M/S Devi Constructions vs M/S Fowler Westrup (India) P Ltd on 21 February, 2022

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Com.A.P 79/2021

IN THE COURT OF LXXXVII ADDL.CITY CIVIL &
SESSIONS JUDGE, (EXCLUSIVE DEDICATED
COMMERCIAL COURT)
AT BENGALURU (CCH.88)

THIS THE 21st DAY OF FEBRUARY 2022

PRESENT:
SRI.CHANDRASHEKHAR U., B.Sc., LL.M.,
LXXXVII ADDL.CITY CIVIL & SESSIONS JUDGE,
BENGALURU.

Com.A.P.No.79/2021

PLAINTIFF: M/s Devi Constructions ,
No.810, 1st Cross, 7th Main,
H.A.L. 2nd Stage, Indiranagar,
Bengaluru 560 038
Represented by its Partner
Mr. S. Palanisamy
(Reptd by Mr. MAS-Adv)

AND

DEFENDANTS : 1. M/s Fowler Westrup (India) P Ltd.,
Raj Mahal Building, 4th Floor
No. 84, Veer Nariman Road
Mumbai 400 024.

Also at:
Plot No. 60-63, KIADB Industrial
Area, IV Phase, Malur 563 130,
Represented by its Managing Director
Sri. Kilar B. Vijaykumar

(Reptd by Mr. VH - Adv)

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: 2. Justice Sri. R. Gururajan (Retd),
Learned Arbitrator
No. 504, Chitrapur Apartments,
5th floor, 15th Cross,

Malleswaram
Bengaluru 560 055.

Date of Institution of the suit	21.10.2021
Nature of the suit (suit on pronote, suit for declaration & Possession, Suit for injunction etc.)	Arbitration Petition
Date of commencement of recording of evidence	-
Date on which judgment was pronounced	21 .02.2022
Total Duration	Year/s 00 Month/s 04 Day/s 00

(CHANDRASHEKHAR U),
LXXXVII Addl.City Civil & Sessions Judge,
(Exclusive dedicated Commercial Court)
Bengaluru.
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JUDGMENT

The plaintiffs have filed the above petition under Section 34(2) (b) (ii) and Section 34 (2) (a) of the Arbitration & Conciliation Act, 1996, (hereinafter called as 'the Act') for setting aside the order dated 22.7.2021 passed by the sole Arbitrator, in A.C. No. 172/2019 before the Arbitration and Conciliation Center, Bengaluru and for costs of the petition.

2. The brief facts of the case of the plaintiff are as hereunder:-

> The plaintiff is a partnership firm engaged in the civil and general construction of large scale industry and other projects. The defendant is a private limited company incorporated with the object of carrying on in India, the business of builders, developers and land developers of all type of buildings, structures, including apartments, residential structures, etc. The plaintiff has initiated arbitration proceedings against the 1 st defendant seeking adjudication of disputes in respect of tender bearing Com.A.P 79/2021 4600001107/22.9.2011 for the construction of a factory for the 1st defendant. M/s URC Constructions Private Limited was the successful bidder for the project and with consent of the 1st defendant, the work order was issued to the plaintiff, who constructed the industry for the 1 st defendant

and the 1st defendant has not paid the final bill and pressurised the plaintiff to enter into MoU, dated 1.8.2014 by agreeing to pay the liquidated damages quantified at Rs.30,00,000/-. Due to financial stress and economic duress, the plaintiff agreed for the same and as per the terms of the Memorandum of Understanding, the 1 st defendant had to settle the dues within 10 days. When the 1st defendant failed to pay the amount within 10 days, as per the MoU, then, the plaintiff got issued a notice calling upon the 1st defendant to settle the final bill and it settled the bill after one year and therefore, no importance can be attached to MoU as the 1st defendant has not followed the terms and conditions of the MoU. Accordingly, as per the arbitration clause available in the contract document, the Com.A.P 79/2021 plaintiff moved the Hon'ble High Court in CMP No. 207/2017 and got appointed an Arbitrator, who after raising point regarding jurisdiction to decide the case for want of arbitration clause. Accordingly, the application filed by the plaintiff came to be withdrawn and in the mean time, the plaintiff moved the Hon'ble Apex Court and after hearing the parties, the Hon'ble Apex Court, by order dated 29.10.2020, directed the Tribunal to decide the question of jurisdiction by giving opportunity. Accordingly, the Tribunal reconsidered the Section 16 application and decided that the Tribunal has no jurisdiction to deal with the case on the basis of non-availability of Arbitration clause in MoU.

