

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Reportable)
ARB.P. 194 of 2008

SUGAM CONSTRUCTION (P) LTD. Petitioner
Through: Mr. Hamid S. Sheikh, Advocate.

Versus

NORTHERN RAILWAY ADMINISTRATION Respondent
Through: Ms. Mansi Gautam for Ms. Geetanjali
Mohan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
05.10.2012

1. This is a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner Sugam Construction Private Limited seeking the appointment of an Arbitrator in the disputes between the Petitioner and the Respondent Northern Railway Administration arising out of an agreement dated 3rd October 2001 for the execution of the work of design and construction of New Box culvert No. 469-A consisting 01 No. of RCC twin box with internal dimension (opening) of 2 x 3.80 m x 3.80 m under railway track at km. 684/12-14 between Jeonathpur and Ahraura Road stations on Mughalsarai – Allahabad section by Box Pushing method on Allahabad Division under Contract bearing 75-W/48/Dy.CE/C/ALD.

2. The case of the Petitioner is that the Respondent created hindrances and acted in breach of its obligations. As a result, the contract was closed on administrative grounds. Despite the Petitioner's letter dated 10th November

2005 to the Respondent listing out in detail its various claims arising out of the contract amounting to over Rs. 4 crores, the Respondent failed to pay the outstanding amounts. By a letter dated 1st July 2006 the Petitioner called upon the Respondent to appoint an Arbitrator. Thereafter, the present petition was filed on 7th March 2008.

3. In its counter affidavit filed on 27th March 2012, the Respondent contended that on account of a Supplementary Agreement ('SA') dated 16th December 2004 entered into between the parties, the Principal Agreement ('PA') dated 3rd October 2001 stood finally discharged and all the terms and conditions contained therein including the arbitration clause stood rescinded. A copy of the SA as signed by the parties has been enclosed with the counter affidavit. It is signed by the Petitioner, the Executive Engineer ('EE') (Construction) N.C.R, Allahabad as well as the Deputy Chief Engineer ('DCE') (Construction), Allahabad. The two preamble clauses of the SA relevant for the present petition read as under:

“AND WHERE AS the party hereto of the first part already made payments of the party hereto of the second part diverse sums from time to time aggregating to Rs.6609100 including the final bill bearing voucher No.412-W/Dec 04 Dated 16-12-04 (the receipt of which is hereby acknowledged by the party hereto of the second part in full and final settlement of all his/its claims under the Principal Agreement.

AND WHERE AS the party hereto of the second part have received further sum of Rs.6609100 Through the final bill bearing voucher No. 412-W/Dec-04 dt 16-12-04 (the receipt of which is hereby acknowledged by the party thereto of the second part) from the party hereto of the first part in full and final settlement of all his/its disputed claims under Principal Agreement.”

4. A rejoinder was filed by the Petitioner on 8th May 2012 stating as under:

“1. Para 1 of the reply is wrong and denied. It is denied that there is any valid supplementary agreement dated 16.12.2004 which is annexure R-1. It is pertinent to mention that at the time of executing the original agreement, the Respondent takes signature on the supplementary agreement itself in a blank form. That the Petitioner having no bargaining power had to sign the supplementary agreement at an initial date of signing the main agreement itself without which the Respondent does not award any contract. *That the supplementary agreement is not enforceable and a sham document. That in all cases where the Respondent gets such supplementary agreement signed at the time of entering the principal contract.*

Clause 9.8 of the Contract dated 03.10.2001 entered into between the parties, provided as under:

“9.8 Supplementary Agreement-After the work is completed and taken over by the Railway as per terms and conditions of the contract agreement or otherwise concluded by the parties with mutual consent and full and final payment is made by the Railway to the contractor for work done under the contract the parties shall execute the supplementary agreement.”

That the Respondent got the blank Supplementary Agreement in the prescribed form signed from the Appellant/Petitioner at the time of execution of the contract itself, contrary to the express provision of the Clause 9.8 thereof. The Respondent informed the Petitioner that unless and until the Petitioner signed the blank Supplementary Agreement, no amount would be released. Blank undated Supplementary Agreement with the signatures of the Petitioner was also unilaterally filled up by the Respondent including the date as 16.12.2004 to force the Petitioner to accept a lower settlement in complete discharge of the contract.”

(emphasis supplied)

5. It is further contended in the rejoinder affidavit as under:

“The alleged Supplementary Agreement is illegal and void document... It is submitted that the Respondent could not have unilaterally filled up the blank Supplementary Agreement in order to wriggle out its obligation to make full payment for the work executed by the Petitioner.

