

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : April 22, 2009**
Judgment delivered on : May 08 , 2009

+ **O.M. P. NO.278/1998**

M/S JATAN BUILDERS Petitioner
Through : Mr. B.B. Sawhney, Sr. Advocate with Mr.
M. Tarique Siddique, Advocate

Versus

ARMY WELFARE HOUSING ORGANIATION Respondent
Through : Mr. A.K. Tewari, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

- | | |
|--|------|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

VIPIN SANGHI, J.

1. The respondent, Army Welfare Housing Organisation (AWHO) has preferred these objections under Section 34 of the Arbitration and Conciliation Act, 1996 (for short ,the Act) to challenge the arbitration award dated 20.7.1998 made by the Sole Arbitrator in favour of the Petitioner/Contractor/Claimant M/s Jatan Builders.

2. The parties entered into a construction contract wherein the petitioner-contractor agreed to construct multi-storeyed residential accommodation for the respondent at Nerul, New Mumbai. Disputes arose between the parties in relation to the said contract which were referred to arbitration in accordance with the arbitration clause contained in the said agreement.

3. Before coming to the award and the objections thereto I may note a few facts. The contract in question was awarded in favour of the petitioner on 8/12.3.1991. The date of completion which was initially fixed as 18.3.1993, was revised to 31.07.1993 upon amendment of the Contract to include within its scope the construction of an additional floor. The time for completion was extended up to 15.09.1993 and thereafter up to 28.02.1994. However, these extensions were granted by the respondent without escalation. Finally, vide Memorandum of Understanding (MOU) dated 24.11.1983 executed between the parties the time for completion was further extended up to 31.03.1994 and the petitioner was granted escalation on the basis of WPI as on 31.08.1993. On 31.3.1994, the consultant architects issued a completion certificate. The final bill was submitted by the petitioner to the respondent on 22.9.1995. 75% amount of the retention money i.e. Rs.20 lakhs in the form of bank guarantee furnished at the behest of the petitioner was released by the respondent on 19.10.1995. Ad hoc payment of Rs. 28 lakhs was also released by the respondent on 15.12.1995. Further performance guarantees of Rs.4.50 lakhs and retention money of Rs. 7.00 lakhs was

released on 29.2.1997. On 10.6.1997, the respondent-objector communicated the approval of the final bill after a technical check for a balance amount of Rs.10,13,667.71. The respondent required the petitioner to submit a no claim certificate. The same was submitted by the claimant-petitioner on 11.6.1987. Thereafter the balance amount of final bill was released on 13.6.1997. On 20.6.1997, the petitioner-contractor communicated that on reconciliation of the final bill with the technical check bill, large variation was noticed for which no details were provided by the respondent. While demanding certified true copy of the final bill to enable it to reconcile the accounts, the petitioner withdrew the no claim certificate issued by it. On 6.7.1997, the petitioner forwarded its list of tentative claims and sought the release of the amounts. On 30.7.1997, the petitioner invoked the arbitration agreement contained in clause 134 of the General Conditions of Contract. The Chairman, AWHO accordingly appointed the Arbitrator who had made the impugned award.

4. The submission of Mr. Tewari, learned counsel for the objector, AWHO is that the award is not sustainable since it is in contradiction and in violation of the contractual terms; the Arbitrator has exceeded his jurisdiction; the Arbitrator has, without assigning any reasons concluded that the MOU dated 24.11.1993 and the No Claim Certificate dated 11.06.1997 issued by the petitioner were a result of duress, coercion and undue influence and has therefore disregarded the same; the arbitrator has even disregarded the amendment to the contract in relation to the additional floor and awarded the claim for

rates contrary to the contract. He submits that apart from claim nos. 1 to 7, the other claims were barred by virtue of clause 119 or the General Conditions of Contract, since they did not form part of the final bill raised by the petitioner. So far as claim nos. 1 to 7 are concerned, he submits that the difference in the final bill submitted by the petitioner relating to those items, and the technically approved bill of the petitioner was only Rs.4,27,654/-, whereas the Arbitrator had awarded against the said claims Rs.8,73,202/-. It is therefore submitted by him that the entire award is liable to be set aside as the petitioner was bound not only by the MOU dated 24.11.1983, and the amendment to the contract, but also by the no claim certificate dated 11.06.1987 issued by it and there was complete accord and satisfaction between the parties from which the petitioner could not resile. There was no surviving arbitrable dispute which could be arbitrated upon by the Ld. Arbitrator.

