

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

**OMP No. 396 of 2009**

MAS CONSTRUCTION PVT. LTD. .... Petitioner

Through: Mr. Abhinav Vasisht, Senior  
Advocate with Mr. Vikramjit Banerjee and  
Mr. Raman Kumar, Advocates

versus

AIR FORCE NAVAL HOUSING BOARD ..... Respondent

Through: Mr. Yoginder Handoo, Advocate

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**

**28.11.2011**

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') by the Petitioner M/s. MAS Construction Private Limited is to an Award dated 30<sup>th</sup> December 2008 passed by the learned Sole Arbitrator to the extent that Petitioner's claims B-1, C-1, C-2, C-3 and C-4 against the Respondent Air Force Naval Housing Board ('AFNHB') have been rejected.

2. The Petitioner and the Respondent entered into a contract for the construction of residential accommodation for the AFNHB at Behala Kolkata Phase-II for a sum of Rs. 7.70 crores. According to the Petitioner, it completed the construction on 30<sup>th</sup> November 2005 and handed over possession to the Respondent on the same date. The Petitioner submitted its final bill for Rs. 1,75,75,537/- as on 13<sup>th</sup> December 2005, out of which

the Respondent released Rs. 15 lakhs on 31<sup>st</sup> January 2006, and thereafter further sum of Rs. 19.40 lakhs as advance for the final bill and a further amount of Rs. 5 lakhs on account of some further construction.

3. In terms of the agreement as entered between the parties, the Petitioner invoked the arbitration clause and made claims under various heads. The Respondent filed its counter claims. Among the claims raised by the Petitioner were:

- (i) a sum of Rs. 36,38,928/- towards extra quantities of items over and above stipulations in terms of original tender drawings;
- (ii) a sum of Rs. 25,35,520/- towards escalation of prices, incurred beyond the stipulated period of time since the Respondent was itself responsible for delay in completion of the work;
- (iii) a sum of Rs. 43,10,424/- towards payment of service tax on construction services.

4. A preliminary objection to the maintainability of this petition has been raised by the Respondent stating that the Petitioner had furnished an undertaking by way of an affidavit to the Respondent at the time of full and final settlement of the awarded amount to the effect that it would not file any appeal against the impugned Award.

5. The submissions of Mr. Abhinav Vasisht, learned Senior counsel

appearing for the Petitioner and Mr. Yoginder Handoo, learned counsel appearing for the Respondent have been heard on this preliminary issue.

6. Mr. Vasisht refers to a supplementary affidavit filed by the Petitioner in this Court on 12<sup>th</sup> April 2010 in which the circumstances under which the payment of the awarded amount was received by the Petitioner were sought to be explained.

7. In the supplementary affidavit it is stated that the Respondent took possession of the project on 30<sup>th</sup> November 2005 and the final bill for Rs. 1,75,75,377/- was submitted to it by the Petitioner immediately thereafter. In terms of the contract, it was payable within four months, i.e., by March 2006 but was not cleared in time. The Petitioner states that it had a number of creditors and the outstanding sum was over Rs. 1.2 crores. Further a sum of Rs. 119 lakhs was borrowed from various banks at commercial rate of interest to pay off the creditors from June 2006 onwards. When the impugned Award was made on 30<sup>th</sup> December 2008 the Respondent informed the Petitioner that it would release the amount only if the Petitioner gave an undertaking for full and final settlement of the Award. It is stated in para 9 of the said affidavit as under:-

“9. Needless to say that the said award did not specify any such condition for providing undertaking. On enquiry, the petitioner was told that the award would be only released if the draft

undertaking as provided by the respondent is issued and there is no option for receiving the award under protest. It has been told that if the petitioner goes to the court then the respondent might decide to challenge the award which would further delay the award indefinitely and the petitioner may be left with nothing and huge pending creditor dues.”

8. In addition, Mr. Vasisht relied upon on the decisions in ***Bennett Coleman and Co. (P) Ltd. v. Punya Priya Das Gupta (1969) 2 SCC 1*** and ***National Insurance Company Ltd. v. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267*** to urge that this was a case where the Petitioner was hard-pressed for funds since it was under compulsion to get the awarded amount released, it had furnished an undertaking “under economic duress on account of coercion” of the Respondent.

9. On the other hand, Mr. Yoginder Handoo, learned counsel for the Respondent points out that the Petitioner voluntarily accepted the full and final payment and was under no compulsion to give the undertaking which it did. He referred to the decisions in ***Kedarnath Gangagopal Misra v. Sitaram Narayan Moharil 1968 Indlaw (Mum) 146*** and ***Gousmohoddin Gajabur Saheb Bhagwan v. Appansaheb 1975 Indlaw (Kar) 100***. It is submitted that an undertaking not to prefer an appeal from a decree is a lawful consideration and since the Petitioner took a conscious decision for good consideration not to prefer any challenge to

the impugned Award, such undertaking was not hit by Section 28 of the Contract Act, 1872.

10. In order to appreciate the above submissions, the precise sequence of events following the making of the impugned Award on 30<sup>th</sup> December 2008 requires to be recapitulated.

11. On 13<sup>th</sup> January 2009 the Petitioner wrote to the Respondent requesting the Respondent “to pay us the said sum as directed in the award”. At this stage, the Petitioner did not state anything about challenging the award. In response thereto on 25<sup>th</sup> March 2009 the Respondent wrote to the Petitioner as under:

“1. Please refer your letter AFNHB/Disp/001 dated 13 Jan 09.

