorded as a compromise decree. Instead, the Courtrecord the understanding reached in the Memorandum of Understanding.

50.Nevertheless, undertaking given to the Courtis binding and cannot be withdrawn as per the HonourableSupreme Courtin **Rekha Mukherjee versus Ashish Kumar Das** AIR 2004 SC 443. In the aforesaid case the facts recorded are as follows:-

> *"**10.**The short question which, thus, arises for consideration in this appeal is as to whether the undertaking of the appellant survives. The undertaking of the appellant was to the effect that she would not execute the decree passed in the aforementioned suit till the decision of Title Suit No. 49 of 1990."*

51.The Courtheld that "*A party giving an undertaking is bound thereby but by reason thereof, the same cannot be given a meaning whereby the scope and extent thereof is enlarged.*"

52.An undertaking given in a compromise cannot be varied by the Courtunless the parties agree. In fact, a compromise which signed the counsel is binding on the parties as per the decision of the Supreme Courtin **BysamPistonjiGariwala Vs Union ofIndia** AIR 1991 SC 2234.

53.In the present case the respondent has himself deposited the amount in pursuance of the Memorandum of Understanding based on which the undertaking was recorded by the Courtand time was extended from time to time on account of the respondents inability to pay the amount. The Courthas enlarged the time to ensure that the respondent complies with the terms of the Memorandum of Understanding.

54.As per the decision of the Supreme Courtin Carvery **Coffee Traders, Mangalore** cited by the learned counsel for the applicant has held that where final settlement is reached after re-negotiation without mis-representation, fraud or coercion and the money payable is accepted towards full and final settlement of the claim it is not open for the parties to make any other claim thereafter.

55.In **National Insurance Company Ltd.** cited by the learned counsel for the applicant laid on the principle the following principle: which are relevant:-

> (a) where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt, nothing survives in regard to such discharged contract;
>
> (*b*) where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;
>
> (*c*) where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there are no outstanding claims or disputes.

56.In **P.K. Ramaiah** [1994 Supp (3) SCC 126] cited by the learned counsel for the applicant held that "*Whatever be the principle or method or manner of working it out, a particular figure was arrived at by the Government. The respondent was then asked to consider its willingness to accept the offer and having accepted the same and received the amount, it is no longer open to the respondent to dispute the claim on any* *count or ground. The dispute was concluded and the respondent fully and finally accepted the [settlement of the] claim and thereafter received the amount. Thus there is accord and satisfaction of the claim relating to labour escalation charges. Thereby there is no further arbitrable dispute in that behalf."*

57.The respondent having settled the dispute by way of a Memorandum of Understanding and having acted in pursuance of the same deposited the amount by seeking extension of time cannot turn turnaround and resile from the undertaking recorded by the Courtsaying that there was mistake and therefore the claim can be agitated in an arbitration proceeding.

58.Had the respondent not deposited the amount or paid the amount to the applicant, it would have been open for the applicant to opt for arbitration for the entire claim as per the Memorandum of Understanding. Unless, fraud, misrepresentation or coercion was exercised, it is not open for a party to resile from the contract.

59.In the facts of the present case, the management of the respondent company has changed hands after the Memorandum of Understanding was signed. Therefore, it is not open for a new management to undo the Memorandum of Understanding unilaterally.

60.The new management ought to have carried due diligence before taking of the liabilities incurred and accepted by the previous management.

61.If the respondent had any grievance it can only agitate against the previous management from whom they have negotiated in purchased the stakes in the respondent company. They cannot resile from a negotiated Memorandum of Understanding. The Memorandum of Understanding was signed voluntarily. Afters is presentation before the Courtonly the understanding was recorded by the Court.

62.Further, the applicant has accepted the amount deposited towards full satisfaction of the claim. The applicant is accordingly entitled to the amount.

63.In view of the above observations, Applicant No.5823 of 2017 deserved to be dismissed. The respondent (the respondent therein) has wanted the Courts time by filing frevilous and vexation proceeding to settle the negotiated understanding reached between the applicant and the respondent and voluntarily submitted the same to the Court.

64.As the Undertaking entered to put an end to the dispute and time was merely enlarged to faciliate the respondent to pay the amount to the applicant. Application No.6323 of 2017 deserved to be allowed. Thus, the mandate of the arbitrator also expires.

65.As far as the Contempt Petition and the sub-applications a concerned, I am of the view that though the conduct of the respondent is to undo the order recording the undertaking, it would not amount to contempt as the respondent has filed applications though wholly unjustified under the circumstances. Ordinarily, cost would have been imposed for wasting the court's time by filing frivolous applications to proract the litigation and to derail the undertaking record pursuant to the Memorandum of Understanding, I am however refraining from imposing cost as the order of the court's was complied though unwillingly by the respondent. As substantial justice is been rendered, I'm not imposing cost even though the application filed by the respondent has resulted in wastage of time not only for the applicant but also of the court.

66.In view of the above observation, following orders are been passed:-

i. Application No . 5823 of 2017 is dismissed .

ii. Application No. 6323 of 2017 in A.No.1954 of 2017 is allowed. The applicant shall be entitled to the amount deposited along with the interest accrued thereon after deduction of Government Commission and Audit Fees .

iii. Contempt Petition No. 1742 of 2017 and the Connected Sub- Application No. 351 of 2017 are dismissed.

Sd/-C.S.N.J

24/09/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 14.11.2018 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.