5. On the other hand, the submission of Mr. B. B. Sahni, Senior Advocate who appears for the petitioner is that the MOU dated 24.11.1983 and the no claim certificate dated 11.6.1997 were both obtained under duress and coercion. The same cannot therefore come in the way of the petitioner raising its claims in arbitration. He submits that claim nos. 1 to 8 were covered by the final bill as raised by the claimant. The total amount claimed under these eight claims was Rs. 15,03,000/-, as against which the learned Arbitrator had awarded Rs.8,81,798/- under claim nos. 1 to 5 and 7 and 8. No amount was awarded against claim no.6, 11, 12, 18 and 20. Claim no.17 was

towards contract tax. The liability to pay contract tax was admitted by the respondent-contractor before the Arbitrator. Claim nos. 9, 10 and 19 were claims towards interest. While claim no.9 was made to claim interest on delayed payment of RA bills, (claimed amount Rs.22,95,108/- and awarded amount of Rs.5,42,326/-), claim no.10 pertained to the claim for interest on delayed payment of final bill which was paid only on 13.6.1997 (The petitioner had claimed Rs.4,25,872/- under this claim and had been awarded Rs.2,90,367/- by the Arbitrator). Claim no.19(a),(b),(c) were claims towards interest for the pre-litigation stage upto September, 1997, pendente lite interest i.e during the pendency of the arbitration proceedings, and post award period respectively. While the petitioner had claimed interest at the rate of 18% p.a. for all these periods, the petitioner was awarded pre-litigation and pendente lite interest at the rate of 15% p.a. and post award interest at the rate of 18% per annum. Claim no.13 was made towards payment due for additional works done by the Contractor which were ordered after the submission of the final bill. This claim was awarded by the Arbitrator for Rs.56,293/-. Consequently the claims for interest and claim no. 13 could not be said to be barred under Clause 119 of the General Conditions of Contract as they could not have been a part of the final bill. Claim no.14 was made towards escalation of labour, material and fuel after 31.8.1993, upto the completion of the work. This claim was premised on the foundation that the MOU dated 24.11.1993 (which provided that the Contractor shall be paid escalation during the extended period of contract i.e upto

31.3.1994 for labour, material, petroleum, oil and lubricants (POL) in terms of the Contract Agreement provisions by freezing the wholesale price index (WPI) on 31.8.1993) was not binding on the petitioner, since it was obtained by duress and coercion. The claimant had contended, and the Arbitrator had accepted the submission of the Petitioner, that the wholesale price index could not have been frozen as on 31.8.1993, for purpose of payment of escalation when the period of the contract had been extended upto 31.3.1994. As against the claim of Rs.24,03,109/-, the Contractor had been awarded Rs.10,51,442.20 against claim no.14. Claim no.15 was made towards higher rate for construction of the additional floor, on the basis that the rate agreed to be paid for the construction of the additional floor (by the amendment to the contract) to the petitioner was lower than the rate agreed to be paid in respect of another similar contract to another Contractor. As against the claim of Rs.10,73,903.11, the Arbitrator had awarded an amount of Rs.5,33,128.00. Claim no.16 was made towards losses due to prolongation of contract. The petitioner had claimed Rs.76,17,122/- against which the Arbitrator had awarded Rs.14,00,760/-. It was submitted that even this claim could not have been raised at the time of raising the final bill, since this claim was not for any amount due towards work done. Therefore, it could not have been billed while raising the final bill, and could have been raised only in arbitration.

6. I may first deal with the finding of the Arbitrator that the MOU dated 24.11.1993 was signed under coercion and duress. A perusal of

the award shows that the respondent-objector raised a specific issue whether a party to the contract can retract from the signed MOU.

7. The Arbitrator notes the submissions of the claimant-petitioner that the MOU and the no claim certificate (NCC) were signed under duress and coercion; that AWHO had kept the claimant under pressure from the beginning of the contract; that AWHO delayed obtaining NOC from SIDCO for water connection which was made available in the end of May 1991 whereafter monsoon started; that AWHO issued sub-standard cement and the claimant was asked to demolish and redo the columns; that the claimant asked for payment which was declined; that ultimately AWHO placed the MOU before the claimant for signature; that the claimant had signed the same under extreme duress and coercion.

8. He also notes the submissions of the respondent that the respondent found serious ambiguities in the letter of the petitioner dated 08.07.1993 seeking extension of time as it was lacking particulars; that these ambiguities were notified to the petitioner; that the extension of time could be provided under Clause 91 and compensation for delay could be levied under Clause 102; that the petitioner did not respond to the respondent's letter dated 04.06.1993; that consequently the respondent granted extension of time but denied escalation; that the respondent had to bear financial liability as the work was delayed; that the petitioner got the benefit of the MOU, took away the amount and then created the dispute for unjust

enrichment. After recording the submissions, the learned Arbitrator proceeded to record his findings, inter alia, on the issue of validity of the MOU in the following manner:-

“After considering all aspects brought by both the parties my findings are that-

(a) As per clause 134 of contract and provisions on page 74(R) of contract, all disputes are referable to Arbitration.

(b) The appointing authority has not excluded any dispute from the jurisdiction of the Arbitrator. AWHO also have not objected to the jurisdiction of Arbitrator in any Civil Court.