3. The order of the Arbitral Tribunal holding that it has no jurisdiction to deal with the case and the application filed by the 1st defendant came to be allowed by holding that the Tribunal has no jurisdiction. The above order of the Arbitral Tribunal is against the terms of the Contract agreement and the observation of the Arbitral Com.A.P 79/2021 Tribunal that MoU is substitution of contract and therefore, it has no jurisdiction to try the case.

4. The plaintiff has challenged the award on the ground that it has failed to understand that the MoU, dated 1.8.2014 was obtained by economic duress and the observation of the Tribunal that the CW1 has not proved the coercion and duress etc., is incorrect and against the settled law, relating to the novation of contract. The Tribunal has failed to consider para No. 38 - 40 of the claim petition, wherein, the background circumstances were made out to show that under which circumstances, the MoU came to be executed. Further, the Tribunal has failed to consider that the 1st defendant failed to adhere to the terms of MoU, then, it cannot be held that it is a substitution of contract agreed upon by the parties. The reason assigned by the Arbitral Tribunal is incorrect and it is against the decision in the case of National Insurance Co. Ltd., Vs. Bogharapoly fab Pvt. Limited and also the decision in the case of GAIL (India) Limited Vs. Bansal Com.A.P 79/2021 Infratech Synergies Limited and some more decisions quoted before it. The Tribunal has failed to understand that the MoU does not supersede the earlier agreement and the very observation to that effect is incorrect and the reliance by the Arbitral Tribunal on the decision in the case of Union of India Vs. Kishorilal Gupta & Bros, Nathani Steels Ltd, Vs. Associated Constructions and some other decisions, are incorrect as it is not proposition of law. The Tribunal has not understood in which context those decisions have been passed.

5. It is further contended that the observation of the Tribunal is contrary to the orders on the same application and there is no proper appreciation of the fact, while dealing with the application filed under Section 16 of the Act. The Tribunal has failed to consider the case in proper perspective and the order of the Apex Court is very clear that it has not interfered with the finding of the High Court and everything was left to the Arbitrator to decide. It is further contended that the Tribunal failed to apply the law Com.A.P 79/2021 pertaining to proof of economic coercion and duress and also evidence led by CW2 to that effect. Further, the delay in releasing amount by the 1 st defendant is against the terms of the MoU and therefore, it cannot be held that the terms of MoU supersede the contract document. Accordingly, it has prayed for setting aside the award.

6. The 1st defendant has filed objection statement denying each and every allegation made which are against the defence taken by it before the Arbitral Tribunal. It has denied para No.3 stating that it is incorrect to state that the plaintiff herein has filed the above application and that the award is against the tender document and other things. As far as para No.1 and 2 is concerned, it is stated that it is formal in nature and it is contended that contents of para No.3 are false to some extent. Regarding payment made by the 1st defendant etc., it is stated that it has paid the amount on time and after ascertaining and completion of snags and also ascertainment of liquidated damages, etc., except that other contentions have been stated to be false.

Com.A.P 79/2021 It has denied that the amounts agreed to be paid under MoU were made and stretched to more than one year and paid eventually by August 2015 in violation of the terms of MoU. Infact, the plaintiff has received entire amount agreed under MoU and after lapse of one year, it has claimed final bill, which is against the terms of MoU and therefore, the present case came to be filed.

7. As far as para Nos.5 to 8, is concerned, it is stated that it is a matter of record and similarly, as far as para No.10 is concerned it is stated that there are no grounds to set aside the Arbitration Award and there is no proof regarding economic duress undergone by the plaintiff. It has denied para No.12 that Tribunal has failed to consider para No.38 and 40 of the claim petition and failed to understand under what circumstances, MoU came to be executed and the reason assigned is incorrect, etc. is false. Similarly, it has denied para Nos. 13 and 14 relating to non-consideration of para No 37 of claim statement and the 1st defendant withhold the payment etc. It is false to say Com.A.P 79/2021 that the plaintiff was in dire financial situation and despite knowing that the 1st defendant withhold the payment etc. and that the Tribunal failed to take note of the same and that the delay is caused due to delay in supply of drawings by the private company. It is false to say that Tribunal has not understood the ratio of the decision laid down in the case of National Insurance Co. Ltd., Vs. Bogharapoly fab Pvt. Limited and similarly, it has denied that the Tribunal has not considered the decision in the case of GAIL (India) Limited Vs. Bansal Infratech Synergies Limited. It has denied para No. 17 and regarding para No.18, it is stated that as per MoU, after mutual discussion the liquidated damages, which was available to 1 st defendant was waived and it was agreed to deduct Rs.30,00,000/- towards liquidated damages and therefore, the plaintiff being the firm is aware of all the circumstances and now it cannot say that the alleged MoU was the outcome of duress and coercion. It has denied para No.19 to 21 regarding application of law laid down in Com.A.P 79/2021 the case of Union of India Vs. Kishorilal Gupta & Bros, Nathani Steels Ltd, Vs.

