M/s. Premier Piles Ltd. Vs M/s. Eden Real Estates Pvt. Ltd.

Court: Calcutta High Court

Date of Decision: April 30, 2010

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11

Citation: 114 CWN 1170

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Amitava Ghosh and Bijon Majumdar, for the Appellant; Ranjan Bachwat, Sanjay Ginodia and Debnath Ghosh, for the Respondent

Judgement

Sanjib Banerjee, J.
The petitioner is up against a juggernaut of a real estate company. And that really may be the key to the question raised

in the present proceedings u/s 11 of the Arbitration and Conciliation Act, 1996. The petitioner claims that pursuant to contract with the respondent

real estate company, the petitioner raised a final bill in or about May, 2009. The petition says at paragraph 6 that the final bill was ""unilaterally and

wrongfully finalized"" by the respondent and that the petitioner received a payment of Rs.7,86,237/- ""under economic hardship."" Paragraph 6 of the

petition, which has been relied upon by both the parties, reads as follows:

6. After completion of the said work the petitioner vide its letter dated 08.05.2009 submitted its Final Bill to the Respondent Rs. 70,85,201/-

(Rupees Seventy Lakhs Eighty Five Thousand Two Hundred One) only and Retention Money of Rs.52,83,844/-. The Respondent in letter

disregard to the said Bill unilaterally and wrongfully finalized the so called final bill. The petitioner under economic hardship received payment

against so called Bill on 04.11.2009 Rs.7,86,237/- recording the following:

We therefore request you to kindly immediately pay out follow outstanding payments:

1. Balance amount of Rs. 62,98,964 of our final bill submitted to you vide Bill No. PF/F.C.R.C0074/ Final Bill dated 08.05.2009 for Rs.

70,85,201/-

2. Retention Money of Rs.52,83,844/-.

A copy of the Letter dated 08.05.2009 regarding FINAL Bill is annexed Letter ""D"".

2. Apart from the assertion of ""under economic hardship,"" there is no allegation in the petition that the petitioner had otherwise been coerced to

receive the payment of a much lesser sum than the amount covered by the petitioner''s final bill. There is no element of fraud or any other kind of

undue influence which is indicated or pleaded in the petition.

3. When the petition was moved, the respondent was required to justify as to why it was necessary for it to use an affidavit. The respondent had

then claimed that there was complete accord and satisfaction and the respondent stood discharged of any obligation to make further payment in

view of a certificate issued by the petitioner. It was in such circumstances that directions were given for filing affidavits.

4. Before the respondent''s affidavit is referred to, some of the letters exchanged between the parties that have been referred to in the petition need

to be noticed. Though there is a reference to a writing of November 4, 2009, expressed rather inarticulately at paragraph 6 of the petition, the

letter of November 4, 2009 has hot been disclosed in the petition A copy of such letter has been relied upon only in the affidavit-in-reply The

petitioner''s first letter of protest that has been disclosed as an annexure to the petition, is one dated November 30, 2009. The letter of November

30, 2009 refers to several previous correspondence exchanged between the parties, including a letter ""No. PF/00074/142 dated 04-11-09"" which

is the letter of November 4, 2009 that has been disclosed in the affidavit-in-reply and the final part whereof is quoted at paragraph 6 of the

petition.

5. In the letter of November 30, 2009 the petitioner called upon the respondent to resolve the disputes amicably in terms of clause 18.1 of the

contract and permitted a period of 45 days for such amicable resolution. The petitioner informed the respondent that the petitioner would, if the

amicable resolution failed, be constrained to invoke the arbitration clause at clause 18.1 of the agreement.

6. The letter of request for a reference was issued by the petitioner on January 22, 2010. In the third paragraph of such letter, the arbitration clause

was alluded to and the petitioner suggested the names of four persons for the respondents to choose one of them as the arbitrator. The extent of

the petitioner''s claim was also indicated. The claim has to be noticed in view of a submission that has been made on behalf of the respondent

based on clause 17.7 of the agreement that the petitioner''s demand was prohibited by the agreement. The claim in the request for reference was

on account of the balance of the final bill; on account of the retention money that has been admittedly retained by the respondent (the respondent

says that the petitioner is entitled to refund of the same only after the defects are rectified and the due date therefor is reached); on account of

interest on the balance unpaid amount of the final bill; and, in respect of two other heads which do not appear to be absolutely clear.