(c) The MOU has been signed by both AWHO and M/s Jatan Builders, as claimed by both them, under coercion and duress. Further, the NCC has been signed by M/s Jatan Builders under coercion and duress as claimed by them. Hence, the plea of waiver of estoppel, in my view, cannot be taken.

(d) Though Indian Evidence Act is not applicable to Arbitration proceedings, Arbitrator has to follow principle of natural justice.

(e) I do not agree with AWHO that they had two options of denying extension (and charge compensation) or grant extension (and deny escalation). If there was no ground for extension the only provision in the contract was to deny extension. There is no provision in the contract of denying escalation in the extended period.” (emphasis supplied)

9. From the above extracted and highlighted portion of the award, it is seen that there is absolutely no germane reason given by the Arbitrator for arriving at his finding that the MOU was signed by the

parties under coercion or duress. The only “reason” given by the learned arbitrator is that both the petitioner and the respondent claimed that the MOU was a result of coercion and duress.

10. To hold that the petitioner was entitled to be relieved of his obligations under the MOU it was incumbent on the learned arbitrator to conclusively hold that the MOU was signed under coercion and duress exercised by the respondent. It was not enough to hold that as both the parties “claimed” that the MOU had been arrived at by exercise of coercion and duress by the other, the MOU was not binding on both the parties. This is so because a contract induced by coercion or undue influence is only a voidable contract at the option of the party whose consent has been caused by coercion or undue influence, and it is not a void contract. (see Sections 19 and 19A of the Contract Act). However, the learned Arbitrator has proceeded on a fallacious assumption of law that since both parties ‘claim’ the exercise of coercion and duress on the other in the execution of the MOU, the same could be held to be signed under coercion and duress. Since it was the petitioner who was seeking to wriggle out of the MOU, it was for the petitioner to establish the exercise of coercion and duress by the respondent in procuring the MOU. Therefore, it was essential for the learned Arbitrator to have determined whether coercion and duress had, as a matter of fact, been exercised by one or the other party, and only if the petitioner had established, and not merely ‘claimed’ that the MOU was caused by exercise of coercion and duress by the respondent, the petitioner could have avoided the MOU. The

approach of the learned Arbitrator betrays complete lack of appreciation of this fundamental principle of law and the erroneous application of the law has led to a patent error in the award on the aforesaid aspect.

11. At this stage it is necessary to set out the said MOU in extenso, as in my view from a reading thereof and on the application of the principles enunciated by the Supreme Court in the case of ***National Insurance Co. Ltd V. Boghara Polyfab***, 2009(1) SCC 267, it cannot be said that the MOU was a result of coercion and duress exercised by the respondent-objector upon the petitioner. The MOU reads as follows:-

“General

1. The work for the construction of Army Welfare Housing Organisation Project at Nerul (New Bombay) is being executed by M/s Jatan Builders. The Accepting Officer approved the extension of time of the subject work upto 28 Feb 94 without payment of escalation during the extended period of completion i.e. after 31 Jul 93.

2. M/s Jatan Builders through their various letters represented to the Accepting Officer for review of the decision on extension of time and payment of escalation during the extended period of completion.

3. Accordingly, a meeting was held between the Managing Director, AWHO and Shri MK Agarwal, Partner of M/s Jatan Builders on 01 Nov 93 and 23 Nov 93.

4. Shri M K Agarwal brought out during the discussion that there has been unprecedented rise in the prices of all commodities since the acceptance of work with very steep rise during the Gulf War. He also explained that the progress of work suffered due to various

factors in the past which were beyond his control.

Points Discussed

5. Shri M K Agarwal brought out the following issues during the discussion:-

(a) Escalation during extended period – It was brought out that the delays in the completion of work for which extension of time has been granted were beyond his control, and he should be paid escalation as per the provisions of contract.

(b) Additional time for completion of work – It was contended that the extension of time granted may not be adequate for completion of balance works for which additional two months may be necessary.

(c) Provision of final cost of painting/polishing just prior to handing over of DUs – It was contended that final coat of painting/polishing and polishing of floor shall be carried out just prior to the handing over of DUs to the allottees to give neater appearance. Also, to guard against likely thefts, the costly fittings like CP fittings etc. should be fitted only at the time of handing over of DU's. It was requested that the completion certificate should be issued with above stipulations.

(d) Delay in completion of certain works on account of connected works by other agencies being not completed in time – It was brought out that certain items of work may not be completed by extended date of completion, as other agency/agencies are working on connected items. It was suggested that completion certificate should be issued with the condition these shall be completed later after the connected works are completed by other agency/ agencies.

Decisions Arrived

6. All the points were discussed in detail and following were mutually agreed: -

(a) The work shall be completed in all respects by 31 Mar 94.

(b) All works not connected or interfering with the works executed by other agency/agencies shall be completed in all respect by 31 Mar 94 except for fixing of fittings like CP fittings etc. which is likely to be stolen.