Associated Constructions and this decisions were not applicable to the case on hand and it has denied that the law laid down in Wapcos Limited Vs. Salma Dam Joint Venture and another reported in (2020) 3 SCC 169 is correctly applied to the present case as contended.

8. It has denied para Nos. 22, 23, 24, 26, 27, 29 of the plaint and contended that the Tribunal has rightly applied law and passed the impugned award and there is nothing to interfere with the award. Further, the award has been passed after recording of evidence of the party and in the light of the decision laid down by the Apex Court and therefore, there are no grounds to interfere with the award. Accordingly, it has prayed for the dismissal of the suit.

9. Heard learned counsel for the plaintiff and learned senior counsel for the defendant.

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10. Now, the points that arise for my consideration are:-

1. Whether the plaintiff proves that the decision of the Arbitral Tribunal regarding jurisdiction under Section 16 of the Act is against the law laid down by the Apex Court and improper interpretation of the Memorandum of Understanding ?

2. What Order ?

11. My findings on the above Points are as under:

Point No.1 :- In the Negative.

Point No.2 :- As per the final Order for the following reasons.

REASONS

12. POINTS No.1 : Learned counsel for the plaintiff would argue that the alleged Memorandum of Understanding entered into between the plaintiff and the defendant was under economic duress and coercion and therefore, the same cannot be treated as a substituted contract, to take away the jurisdiction of Arbitral Tribunal Com.A.P 79/2021 under Section 16 of the Act. Infact, the defendant had filed application under Section 16 of the Act to rule on the jurisdiction on the grounds that there is no Arbitration clause and subsequently, it was got withdrawn on the say of the Tribunal, later, it was challenged before the Hon'ble Apex Court and the Hon'ble Apex Court directed to consider the said application and rule on jurisdiction uninfluenced by the observation made by the Hon'ble High Court in CMP and also the Hon'ble Apex Court. However, the Arbitral Tribunal without interpreting the Memorandum of Understanding properly and without considering the decision in the case of National Insurance Co. Ltd., Vs. Bogharapoly fab Pvt. Limited and also the decision in the case of GAIL (India) Limited Vs. Bansal Infratech Synergies Limited has rendered the order on the ground that it has no jurisdiction to try the dispute between the parties for want of Arbitration clause. Further, the Memorandum of Understanding is silent about the fact that it supersedes all the terms

and conditions agreed upon Com.A.P 79/2021 between the parties under the contract document. When the Memorandum of Understanding, is silent about specific condition regarding superseding of earlier contract, then, it is in addition to the earlier contract document and therefore, the observation of the Arbitral Tribunal is incorrect. Further, though Memorandum of Understanding was executed, it was incumbent upon the defendant to pay all the dues within 10 days, but, it was paid after about one year that itself goes to show that the defendant has not honoured the Memorandum of Understanding and therefore, the claim of the plaintiff is very well maintainable and the arbitral tribunal has jurisdiction. So, in this background, he took the Court to the very decision in the case of National Insurance Co. Ltd., Vs. Bogharapoly fab Pvt. Limited, reported in (2009) 1 SCC 267 to the effect that if a party which executes discharge agreement, alleged that the discharge on account of coercion/ fraud or undue influence then, such a discharge is void and any dispute raised would be arbitrable. He would cite another decision Com.A.P 79/2021 in the case of GAIL (India) Limited Vs. Bansal Infratech Synergies Limited reported in 2021 SCC OnLine Delhi 3628 to the effect that the issuance of a "No Claim Certificate" does not, by itself, extinguish the rights and claims of the party issuing such a certificate. If the party is able to establish duress, or coercion, then, the "No Claim Certificate" issued by it would be void and its claim would have to judge on merits. At the same time, a bald assertion of coercion or duress without any material to back such a plea would not entitle the party who gave the "No Claim Certificate", to renege from it".