7. The respondent replied to the request for reference on February 1, 2010. The respondent asserted that it had duly made payment of the ""entire

amount payable to you under our contract"" and insisted that no further money was due to the petitioner. The respondent referred to a ""no dues

certificate"" that had been issued by the petitioner and complained that after receiving and acknowledging full payment, the petitioner was trying to

put pressure on the respondent to extort money. The letter admitted that 50% of the retention money had been withheld but the period for which

the petitioner had to wait to receive such payment had not expired.

8. The petitioner wrote back on February 2, 2010 calling upon the respondent to select one of the ""independent persons"" that the petitioner had

suggested as arbitrator. The petitioner nominated one of the four names sent earlier by the petitioner as the petitioner''s nominee.

9. In the affidavit-in-opposition, the sheet-anchor of the respondent''s case is a hand-written letter of October 15, 2009 issued on the letter-head

of the petitioner company wherein the petitioner appears to have acknowledged receipt of a cheque for Rs. 7,86,237/-. The letter thereafter

recorded:

... we hereby certify that there is no further due from you except the Retention Money which will be paid to us on completion of defect liability

period.

10. The respondent insists that once the petitioner had acknowledged there was no further sum due in respect of its final bill, it could not have

made any subsequent claim in that regard. The essence of the submission is that there is no live claim that can go to arbitration.

11. The respondent has also referred to a letter that the respondent issued to the petitioner''s further request of February 2, 2010. In such response

of February 12, 2010, the respondent asserted at paragraph 3 as follows:

3. The Final Bill as prepared and submitted by you was checked by Team PMC Services Pvt. Limited and subsequently revised in your favour in

a joint meeting which was accepted by you, pursuant to which payment of the outstanding Rs. 7,86,237/- was made by us on 15th October, 2009

in full and final settlement of your Final Bill and claims therein. The sum of Rs.7,86,237/- was received and accepted by you without any protest or

reservation. Accordingly, at the time of receiving and accepting Rs.7,86,237/- on 15th October, 2009, you issued us a certificate stating that there

were no further dues payable by us to you, except the Retention Money. The above payment was received by you after settlement of all

controversies and as on 15th October, 2009 all your claims stood fully satisfied even as per your own acknowledgment. By receiving and

accepting payment of Rs.7,86,237/- as stated above, you waived any and all of your other claims and they stood extinguished.

12. Elsewhere in the body of the affidavit, the respondent has claimed that the petitioner had deliberately and willfully suppressed that the petitioner

had received full payment and that it had certified as such in its letter of October 15, 2009. The respondent has referred to the ""no dues certificate

of October 15, 2009 at paragraph 3(a)/its affidavit. At paragraph 3(b) it has been averred that the payment was in full and final settlement of the

final bill which the petitioner had received ""without any protest, demur or reservation."" It is the respondent''s assertion in its affidavit that the claims

of the petitioner in respect of final bill stood satisfied upon the petitioner acknowledging receipt of payment of the sum of Rs.7,86,237/-. The

respondent says there is no dispute that needs to be carried to any reference and the claims of the petitioner ""are deemed to have been waived by

the petitioner and/or stand extinguished."" The respondent has repeated at paragraph 3(f) of its affidavit that there are no ""live and/or arbitrable

disputes which can be referred to arbitration in terms of the arbitration agreement between the parties.

13. The apparently clumsy manner in which the petition was presented was sought to be rectified in the affidavit-in-reply. Upon receipt of the

respondent''s defence, a more organized version of its case emanated from the petitioner in the affidavit-in-reply. Paragraph 3(a) of the affidavit-in-

reply uses words such as ""duress"" and ""coercion"" after the respondent had launched a robust challenge to the petitioner''s request to the Chief

Justice for a reference. At paragraph 4 of the reply, the petitioner has alleged that the respondent had exerted undue influence by deducting a huge

amount from the final bill as well as the retention money and had ""coerced the claimant to come to their terms (and) otherwise refused to make

payment of the said sum of Rs.7,86,237/-."" According to the petitioner in its reply, the petitioner had to accept such payment of Rs.7,86,237/- and

acknowledge it to be a discharge under coercion.