Respondent has adopted this practice of taking undated blank Supplementary Agreement in the prescribed format signed by the contractors for subsequently executing acknowledgement of sums smaller than the claims in full and final settlement of all disputed claims as a condition precedent for releasing even the admitted dues and recording final discharge of the terms and conditions of the contract. This procedure/practice is unfair and illegal.

That the payment of the final bill was made to the Petitioner after making arbitrary and illegal deductions. Not only this the order for release of the Security Deposit of Rs.45,200.00 and the Bank Guarantee of Rs.3.00 Lacs were passed by the Respondent on 05.08.2005 only.

That the Supplementary Agreement dated 16.12.2004 stipulated that the principal agreement stood discharged in consideration of the amount already received is belied by the fact the payments were released to the Petitioner even as late as August 2005.

That the Supplementary Agreement is an unilateral document and was not executed validly and voluntarily but under duress. There was no full and final settlement between the parties.” (emphasis supplied)

6. Mr. Hamid S. Sheikh, learned counsel for the Petitioner, first contended that a pre-printed standard form SA was got signed in blank even at the time of execution of the PA. This was later filled up by the Respondent on 16th

December 2004 at the time of making part payment of the final bill. The Petitioner was forced to accept the payment thereunder under duress and coercion. Relying on the decision of this Court in ***S.K. Sharma v. Union of India (2009) 157 DLT 647*** Mr. Sheikh urged that in similar circumstances in a contract involving the Respondent, this Court had referred the disputes to arbitration.

7. The first question that arises for consideration is whether the Petitioner has any justifiable reason for not disclosing the full and material particulars in his petition under Section 11(5) of the Act and if not whether it is entitled to any relief? The second question is whether the SA dated 16th December 2004 was only a filled up form of a blank version signed earlier by the Petitioner? The third question is whether the Petitioner's plea that it was made to sign the SA and accept the payment under the final bill is acceptable? And lastly, whether there was accord and satisfaction of the Petitioner's claims and therefore no arbitrable dispute between the parties?

8. The Petitioner has nowhere in the petition mentioned of the fact of there being an SA; of there being a final bill dated 16th December 2004 under which payment was made to him and of his having accepted such payment. There is no mention of his having accepted such payment or having signed the SA under duress and coercion. In response to the counter affidavit which brings out the above facts, the Petitioner has in its rejoinder not denied having received payment under the final bill which was for a sum of Rs.66,09,100 as recorded in the SA. However it is contended for the first time in the rejoinder that the "Respondent got the blank supplementary agreement in the prescribed form signed by the Appellant/Petitioner at the

time of execution of the contract itself, contrary to the express provision of the Clause 9.8 thereof.” The plea that the Petitioner signed the SA and accepted payment under the final bill under duress and coercion is urged for the first time in the rejoinder. Even in the letter dated 10th November 2005 raising claims and the subsequent letter dated 1st July 2006 by which the arbitration clause was invoked, the Petitioner does not state that the payment under the final bill was received under protest or that the SA was got signed under duress and coercion.

9. The Court is satisfied that in the instant case the Petitioner has not been forthright and has wilfully suppressed material facts as to acceptance by him of the payment under the final bill. He nowhere mentioned in the petition or his correspondence with the Respondent earlier to the filing of the petition that he accepted such payment under protest or under duress and coercion. In fact in the rejoinder it comes up with a further fact that in August 2005 it received the sums against the security deposit and bank guarantee. Even this fact has been suppressed in the main petition. There can be no justification for this conduct of the Petitioner. It could not have afforded to wait till the filing of the rejoinder to come up with the plea of duress and coercion. On this ground alone, the petition deserves to be dismissed. Nevertheless, the Court proceeds to examine the tenability of the plea as to duress and coercion.