13. So, with the help of the above two decisions, he would argue that even if there is certificate issued to the effect that there will not be any future claim, if it is shown that the said certificate has been obtained by coercion or by misusing the economic duress of the party, then, it cannot be treated as accord and satisfaction. To support his claim, he refers to the document produced by the defendant along with objection statement, at page No. 37 i.e., Com.A.P 79/2021 document No.2 relates to the letter issued by the plaintiff to the defendant expressing about non-furnishing of GFC drawings, etc., and difficulty in proceedings further and withholding of payment etc., in last page of document -2 para No.4, it is stated that:

> "being aware of the consequences that the additional works would hamper the progress of main works, the decision of providing additional works to the main contractor during the performance of main work is purely yours".
>
> "We are not liable for interest incurred by your good-selves rather we have extended fullest support by taking up the additional works as well as Phase II works to serve you in a good away. Hence, by considering all our supports extended towards the completion of the projects, we request your good-self not to impose any penalty and we request you to kindly release the balance payment at the earliest".

14. So, as early as in the year 2014 itself, the plaintiff has requested the defendant not to levy penalty as they have undertaken additional work, though it was not agreed upon and the said letter goes to show that the payments were withheld for non-completion of the work. Thereafter, he took the Court to the very same compilation at page No. Com.A.P 79/2021 395, which is the letter issued from the plaintiff to the Architect with attachment, which also discloses that they have completed the work inspite of sustaining loss. The next document is the letter dated, 1.7.2014 available at page

No. 397, which discloses about amount due from the plaintiff to the India Cements Limited on account theft of cement bags and FIR was lodged, which is available at page No. 398 and thereafter, he took the Court to the mail sent by the plaintiff along with Memorandum of Understanding, how the Memorandum of Understanding came into exists to show the economic duress on account of theft, etc. Thereafter, he took the Court page No. 425, document No.28, which is the e-mail sent by the plaintiff to the defendant along with attachment, which also discloses withholding of final bill and inspite of certification by the Architect and fixing of liquidated damages, etc. and it goes to show that the plaintiff was under economic duress and coercion and same has been encashed by the defendant to execute the Memorandum of Understanding. Therefore, Com.A.P 79/2021 Memorandum of Understanding cannot be taken into consideration. Further, there was no dispute about payment of final bill and when the plaintiff has placed sufficient materials before the Arbitral Tribunal what are all the circumstances, which led to execution of Memorandum of Understanding and therefore, since, the plaintiff was under economic duress, he was made to sign the Memorandum of Understanding and therefore, the contract document will not lose importance and the observation of the Arbitral Tribunal therefore it is against the Section 16 and law laid down by the Hon'ble Apex Court and therefore it is against the public policy and amounts to patent illegality committed by the Arbitral Tribunal, as such it is liable to be set aside. Since, the Memorandum of Understanding does not speak about superseding of earlier contract agreement, it is nothing but, continuation and therefore, the very observation made by learned Arbitrator is against the fact and as such it is liable to be set aside.

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15. Per contra, learned counsel for the defendant would argue that the defendant invited tender for construction of industry at Malur and the plaintiff was the successful bidder and it took four years to complete the work, which is against the completion period mentioned in the agreement and in the said connection he took the Court to tender document, which is available at document No.3, at ink page No.40, wherein, clause No.1.5.4.36 deals with resolution of disputes or arbitration and it specifically reads that:

> "the owner and the contractor shall make every effort to resolve amicably by directing informal negotiations any disagreement or dispute arising between them under or in connection with the contract. The venue of arbitration proceedings shall be in Bangalore. It is also a term of this contract that if the contractor does not make any demand for appointment of Arbitrator in respect of claims in writing, within 90 days of receiving the intimation that his final bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the owner shall be discharged and release of all liabilities under the contract, in respect of the claims".

16. So with the help of the above clause, he would argue that an attempt was made to settle the dispute after Com.A.P 79/2021 exchange of various letters, which are also available at page No.295, document No.7, which is a letter written by the plaintiff to the defendant, wherein, it is specifically stated that the construction work should be completed by 13.7.2012 and when it was within the

