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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on: March 06, 2012*
Judgment Pronounced on: March 26, 2012

+ **FAO(OS) No.480/2006**

M/S.THERMOSPARES INDIA Appellant
Represented by: Mr.Raman Kapur, Senior Advocate
instructed by Mr.R.P.Singh and
Mr.Aviral Tiwari, Advocates.

versus

BHARAT HEAVY ELECTRICALS LTD. & ORS...Respondents
Represented by: Mr.Parag Tripathi, Senior
Advocate instructed by
Mr.B.K.Satija and
Mr.Kunal Bahari, Advocates for BHEL

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The agreement(s) between the parties, having an arbitration clause, two claims in sum of ₹3,36,13,692.50 raised by the appellant were referred to a Sole Arbitrator.

2. As per the appellant, on November 03, 1976 and May 10, 1977, the respondent issued two Work Orders No.529/VA/103/60049 and No.07/PPN/60049 respectively on the appellant for transportation from project stores, erection, testing and commissioning of pressure parts of Units I and II of Panipat Thermal Power Plant, Panipat. Thereafter, on

August 17/22, 1977 the respondent issued a third Work Order No.27/PPN/60049 on the appellant for transportation from project stores/Railway siding, pre-assembly, erection, testing and commissioning of external pipelines and auxiliaries of Units I and II of Panipat Thermal Power Plant, Panipat. Whereas the Work Orders Nos.529/VA/103/60049 and 07/PPN/60049 required the appellant to erect, test and commission the pressure parts of Unit I and II by 'ARC Welding', the appellant erected, tested and commissioned the pressure parts of Unit I and II by 'TIG Welding' at the instance of the officials of the respondent and since this entailed extra cost, the appellant raised 3 bills totaling ₹6,07,605.60 viz. (i) Bill No.TS1/A1/151 dated January 10, 1978 for a sum of ₹2,47,859/-; (ii) Bill No.TS3/A-1/140 dated January 10, 1979 for a sum of ₹3,03,600/- and (iii) Bill No.TS1/B-1/239/80-81 dated October 31, 1980 for a sum of ₹56,146.60 upon the respondent for having erected, tested and commissioned the pressure parts of Unit I and II by 'TIG Welding'. Stating that the respondent paid a sum of ₹1,23,034.56 to the appellant towards the said 3 bills but did not make the balance payment in sum of ₹4,84,571.04, it was pleaded that the appellant was required to complete the work of erecting, testing and commissioning of pressure parts of Unit I and II within a period of 15 months from the issuance of the work orders Nos.529/VA/103/60049 and 07/PPN/60049 as per the said work orders, however the appellant managed to complete the work within a period of 21 months from the

issuance of the said work orders and thus the respondent is liable to pay overrun charges to the appellant to compensate it for having overstayed at the site for nearly 6 months. In respect of Work Order No.27/PPN/60060 it was pleaded by the appellant that it had executed joinery work for the purposes of erection, testing and commissioning of external pipelines and auxiliaries of Unit I and II at the instance of the officials of the respondent, which work was not stipulated in the Work Order No.27/PPN/60060. The appellant raised 3 bills totaling ₹10,48,450/- viz. (i) Bill No.TS1/EP1/179 dated March 26, 1979 for a sum of ₹2,53,600/-; (ii) Bill No.TS1/EP1/180 dated March 26, 1979 for a sum of ₹2,64,200/- and (iii) Bill No.TS1/B-1/238/80-81 dated October 11, 1980 for a sum of ₹5,30,650/- upon the respondent in respect of the extra joinery work executed by it. The respondent paid a sum of ₹1,49,315.60 to the appellant towards the said 3 bills but did not make the balance payment in sum of ₹8,99,134.40. When the respondent refused to make payment of the aforesaid bills despite repeated requests made by the appellant in said regards, the appellant was constrained to invoke arbitration clause contained in the agreement(s) between the parties in the year 1985. With respect to work orders Nos. 529/VA/103/60049 and 07/PPN/60049 the appellant raised 8 claims, gist whereof is as under:-

S. No.	Particulars	Amount
1.	Payment of bills dated 10.01.1978, 10.01,1979 and	₹4,84,571.04 (principal) +

	31.03.1980 referred to above together with interest thereon	₹5,46,845.40 (interest) = ₹10,31,416.44
2.	Payment of overrun charges for compensating the appellant for having overstayed at the site for 6 months together with interest thereon	₹3,15,000/- (principal) + ₹1,41,751/- = ₹4,56,751/-
3.	Refund of labour security	₹3,750/-
4.	Refund of sales tax recoveries	₹28,000/-
5.	Payment of overhead charges on consumables	₹46,000/-
6.	Interest @ 18% per annum on the claims nos.(1) to (5) for the period from 17.12.1984 to 31.08.1998	₹1,60,50,638.50
7.	Damages	₹5,00,000/-
8.	Legal Expenses	₹50,000/-

