

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

FAO No. 4385 of 2013 (O&M)

Date of decision: May 29, 2019

Punjab State Warehousing Corporation

...Appellant

Versus

LMJ International Limited and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Vikas Bahl, Senior Advocate with
Mr. Nikhil Sabharwal, Advocate,
for the appellant.

Mr. D.K. Singal, Advocate,
for the respondent.

JAISHREE THAKUR, J.

1. This First Appeal against the Order has been filed against the judgment dated 5.11.2012 passed by the Additional District Judge, Chandigarh, whereby a petition filed by the appellants under Section 34 (2) (iv) (v) and 2 (b) of the Arbitration and Conciliation Act, 1996 (for short '**the Act**') against the arbitral award dated 6.3.2009 has been dismissed.

2. In brief, the facts are that in September, 2002, the appellant—Corporation entered into a Memorandum of Understanding (MoU) with the respondent at Chandigarh to secure export orders in the name of the appellant for the commodities identified under the said MoU. Thereafter, on 9.9.2002, the appellant entered into separate Associate Agreements with the respondent company for export of wheat and rice to foreign countries. As

per the said Associate Agreements, the respondent was to pay for the value of the goods at the prevalent market rate declared by the Food Corporation of India for export of wheat. The respondent was to remit the value of the goods by cheque payable to the appellant within 48 hours of faxing of the copy of the order. For this, the respondent was entitled to service charges as specified in the Associate Agreements, which was 0.50 US\$ to 0.60 US\$ per metric ton. Under the various Associate Agreements, the respondent lifted 5,27,578 metric tons of wheat in various crop years, the stock value of which comes to ₹2,61,46,35,430/-. On this amount, the interest rate due from the respondent comes to ₹7,66,08,120 and service charge comes to ₹1,35,76,882/- upto 15.10.2004. Thus, the total amount due and payable by the respondent for the wheat lifted by it for the purpose of export as on 15.10.2004 was ₹2,79,71,88,813/-. However, the respondent against the aforesaid amount made payment till that date amounting to ₹2,30,36,19,418/-, leaving an outstanding payment to the tune of ₹49,69,57,294/- payable to the appellant against the stocks of wheat lifted by the respondent. It is alleged that when inspite of repeated notices, the respondent did not make the payment, the appellant by letter dated 29.11.2004 invoked the arbitration clause in all these agreements and named Sh. D.S. Chatha, Additional District & Sessions Judge (Retd.) and sought confirmation of the respondent, as provided in the arbitration clause. Since the respondent did not give any acceptance in respect of the letter of the appellant dated 29.11.2004, therefore, the appellant filed an application under Section 11 (5) of the Act before this Court being, Application No.1 of 2005. Notice was issued by this Court. However, the respondent instead of

appearing before this Court filed an application under Section 11 of the Act before the High Court at Calcutta for appointment of an Arbitrator being A.P. No. 40 of 2005.

3. The appellant appeared before the Calcutta High Court and submitted that since an application for appointment of an Arbitrator has already been filed prior to the application filed in the Calcutta High Court, therefore, the same was not maintainable and contested the petition on the ground of jurisdiction also. However, the Calcutta High Court ordered appointment of an Arbitrator by order dated 4.4.2005. Aggrieved against the order, the appellant filed an SLP before the Supreme Court, being SLP No. 10963 of 2005. Eventually, the SLP came to be disposed of by order dated 20.2.2006, which reads as under:-

“We have heard the counsels of both the sides who have agreed and an arbitrator will be appointed in the matter. We are informed that the respondent has business office in Delhi. Although the petitioner's counsel insists that the arbitration should be held in Chandigarh, it will be more convenient for the parties if the arbitration proceedings are held in Delhi. Hence, we appoint Mr. Justice S.C. Aggarwal Retired Judge of this Court to be arbitrator (subject to his consent) on such terms as the Ld. Arbitrator may decide. It is made clear that the arbitration proceedings will be held at Delhi. SLP stands disposed of in these terms. A copy of this order be transmitted to Mr. Justice S.C. Aggarwal.”

Thereafter, learned Arbitrator entered into reference and fixed the arbitration proceedings for 12.7.2005. In the meantime, on 13.4.2006 the parties entered into a compromise deed and moved a joint application before the Arbitrator stating that the parties have met and on reconciliation they have

decided not to pursue the matter before the Arbitrator and requested that proceedings before the Arbitrator be terminated, which request was accepted by the Arbitrator, who terminated the proceedings by order dated 19.5.2006. With regard to the remaining disputes, which could not be settled, the Managing Director of the appellant Corporation, by Office order dated 24.5.2006, appointed Sh. D.S. Chatha, Additional District & Sessions Judge (Retd.) as the Sole Arbitrator. Needless to mention that subsequent to the settlement, the case pending before the Calcutta High Court was dismissed for non-prosecution on 14.7.2006.