2. You are requested to forward an enclosed undertaking on Rs. 10/- judicial Stamp Paper duly notarized so that the payment can be released before 31 Mar 09.”

12. The Petitioner by its letter dated 25<sup>th</sup> March 2009 furnished the undertaking to the Respondent by way of an affidavit which reads as under:

#### “UNDERTAKING

1. I Shri Himadri Guha hereby declare that I am the authorized signatory of M/s. MAS Construction Pvt. Ltd. and duly authorized to sign this undertaking on behalf of M/s. MAS Construction Pvt.

2. I Shri Himadri Guha on behalf of M/s. MAS Construction Pvt. Ltd. hereby solemnly affirm and undertake that, in case if a sum of Rs. 89,90,190/- (taxes as applicable shall be deducted) as awarded by the Arbitrator vide Reference No. 31593/AFNHB/ARB/PERS dated 30 Dec'08 is released, it will be full and final settlement pertaining to the work executed by our firm for AFNHB Project at Behala.

3. I Shri Himadri Guha on behalf of M/s. MAS Construction Pvt. Ltd. further undertake that our firm shall not file any appeal in whatsoever manner before any Court of Law, challenging the award dated 30 Dec. '08, passed by the Ld. Arbitrator.”

13. In other words, the Petitioner nowhere indicated that it was accepting the payment under protest. It did not even write to the Respondent thereafter to withdraw the undertaking.

14. It was submitted by Mr. Vasisht that since the present petition was filed on 9<sup>th</sup> April 2009 soon after the payment was accepted, it was implied that the Petitioner had accepted the payment under protest. This Court does not find this explanation to be acceptable since it appears that the Petitioner was under no compulsion whatsoever to furnish the undertaking that it did. As long as there was an Award which was executable as a decree of the court, in terms of the Act there was no compulsion on the Petitioner to give up its right to challenge the said Award to the extent that it turned down some of the Petitioner's claims.

The Petitioner was however not prepared to wait for the time it might have taken for it to recover the decretal amount by way of execution proceedings. Therefore, the Petitioner took a conscious decision not to further challenge the impugned Award. The Respondent too decided to put an end to litigation and accept the Award and make payment. The consideration from the point of view of the Respondent, was that the Petitioner would not further challenge the Award to the extent that some of its claims were negatived. The consideration for the Petitioner was that it would get payment of the awarded amount without any delay. As rightly pointed out by the learned counsel for the Respondent, the above arrangement between the parties cannot be said to be hit by Section 28 of the Contract Act.

15. The following observations of the Bombay High Court in ***Kedarnath Gangagopal Misra v. Sitaram Narayan Moharil*** are pertinent:

“When decrees are passed in Courts, it is common knowledge that compromises are effected out of Court or adjustments are made in the decrees which are got certified from Courts. These are valid contracts. Even though a person has got a right of appeal, he is not obliged to file an appeal against the decree. If no appeal is filed during the period of limitation, the decree becomes final. In the circumstances, if the judgment-debtor has gained breathing time for finding alternate accommodation and has put off the evil day by one month, that could be considered

a good consideration for such a contract. This is not a contract which is affected by Section 28 of the Indian Contract Act. A distinction has to be made between contracts which are opposed to public policy or contracts which are in the nature of bona fide settlement of a dispute or claim. Where parties evaluate circumstances, make a compromise and actually derive benefit under it, they cannot be permitted, after the benefit is enjoyed, to turn round and plead bar of Section 28 of the Contract Act.”

16. To the same effect are the observations of the Karnataka High Court in *Gousmohoddin Gajabur Saheb Bhagwan v. Appansaheb*.

17. Turning to the decision of the Supreme Court in *Bennett Coleman and Co. (P) Ltd. v. Punya Priya Das Gupta*, that was a case concerning the right of a former employee to seek remedies to recover leave encashment from the employer even after accepting the final dues of payment. There can be no comparison drawn between the said case and the case on hand. In *National Insurance Company Ltd.*, the Supreme Court set out illustrative situations where a party could be held to have waived its right to refer disputes to arbitration. The two circumstances as discussed by the Supreme Court in *National Insurance Company Ltd.*, are contained in para 52 (iii) and (v) which read as under (SCC @ p. 295-296):

“(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.”

.....

“(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.”

18. Although Mr. Vasisht tried to persuade this Court to hold that the case on hand is similar to the situation in para 52 (iii), it appears to this Court that it is not so. Here the Petitioner had a complete round before the learned Arbitrator, who gave a reasoned Award upholding some of its claims and rejecting some others. There was absolutely no coercion on the Petitioner. The economic duress faced by the Petitioner was not on account of the Respondent. It was always open to the Petitioner to seek to execute the impugned Award as a decree in accordance with law while at the same time reserving to itself the right to challenge it insofar as it rejected some of its claims. The Petitioner took a conscious decision instead to furnish an undertaking to the Respondent stating that it would not challenge the Award further. In the circumstances, the Petitioner should be held bound by its undertaking and, therefore, precluded from raising a challenge to the impugned Award.

19. The preliminary objection raised by the Respondent is upheld. The petition is dismissed but in the circumstances with no order as to costs.

**S. MURALIDHAR, J.**

**November 28, 2011**

*rk/akg*