10. The second question is whether the SA dated 16th December 2004 was only a filled up form of a blank version signed earlier by the Petitioner? The Petitioner has at page 94 of the paper book placed a photocopy of the blank Annexure B titled “Supplementary Agreement” signed by the Petitioner on

the left side with the signature in the bottom centre of the Assistant Engineer ('AE') (Construction-II), Northern Railway, Allahabad. The Respondent has enclosed as Annexure R-1 to its counter affidavit the filled up SA dated 16th December 2004 signed by the Petitioner, the EE and the DCE (Construction). A cursory comparison of the copy of the SA annexed at page 94 of the petition with the filled up SA at Annexure R-1 to the counter affidavit filed by the Respondent brings out several differences which demonstrate that the SA dated 16th December 2004 was not the blank SA at page 94 of the paper book. The points of difference are highlighted in bold in the following extracts, and the filled up portions in the second SA enclosed with the counter affidavit are indicated with underlining:

Paras of the Blank SA at page 94 (Annexure B)

“ARTICLES of Agreement made this in the year **one thousand nine hundred and** between the President of India, acting through the Chief Engineer/Con/NCR, Dy. Chief Engineer/Construction, Northern Railway, Administration having his office at Allahabad hereinafter called the Railway of the one part and Shri/M/s. of the second part.

WHEREAS the party hereto of the other part executed on agreement with the party hereto of the first part being agreement No./Work order No. Dated.... for the one performance of hereinafter called the “PRINCIPAL AGREEMENT””

Corresponding Paras of the SA (Annexure R-1)

“ARTICLES of Agreement made this on 16th day of December in the year **two thousand four** between the President of India, acting through the Chief Engineer/Con., Dy. Chief Engineer/Construction, Northern Railway, Administration having his office at

Delhi/Allahabad herein after called the Railway of the one part and Shri/M/s. Sugam Const (P) Ltd; 48/2 Janpath-NDLS of the second part.

WHERE AS the party hereto of the other part executed an agreement with the party hereto of the first part being agreement No./Work order No. 75-W/48/Dy.CE/C/ALD Dated 3-10-2001 for the one performance of “Design & Const of New Box Culvert Bridge No.469-A consisting of 1 No. RCC twin box with total internal dimension (opening) 2 x 3.80 m x 3.80 m under railway track of km. 684/12 between JEW-Ahraura Rd Stn. herein after called the PRINCIPAL AGREEMENT on MGS – ALD Section by Box pushing method on ALD DIVN.”

11. The other differences are that in the SA dated 16th December 2004 there is no signature of the AE at the bottom centre but there are signatures of the EE (Construction) and the DCE (Construction). The signature of the Petitioner in the proforma blank SA at page 94 (Annexure B) appears to have been made on a rubber stamp of the Petitioner with the name of the person signing indicated in capital letters below the signature. In the SA at Annexure R-1 there is no such rubber stamp. Instead, in hand, it is written “for Sugam Construction Pvt. Ltd.”. Therefore, there is no doubt that the SA at Annexure R-1 is not the filled up version of proforma blank SA at page 94 of the petition.

12. Therefore, the contention of the Petitioner about his having signed the blank document and the same having been later filled up by the Respondent to make up the SA dated 16th December 2004 is rejected.

13. The third and fourth questions are connected. They are whether the Petitioner’s plea that it was made to sign the SA and accept the payment

under the final bill is acceptable and whether there was accord and satisfaction of the Petitioner's claims and therefore no arbitrable dispute between the parties? In ***National Insurance Company Limited v. Boghara Polyfab Private Limited (2009) 1 SCC 267*** the Supreme Court dealt with the question of accord and satisfaction and the scope of the proceedings under Section 11 of the Act in that context. The decision emphasised that in order to enable the court to consider a plea that a Contractor was made to accept full and final payment of its bills under coercion and duress the Contractor in the first place was required to make a plea to that effect before the Court. Further he had to make good such plea by evidence as he would do so in a civil suit.

14. In ***Boghara Polyfab*** (supra) the Supreme Court analysed two types of cases. One was where the Court, after considering the facts, found that there was full and final settlement resulting in accord and satisfaction. Consequently, there was no substance in the allegation of coercion or undue influence. The second category was where the Contractor claimed that full and final settlement discharge vouchers were taken either in blank or printed format or otherwise as a condition precedent for release of the admitted dues. The decisions in ***Chairman and M.D., N.T.P.C. Limited v. Reshmi Constructions, Builders and Contractors 2004 (1) Arb.LR 156 (SC)***, ***P.K. Ramaiah and Company v. Chairman and Managing Director, National Thermal Power Corporation (1994) Supp 3 SCC 126*** and ***Ambica Construction v. Union of India JT (2006) 10 SC 629*** concerned the second category.