4. The parties filed their statement of claims and statement of defence including the claims and counter-claims before the Arbitrator, who passed the Award dated 6.3.2009, which was challenged the appellant before the Additional District Judge, by way of filing a petition under Section 34 (2) (iv) (v) and 2 (b) of the Act, but the same was dismissed on 5.11.2012 on the ground that in view of the bar contained in Section 42 of the Act, the appellant should have approached Calcutta High Court where the first application had been filed. The observations made by the Additional District Judge, while dismissing the petition under Section 34 (2) (iv) (v) and 2 (b) of the Arbitration and Conciliation Act, 1996 reads as under:-

“I find merit in the arguments of learned counsel for the applicant—respondent, as it was the original agreement, which existed between the parties, though at some stage they might have arrived at compromise. That is to be seen because if subsequently qua some matters, the parties have arrived at settlement and entered into some agreement and some of the issues still remained disputed between the parties and in order to solve those issues, the arbitrator was appointed, then it was

under original agreement between the parties because the memorandum of understanding was executed between the parties in September, 2002.”

This how the present appeal came to be filed against the order dated 5.11.2002.

5. Mr. Vikas Bahl, learned Senior Advocate, along with Mr. Nikhil Sabharwal, Advocate, appearing on behalf of the appellant, submits that the Additional District Judge has not appreciated that proceedings before the Arbitrator, as appointed by the Supreme Court, were terminated on a joint request made by the parties. These proceedings were terminated by order dated 19.5.2006. Thus, with regard to the remaining disputes, which could not be settled, the Managing Director of the appellant Corporation, by Office order dated 24.5.2006, appointed Sh. D.S. Chatha, Additional District & Sessions Judge (Retd.) as the Sole Arbitrator. It is submitted that with a fresh compromise having been arrived at between the parties, the original contract stands substantially altered and substituted and therefore, necessarily became inoperative and unenforceable and ceases to exist. Therefore, the bar as created by Section 42 of the Act will not come in the way and as such the Additional District Judge has gone wrong in relying on Section 42 of the Act so as to decline to entertain the objections so filed by the appellant. Reliance has been placed upon the judgments rendered in **The Union of India Versus Kishorilal Gupta and Bros. 1959 AIR (SC) 1362, Damodar Vally Corporation Versus K.K. Kar 1974 AIR (SC) 158 and M/s Dadri Cement Co. and another Versus M/s Bird and Co.Pvt. Ltd. 1974 AIR (Delhi) 223.**

6. Per contra, learned counsel appearing on behalf of the respondents, while supporting the impugned judgment, submits that there is no illegality in the judgment so passed and as such no interference is called for by this Court. It is submitted that under Section 62 of the Indian Contract Act, 1872 apart from novation of a contract and rescission of a contract, alteration of a contract is also mentioned. Alteration is understood in the sense of amendment. It is settled law that an amendment to a contract being in the nature of a modification of the terms of the contract must be read in and become a part of the original contract and would not amount to an alteration under Section 62 of the Indian Contract Act. Learned counsel for the respondent places reliance upon a judgment rendered in **All India Power Engineer Federation Versus Sasan Power Limited 2017 (1) SCC 487**.

7. I have heard learned counsel for the parties and have gone through the pleadings of the parties.

8. The genesis of the dispute is regarding the compromise that was arrived at between the parties on 13.4.2006 and that too during the arbitration proceedings that had commenced pursuant to an Arbitrator being appointed by the Supreme Court. The only question that arises for adjudication is, if the new agreement entered into with a separate arbitration clause would be deemed to be a substitution of the earlier agreement or a continuation/supplementary of the earlier original one.

9. At this stage, it would be appropriate to re-produce Section 62 of the Indian Contract Act 1872:

“62. Effect of novation, rescission and alteration of contract.-

If the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed.”

10. The basic law pertaining to ‘novation’ has been settled in para 10 of **Lata Construction V. Dr. Rameshchandra Ramniklal Shah and another 2000 (1) SCC 586**, where it has been held as:

"One of the essential requirements of 'Novation', as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract."