knowledge of the plaintiff to complete the work, the plaintiff did not complete the work and clause No. 9 relating to liquidated damages goes to show that the defendant is entitled to claim liquidated damages maximum to the tune of 5% of the value of the contract and since the work was completed in the year 2014 about 2 years delay was caused by the plaintiff and it can be safely held that the for two years the defendant could not run the industry and sustained huge loss and therefore, the defendant had every right to impose penalty by way of liquidated damages to the tune of Rs.1,69,33,339/- and the claim of the plaintiff was lesser than that and by considering the request made by the plaintiff, Memorandum of Understanding came to be executed. The plaintiff completed construction and Com.A.P 79/2021 rectified all the mistake in the month of January 2015. Therefore, the Court has to consider the fact that the defendant could not start the industry for more than 2 years and sustained loss and for which the plaintiff is liable to answer. The final bill for Rs.1,30,00,000/- and counter claim for Rs.1,69,33,239/- were made by the parties. Thereafter, he took the Court to mail sent by plaintiff about the completion and matter relating to imposing of liquidated damages and the consultant Architect intervened and negotiated and which was agreed upon by the parties as could be seen from document No.25, which is a draft Memorandum of Understanding which was sent to the plaintiff and the plaintiff made certain corrections and sent it back for finalisation. So, having agreed for the Memorandum of Understanding and settlement of final bills and payment of liquidated damages to the tune of Rs.30,00,000/- and when there is a specific clause regarding final statement, then, the plaintiff cannot harp upon, the fact that Arbitration clause available in tender Com.A.P 79/2021 document continues and that he can maintain the claim before the Arbitral Tribunal. In the said regard, learned senior counsel took the Court to the document No.1, i.e, MoU, wherein, it is clearly stated the background of the MoU, why it was executed etc., In second page of the said MoU at clause No.3 it is stated that it is agreed by FWL that in view of the above settlement the above payment will be made in 10 days time after deducting LD of Rs.30,00,000/-.

17. Clause No.4, it is agreed between the parties that the balance retention amount of Rs.84,66,620 will be released by FWL on Devi Constructions attending to all the snags, mutually agreed during the joint inspection of site by Devi Constructions, FWL and InFORM Architects on 9.6.2014, to the satisfaction of InFORM Architects. So, based upon this, the snags were attended and completed in the month of January 2015.

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18. Clause No.8, reads as "it is agreed by Sri Devi Construction that they will not make or raise further bill or claim pertaining to this project. Similarly, FWL will not claim any further LD".

19. Clause No.9 "this agreement represents full and final settlement between Devi Construction and FWL of matters pertaining to the Malur Factory constructions under the Purchase Orders and amendments referred above. So, with the help of above clauses, learned senior counsel for the defendant would argue that when it is full and final settlement, there ends the contract and the earlier contract automatically superseded by the present Memorandum of Understanding and therefore, the Tribunal has no jurisdiction to deal with the case and the Tribunal has rightly held the same.

20. Learned senior counsel while canvassing his argument took the court to page No. 427 of the compilation i.e., document No.29, which is also the letter written by the plaintiff to the defendant stating about the coercion etc., for Com.A.P 79/2021 the first time in the month of August 2015, which is against MoU and called upon the defendant to pay the said amount. Thereafter, he took the Court to Order of the Hon'ble High Court in CMP No. 207/2017 appointing the Arbitrator and the above order is very elaborate regarding jurisdiction etc., and that was also taken before the Hon'bele Apex Court by the defendant which directed the Artibral Tribunal to decide on the jurisdiction. Further, learned Arbitrator in order to decide the application has recorded the evidence of both the parties, which is available and cross-examination of CW1 goes to show that he is well versed with the law relating to the contract and this type of terms and conditions etc., and the cross-examination of CW1 at question No.8 reveals that the proprietor of claimant Mr. S.Palaniswamy is empowered to take decision pertaining to the claimant.

21. Further, he refers to Section 7 and particularly, question No. 13 and 14, which discloses that they have issued a letter with regard to objection and regarding Com.A.P 79/2021 mail which was attached along with draft MoU, he would say that he has to check and answer the same.

22. For question No.22, a question was put that Mr. Palaniswamy is an experienced businessman and has signed the MoU, after going through the contents of the same, for which, the witness answers that he agrees but, he adds that Mr. Palaniswamy has signed due to compulsion and in later part, answer to question No.32, 33, 45 goes to show that the plaintiff was aware of the consequences and signed voluntarily and therefore according to learned senior counsel, he cannot contend otherwise, now. Since, the proprietor has signed the MoU and since, he has not stepped into witness box adverse inference has to be drawn as held in the decision in the case of Union of India Vs. Ibrahim Uddin and another, reported in (2012) 8 SCC 148, Vidhyadhar Vs. Manikrao and another reported in (1999) 3 SCC 573. He has cited two more decisions regarding this aspect and according to him, Mr. Palaniswamy, is the best witness to speak about Com.A.P 79/2021 the MoU and since he did not step into the witness box, now he cannot contend that the MoU was executed under the coercion and compulsion.

23. After referring to the evidence, he would argue regarding competency of Arbitral Tribunal to decide competency to deal with the dispute. Section 16 of the Act provides for competency of Arbitral Tribunal to rule on its jurisdiction and everything is settled, now and it is held in the catena of decisions that competency of the Arbitral Tribunal can be decided by the Arbitral Tribunal and that has to be left to the decision of the Arbitral Tribunal in view of the latest decision on this aspect.

