M/S.Cauvery Coffee Traders,Mangalore vs M/S.Hornor Resources (Intern.)Co.Ltd on 13 September, 2011

Equivalent citations: 2011 AIR SCW 6350, 2011 (10) SCC 420, AIR 2012 SC (CIVIL) 99, (2012) 1 MAD LJ 1183, (2011) 4 ARBILR 1, (2011) 10 SCALE 419, (2012) 1 CLR 142 (SC), (2012) 4 CIVLJ 135, (2011) 4 CIVILCOURTC 723, (2012) 1 RECCIVR 1, (2011) 2 WLC(SC)CVL 684, (2012) 1 ALL WC 269, (2011) 4 CURCC 88

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Bench: B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NOS. 7 & 8 OF 2009

M/s. Cauvery Coffee Traders, Mangalore ...Petitioners

Versus

M/s. Hornor Resources (Intern.) Co. Ltd. ...Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. The arbitration applications under Section 11(5) & (9) of the Arbitration and Conciliation Act, 1996, hereinafter called the "Act 1996" have been filed for appointment of Arbitrator in an international arbitration dispute to adjudicate the disputes/differences which have arisen between the parties.

2. The applicants are a partnership concern incorporated under the Indian Partnership Act, 1932 and have filed two applications as the dispute raised herein relate to two consignments. However, for convenience, facts and issues related to Petition No.7/2009 are being considered.

3. On 24.6.2008, a Purchase Contract bearing No. CCT/SST/027/ 240608 was entered and executed by and between the applicants and the respondents wherein the applicants agreed to sell and the respondents agreed to purchase Calibrated Lumpy Ore Fines of the approximate quantity of 40,000/- Wet Metric Tones (hereinafter called as `WMT') (10% more or less at buyers' option) at the price and on the terms and conditions stipulated in the said agreement. The agreement provided for the chemical specification/composition of the Ore and for guaranteed level of Fe i.e. iron content in the contracted goods which could not be less than 63%. In case the iron content was less than 63%, the buyer would have a right to reject the cargo.

4. A large quantity of Ore had been supplied to the respondents which had been accepted and payments had been made. Pursuant to the purchase contract, the applicants on 6.8.2008 shipped a total consignment of 24,500 Dry MT of Calibrated Lumpy Ore from New Mangalore Port, India to the port of discharge viz. Rizhao Port, China by vessel named "MV. FUJIN". The applicants raised a provisional invoice for a sum of US$ 32,13,529.11 and sent a Certificate of Origin and the Bill of Lading dated 6.8.2008 as issued by the carriers in respect of the carriage of the goods from Mangalore Port, India to Rizhao Port, China. The material so supplied had been sent after proper analysis and it had been certified by the analyst in India that the goods supplied contained more than 63% Fe contents. The said goods reached at China Port. The delivery of the same was taken by the respondents and on chemical analysis, according to them, the iron contents Fe, were found to be 62.74%. The goods reached the Port of Discharge, and were accepted by the respondents-buyers who promised that payment would be made without any delay.

5. The respondents vide email dated 19.9.2008 informed the applicants that a provisional payment would be released for the shipment in question based on revised rates and, in case, the applicants were willing to accept the revised rates stipulated therein, the respondents would request their end buyers' confirmation to release the payment, and for that purpose, applicants were asked to send necessary instructions through their banker. The respondents vide email dated 7.10.2008 informed the applicants that US$ 1.5 million could be the amount for the final settlement in respect of the shipment in question, in spite of the fact that the agreed amount had been US$ 18,91,204.00.

By the said email, applicants were asked by the respondents to inform through their banker in case of their acceptance to the said proposal.

Under these peculiar facts and circumstances, as the goods had already reached China and applicants were in dire need of money, they informed through their banker that they agreed to

receive payment under the Letter of Credit in a sum of total claim of US$ 18,91,204.00.