11. The original agreement i.e. a Memorandum of Understanding dated September, 2002 (Annexure A/1) was entered into between the parties pertained to ‘to work together in export of Agro commodities’. As per the broad terms and conditions were mentioned therein, it was specified that LMJ International would secure export orders in the name of Punjab State Warehousing, Corporation. Terms and conditions for export contract with buyers would be finalized by LMJ International Ltd, the respondent herein, keeping in view the general guidelines issued by FCI; export price would be negotiated with overseas buyers by respondent directly with the sole responsibility of ensuring receipt of payments from foreign buyers. As per

terms and conditions of the MoU, Punjab State Warehousing Corporation, the appellant was to invest their finances in procurement of different commodities covered under the MoU. The appellant was to receive the cost of financing at EPC rate +1% from the respondent. All arrangements for uploading the goods were to be made by the respondent and any shortage in the goods in transportation from storage point up to port station would be made good by the respondent. This MoU was followed by an Associate Agreement dated 9.9.2002 pertaining to export of Indian rice and wheat. Clause 15 of the Associate Agreements specified *“any differences or disputes arising out of this agreement shall be resolved amicably, failing which, as in the arbitration and conciliation”*.

12. A compromise that was arrived at the proceedings being held before the Arbitrator as appointed by the Supreme Court on 13.04.2006 pertained to the residual disputes pending between the parties. A reading of the compromise reflects that accounts had been re-conciliated between the parties and certain amounts which were disputed were being put to arbitration. The respondent herein had accepted to make a payment of an amount of ₹11,73,67,150/- on account of the cost of stocks and service charges, which was paid by way of demand draft. The matters to be referred to arbitration were crystallized in the Compromise Deed itself. Since the dispute whether the exporters were liable to pay the enhanced cost of rice was the subject matter before the High Court of New Delhi in Civil Writ Petition No. 5740 of 2004 in All India Grain Exporters Association Versus Union of India and Food Corporation of India, it was agreed that the decision of the High Court would be applicable to the parties. The parties

agreed to refer the following disputes to the arbitrator namely, a) *Enhanced rate of cost of wheat and cost of rice after issuance of allocation/release order by the Food Corporation of India*, b) *Interest and Bank charges*, c) *Custom charges, under charges and other deductions*, d) *Sales tax on gunnies*, with an agreement that “*arbitration would be by an arbitrator to be nominated by the Managing Director of PSWC. The decision of the arbitrator will be binding on both the parties.*”

13. The compromise also reflected that the respondent would agree to a security deposit of ₹8.95 crore on account of enhancement of rates of cost of wheat and rice. It was agreed that in the eventuality that the High Court of Delhi decided Civil Writ Petition No. 5740 of 2004 in favour of the exporters disallowing the claim of enhanced rates made by FCI and as claimed by the appellant, the security amount would be refunded in entirety and in case the decision was allowed in favour of FCI an undertaking was given that the entire payment would be made by the respondent. Apart from these terms, it was agreed between the parties that the respondent would withdraw the arbitration suit filed at Calcutta High Court and all other cases pending in relation to the exports of wheat and rice, whereas the appellant would withdraw all cases filed in respect of matters covered by the agreement, including civil, criminal suits filed against the respondent. One of the additional terms mentioned in the compromise deed was that the appellant would abide by all terms of MoUs and Associate Agreements, including those relating to submission of export document. There was also a specific Clause mentioned under 'E: Additional Terms', c) which reads as

“this compromise deed which is a sequel of MOU and Associate

Agreements between both the parties does not bind either party from raising any legitimate/bona fide claim arising out of these exports as the same may have not been included in the current compromise deed”.

14. On a perusal of the Compromise deed arrived at, it is clear that the deed had been entered into after accounts were settled between themselves and since there were some issues still to be settled, the areas of dispute were crystallized as well. There is also an acknowledgment by the respondent regarding a payment due to the appellant and payment has been made in that respect. Apart from the reconciliation of accounts, the parties had also bound themselves to follow the judgment as rendered by the Delhi High Court in Civil Writ Petition No. 5740 of 2004. There was also a deposit of a security of ₹8.95 crore by the respondents to be released in case the judgment upheld the demand of Union of India and FCI regarding the enhanced price. Moreover, another salient feature in the agreement was that the Arbitrator to be appointed was at the sole discretion of the Managing Director of the appellant, which was at variation with the Associate Agreements entered into on 9.9.2002.