3. With respect to Work Order No.27/PPN/60060 the appellant raised 6 claims, the gist whereof is as under:-

S. No.	Particulars	Amount
1.	Payment of bills dated 26.03.1979 and 11.10.1980 referred to above together with interest thereon	₹8,99,134.40
2.	Payment of a running bill of Rs.5,000/-	₹5,000/-
3.	Interest accrued on claims (1) and (2) till 17.12.1984	₹4,20,056/-
4.	Interest @ 18% per annum on the claims nos.(1) to (5) for the period from 17.12.1984 to 31.08.1998	₹1,35,72,947.10
5.	Damages	₹5,00,000/-
6.	Legal Expenses	₹50,000/-

4. In the reply(s) filed by the respondent it was pleaded that on April 24, 1979 the appellant executed a no claim certificate in respect of Work Order No.529/VA/103/60049. On the very next day i.e. April 25, 1979 a meeting was held between Mr.B.K.Jain, the partner of the appellant, and the representatives of the respondent and a settlement was arrived at between the parties in respect of the bills raised by the appellant pertaining to TIG Welding and extra joinery work. In pursuance of the aforesaid settlement, the appellant issued no claim certificates in respect of Work Orders Nos.07/PPN/60049 and 27/PPN/60060 on April 05, 1980 and October 21, 1981 respectively and thereafter in terms of the settlement recorded on April 25, 1979 received the final payment from the respondent in full and final settlement of the dues pertaining to the work(s) done by the appellant. On October 11, 1980 a letter was written by the appellant to the respondent regarding payment of the bills pertaining to TIG Welding Work raised by the appellant, in response to which the respondent wrote letter dated October 20, 1980 stating therein that the issue relating to said bills were settled in the meeting held on April 25, 1979 and that no payment is outstanding in said regards. Thereafter on February 08, 1983 and February 18, 1983 the appellant wrote 2 letters to the respondent wherein it was stated that the appellant has decided to withdraw the claims pertaining to interest raised by it vide letter dated January 18, 1983. On January 24, 1983 the appellant wrote another letter to the respondent stating

therein that all bills raised by the appellant stand settled and only a sum of ₹12,000/- is left unpaid. On June 12, 1984 the appellant wrote a letter requesting the respondent to make a payment in sum of ₹5,000/- withheld by it for completion of the balance work. It was pleaded that there was complete accord and satisfaction of the disputes pertaining to the work orders in question and that in view thereof the appellant is estopped from raising any claim in respect of the said work orders.

5. In the rejoinder filed, the appellant denied that there was a complete accord and satisfaction of the disputes pertaining to the work orders in question. With respect to no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 it was pleaded that the said certificates pertained to the bills raised by the appellant with respect to execution of works which formed part of the work orders and that they do not pertain to the bills which form subject-matter of the claim petition(s), inasmuch as said bills were raised by the appellant with respect to execution of TIG Welding and extra joinery works which did not form part of the work orders. With respect to meeting dated April 25, 1979 it was pleaded that the respondent cannot arbitrarily pay an insignificant amount to the appellant in respect of extra joinery works executed by it without going into the merits of the case of appellant and that the respondent cannot arbitrarily impose the rates decided in respect of other contractor upon the appellant in respect of TIG Welding Work

executed by it without going into the merits of the case of appellant. With respect to the letter dated January 24, 1983 it was pleaded that said letter was written in the context of the bills raised by the appellant pertaining to the execution of works which formed part of the work orders and not with respect to the bills which form subject-matter of the claim petition(s) i.e. extra work. With respect to the letters dated February 08, 1983 and February 18, 1983 it was pleaded that the said letters were signed by one of the partners of the appellant on account of undue harassment by respondent.