(c) The Project Manager will issue completion certificate if the works stated in sub para (b) above is completed before 31 Mar 94 with the list of balance works lying incomplete. The incomplete works shall be completed within two weeks of the site of the incomplete works becoming available.

(d) The contractor shall be paid escalation during the extended period of completion i.e. upto 31 Mar 94 for labour, material and POL in terms of Contract Agreement provisions by freezing the wholesale Price Index on 31 Aug 93.

(e) The escalation becoming payable as a result of agreement at sub para (d) above shall be released as under: -

(i) Seventy percent of the amount of escalation becoming due till 06 Nov 93 shall be released alongwith the running bills whenever they are preferred. The balance thirty percent amount shall be released after the issue of completion certificate.

(ii) Escalation becoming due for the period after 07 Nov 93 till 31 Mar 94 shall be released in full as worked out in terms of sub para (d) above alongwith the running bills whenever preferred.

7. Shri M K Agarwal appreciated the gesture of Managing Director AWHO and accepted the same as additional help and agreed that all issues regarding the payment of escalation and completion of works stands fully resolved and he will have no claims whatsoever on this account in future.

8. Whereever there are conflicting provisions in this Memorandum of Understanding an provisions of Contract Agreement, the provisions contained in this Memorandum of Understanding shall take

precedence and if there are any clarification if necessitated due to any reason whatsoever, the decision of Managing Director AWHO shall be find and binding.

9. This Memorandum of Understanding has been discussed, examined and signed by both the parties without any pressure, duress and with free will.

Signed on 24th day of November 1993 at New Delhi.”

12. A perusal of the above MOU shows that under the original contract there was no specific provision for either grant or the denial of escalation in rates during the extended period of the contract. The respondent had granted extension beyond 31.07.1993 and up to 28.02.1994 while specifically denying escalation to the petitioner. The petitioner-contractor had represented for a review of this aspect in the contract by demanding escalation during the extended period of completion. The petitioner-claimant had urged that there was unprecedented rise in the price of all commodities. He had also explained that the progress of the work had suffered due to various factors in the past which were beyond his control.

13. After mutual discussion, the parties agreed that the period of the contract be extended up to 31.03.1994 and that the Contractor shall be paid escalation during the extended period of completion i.e. upto 31.3.1994 for labour, material and POL in terms of the Contract Agreement provisions by pegging down the wholesale price index as on 31.8.1993. The manner of release of the escalation amount was also agreed under sub clause (e) of Clause 6. Clause 7 records the

appreciation and acceptance by the petitioner of the agreement regarding payment of escalation and further recorded that all issues regarding payment of escalation and completion of works stands fully resolved and that the claimant-petitioner shall have no claims whatsoever on this account in future. The terms of the MOU were to prevail over the contractual terms wherever there was any conflict.

14. Consequently it would be seen that though there was a claim for larger escalation made by the Contractor-petitioner on account of the rise in prices, the parties upon their mutual agreement agreed for 31st August 1993 as the date to freeze the wholesale price index for computing the escalation during the entire extended period upto 31.3.1994. This means that the escalator to be applied was determined by the parties as a fixed and definite percentage/ratio which was known to the parties when they entered into the MOU on 24.11.1993. It is not that under the MOU no escalation was to be granted for work done beyond 31.8.1993. The same was to be paid for the work done during the extended period i.e beginning 01.08.1993 upto 31.3.1994. Full escalation was agreed to be payable upto 31.08.1993. For the work done after 31.08.1993, if there was any further escalation on account of increase in the W.P.I., after 31.08.1993, the same was restricted to escalation admissible on the basis of W.P.I as on 31.08.1993. It is therefore clear that the MOU was arrived at after negotiations between the parties. There was mutual give and take. It was not the case of the respondent-claimant that the Petitioner had altogether denied its claim for escalation and used the

extension of time upto 31.03.1994 as a lever to compel the respondent to give up its claim for escalation during the extended period completely.

15. In ***National Insurance Company Ltd.***(supra), the Supreme Court considered the various situations in which a full and final discharge voucher or no claim certificate would bind the issuing party and in which cases it would not. After a comprehensive review of earlier decisions of the same court, in para 52, a few illustrations were given by the Supreme Court. Para 52 of the said decision reads as follows:-

“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:

(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 claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and 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." (emphasis supplied)

16. On a perusal of the aforesaid paragraph, it would be seen that so far as the execution of the MOU is concerned, the same is relatable to illustration (ii) above. The petitioner made its claims for full and complete escalation. However, after negotiations, the petitioner agreed to receive the amount of escalation as agreed under the MOU. The respondent also agreed to extend the period of the contract to 31.03.1994 on the petitioners representation that it was agreeable to settle the issue of escalation and extension of time by accepting escalation pegged down on W.P.I. as on 31.08.1993.