14. The only annexure to the affidavit-in-reply is a copy of the letter dated November 4, 2009. It is of some significance that the letter of

November 4, 2009 is an undisputed document. The respondent has not sought to deny the existence of such letter despite it being disclosed only in

the affidavit-in-reply. The respondent has not sought leave to use a rejoinder to the affidavit-in-reply or deal with the contents of the letter of

November 4, 2009 prior to the hearing commencing. The opening paragraph of the letter of November 4, 2009 needs to be noticed in its entirety :

This is to inform you that on 15.10.2009 we had received the payment of Rs. 7,86,237/-... by cheque from you towards our final bill under

financial duress and this payment cannot be considered as full and final settlement of our claims for the subject work"".

15. The second paragraph of the letter proceeded to allege that a named officer of the respondent had informed the petitioner"s representative that

unless such certificate was issued, the cheque would not be handed over. It is of some significance that an assertion as to the circumstances in

which the cheque was handed over and the certificate of October 15, 2009 was issued by the petitioner had been recorded within some 20 days

of the incident taking place on October 15, 2009. This undisputed document of November 4, 2009 preceded the petition by several months.

16. On the legal score, the petitioner has relied on a judgment reported at Jayesh Engineering Works v. New India Assurance Co. Ltd., The

petitioner has relied on the concluding part of the first paragraph of the short judgment where the Supreme Court recorded that as to whether the

contract had been finally worked out or not and as to whether payments had been made in full and final settlement in respect thereof, were

questions that could be referred to arbitration.

17. The petitioner has also relied on paragraph 39 of the Constitutional Bench judgment in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another,

It is not necessary to immediately notice paragraph 39 of the report that has been cited by the petitioner since a subsequent judgment referred to

by the petitioner has considered the same paragraph in great detail. The later judgment that the petitioner has relied on is reported at 2007(1) Arb.

LR 517 [Shree Ram Mills Ltd. vs. Utility Premises (P) Ltd.] The petitioner has placed a passage from paragraph 27 of the report that immediately

follows the relevant quotation from paragraph 39 of the SBP & Co. judgment. It would do best to notice how the Supreme Court elucidated on

the observations at paragraph 39 of the SBP & Co. case.

A glance on this para would suggest the scope of order u/s 11 to be passed by the Chief Justice or his designate. Insofar as the issues regarding

territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his designate has to decide those issues

because otherwise the arbitration can never proceed: Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there

exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief

Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have

recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial

claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining.

It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the

agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that

event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on

a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be

started that the Chief Justice has to record satisfaction that there remains a live issue between the parties. The same thing is about the limitation

which is always a mixed question of law and fact. The Chief Justice only has to record to his satisfaction that prima facie the issue has not become

dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues

covered by the agreement. It is for this reason that it was pointed out in the above para that it would he appropriate sometimes to leave the

question regarding the live claim to be decided by the arbitral tribunal. All that he has to do is to record his satisfaction that the parties have not

closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issues,

then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.

18. The petitioner has also referred to a recent judgment reported at National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., where several

previous judgments including those of Jayesh Engineering and SBP & Co. have been considered by a two-member Bench of the Supreme Court.

19. The petitioner says that a distinction has been made in the ""said judgment as to the circumstances in which accord and satisfaction may be

perceived. Both parties have referred to several paragraphs of the judgment; the respondent has placed paragraphs 25 to 52 of the report. At

paragraph 52 of the judgment illustrative instances have been set out by the Supreme Court, emphasising that the illustrations are not exhaustive, as

to when the disputes may be fit for being referred to arbitration despite an assertion of accord and satisfaction by one party and a denial thereof by

another.

20. The respondent has referred to a judgment reported at AIR 2009 SC 3168 (Union of India vs. Onkar Nath Bhalla & Sons) also rendered by

a two-member Bench of the Supreme Court where the various judgments that have been referred to in the Boghara Polyfab case have not been

noticed. In any event, what weighed with the Supreme Court in Onkar Nath Bhalla appears to be that the protest as to the finality of the payment

was raised nearly two years after the payment had been received by the contractor. In any event, since the conclusion of the Supreme Court is that

in such a situation there cannot be said to be any live dispute which can be sent to a reference, the legal principle has to be examined with reference

to the several authorities that have been cited in Boghara Polyfab.

21. Paragraph 25 of Boghara Polyfab begins with the recognition of the circumstances in which a contract may stand discharged by performance.

The Supreme Court refers to it being a mixed question of fact and law and indicates the possibility of an arbitral reference if there was a bona fide

lack of unanimity between the parties on such score.