6. On the basis of pleading of parties, following issues were settled by the learned Arbitrator:-

“A Contract No.529/VA/103/60049 & Contract No.07/PPN/60049

Issues of the Claim of M/s Thermo Spares:

- 1) Whether M/s Thermo Spares is entitled to recover a sum of ₹4,84,571.04 Paise from M/s BHEL on account of execution of additional work of TIG Welding, as claimed?
- 2) Whether M/s Thermo Spares is entitled to recover over-run charges of ₹3,15,000/- from BHEL, as claimed?
- 3) Whether M/s Thermo Spares is entitled to recover ₹3750/- towards security with BHEL, as claimed?
- 4) Whether M/s Thermo Spares is entitled to recover ₹28,000/- towards Sales Tax recovered by BHEL, as claimed?
- 5) Whether M/s Thermo Spares is entitled to recover ₹46,000/- towards overhead charges of consumables charged by BHEL, as claimed?

6) Whether M/s Thermo Spares is entitled to recover ₹5,00,000/- as damages from BHEL, as claimed?

7) Whether M/s Thermo Spares is entitled to recover ₹50,000/- towards legal expenses from BHEL, as claimed?

8) Whether M/s Thermo Spares is entitled to award of interest from BHEL, as claimed?

ISSUES OF BHEL

1) Whether the claims filed by M/s Thermo Spares is maintainable or not?

2) Whether M/s Thermo Spares is entitled for any amount or amount as claimed for in the claim petition under different heads especially when the claimant has already submitted no claim certificate and even otherwise?

B CONTRACT NO.27/PPN/60060

ISSUES OF THE CLAIM OF M/S THERMO SPARES

1. Whether M/s Thermo Spares is entitled to recover a sum of ₹8,99,134.40 from M/s BHEL on account of execution of additional work of extra joints, as claimed?

2. Whether M/s Thermo Spares is entitled to recover a sum of ₹5,000/- being outstanding amount of running bills, as claimed?

3. Whether M/s Thermo Spares is entitled to recover a sum of ₹5,00,000/- damages from M/s BHEL, as claimed?

4. Whether M/s Thermo Spares is entitled to recover a sum of ₹50,000/- towards legal expenses from M/s BHEL, as claimed?

5. Whether M/s Thermo Spares is entitled to award of interest, as claimed?

ISSUES OF BHEL

1. Whether the claims filed by M/s Thermo Spares is maintainable or not?

2. Whether M/s Thermo Spares is entitled for any amount or amount as claimed for in the claim petition under different heads especially when the claimant has already submitted no claim certificate and even otherwise?"

7. Before the Arbitrator no oral evidence was led and parties relied upon the correspondence to which they had referred to in their pleadings. It had to be so, for the reason the job of the learned Arbitrator was to decide whether a full and final settlement had been arrived at by the parties without any undue pressure upon the appellant for the reason the respondent was relying upon documentary evidence recording full and final payment having been acknowledged as received by the appellant.

8. Now, the Minutes of a meeting held on April 25, 1979 are important for the reason the satisfaction of the claim of the appellant and the documentary evidence relied upon by the respondent relates to the said minutes of the meeting and it is not the case of the appellant that its representative agreed to what was minuted in the said meeting. The relevant portion of the minutes, read as under:-

“Minutes of the meeting held with Sh. B.K. Jain of M/s Thermospares India on 25th April, 1979 at New Delhi.

Present:

.....

2. The representative of M/s Thermospares mentioned that two of their extra claim bills might be settled.

3. After discussion, it was settled that

(a) the claim on extra tig-welding joints (Bill No.20/BHEL/PPP/78-79 against work order No.529/VA/10/60049 and Bill No.26/BHEL/PTP/78-79 against work order No.07/PPN/60049 dated 10.5.1977, belonging to Jan. 10, 79 and 10.1.78 respectively) will be settled on the same terms and conditions as were settled for M/s Northern India Erectors, Badarpur, and adjustments made for the advances already paid to them on this account.

(b) The extra claims regarding the extra joints for piping, namely, Bill No.TSI/EP1/179 dated 26.3.79 for ₹2,63,000 and TSI/EP1/180 dated 26.3.79 for ₹2,64,200 were settled to ₹77,315.60 (Rupees seventy seven thousand three hundred fifteen and paise sixty only) as per the annexures attached. An amount of ₹65,000/- will be released to effect immediate labor payment and the balance set off against the dues of M/s Thermospares to BHEL.

4. While making the above settlement as in above para 3, it was agreed by M/s Thermospares that

(a) those settlements regarding the extra claims are final as far as those bills are concerned and nothing would be outstanding in this regard....."