17. Who knows, the respondent may not have agreed to grant extension of time upto 31.03.1994 if the petitioner had insisted on being granted extension of time upto 31.03.1994 with full escalation for the work done after 31.07.1993. Once having agreed to settle the issue of time extension and escalation in a particular way, the petitioner could not have later turned around, after taking benefit of the MOU dated 24.11.1993 to claim further escalation upto 31.03.1994. The claim for any further escalation stood discharged by accord and satisfaction upon the Petitioner agreeing to receive escalation on the basis of WPI as on 31.08.1993 and extension of time being granted upto 31.03.1994. If the petitioner was not agreeable to the terms on which the MOU was signed, it was open to it not to sign the same and to invoke arbitration to pursue its claims. However, instead it agreed to settle its claim for escalation in the manner stated in the MOU. Consequently, there could have been no reference of a dispute regarding the validity of the MOU to arbitration.

18. As noticed above, there is no germane reason given by the learned Arbitrator to arrive at the conclusion that the MOU was hit by coercion and duress on the petitioner-contractor at the time of the signing of the MOU. The said finding being unreasoned is not sustainable. The MOU could not have been ignored and the claimant-petitioner could not have been relieved of the condition that the escalation would be paid on the basis of the wholesale price index as on 31.8.1993. Not only is the finding that the MOU was entered into by the petitioner under duress and coercion arrived at without any

material or evidence, even the pleading of the petitioner in this regard before the learned Arbitrator was non-specific. With regard to duress and coercion allegedly claimed to have been exercised by the respondent, the only averment made by the petitioner-claimant in its statement of claim reads as follows:-

“8. During the course of execution of the works, there were delays beyond the control of the Claimant. The General Conditions of the Contract had the provision to mitigate the delays by grant of suitable extension of time. However, when the Claimant requested for the extension of time, the Respondent deliberately delayed the grant of extension of time and caused irreparable damage to the Claimant financially and to the project. In addition to the above, the respondent first extended the period of completion provisionally and that too without payment of escalation. The above mentioned conditions were against the agreed terms and conditions of the contract and the Respondent were in clear breach of the contract terms.

The Respondent, thereby was exerting undue pressure to make the Claimant submit to their dictate. The Respondent forced the Claimant for arriving of an understanding when none was required. The Respondent forced the Claimant to accept escalation on the frozen WPI as on the date of revised completion. This aspect will be further explained later in the submission.”

19. The submission of Mr. Sahni founded upon the Supreme Court decision in ***K.N.Sathyapalan(Dead) By Lrs. V. State of Kerala and Another***, (2007) 13 SCC 43 that even if the MOU is held not to have been hit by duress and coercion, the same does not take away the right of the Contractor to demand escalation for executing the work during the extended period of the contract cannot be

accepted. Before the Supreme Court in ***K.N.Sathyapalan*** (supra), the factual situation was entirely different. In that case the Arbitrator found, as a matter of fact, that the contractor was prevented by unforeseen circumstances from completing the work within the stipulated period and the delay could have been prevented had the state stepped in to maintain the law and order situation which had been created at the work site. The Arbitrator also found, as a matter of fact, that adequate space had not been provided for dumping the excess earth which had to be conveyed for distant place for dumping. The Supreme Court also observed that it was clear that rubber and metal which should have been made available at the departmental quarry had to be obtained from quarries which were situated at double the distance resulting in doubling of the transportation charges. Site for dumping of excess earth was not provided by the respondent-state which compelled the contractor to dump the excess earth at a place which was far away from the work site entailing extra cost for the same. The contractor executed the supplementary agreement thereby giving up his right to claim escalation for carrying out the work during the extended period under protest. It was in these circumstances that the Supreme Court held that though ordinarily parties would be bound by the terms of their agreement, where one of the parties is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to

its obligations. In ***K.N. Sathyapalan*** (supra), the supplementary agreement completely barred all claims towards escalation during the extended period of contract.

20. However, in the present case, the learned Arbitrator has not returned any finding of fact to the effect that the extension of the period of the contract beyond 31.07.1993 was for reasons attributable to the respondent alone and that the petitioner was not responsible for the delay. Moreover, the petitioner has consciously agreed to settle the claim for escalation by accepting escalation for the entire extended period of the contract pegged down to the escalation derived on the basis of WPI as on 31.08.1993. While deciding ***K.N. Sathyapalan*** (supra), the Supreme Court was conscious of the fact that it was letting off the contractor from the clutches of the supplementary agreement not to claim escalation during the extended period of the contract, but the justification given by the Supreme Court was that the Arbitrator had found, as a matter of fact, that the entire delays and defaults in the work not being completed during the stipulated period of completion was attributable to the respondent-state. In para 33 and 34 of the judgment, the Supreme Court observed:

“33. We have intentionally set out the background in which the Arbitrator made his award in order to examine the genuineness and/or validity of the appellant's claim under those heads which had been allowed by the Arbitrator. It is quite apparent that the appellant was prevented by unforeseen circumstances from completing the work within the stipulated period of eleven months and that such delay could have been prevented

had the State Government stepped in to maintain the law and order problem which had been created at the work site. It is also clear that the rubble and metal, which should have been available at the departmental quarry at Mannady, had to be obtained from quarries which were situated at double the distance, and even more, resulting in doubling of the transportation charges. Even the space for dumping of excess earth was not provided by the respondents which compelled the appellant to dump the excess earth at a place which was far away from the work site entailing extra costs for the same.