24. In the said regard, he would cite the decision in the case of N.N. Global Mercantile Pvt. Ltd., Vs. Indo Unique Flame Ltd., and others, reported in 2021 SCC OnLine SC 13, wherein, their lordships have held at para No. 7.11 by referring earlier decisions that:

> Com.A.P 79/2021 "The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or

validity of the arbitration agreement. This doctrine is intended to minimise 13 (2020) 2 SCC 455. judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ).

352. Refer to PSA Mumbai Investments Pte. Ltd. v.

Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 :

(2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes.

Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, Com.A.P 79/2021 failing any indication thereon, under the law of the country where the award was made".

25. To show that Section 16 is an inclusive provision which would comprehend all tribunal acting upon jurisdiction and in the said regard, he would cite the decision in the case of Uttarkakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited, reported in (2020) 2 SCC 455 and this decision has been considered by the Hon'ble Apex Court in the earlier decision in the case of M/S N.N. Global Mercantile Pvt. Ltd., Vs. M/S Indo Unique Flame Ltd. And others reported in 2021 SCC OnLine SC 13 and in this decision also very same para No. 7.11 has been reproduced in the first decision cited by learned senior counsel which also speaks about competency of the Arbitral Tribunal to deal with the case.

26. Therefore, according to learned senior counsel the Arbitral Tribunal has got every right to decide on its own jurisdiction and in this case Arbitral Tribunal after Com.A.P 79/2021 recording the evidence of the party, has rendered decision on the jurisdiction and therefore, the same cannot be interfered with.

27. Regarding superseding of Arbitration clause pursuant to execution of Memorandum of Understanding, he would argue that when there is a full and final settlement by way of Memorandum of Understanding, then, it automatically supersedes the contract document and in the said regard, he would rely upon the decision in the case of Union of India Vs. Kishorilal Gupta &

Bros, reported in AIR 1959 SC 1362, wherein, at para Nos. 8 and 10 their lordships have held that:

> 8. "Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was none the less an integral part of the contract, which had no existence dehors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival Com.A.P 79/2021 of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the arbitration clause.

The case-law referred to by the learned Counsel in this connection does not, in our view, lend support to his broad contention and indeed the principle on which the said decisions are based is a pointer to the contrary".

10. "The following principles relevant to the present case emerge from the aforesaid discussion:

> (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms;

but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void ; in the latter case, as the (1) I.L.R. [1948] 2 Cal. 171. original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists Com.A.P 79/2021 for certain purposes, the arbitration clause operates in respect of these purposes".

28. Thereafter, he refers to the decision in the case of Nathani Steels Ltd., Vs. Associated Constructions reported in 1995 Supp (3) SCC 324, wherein, at para No.3, it is held by relying upon the decisions in the case of P.K. Ramaiah and Co. Vs. Chairman & Managing Director, National Thirmal Power Corporation and another and State of Maharashtra Vs. Nav Bharat Builders, has opined that in the first case, the parties had resolved their disputes and differences by a settlement

pursuant whereto the payment was agreed and accepted in full and final settlement of the contract. Thereafter, brushing aside that settlement the Arbitration clause was sought to be invoked and this Court held that under the said clause certain matters mentioned therein, could be settled through Arbitration, but, once those were settled amicably by and between the parties and there was full and final payment as per the settlement, there existed no arbitrable dispute Com.A.P 79/2021 whatsoever and therefore, it was not open to invoke the Arbitration clause. In the second mentioned case, the respondent Contractor acknowledged the receipt of the amount paid to him and stated that there was unconditional withdrawal of his claim in the suit in respect of the labour escalation. There was, thus, full and final settlement of the claim and it was contended that no arbitrable dispute survived in relation thereto. So, with the help of this decision, he would argue that a plain reading of Memorandum of Understanding goes to show that the plaintiff has accepted the amount in full and final settlement and therefore, it cannot invoke the Arbitration clause found in tender document. Similarly, he has cited the decision in the case of P.K. Ramaiah and Co. Vs. Chairman & Managing Director, National Thirmal Power Corporation and another and this decision has been discussed in the decision of Nathani Steels Ltd., Vs. Associated Constructions and therefore, I won't repeat the Com.A.P 79/2021 same and both the decisions speak about non-availability of Arbitration clause when there is full and final settlement.