(Emphasis Supplied)

9. Suffice would it be to state that as per para 3(a), pertaining to the extra items of TIG Welding, it was agreed

that payment would be made on the same terms and conditions as were settled for M/s.Northern India Erectors Badarpur. Thus, the basis was agreed to by the parties and qua said works, the only issue would be, whether payment was released on same basis. The dispute raised before the Arbitrator that the respondent could not force upon the appellant rates agreed to be paid for the same work executed by a same party, would be dealt with by us at the appropriate stage, but we note as aforesaid for the benefit of the reader of our decision as what we have noted in the preceding part of the present paragraph would be our take off point.

10. As noted above while summarizing the pleadings of the appellant, it had raised a bill under cover of its letter dated October 11, 1980 in sum of ₹5,30,650/- and qua the said letter and bill, on October 20, 1980 the respondent wrote to the appellant as under:-

“SUB: - TIG WELDING CLAIM REG.

Dear Sir,

This is in reference to your letter No.TSI/B-1/240/80-81 dated Oct. 11, 1980 regarding the above mentioned subject. Your claims in respect of TIG welding have already been settled and cleared vide minutes of meeting held on 25.4.79 at New Delhi and no further payment is outstanding in this regard. As such your letters No.TSI/B-1/239/80-81 dated Oct. 11, 1980 and TSI/B-1/243/80-81 dated July 21, 1980 (for bill No.26/BHEL/PTP/78-79 against W.O. No.07/PPN/60049 dated 10.5.77), and TSI/B-1/242/80-81 dated July 21, 1980 (for bill No.30/BHEL/PTP/78-79 against W.O.

No.529/VA/10/60049) are hereby returned to you in original.”

11. As noted, while recapping the pleadings of the respondent, the appellant had written to the respondent a letter dated January 24, 1983, affirming full payment being received except ₹12,000/-. The letter reads as under:-

“SUB: Finalisation of Final Bill against W.O.27/PPN

Dear Sir,

We are to bring it to your kind notice that all our bills are cleared and settled, except the above and now only a sum of ₹12,000/- (Rupees Twelve Thousand Only app.) is left to be paid to us against the above bill. The Bank Guarantees against all the work orders were also released long back. We shall be highly thankful to your goodself if the above sum is released immediately and the cheque of the said amount be sent to our bankers. The Hindustan Commercial Bank Ltd., Panipat’ with the request to credit the same to our current account and under intimation to us.

We are also pleased to withdraw our letter No.TSI/B-1/244/82-83 dated 23-8-1982.

We also request you to kindly refund a sum of ₹3750/- deducted as security against labor from our bills as we have made the payments to all our workers and no liability on labour account is left.

Thanking you and hoping for an immediate action at your end for the clearance of the bill under question.”
(Emphasis Supplied)

12. The letter dated June 12, 1984 referred to by the respondent in its pleadings, which was addressed to it by the appellant reads as under:-

“SUB: - Final Bill against W.O. No.27/PPN/60060 dated 22.8.77

Dear Sir,

We shall be highly thankful to your goodself if you very kindly make the payment for a sum of ₹5,000/- (Rupees five Thousand only) withheld to complete the balance work, during shut down. As no work is done during shut down on this account and hence this refund is required.

The measurement of the final bill were recorded in M.B. No.317 at page 6 to 8.

Thanking you and hoping for an immediate action at your end.”

13. Highlighting that in addition to arguing that no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 executed by its partner did not pertain to the bills which formed the subject-matter of the claim petition(s) it was argued by the appellant before the learned Arbitrator that the said certificates were issued by its partner under duress since the respondent was not releasing the bank guarantees furnished by the appellant nor was making payments of other bills raised by the appellant. With regard to the claim towards over-run charges raised by the appellant it was argued by the respondent before the learned Arbitrator that the appellant is prohibited from claiming any amount towards over-run charges in view of clause 3.34 of the agreement(s) between the parties which provides that ‘*no over run charges shall be paid in the event the completion period is extended for any reasons whatsoever*’. With regard

to the claims towards interest raised by the appellant it was argued by the respondent before the learned Arbitrator that the appellant is prohibited from claiming any amount towards interest in view of clauses 1.10.4 and 1.8.10 of the agreement(s) between the parties which provide that '*no interest shall be payable by BHEL on Earnest Money/Security Deposit or any money due to the contractor by BHEL*'.