34. In the aforesaid circumstances, the Arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was referable to the execution of the work during the extended period. In our judgment, the view taken by the High Court was on a rigid interpretation of the terms of contract and the Supplemental Agreement executed between the parties, which was not warranted by the turn of events."

21. Consequently, the decision in ***K.N. Sathyapalan*** (supra) has no bearing on the facts of this case.

22. No material was placed on record before the learned Arbitrator by the petitioner to establish that the MOU was a result of coercion or duress. The petitioner did not repudiate the MOU soon after its signing and raised its bills and received payments in terms thereof. The MOU was challenged only in arbitration. For the aforesaid reasons, the finding returned by the learned Arbitrator that the MOU dated 24.11.2003 was a result of duress and coercion and for that reason, the petitioner was not bound by the terms thereof cannot be sustained. The said finding has been arrived at without any cogent

and intelligible reasons. It is clearly a case covered by illustration 2(ii) of para 52 of the judgment of the Supreme Court in **India Insurance Co. Ltd.** (supra). It has no factual basis. It has been arrived at on an erroneous understanding of the law. Resultantly, the award made in favour of the petitioner on claim No.14, awarding Rs.10,51,442/-, cannot be sustained and is set aside.

23. The position with regard to the no claim certificate is, however, materially different. As noticed hereinabove, on 10.06.1997, the respondent-objector communicated the approval of the final bill after the technical check for balance amount of Rs.10,13,667.71 and also required the petitioner to submit a no claim certificate. It is evident that without the submission of the no claim certificate, the petitioner could not have been received even the admitted dues of Rs.10,13,667.71. The work had substantially been completed at the time of recording completion of work on 31.03.1994. Looking to the length of time that had passed from the time of recording completion of work, to the time when the final bill was checked and cleared for the aforesaid amount, it can be inferred that the petitioner contractor was starved of funds. The issuance of the no claim certificate is clearly covered by illustration (c) in para 52 of the Supreme Court decision in **India Insurance Co. Ltd.** (supra). The no claim certificate submitted on 11.06.1997 was withdrawn by the petitioner at the earliest opportunity after receiving the admitted amount as per the checked final bill, on 20.06.1997. It cannot, therefore, be held that the right of

the petitioner to raise its claims in arbitration was barred only on account of the issuance of no claim certificate.

24. Claim Nos.1 to 8 arose on account of reductions being made by the respondent from the final bill raised by the petitioner upon a technical check. In respect of these claims, therefore, there can be no objection as to their maintainability before the arbitrator and they are not barred under Clause 119 of the general conditions of contract, which reads as follows:

“119. No further claims shall be made by the contractor after submission of final bill, and other claims if at all, shall be deemed to have been waived and extinguished with his free consent.”

25. The only objection raised by learned counsel for the respondent in respect of these claim Nos.1 to 7 was that the arbitrator had awarded an amount of Rs.8,73,202/- which, in any event, could not have been awarded as the difference between the final bill amount and the amount as finally approved after the technical check of the final bill was only Rs.4,27,654/-.

26. This submission of learned counsel for the respondent is *ex facie* wrong. The amount of the final bill as raised by the petitioner/claimant was Rs.11,97,11,620/-. However, the amount that was approved by the respondent as payable to the petitioner after the technical check was Rs.11,82,08,975.71. Therefore, the difference between the amount claimed by the petitioner and that approved by

the respondent was Rs.15,03,000/-. It is, therefore, wrong for the respondent to contend that the difference was only Rs.4,27,654/-. The error in the submission of the respondent lies in the fact that instead of treating the net amount paid of Rs.10,71,346/- as a part of the amount approved by the respondent/objector, the same has been treated as having been paid over and above an amount of Rs.11,82,08,975/-. But, that is not the position. The net amount admitted to be due of Rs.10,71,346/- is a part of the Final Bill as approved. Since no other objection has been raised by the respondent in respect of claim Nos.1 to 7, the award on these claims does not call for inference. The respondent has also not argued any particular objection in respect of the award on claim No.8, which was against the deduction effected in the final bill for rectification of work relating to water supply. Consequently, there is no reason to set aside the award on claim No.8.