29. The next decision is in the case of Wapcos Limited Vs. Salma Dam Joint Venture and another reported in (2020) 3 SCC 169, wherein, at para No. 34, it is held that:

> 34. "It is not unknown in commercial world that the parties amend original contract and even give up their claims under the subsisting agreement.

The case on hand is one such case where the parties consciously and with full understanding executed AoA whereby the contractor gave up all his claims and consented to the new arrangement specified in AoA including that there will be no arbitration for the settlement of any claims by the contractor in future. Having chosen to adopt that path, it is not open to the contractor to now take recourse to arbitration process or to resurrect the claim which has been resolved in terms of the amended agreement, after availing of steep revision of rates being condition precedent."

30. The next decision is in the case of National Insurance Co. Ltd., Vs. Bogharapoly fab Pvt. Limited and the very same decision has been relied upon by the plaintiff in the above case. In the said case, at para No.29, Com.A.P 79/2021 it is stated about when reference cannot be made, etc., and particularly, in para No.34, their lordships by referring to the decision in the case of State of Maharashtra Vs. Nav Bharat Builders have examined the nature of contract and discharge of liability by accord and satisfaction. So, the above decision is in the line of one cited in the case of Wapcos Limited Vs. Salma Dam Joint Venture and another. Ofcourse, the above decision also deals with that when the accord and satisfaction is obtained by coercion and duress, then, the aggrieved can invoke arbitration clause irrespective of the fact that there is an amended agreement, etc., This decision is squarely helps the defendant rather the plaintiff.

31. Regarding accord and satisfaction, few more decisions are cited in the case of Union of India and others Vs. Hari Singh, Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International)

Company Limited, Union of India and others Vs. Master Construction Company, New India Assurance Company Com.A.P 79/2021 Limited Vs. Genus Power Infrastructure Limited. Lastly, in the case of ONGC Mangalore Petrochemicals Limited Vs. ANS constructions Limited and another.

32. Regarding alleged coercion, learned senior counsel would rely upon the decision in the case of Ranganayakamma and another Vs. K.S. Prakash (Dead) by LRs and others, to the effect that whenever there is an allegation of fraud, coercion and misrepresentation there must be pleadings as required under Order VI Rule 4 CPC and claims statement is silent about those aspects and for the first time in the rejoinder to the counter claim the same has been made and therefore, the case of the plaintiff cannot be accepted regarding alleged coercion

33. The next decision is in the case of Purushottam Daji Mandlik Vs. Pandurang Chintaman Biwalkar, reported in AIR 1915 Bombay 68, wherein, it is observed by his lordship that: "But, it certainly does seem to me a strange thing that a plaintiff, who comes to Court alleging Com.A.P 79/2021 fraud, or coercion, in respect of which the law, as is well known, requires him to give particulars, should give every particular, which must be within his own knowledge, and after being disbelieved upon every material one of them should be given relief.

34. Similarly, he has cited the decision in the case of North Ocean Shipping Co. Ltd., Vs. Hyundai Construction Co. Ltd., and another, reported in (1979) 3 WLR 419 (twins bench) and in the case of Pao on and others Vs. Lau Yiu Long and others privy council, reported in (1979) 3 WLR 435, to the effect that mere commercial pressure is insufficient for coercion and the last decision is in the case of H. R. Basavaraj (dead) by his LRs and another Vs. Canara Bank and others, reported in (2010) 12 SCC 458 regarding the basic concept of novation, it is the substitution of a contract by a new one. By referring to Section 62 of Indian Contract Act, it is held that this Section gives statutory form to the common law principle of novation. The basic principle behind the Com.A.P 79/2021 concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in Scarf v. Jardine that "there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract". So, according to learned senior counsel for the defendant that the Memorandum of Understanding is nothing but, substitute of contract and it is full and final statement regarding balance claim and the defendant has given up its liquidated damages considerably, thereby the plaintiff is benefited and plaintiff after taking the benefit, after lapse of few months, has approached the Court/Tribunal in the guise of breach of contract and Arbitration clause available in the contract document, which is not permissible. So, the sum and substance of the Com.A.P 79/2021 arguments of learned senior counsel for the defendant is that a person who having received the benefit of settlement cannot agitate and go back stating that he is still empowered to recover the amount on the basis of the earlier ground.

35. In such a situation, whether the Court acting under Section 34, can interfere with findings given by learned Arbitrator. In this regard, learned senior counsel would cite the latest decision in the case of Atalanta Limited through its Managing Director Vs. Union of India reported in 2022 SCC OnLine

SC 49, which deals with the aspect that the Court acting under Section 34 is not sitting in appeal over the findings given by Arbitrator and the Court cannot re-appreciate the evidence or substitute its view in the view expressed by learned Arbitrator.