By email dated 7.10.2008 the respondents stated that the applicants should accept US$ 1.5 million in full and final settlement. Accordingly, an amount of US$ 1.5 million had been received by them. Subsequent thereto, the applicants had repeatedly been sending reminders to the respondents to make good the balance payment under the said purchase contract, but no payment had been made. As the respondents failed to make the payment of the balance amount, the applicants sent a legal notice dated 14.11.2008 to call upon the respondents to pay the balance amount under the purchase contract and further provided that, in view of the arbitration clause 18 contained in the purchase agreement, they should carry on friendly negotiations to settle the dispute accrued between the parties. As per the terms of the purchase agreement, arbitration can be held only in a third country. The applicants suggested to have the arbitration proceedings either in Singapore or in Australia.

In spite of receiving the said notice, neither the payment of the balance amount was made, nor the respondents came forward for friendly negotiations. Therefore, a further reminder was sent by the applicants to the respondents calling upon them to indicate the place of arbitration. As neither the payment had been made, nor the respondents have agreed for arbitration proceedings, they have approached this Court by filing these applications.

6. Shri V.A. Mohta, learned senior counsel appearing for the applicants, has submitted that in spite of the fact that the supply of iron ore has been made strictly in terms of the purchase contract and the outstanding payments have not been made even after several reminders, the applicants served a notice on the respondents for appointment of Arbitrator in the third country in terms of Clause 18 of the Purchase Agreement but the respondents did not make any effort either to come for friendly negotiations or to refer the matter for arbitration, therefore, this Court must refer the matter to the Arbitrator in a third country preferably Singapore or Australia.

7. On the contrary, Shri Ashok K. Srivastava, learned senior counsel appearing for the respondents, has vehemently opposed the applications contending that the applications themselves are not maintainable as the purchase agreement can be dealt with Part-II and certainly not under Part-I of the Act 1996. Therefore, the applications under Section 11(5) & (9) of Act 1996 are not maintainable, even otherwise, there has been a complete settlement between the parties and the applicants have accepted the full and final settlement as suggested by the respondents in view of the fact that Fe contents were not as per the specifications and certain terms had been offered to the applicants for settlement, which had been agreed by them. The question of making the reference to arbitration proceedings does not arise.

8. I have considered the rival submissions made by learned counsel for the parties and perused the record.

9. So far as the issue relating to maintainability of the application itself is concerned, is no more res integra. This court in Bhatia International v. Bulk Trading S.A, (2002) 4 SCC 105, held as under:

> ".....notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable. It clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case."

(See also: Indtel Technical Services Private Limited v. W.S. Atkins Rail Limited, (2008) 10 SCC 308; and Citation Infowares Limited v. Equinox Corporation, (2009) 7 SCC 220).

10. In Venture Global Engg. Case v. Satyam Computer Services Ltd. (2008) 4 SCC 190, this Court considered the similar issue and after considering various earlier judgments, came to the conclusion that implied exclusion of provision of Part-I cannot be inferred and therefore the principles regarding the arbitral reference laid down in Bhatia International (supra) are applicable.

11. Hon'ble Mr. R.C. Lahoti, J. (as His Lordship then was) however, has taken a contrary view as in Shreejee Traco (I) Pvt. Ltd. v.

Paperline International Inc., (2003) 9 SCC 79; it was held:

> "8. So far as the language employed by Parliament in drafting sub-section (2) of Section 2 of the Act is concerned, suffice it to say that the language is clear and unambiguous. Saying that this Part would apply where the place of arbitration is in India tantamounts to saying that it will not apply where the place of arbitration is not in India."

However, considering the fact that Bhatia International (supra) is a three-Judge Bench judgment and has consistently been followed, the judgment of the learned Single Judge in Shreejee Traco (I) Pvt.

Ltd. (supra) does not have binding effect. As a consequence, the application is held to be maintainable.

12. The Relevant part of the Purchase Agreement dated 28.6.2008 reads as under:

> "Clause 5: Price Adjustment For Fe content:
>
> In respect of iron ore which does not meet the Fe specifications set forth in Clause 3 the base price referred to in Clause 4 shall be adjusted in accordance with Fe content as determined pursuant to the provisions of Clause 8 as follows: The base price shall

be increased by single prorate (USD2.2) per dry metric tonne for each 1% Fe below 63.5% upto 63.0 fraction prorate. The Buyer has the right to reject the cargo if Fe content is below 63.0% .