14. After considering the case in its entirety, vide award dated July 27, 2000, the learned Arbitrator allowed claims Nos.1, 2, 3, 5, 7 and 8 raised by the appellant with respect to work orders Nos. 529/VA/103/60049 and 07/PPN/60049 and claims Nos.1, 2 and 5 raised by the appellant with respect to work order No.27/PPN/60060, though it awarded lesser amounts than what was claimed by the appellant under each claim. It was held by the learned Arbitrator that:- (i) no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 were given by the appellant without its free consent which is evident from the fact that the respondent would have released payment of the bills raised by the appellant only upon the appellant issuing the no claim certificates; (ii) clause 3.34 of the agreement between the parties is without consideration and that there is uncertainty in the said clause regarding the period for which no over run charges are payable; (iii) terms of agreement between the parties are inequitable inasmuch as a penalty is to be levied on the contractor when it is not able to complete the work within the specified period whereas no penalty is to be levied on the

department when delay in completion of the work is caused due to act or fault of the department; and (iv) clause 1.10.4 contained in the agreement(s) between the parties is against public policy inasmuch as no party can be allowed to suffer losses for indefinite period.

15. Aggrieved by the award dated July 27, 2000 passed by the Arbitrator the respondent filed objections under Sections 30 and 33 of the Arbitration Act, 1940 before a learned Single Judge of this Court. On the other hand, the appellant filed a petition under Sections 14 and 17 of the Arbitration Act, 1940 before a learned Single Judge of this Court inter-alia praying that the award dated July 27, 2000 be made rule of the Court and decree be drawn accordingly.

16. Vide impugned judgment dated May 26, 2006, the learned Single Judge allowed the objections filed by the respondent and set aside the award dated July 27, 2000 passed by the Arbitrator. It has been held by the learned Single Judge that:- (i) the Arbitrator committed an illegality in concluding that no claims certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 were given by the appellant without its free consent when said plea was not taken up by the appellant in its claim petition(s); (ii) the conduct of the appellant of not raising the issue of duress at the time of receipt of payment from the respondent or in any communication issued by the appellant to the respondent between the period from giving no claim certificates till the invocation of arbitration clause by the appellant when seen in

the light of correspondences exchanged between the parties strongly probablizes that no claim certificates were given by the appellant with its free consent and without there being any duress from the side of the respondent; (iii) despite the fact that the respondent had stated in its letter dated October 20, 1980 written to the appellant that the bills relating to TIG Welding and extra joinery works stand settled, no communication was issued by the appellant to the respondent rebutting the aforesaid stand and on the contrary, it stated in its letter dated January 24, 1983 that all the bills raised by it stand settled and that only a sum of ₹12,000/- is outstanding, negates the plea of the appellant that the no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 did not relate to TIG Welding and extra joinery works executed by the appellant; and (iv) the very fact that the total value of the work order No.27/PPN/60060 was ₹12,37,450/- whereas the no claim certificate dated October 21, 1981 issued in respect of the said work order was for a sum of ₹14,88,288.84 shows that the extra joinery work executed by the appellant was envisaged in the no claim certificate dated October 21, 1981.

17. Though it was opined by the learned Single Judge that the finding of the Arbitrator that the appellant had given the no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 under duress is liable to be set aside and as a natural consequence thereof, all claims raised by the appellant should be held to have been settled, the learned

Single Judge has proceeded to examine the correctness of the decision of the Arbitrator with respect to claims pertaining to overrun charges and interest raised by the appellant. On the issue of overrun charges, it has been held by the learned Single Judge that clause 3.34 of the agreement(s) between the parties does not imply that even if the delay in the completion of work was attributable to the respondent the appellant would be without any remedy. However, in order to allow the claim of overrun charges raised by the appellant the Arbitrator ought to have returned a finding that the delay was occasioned, on account of the factors attributable to the respondent, which finding was not returned by the Arbitrator. In the absence of such finding, the learned Single Judge has held that the Arbitrator has committed an illegality in allowing the claim pertaining to overrun charges raised by the appellant. On the issue of interest, it has been held by the learned Single Judge that clauses 1.10.4 and 1.8.10 of the agreement(s) between the parties does not prohibit or prevent an Arbitrator from awarding interest for the period after the invocation of arbitration clause till payment was made. Thus, for all effect and purposes, with respect to the first finding returned by the learned Single Judge, the award has been set aside.

18. Aggrieved by the impugned judgment dated May 26, 2006 passed by the learned Single Judge the appellant has filed the above captioned appeal.

19. In support of the present appeal, it was argued by the learned counsel for the appellant that the Arbitrator had returned a finding of fact that the appellant had given no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 under duress after duly considering the facts and circumstances of the case. Counsel argued that it is settled law that the arbitrator being sole judge of the quality and quantity of evidence, it is not open to the Court to sit in appeal over the decision of the arbitrator by re-appreciating evidence led before the Arbitrator while dealing with an objection under Section 30 of the Arbitration Act, 1940. Such being the legal position, it was urged that the learned Single Judge fell into an error in upsetting a finding of fact returned by the Arbitrator.