15. In para 52 (SCC) of the decision in ***Bhogara Polyfab*** illustrations were

given by the Supreme Court of the plausible situations where such a plea of the Contractor would be accepted. However, the Court made clear in the previous paras that there must be a specific plea followed by evidence produced by a person alleging fraud and coercion brought about by the opposite party as soon as the Claimant issues the discharge voucher. The burden of proof was on the person pleading coercion. In paras 50 and 51 (SCC), the Supreme Court observed as under:

“50. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by the plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether the plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration.

51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not

issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance.”

16. In a subsequent decision in *Union of India v. Master Construction Company (2011) 12 SCC 349* it was observed by the Supreme Court as under:

“18. In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. **Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be a necessity to refer the dispute for arbitration at all.**

19. It cannot be overlooked that the cost of arbitration is quite huge—most of the time, it runs into six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. **A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an afterthought,**

make-believe or lacking in credibility, the matter must be set at rest then and there.” (emphasis supplied)

17. Turning to the case on hand, the plea of the Petitioner of it being compelled to sign the SA and accept payment under the final bill under duress and coercion has to be tested with reference to the clauses of the PA and the pleadings. Clause 9.8 of the PA envisaged an SA being executed “after the work is completed and taken over by the Railway as per terms and conditions of the contract agreement or otherwise concluded by the parties with mutual consent and full and final payment is made by the Railway to the contractor for work done under the contract.” A proforma of the SA was annexed to the PA as Annexure B. Therefore the Petitioner was aware of the necessity of executing an SA at the time of settlement of the final bill. Since the form of the SA was appended, the Petitioner could not have been under any illusion that such an SA, containing clauses discharging the Respondent of further liability, had to be executed.

18. In the decision of this Court in **S.K. Sharma** (supra), on which considerable reliance was placed by the learned counsel for the Petitioner, it is noted in para 12 that: “It is averred that the petitioner thus signed the proposed final bill under protest. Significantly, this fact was admitted by the counsel for the respondent during the hearing.” It is the above fact that persuaded the Court in **S.K. Sharma** (supra) to proceed to hold that a blank form already signed by the Petitioner in that case was used by the Respondent to make a supplementary agreement.

19. As far as the present case is concerned, not only that there is no averment

by the Petitioner that it was compelled to sign any blank form, even in any of the letters written by the Petitioner to the Respondent, there is no such statement in the petition. Learned counsel for the Petitioner submitted that at the time of filing of the petition the Petitioner perhaps could not have anticipated that the Respondent would produce the signed and filled up SA and contend that there has been full and final settlement of the Petitioner's claim and, therefore, the Petitioner did not advert to it. He further submitted that in the rejoinder the Petitioner has categorically stated that he was forced to sign the SA under duress and coercion.

20. The above submission overlooks the fact that the Petitioner does not dispute that he has received payment against the final bill in the sum of Rs.66,09,100 on 16th December 2004. Annexure R-3 to the counter affidavit is a copy of the final bill which has been signed by the Petitioner. It shows an amount of Rs.66,09,100 after deduction of all taxes and penalties. If indeed the Petitioner was compelled to receive the said payment under coercion then the Petitioner ought to have written a letter of protest to the Respondent even if not on the same date (as was done in the ***Reshmi Constructions*** case) but at least soon thereafter - may be after ten days or one month. In the present case, the Petitioner had at no point of time written to the Respondent stating that the payment it had received on 16th December 2004 by way of full and final settlement was received by him under duress or that it was not a full and final settlement payment. The plea appears to be an afterthought and not substantiated by any material other than the self serving statement of the Petitioner in the rejoinder.

21. Consequently, this Court is satisfied that the plea of the Petitioner that it

had signed the SA or accepted payment under the final bill under duress or coercion is without any merit.

22. It was finally submitted by Mr. Sheikh that there were two arbitration petitions before the Court - Arb. P. Nos. 193 of 2008 and 194 of 2008 and in both the cases SAs had been executed in the same fashion. It is pointed out that in Arb. P. No. 193 of 2008 the disputes have been referred to arbitration and arbitral proceedings are in progress. The order passed in Arb. Petition No. 193 of 2008, which pertained to the Delhi contract, shows that the reference to arbitration was made by consent of the parties. The present case concerns the Allahabad contract and the Respondent has filed a counter affidavit opposing the reference of disputes to arbitration.

23. This Court is of the view that there is no arbitrable dispute between the parties. Taking exception to the suppression of material facts in the petition, the Court cautions the Petitioner to be careful in future while presenting a petition before a Court.

24. The petition is dismissed.

S. MURALIDHAR, J.

OCTOBER 05, 2012

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