15. An argument has been raised that the compromise deed was a continuation of the earlier MoU and the Associate Agreements as there was a clause in the compromise deed that the terms of the earlier agreement would continue. It is further argued that any amendment to a contract being in the nature of modification of the terms of the contract must be read in and become a part of the original contract in order to amount to an alteration under Section 62 of the Indian Contract. Learned counsel for the respondent places reliance upon a judgment rendered in **All India Power Engineer**

Federation Versus Sasan Power Limited 2017 (1) SCC 487. However, the judgment rendered in **All India Power Engineer Federation (supra)** would not be applicable since both parties opted to enter into a compromise on new terms and conditions and requested for a termination of the proceedings before the Arbitrator as appointed by the Supreme Court under the Associate Agreements dated 9.9.2002. Even though there was a Clause in the Compromise Deed that the appellant would abide by all terms of MoUs and Associate Agreements, including those relating to submission of export document, this saving would not term the Compromise to be a continuation as the parties voluntarily got the proceedings terminated before the Arbitrator and decided to settle the pending issues as identified themselves, failing which a new Arbitrator was to be appointed and that too by the Managing Director. Meaning thereby, an entirely new arbitration clause had come into effect.

16. Moreover, the compromise deed itself notices that '*it is a sequel to the MoU and Associate Agreements*' and allows either party to raise further claims which may not have been included in the current compromise. The term '*sequel*' has been defined in The Collins Dictionary as "*The sequel to something that has happened is an event or situation that happens after it or as a result of it*". Therefore, an inference can easily be drawn that the parties had renegotiated the terms and conditions and had entered into a fresh settlement with a fresh arbitration clause during arbitration proceedings. Interestingly, the subsequent deed does not say that the compromise deed is a continuation of the MoU or Associate Agreements.

17. In a judgment rendered in **The Union of India Vs Kishorilal Gupta and Bros 1959 AIR (SC) 1362**, a similar issue arose for consideration. The Special Leave Petition raised the question of survival of an arbitration clause in a contract after the said contract was superseded by a fresh one. On a consideration of the facts, the Supreme Court came to hold that the subsequent document was a self contained document and it did not depend upon the earlier contract for its existence or enforcement. And it was held as. *“We do not find any justification for this contention either in the express terms of the contract or in the surrounding circumstances whereunder the document came to be executed. It was a self-contained document, it did not depend upon the earlier contracts for its existence or enforcement. The liability was ascertained and the mode of recovery was provided for. The earlier contracts were superseded and the rights and liabilities of the parties were regulated thereunder. No condition either precedent or subsequent was expressly provided nor was there any scope for necessarily implying one or other either. The only argument in this direction, namely, that it is impossible to attribute any intention to the Government to take a mere promise on the part of the respondents to hypothecate their properties "as satisfaction" and therefore it should be held that the intention of the parties was that there would be no satisfaction till such a document was executed, does not appeal to us. We are concerned with the expressed intention of the parties and when the words are clear and unambiguous they are undoubtedly clear in this case - there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties; nor are we attracted by the argument*

that the description of the properties intended to be hypothecated was not made clear and therefore the presumed intention was to sustain the rights under the new contract till a valid document in respect of a definite and specified property was executed. Apart from the fact that we are not satisfied with the argument that the description was indefinite, we do not think that such a flaw either in validates a document or suspends its operation till the defect is rectified or the ambiguity clarified. The substituted agreement gave a new cause of action and obliterated the earlier ones and if there was a valid defence for the enforcement of the new contract in whole or in part, the party affected must take the consequences. We have, therefore, no doubt that the contract dated February 22, 1949, was for valid consideration and the common intention of the parties was that it should be in substitution of the earlier ones and the parties thereto should thereafter look to it alone for enforcement of their claims. As the document does not disclose any ambiguity, no scrutiny of the subsequent conduct of the parties is called for to ascertain their intention.”

18. In the case in hand, after an Arbitrator had been appointed, the matter was partly resolved inter-se the parties and all disputes pending between the parties were crystallized by a Compromise Deed with fresh terms. A new arbitration clause was also entered into. Therefore, the subsequent agreement gave a fresh cause of action. Therefore, while taking into consideration the principle of novation as contained under Section 62 of the Indian Contract Act, it is held that as original contract between the parties has been altered by induction of new terms and conditions given

under the new Compromise Deed and as substitution by way of a new contract is the essence of novation, Section 42 of the Arbitration and Conciliation Act, 1996 cannot be invoked in the given circumstances.

19. Consequently, the present appeal is allowed holding that the District Judge would have the jurisdiction to decide the objections since the proceedings initiated under the Associate Agreements stood terminated and a fresh arbitration clause came into existence. The arbitration was conducted in Chandigarh giving the courts at Chandigarh jurisdiction to decide objections filed under Section 34 of the Arbitration and Conciliation Act 1996. The matter is remitted back to the District Judge to decide the objections in the light of Section 34 of the Arbitration and Conciliation Act 1996 with a request to decide the matter within a period of six months. The parties are directed to appear before the District Judge, Chandigarh on 15th July, 2019.

May 29, 2019
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No