36. Similarly, he has cited one more decision in the case of MMTC Limited Vs. Vedanta Limited, reported in (2019) 4 SCC 163, to the effect that the Court acting under Com.A.P 79/2021 Section 34 cannot re-appreciate the evidence or substitute its own opinion in the place of opinion expressed by learned Arbitrator. So, with the help of these two decisions he would argue that when the scope is very limited, there is no question of interference.

37. With the light of the above submission made by learned counsel for the plaintiff and learned senior counsel for the defendant, let me go through the award passed by learned Arbitrator. Learned Arbitrator in his award has referred to the relief claimed by the defendant herein under Section 16 of the Act, by filing application to the effect that the Arbitral Tribunal has no jurisdiction to deal with the case on account of execution of Memorandum of Understanding between the parties. Learned Arbitrator has referred to the claim statement and objection statement and also heard the learned senior counsel appearing for the defendant herein and also learned counsel appearing for the plaintiff and by referring to the decisions cited by learned senior counsel for the defendant and also the Com.A.P 79/2021 plaintiff distinguished the same by referring to Ex.R9 Memorandum of Understanding and has given finding at para No.22 stating that though there was a construction contract between the parties, which provides for liquidated damages to the tune of maximum of 5% of the value of the contract, it was emphasized by the defendant herein that due to inordinate delay in completion of the work beyond agreed period. The defendant is entitled to claim liquidated damages to the tune of Rs.1,69,33,239/- and since amount claimed by the plaintiff herein as final bill is less than one claimed by the defendant in the counter claim, at the intervention of the inFORM Architect, the settlement was arrived at by raising two points regarding execution of Memorandum of Understanding and also jurisdiction of the Arbitral Tribunal as per Section 16 of the Act and elaborately discussed the various decisions cited by learned senior counsel particularly, in the case of Ranganayakamma and another Vs. K.S. Prakash (Dead) by LRs and others, regarding fraud and particulars of Com.A.P 79/2021 proof etc., required to be pleaded and by referring to the various decisions and also the evidence given by CW1 during the cross-examination has come to the conclusion that the Arbitral Tribunal has no jurisdiction. Learned Arbitrator by referring to Ex.R9 and also the contents therein and by referring to the decision cited by the plaintiff in the case of National Insurance Co. Ltd., Vs. Bogharapoly fab Pvt. Limited and also has distinguished the same and I do not find any mistake in the reasoning arrived at by learned Arbitrator. Learned Arbitrator has considered the background of Memorandum of Understanding and full and final settlement and by quoting decisions cited by learned counsel for the plaintiff and defendant, has come to the conclusion that the Arbitral Tribunal has no jurisdiction to deal with case for want of Arbitration clause. Further, in the present suit, learned senior counsel has submitted many decisions to the effect that when there is a full and final settlement, then, it is nothing but, substitution of contract and same cannot be Com.A.P 79/2021 re-agitated. So, when we read the entire order along with the decision cited before learned Arbitrator and one before this Court, one thing is clear that the plaintiff has agreed for full and final settlement and has also undertaken that he will not raise any future bill. Similarly, the defendant has undertaken that he will not claim any liquidated damages in

future, then, the parties have acted upon the Memorandum of Understanding and therefore, now the plaintiff cannot blow hot and cold. Having received benefit under the Memorandum of Understanding and even if there is delay in payment of the bill the same cannot be ground and it will not confer jurisdiction on the Arbitrator to fall back on the contract document to decide the case.

38. When, learned Arbitrator has given his anxious attention regarding the terms of contract and Memorandum of Understanding and also evidence of CW1, then, this Court being not an appeal court cannot interfere with the findings and this Court cannot substitute its view in the place of view expressed by the learned Arbitrator.

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39. Under Section 34 of the Act, the award can be set aside if it is opposed to public policy, against basic notion of justice, against the documents and also non- consideration of the law of the land and the decision of the Higher Courts. In view of the above fact, I do not find any merits in the suit and therefore, I answer point No.1 in the negative.

40. Point No.2: For the above said reasons, I proceed to pass the following;

ORDER The petition filed by the plaintiff under Section 34 of the Arbitration & Conciliation Act, 1996, is hereby dismissed. No costs.

(Dictated to the Stenographer, typed by him, corrected and then pronounced by me in open Court on this the 21st day of February, 2022).

(CHANDRASHEKHAR U), LXXXVII Addl.City Civil & Sessions Judge, (Exclusive dedicated commercial Court) Bengaluru.

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