20. The controversy involved in the present case can be pithily stated as under: Whereas the appellant contended that the respondent did not make full payment of the bills pertaining to TIG Welding and extra joinery works raised by it, the respondent contended that there was complete accord and satisfaction of the disputes which had arisen between the parties in respect of said bills.

21. What is meant by “accord and satisfaction”?

22. In legal parlance, accord and satisfaction means that a person entitled to the performance of a promise might accept, instead of the original performance, something different. This different thing is agreed upon by an accord reached between the promisor and promisee. Thus accord is a

name given to a special agreement between the parties which has as its foundation another earlier agreement between the same parties. Satisfaction is the performance of the different promise as per the new agreement of accord and its acceptance by the promisee.

23. The law relating to accord and satisfaction was dealt by a Division Bench of this Court in the decision reported as Jain Refractory Erectors v Cement Corporation of India (104) 2003 DLT 469. It would be apposite to reproduce following observations made by the Court in the said decision:-

“Is there an **accord and satisfaction** between the parties on 11.4.1980? Did the Arbitrator have jurisdiction to adjudicate upon the claim? Was there any subsisting dispute or difference between the parties, which could be referred to the Arbitrator?

16. The aforesaid questions have received the attention of the Apex Court and are a subject matter of adjudication in the five cases noted above. Appellant relies upon two of them. The respondent relies upon three judgments of the Apex Court.

17. The judgment in U.O.I. v. L.K. Ahuja (supra), being the first on point of time may be noted. It is a judgment by a two-Judge Bench of the Apex Court. The issue arose in the context of limitation for invoking the arbitration clause and the invoking of the arbitration clause if the final payment was received by a party coupled with issuance of a no claim declaration. In the context of the twin issues raised it was held as under:

"In view of the well-settled principles we are of the view that it will be entirely wrong to mix-

up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act, and, secondly, whether the claim to be adjudicated by the Arbitrator, was barred by lapse of time. The second is a matter which the Arbitrator would decide unless, however, if no admitted facts a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case, the claim for reference was made within three years commencing from April 16, 1976."

18. The aforesaid observations were considered in the second judgment in a P.K. Raimaia's case (supra). The said judgment is again by two Judges. It was noted in the said judgment that there was a dispute between the parties pertaining to measurement and payment under the final bill. Parties had deliberated upon the said difference and on May 19, 1981, the contractor had made, in his own hand the endorsement that: "final measurement and payment accepted in full and final settlement of the contract." Later on the contractor sought to wriggle out of the same by pleading coercion. Matter was sought to be referred to arbitration. It was declined and the matter came up before the Supreme Court. The contractor relied upon the judgment in L.K. Ahuja's case. Dealing with the issue, it was held as under:

".....In L.K. Ahuja and Company case this Court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of **accord and satisfaction** but one of pleading power of limitation without prior rejection of the claim. Therefore, the ratio therein is of little assistance."

19. It was held that admittedly the full and final satisfaction was acknowledged in writing and the amount was received unconditionally. Thus, there was **accord and satisfaction** by final settlement of the claims. It was held that the subsequent allegation of coercion is an after-thought and a device to get over the settlement of the dispute. The Apex Court held that there was no existing arbitrable dispute capable of reference to the arbitration. The decision of not referring the dispute to arbitration was upheld, the appeal was dismissed.

20. In the third case, Nathani Steels Ltd. (supra), we may note that the judgment is by a Three-Judge Bench. The facts were similar. Contractor's claim under the final bill was disputed. Parties sat across the table and negotiated. Settlement was arrived at. Payment was received and thereafter the contractor sought reference of the dispute to arbitration. It was held as under:

"It appears that the dispute which arose on account of the non-completion of the contract came to be settled by and between the parties and the settlement was reduced to writing as found in document dated 28.12.199 (Exh. 'F' at p. 236). By this document the disputes and differences were amicably settled by and between the parties in the presence of the

Architect on the terms and conditions set out in Clauses 1 to 8 thereof. There is no dispute that the parties had, under the arrangement, arrived at a settlement in respect of disputes and differences arising under the contract then existing between the parties. This document bears the signatures of the respective parties. There is also a reference in regard to discussion that had ensued prior in point of time before the parties came to a final amicable settlement of the disputes and differences."