22. The respondent here has relied on the relevant extracts from the previous judgments that have been referred to in Boghara Polyfab and seeks

to distinguish the judgments from which Boghara Polyfab has drawn sustenance on the ground that in such previous cases there was invariably a

bona fide dispute raised within a short time of the alleged certification of accord and satisfaction or the discharge by payment of one party. At

paragraph 42 of the report, the Supreme Court says there may be two categories of cases where full and final satisfaction is set up by way of

defence. The Supreme Court notices the categories at paragraphs 42 and 43. It is the 44th paragraph of the report on which the respondent places

strong reliance where there is a sentence to the effect that a question as to final satisfaction may not always be reopened unless fraud'', ''coercion''

or undue influence'' had been alleged. At paragraph 50 of the report the Supreme Court considered what a civil Court would do in the

circumstances when a party claimed that it was entitled to further payment notwithstanding an alleged ""no dues certificate"" having been given. At

paragraph 51 of the report the Supreme Court considered the two avenues that would be open to the Chief Justice (or his delegate) to consider

upon a request u/s 11 of the 1996 Act being carried in such circumstances. In the first part of paragraph 51 the Supreme Court recorded that the

Chief Justice (or his delegate) could conclusively assess as to whether there was accord and satisfaction. In the second part of the paragraph, the

Supreme Court recorded that a prima facie view could be taken that there was a dispute as to whether there was final payment and discharge by

performance and to such extent the dispute may then be referred to arbitration.

23. Paragraph 52 needs to be seen since, of the five illustrations that have been recorded there, the respondent claims that the present situation falls

under either the second or the fifth when it appears obvious to Court that the instant case is squarely covered by the third illustration:

52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and

satisfaction are disputed, to round up the discussion on this subject are:

i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are

drawn up and signed by both the parties and attested by the conciliator or the members of the Lok Adalat. After settlement by way of accord and

satisfaction, there can be no reference to arbitration.

ii) A claimant makes several ""claims. The admitted or undisputed caims are paid. Thereafter negotiations are held for settlement of the disputed

claims resulting in an agreement in writing settling all the pending claims are disputes. ON such settlement, the amount agreed is paid and the

contractor also issues a discharge voucher/no-claim certificate/full and final receipt. After the contract is discharged by such accord and

satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only

for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed

format acknowledging receipt of rupees six, lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released.

The contractor who is hard-pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or

otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of

coercion employed by the employer. Obviously, the discharge voucher cannot be considered. to be voluntary or as having resulted in discharge of

the contract by accord and satisfaction. It will not be a bar to arbitration.

iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless

the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be

rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement Only a

few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under

duress, compulsion and coercion. The coercion is subtle, but very much real The ""accord"" is not by free consent. The arbitration agreement can

thus be invoked to refer the disputes to arbitration.

v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a

settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a

full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial Compulsions and commercial pressure

or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and

satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.

24. Since the respondent claims that the present situation is covered by the second illustration, the matter has to be assessed in somewhat greater

detail. In the second illustration the admitted or undisputed portion of the claim is first paid and thereafter negotiations are held for settlement of the

disputed claims. On facts, such a situation has not arisen in this case. There is no case made out that the admitted portion of the claim had been

paid out by the respondent and thereafter negotiations had ensued between the parties which culminated in a certificate of satisfaction being issued

by the petitioner. In fact, there is an assertion in the respondent''s letter of November 12, 2010 in its third paragraph to the effect that an

independent agency (which, according to the respondent, is referred to in the agreement) had inspected the bills and upon its independent

assessment it reduced the quantum of the final bill of the petitioner. At the third paragraph of such letter the respondent had asserted that the

independent agency had reduced the amount that was due to the petitioner to lower than what was ultimately paid and following negotiations the

amount had been increased and a sum of Rs.7,86,237/- had been cleared for payment.

25. Significantly, the contents of paragraph 3 of the reply of November 12, 2010 are not reflected in the several sub-paragraphs under paragraph

3 of the affidavit-in-opposition. The respondent says that since a copy of the letter is appended to its affidavit-in-opposition there is no reason for

the contents of the third paragraph of the letter of November 12, 2010 to be repeated in the affidavit.

26. In the petitioner''s letter of November 4, 2009, it had detailed the circumstances leading up to the issuance of the certificate by the petitioner on

October 15, 2009. There is no contemporaneous denial of the allegations by the respondent. That the certificate is hand-written when all other

correspondence are in ends credence to the petitioner''s version. Further, there is an assertion of a state of things and a denial thereof which has

given rise to a dispute. Such dispute is covered by the arbitration agreement.