27. I may now deal with the objection raised by the respondent to the maintainability of the claims (beyond claim Nos.1 to 7), by virtue of Clause 119 of the general conditions of contract, which has been extracted above. The said clause bars the contractor from making further claims after the submission of final bill. From the award, it is clear that the respondent had specifically raised the defence founded upon Clause 119 of the general conditions of contract. However, the learned arbitrator rejected the same for the reasons as extracted hereinabove in para 8 of this judgment. Of the five reasons contained in the above extract from the award, it appears that the reason for brushing aside Clause 119 of the general conditions of contract given

by the arbitrator was that the Indian Evidence Act is not applicable to arbitration proceedings and that the arbitrator has to follow principles of natural justice, and that all disputes are referable to arbitration under Clause 134 of the contract and the appointing authority has not excluded any dispute from the jurisdiction of the arbitrator. Moreover, the respondent has not objected to the jurisdiction of the arbitrator in any civil Court.

28. The aforesaid reasons given by the learned arbitrator betray a complete lack of understanding on his part of the relevant legal principles. Merely because all disputes are referred to arbitration, and the respondent did not object to the jurisdiction of the arbitrator in a civil Court, it does not follow that the arbitrator can overrule and ignore the contractual terms. The learned arbitrator was obviously oblivious of Section 5 of the Act, which states that in respect of matters governed by part 1 of the Act except where so provided by the said part, no judicial authority shall intervene. Section 16 empowers the arbitral tribunal to rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. A plea that the arbitral tribunal is exceeding the scope of its authority has to be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitration proceedings. Therefore, when the respondent raised an objection that certain claims could not have been raised in arbitration by reference to Clause 119 of the general conditions of contract, it was no answer for the arbitrator to give that the respondent had not approached the Civil

Court to question his jurisdiction to entertain such claims, which were barred by reference to Clause 119 of the agreement.

29. The further reasoning given by the arbitrator that the Evidence Act is not applicable to arbitration proceedings and the arbitrator has to follow principles of natural justice, to brush aside Clause 119 of the general conditions of contract also appears to be equally unintelligible. No doubt the Indian Evidence Act does not apply to arbitration proceedings and the arbitrator can evolve a procedure, which complies with the principles of natural justice for conduct of the proceedings. However, that does not mean that the arbitrator can ignore a contractual term, in answer to the reliance placed by the respondent on Section 115 of the Evidence Act. Even if the provisions of the Evidence Act are ignored, the parties and the arbitrator cannot override and ignore the contractual terms and act contrary to them. Therefore, there is a clear error in the understanding and application of the law by the learned arbitrator while concluding that Clause 119 of the general conditions of contract is not binding on the petitioner. Clause 119, as aforesaid, was certainly enforceable against the petitioner.

30. I now proceed to examine the claims beyond claim Nos.1 to 8 in the light of the aforesaid position. Claim No.9 was made by the petitioner towards interest on delayed payment of running account bills. While claim No.10 pertains the claim of interest on delayed payment of final bill. So far as the claim of interest in respect of delay

in payment of running account bills is concerned, the same could have been raised and ought to have been raised by the petitioner while raising its final bill, since the extent of the delay in payment of the running account bills was already known to the claimant-petitioner. The cause of action for raising the said claim had arisen before or at the time of raising of the final bill. Not having raised the said claim in the final bill prepared by the petitioner, in my view, the same could not have been raised subsequently in arbitration when the same is specifically barred by Clause 119 of the general conditions of contract. Accordingly, claim No.9 was not maintainable before the arbitrator and the arbitrator had no jurisdiction to adjudicate thereupon. The award on claim No.9 is, accordingly, set aside.

31. Claim No.10, however, stands on a different footing. This claim was made to claim interest on delayed payment on the final bill. Obviously, the said claim could not have been made in the final bill and is, therefore, not barred by Clause 119 of the general conditions of contract. So far as claim No.10 is concerned, learned counsel for the objection has argued that though the work was certified to have been completed on 31.03.1994, as a matter of fact a perusal of the completion certificate itself shows that there were a large number of outstanding works and the completion certificate was issued subject to the completion of these outstanding works and removal of defect. The petitioner had raised its final bill only on 22.09.1995 i.e. nearly 17½ months after the issuance of the conditional completion certificate for the reason that the works were admittedly not complete and were also

defective as on 31.03.1994. By reference to the arbitration record, learned counsel for the respondent submits that on 28.09.1995 various queries were raised and clarifications sought by the respondent. The petitioner was required to furnish documents in respect of the same. On 20.10.1995 once again the petitioner was asked to submit the documents in respect of the final bill in accordance with the contractual terms. Even though the contractor did not submit the documents in support of the final bills, ad hoc payments were made and bank guarantees furnished by the petitioner towards performance guarantee were released from time to time. The petitioner communicated the testing of the fire-fighting system in all the five blocks and also admitted that minor defects were found on 20.05.1997, vide their communication dated 31.05.1997. It is argued that only thereafter, the work was completed as a matter of fact without any delay. On 10.06.1997 the petitioner was informed about the technical check of the bill by the respondent and was asked to receive the final payment of Rs.10,13,667.71, after issuing of the NCC. The submission of learned counsel for the petitioner, therefore, is that the learned arbitrator has ignored the documents placed on record, particularly the letter dated 31.05.1997 of the petitioner, wherein the petitioner admits to completion of testing of the fire-fighting work and also that there were certain defects found on 20.05.1997.