"In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the arbitration clause. We are, Therefore, of the opinion that the High Court was wrong in the view that it took."

21. In the 4th judgment, Union of India v. Popular Builders, which again is a judgment by a Three-Judge Bench, it was noted that the agreement between the parties contained an arbitration clause and that after completion of the work a final bill was raised. There was dispute pertaining to the claim under the final bill. A settlement was arrived at. The contractor agreed to accept the final bill without demur and indeed received payment for the same. Contractor claimed that dispute subsisted. Matter was referred to arbitration. Arbitrator made an award in favor of the contractor. Award was challenged as being without jurisdiction on the ground that there was no subsisting dispute, which could be referred to arbitration and hence the Arbitrator had no jurisdiction. Following the ratio of law in Nathani Steels Ltd. and P.K. Raimaia's case it

was held that the existence of a dispute being the condition precedent for appointment of an Arbitrator, the matter being settled and the contractor receiving the payment pursuant to the settlement, there was no subsisting dispute, which could be made a subject matter of reference of an arbitrable dispute.

22. In the 5th judgment Jayesh Engineering Works (supra), which is a judgment by a two-Judge Bench, the Apex Court relying upon L.K. Ahuja's case came to the conclusion that notwithstanding the receipt of payment in full and final settlement of the works the appellant was entitled to have the matter referred to arbitration. The issue was decided by the Apex Court as under:

"(1) The appellant offered Tenders I and II to the respondents, pursuant to which certain civil works were carried out and in respect of which they made a claim for payment of money. Although several claims had been made by the appellant, ultimately on 6.2.1989, the respondents intimated the appellant to receive a cheque for a sum of Rs. 2,79,600/- in full and final settlement of the works relating to Tenders I and II. The appellant acknowledged the same by endorsing on the said letter stating that he had received the said amount as full and final settlement and he had no further claim in that regard. Thereafter, he wrote a letter dated 24.2.1989 stating that his statement that payment had been accepted by him on 6.2.1989 in full and final settlement is not correct and still there are outstanding dues which need to be paid otherwise the matter will have to be referred to arbitration in terms of Clause 37 of the agreement. Pursuant to the said notice each of the parties nominated

their respective Arbitrators. At that stage, an application was filed under Section 33 of the Arbitration Act seeking a declaration that the agreement dated 7.4.1981 between the parties no longer subsists as the work has already been completed and the payment was received by respondent in full and final settlement. It was also contended that the clause providing for reference of disputes to arbitration is not attracted in such a situation. In an identical situation, this Court in *Union of India v. L.K. Ahuja and Co.*, held that on completion of work, the right to get further payment gets weakened but whether the claim subsists or not, is a matter which is arbitrable. When this direction was cited before the High Court, the same was distinguished by stating that it was a decision on its own facts and has no application to the case. We find that this view does not appear to be correct. Whether any amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the Arbitrator. In fact, whether the contract has been fully worked out and whether the payments have been made in full and final settlement are questions to be considered by the Arbitrator when there is a dispute regarding the same. We, Therefore, set aside the order made by the High Court and dismiss the application filed under Section 33 of the Arbitration Act. Now proceedings before the Arbitrator/s will have to be continued in accordance with law.

(2) The appeal is allowed. No costs."

23. What would be the legal position pertaining to the issue of **accord and satisfaction** culled out from the aforesaid five judgments of the Apex Court? The

observations made in L.K. Ahuja's case have been explained in P.K. Raimaia's case, followed in Nathani Steel's case and reiterated in Jayesh Engineering Works. If there is a considered endeavor made by the parties to settle the dispute and the dispute is settled between the parties resulting in an accord and satisfaction of the dispute, no dispute would subsist thereafter and as a result there would be no existing arbitrable dispute capable of being referred to arbitration."

(Emphasis Supplied)

24. In the backdrop of above legal position, we proceed to determine whether the learned Arbitrator applied correct principles while deciding that there was no accord and satisfaction and thus the learned Single Judge was justified in interfering with the award.