27. The respondent''s argument that the instant case is covered by the second illustration does not appeal. The fifth illustration which is reflected at

paragraph 52 of Boghara Polyfab is where a party makes a huge claim which is disputed by the other party and the party making the claim, in

order to avoid litigation, agrees to receive a lower sum. Again, on facts this is not how the parties here approached the final bill nor does it appear

that the respondent disputed the final bill upon the same being raised by the petitioner.

28. It is then that the third illustration would be the most apposite in the present case. Such illustration contemplates a situation where a contractor

executes the work and claims payment of a certain sum and Where the employer admits a much lower sum either in writing or orally and requires

the contractor to execute a ""no dues certificate"" for receiving payment of the lower sum.

29. Since the letter of November 4, 2009 that has been appended to the affidavit in reply has been duly received by the respondent and there is no

denial as to its authenticity, the allegations contained in such letter ought to have been addressed by the respondent. There is a categorical assertion

in such letter in its opening paragraph that the petitioner was constrained to receive the payment of Rs. 7,86,237/- under duress. There is a further

assertion in the second paragraph that a named employee of the respondent real estate company had required the petitioner to hand over a ""no

dues certificate"" or not receive the payment at all.

30. It is not necessary to assess the matter conclusively at this stage. All that the Chief Justice or his delegate u/s 11 of the 1996 Act is required to

do upon receipt of a request is to assess whether there is a live claim to go to arbitration. The petitioner in the present case is at a slight advantage.

The petitioner does not have to conclusively demonstrate that there was any undue influence or coercion exercised by the respondent on the

petitioner in the petitioner issuing the handwritten certificate on October 15, 2009. The corresponding disadvantage that the respondent is

burdened with is that, for the reference to be declined the respondent has to conclusively demonstrate that the final payment had been duly

received and the petitioner was not entitled to claim any payment after issuing the certificate of October 15, 2009. The scales are slightly weighed

against the respondent in such case. But once it is noticed that there is an arbitration agreement between the parties and the disputes covered by

the arbitration agreement are to be decided by such agreed forum in preference to the Court, the Court, on a request u/s 11 of the 1996 Act,

would venture no further than a prima facie assessment as to whether there is the makings of a dispute that can be referred to arbitration.

31. The illustrations under paragraph 52 of the Boghara Polyfab would lead to such conclusion. The body of authorities that has been referred to in

Boghara Polyfab would also point in such direction.

32. A final issue remains. The respondent has referred to Onkar Nath Bhalla judgment which is also rendered by a two-Judge Bench of the

Supreme Court as are the Boghara Polyfab and the Jayesh Engineering cases.

33. It is now settled law that when varying opinions of Benches of the Supreme Court of co-ordinate strength are presented before a High Court,

the High Court has the option of choosing between them, not on the basis of the judgment which was rendered earlier but merely on the High

Court''s choice of the more apposite decision in the context in which it is sought to be applied.

34. The Onkar Nath Bhalla judgment does not notice the body of authorities that preceded, it on such aspect of the matter that fell for

consideration. In Boghara Polyfab, the authorities cited range between those under the 1940 Act and the more recent ones under the 1996 Act. It

is the Boghara Polyfab judgment which is the more appealing in the circumstances of the present case, particularly as the matters in dispute here

appear to be covered by the third illustration under paragraph 52 of the report.

35. The petitioner had followed the procedure for appointment as mandated by clause 18.2 of the agreement, but the respondent declined to

accede to the reference on its insistence that there was no live dispute to go to arbitration.

36. Since the validity of the arbitration agreement and the existence thereof have not been questioned by the respondent and since the argument put

forth by the respondent that there is no live claim to be sent to reference has been repelled, A.P. No. 52 of 2010 is directed to be placed before

the Hon''ble Delegate of the Hon''ble the Chief Justice for constitution of an arbitral tribunal to adjudicate upon the disputes covered by the

arbitration agreement.

37. It is made clear that none of the observations herein will prejudice either parry in the reference and it will be open to the respondent to assert

and establish that the certificate of October 15, 2010 had, indeed, relieved the respondent of any further obligation to make payment under the

relevant agreement.

38. In the event a positive award in terms of money is made in favour of the petitioner in the reference, the petitioner will also be entitled to 1000

GM by way of costs for the present petition. Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance

with all requisite formalities.