Clause 15: Title and Risk The title with respect to each shipment shall pass from Seller to the Buyers when Seller receives reimbursement of the proceeds from the opening bank through the negotiating bank against the relative shipping documents as set forth in clause 6 after completion of loading on board the vessel at loading port, with effect retrospective to the time of delivery of ore.

Clause 18: Arbitration All disputes in connection with this contract or the execution thereof shall be settled amicably by friendly negotiations between the two parties. If no settlement can be reached, the case in dispute shall then be submitted for arbitration to a third country, which shall be agreed upon by both parties. The arbitration award shall be final and binding on both the parties and may be enforced in any court having jurisdiction over the party against which enforcement is sought. The cost of arbitration shall be borne by the losing party."

Thus, from the Purchase Agreement it is evident that the ore supplied must contain Fe contents not less than 63%. In case the Fe contents are less than the specified percentage, the buyers would have a right to reject the cargo. The Purchase Agreement also contains a clause providing for price adjustment in case the supplied ore does not meet the requirement of specification provided for iron ore. In case of any dispute between the parties, the agreement provides for arbitration in any third country.

13. The documents on record reveal that parties had been negotiating for the goods supplied and also in respect of payment for the same (vide emails dated 25.6.2008 and 8.9.2008). Relevant part of the email dated 25.9.2008 reads as under:

"……Both cargos were rejected by end buyers due to the quality failure.

In such case, we regret to say that the maximum CFR price we can work here is $110 for Zhongqiang II AND $120 FOR Fujin. Pls note current market price for cargo below 63 is only $100 and market is still on the down trend. However in consideration of the long term good cooperation between the two companies, we are offering to bear at least a $10-20 loss on our side and with the huge risks of further slide of market, which actually is foreseeable.

……Our above offer is valid till this Friday (26th September, 2008) only..."

14. The email dated 7.10.2008 sent by the applicants to the respondents reads as under:

"Further to telecom just now, pls note as per latest mutual agreement between seller and buyer, the said USD1.50 million shall be final settlement for subj.shipment, so

please request your bank to revise the swift msg as follows:

"beneficiary agrees to receive USD1,500,000.00 for full and final payment for this set of documents and under this letter of credit, after release of this amount, the letter of credit shall be considered expired and cancelled." (Emphasis added)

15. Subsequently, the applicants sent an email to the respondents dated 14.11.2008 which provided inter-alia, as under:

"Clause 8 of the Purchase Contract provided for the remedies available in the event of there being a difference in percentage of the Fe content as compared to the specifications mentioned in the Contract. The said Contract also provided that all disputes would be settled amicably and that if no settlement could be reached, the disputes would be submitted to arbitration to a third country to be agreed upon by both the parties.

.....Since the Arbitration clause provides for the dispute being submitted for arbitration to a third country, our clients would suggest conduct of the arbitration either in Singapore under the auspices of the Singapore International Arbitration Centre and/or Australia under the Rules of the Institute of Arbitrators and Mediators, Australia."

16. The applicants again asked the respondents for reference to Arbitrator vide email dated 21.11.2008, but in vein.

17. Stand of the respondents throughout had been that under Clause 5 of the Purchase Contract dated 24.6.2008 in respect of the iron ore, the buyers had a right to reject the whole consignment in case the iron contents were less than 63%, as has been in the instant case. However, considering other factors that goods had already reached the port of discharge in China, the buyers accepted the delivery thereof and therefore, the buyers made a proposal for adjustment of price.

Negotiations started as is evident from the email messages dated 8.9.2008, 25.9.2008 and 7.10.2008 as referred to hereinabove, and it was in pursuance of these negotiations that the applicants had instructed their banker to accept the proposal made by the respondents and it was in pursuance of their instructions, the banker vide email dated 8.10.2009 accepted the proposal and agreed to receive a sum of US$500,000.00 as full and final settlement for the consignment in issue. The payment made was accepted by the applicants and it was after 3 months thereafter that they served a legal notice dated 14.11.2008 for making a reference to the Arbitrator. The applicants in the present application do not dispute the negotiations or giving instructions to their banker or in respect of the email by their banker to the respondents or receiving the money in lieu thereof. Therefore, the question does arise as to whether the banker's acceptance of instructions given by the applicants can be treated as full and final settlement of the dispute. The main ground in this regard had been taken in this application in Paragraph (P) as under:

"In spite of the fact that the Applicants had specifically informed their Bankers that an amount of US$ 1.5 million was to be received in lieu of provisional payment, an erroneous message was forwarded by the Applicants' Bankers to the Respondents that the beneficiary being the Applicants herein had agreed to receive an amount of US$ 1.5 million towards full and final payment and that the Letters of Credit would be considered expired and cancelled on receipt of the said payment." (Emphasis added)

18. Error means - a mistake in judgment/assessment in a process or proceedings; some wrong decision taken inadvertently; unintentional mistakes; something incorrectly done through ignorance or inadvertence; mistake occurred from an accidental slip; deviation from standard or course of right or accuracy - unintentionally; to be wrong about; to think or understand wrongly; an omission made not by design, but by mischance.

19. In Nathani Steels Ltd. v. Associated Constructions, 1995 Supp (3) SCC 324, while dealing with a similar issue, this Court held:

".....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 amicably 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...."

A similar view has been re-iterated in State of Maharashtra v.

Nav Bharat Builders, 1994 Supp (3) SCC 83.

20. This Court in M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, NTPC, (1994) Supp. 3 SCC 126 considered the ambit of accord and satisfaction by the parties voluntarily entered into and dispute raised thereunder. This Court after considering the entire controversy held that:

"Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given.... Having acknowledged the settlement and

> also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration." (Emphasis added)

21. In National Insurance Company Limited v. M/s. Boghara Polyfab Private Limited, AIR 2009 SC 170, this Court held:

> "26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable." (Emphasis added).
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> 29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both the parties or by the party seeking arbitration):
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> (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."

(Emphasis added)

22. In R.L. Kalathia v. State of Gujarat, (2011) 2 SCC 400, this court considered a similar issue and held:

> "(i) Merely because the contractor has issued "no-

dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

23. In view of the above, law on the issue stands crystallised to the effect that, in case, final settlement has been reached amicably between the parties even by making certain adjustments and without any misrepresentation or fraud or coercion, then, acceptance of money as full and final settlement/issuance of receipt or vouchers etc. would conclude the controversy and it is not open to either of the parties to lay any claim/demand against the other party.

24. The applicants have not pleaded that there has been any kind of misrepresentation or fraud or coercion on the part of the respondents.

Nor it is their case that payment was sent by the respondents without any settlement/agreement with the applicants, and was a unilateral act on their part. The applicants reached the final settlement with their eyes open and instructed their banker to accept the money as proposed by the respondents. Proposal itself was on the basis of clause 5 of the Purchase Contract which provided for Price Adjustment. For a period of three months after acceptance of the money under the full and final settlement, applicants did not raise any dispute in respect of the agreement of price adjustment. In such a fact-situation, the plea that instructions were given by the applicants to the banker erroneously, being, afterthought is not worth acceptance.

The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-

explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

25. In R.N. Gosain v. Yashpal Dhir, AIR 1993 SC 352, this Court has observed as under:-

> "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the

> footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

26. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: Nagubai Ammal & Ors. v. B. Shama Rao & Ors., AIR 1956 SC 593; C.I.T. Vs. MR. P. Firm Maur, AIR 1965 SC 1216; Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329; P.R. Deshpande v. Maruti Balaram Haibatti, AIR 1998 SC 2979; Babu Ram v. Indrapal Singh, AIR 1998 SC 3021; Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, AIR 2004 SC 1330; Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors., AIR 2009 SC 713; and Pradeep Oil Corporation v.

Municipal Corporation of Delhi & Anr., (2011) 5 SCC 270).

27. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity.

By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

28. In the facts and circumstances of the case, as the respondents resorted to clause 5 of the Purchase Agreement dated 28/6/2008, regarding price adjustment and the offer so made by the respondents has been accepted by the applicants and agreed to receive a particular sum offered by the respondents as a full and final settlement, the dispute comes to an end.

The applicants cannot take a complete somersault and agitate the issue that the offer made by the respondents had erroneously been accepted.

In view of the above, as no dispute survives, the applications are dismissed.

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...J.

(Dr. B.

CHAUHAN)

New Delhi,

September 13, 2011