25. The respondent had issued 3 work orders upon the appellant for transportation from project stores, erection, testing and commissioning of pressure parts, external pipelines and auxiliaries of Units I and II of Panipat Thermal Power Plant, Panipat. It is not in dispute that the appellant had executed TIG Welding and extra joinery works, which works did not form part of the work orders issued to the appellant. Disputes arose between the parties in respect of the bills relating to TIG Welding and extra joinery works raised by the appellant. On April 24, 1979 a no claim certificate was issued by the appellant with respect to the final bill pertaining to 1st work order i.e. work order No.529/VA/60049 raised by it and this indisputably related to the work done as per the work order and not the extra work and we see no reason why

counsel for the appellant made an attempt to urge that even this No Claim Certificate was obtained by duress for the reason the payment made pertaining to this bill was in terms of the bill. On the very next day i.e. April 25, 1979 a meeting was held between a partner of the appellant and representatives of the respondent to resolve the dispute which had arisen between the parties with respect to the bills pertaining to TIG Welding and extra joinery works raised by the appellant. A settlement was arrived between the parties in the said meeting. The minutes of the said meeting were prepared and the settlement arrived between the parties was recorded in the said minutes. The minutes specifically record that the appellant would be paid for the extra works on the same basis on which payment was released to M/s.Northern India Erectors Badarpur. Thus, a basis to effect payment was agreed upon. The minutes have been signed by Mr.B.K.Jain, a partner of the appellant. Pursuant to the settlement arrived at between the parties, on April 05, 1980 and October 21, 1981 the appellant issued no claim certificates with respect to the final bills pertaining to the remaining 2 work orders i.e. work orders Nos.07/PPN/60049 and 27/PPN/60060 raised by it and payments were released to the appellant pursuant to the settlement arrived on April 25, 1979 and at the time of receiving payment, the appellant did not allege any duress. Further, on January 24, 1983 the appellant wrote a letter to the respondent stating therein that all the bills raised by it stand settled and only a sum of ₹12,000/- is outstanding. It is

most significant to note that there is not even a whisper in the said letter that the no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 were issued by the appellant under duress or that the bills relating to TIG Welding and extra joinery works raised by the appellant remain to be settled. Thereafter on June 12, 1984 the appellant wrote another letter to the respondent requesting it to release a sum of ₹5,000/- withheld by it for some reason. Yet again, the letter dated June 12, 1984 does not contain even a whisper that the no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 were issued by the appellant under duress or that the bills relating to TIG Welding and extra joinery works raised by the appellant remain to be settled. However, all of a sudden, in the year 1985 the appellant awoke from a slumber and issued a notice to the respondent invoking the arbitration clause contained in the agreement(s) between the parties, inter-alia claiming therein, that the respondent had not released the payments of the bills pertaining to TIG Welding and extra joinery works raised by it. There is nothing on record to show that the appellant had issued any communication to the respondent stating therein that the no claim certificates April 24, 1979, April 05, 1980 and October 21, 1981 were issued by the appellant under duress or that the bills relating to TIG Welding and extra joinery works raised by the appellant remained unsettled till the appellant invoked the arbitration clause.

26. It is significant to note that the stand taken by the appellant in the claim petition(s) filed by it was that no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 did not relate to the bills pertaining to TIG Welding and extra joinery works raised by the appellant. It was also sought to be projected by the appellant in the claim petition that the settlement arrived at between the parties on April 25, 1979 was inequitable. However, at the time of arguments before the Arbitrator the stand which was taken by the appellant was that the no claim certificates dated April 24, 1979, April 05, 1980 and October 21, 1981 were issued by the appellant under duress, little realizing that a party which sets up a plea of duress/coercion has to lay the factual foundation for said plea in its pleadings. The said inconsistency in the stands taken by the appellant before the Arbitrator brings out the mala fides of the appellant and that the learned Arbitrator has approached the subject ignoring the principles of law on which an issue pertaining to accord and satisfaction has to be decided.

27. The inescapable conclusion which result from the afore-noted cauldron of facts is that there was a complete accord and satisfaction of the disputes which had arisen between the parties with respect to the bills pertaining to TIG Welding and extra joinery works raised by the appellant and that no amount whatsoever was required to be paid by the respondent to the appellant in respect of said bills.

28. We need not go into the issues of overrun charges and interest claimed by the appellant for the same would be an academic exercise in view of our decision that there was complete accord and satisfaction of the disputes which had arisen between the parties with respect to the bills pertaining to TIG Welding and extra joinery works raised by the appellant and that no amount whatsoever was required to be paid by the respondent to the appellant in respect of said bills.

29. We thus do not opine upon the view taken by the learned Single Judge on the issue of interest for the reason, even as per the view taken by the learned Single Judge, it was only an academic exercise completed by the learned Single Judge who took the view that there was a complete accord and satisfaction.

30. In view of above discussion, the impugned judgment dated May 26, 2006 passed by the learned Single Judge is upheld and the appeal is dismissed.

31. Parties are left to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MARCH 26, 2012
dk