32. A perusal of the award shows that the learned arbitrator has taken into consideration the submissions founded upon the documents referred to by learned counsel for the respondent. The aspect whether

there was any delay in payment of the final bill is a question of fact, and the arbitrator is the final judge of such facts. I, therefore, see no infirmity in the award made by the learned arbitrator on claim No.10 and there is no ground to interfere with the same.

33. So far as claim No.13 is concerned, the same was made in respect of additional works ordered to be done by the petitioner after the submission of the final bill. Clause 119 of the general conditions of contract obviously would have no application in relation to this claim. The respondent has not raised any specific objection in relation to the award of the said claim. Consequently, the award on claim No.13 is upheld.

34. Claim No.15 made by the claimant-petitioner was made to claim higher/additional rates for construction of the additional floors under amendment No.1 to the contract. The foundation of the said claim was that in respect of another contractor, who was performing similar work, the respondent had agreed to pay higher rates. By allowing the said claim partly, the learned arbitrator awarded an amount of Rs.5,33,128/-.

35. The award on claim No.15 by the learned arbitrator is unsustainable for the reason that the arbitrator, to allow the said claim, has ignored the contractual rates agreed between the parties for carrying out construction of additional floor as contained in amendment 1 to the contract between the parties. The award itself shows that though the contractor had demanded Rs.23.69 Lacs per

block before signing the amendment. However, the rates was finalized at Rs.20,29,865.63 at the time of signing the amendment. Therefore, the petitioner had agreed to the rate of Rs.20,29,865.63 per block with open eyes. Merely because other contractors were able to secure higher rates, the arbitrator could not, on the basis of some principles of natural justice and equity, grant higher rates to the petitioner in breach of the contractual terms. The award on claim No.15 being contrary to the contract contained in amendment No.1 is unsustainable and is set aside. Even otherwise, this claim could have been raised by the petitioner at the time of raising of the final bill, which admittedly was not done. This claim was, therefore, barred by Clause 119 of the general conditions of contract and could not have been raised and arbitrated upon by the learned arbitrator.

36. Claim No.16 was made by the petitioner to claim damages due to prolongation of the contract period. The amounts were claimed towards extra expenditure incurred during the prolongation period by way of extra head office overheads and loss of profitability during the extended period, and site overheads and under utilization of T&P machinery, shuttering during the extended period. In my view, there is merit in the petitioner's submission that this claim could not be said to be barred by Clause 119 of the general conditions of contract. This is so because a claim for damages, which requires adjudication, could possibly not have been raised in the final bill.

37. Apart from a liquidated claim such as the claim of interest on delayed payment of the running bills the final bill could have been raised only in respect of such works, which the contractor claims to have carried out. I am, therefore, of the view that claim No.16 could not be said to have been barred by clause 119 of the general conditions of contract.

38. The award made by the learned arbitrator on this claim appears to be unassailable for the reason that the parties had agreed to extend the period of the contract upto 31.03.1994 without levy of liquidated damages upon the petitioner-contractor, and subject to payment of escalation, as aforesaid. Consequently, the petitioner-claimant was entitled to be compensated for the additional expenditures incurred on head office overheads, loss of profitability during extended period, site overheads and underutilization of T&P. The learned arbitrator has discussed the justification for this claim in detail and his reasoning appears to be sound. No specific objection has been raised and no infirmity has been pointed out by the respondent to assail the award on this claim. Accordingly, the objections of the respondent to the award on claim No.16 is rejected.

39. So far as claim No.17 is concerned, the respondent has not disputed the same. The same is, accordingly, affirmed.

40. Claim No.19 was made towards interest for pre lite, pendente lite and post award period. The learned arbitrator has awarded 15% interest for the pre litigation and pendente lite period, and 18%

interest for the post award period. Considering the fact that the contract was performed in the year 1993-95, I am of the view that the pre litigation, and pendente lite interest awarded @ 15% per annum was justified and cannot be assailed. However, considering the fact that the award was made in July, 1998, by when the rates of interest had come down and continued to fall the rate of interest from the date of the award till payment is reduced to 9% per annum. Accordingly, while setting aside the award in respect of claim Nos.9, 14 & 15, the award on the other claims is affirmed subject to the reduction of the rate of interest from the date of the award till payment to 9% p.a. Parties are left to bear their own costs.

Petition stands disposed off.

(VIPIN SANGHI)
JUDGE

May 08, 2009
as/rsk