

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 196 of 2005

Reserved on: 17th August, 2012

Decision on: 27th August, 2012

M/S. GURMUKH SINGH AND CO. Petitioner

Through: Mr. Sandeep Sharma, Advocate

versus

MUNICIPAL CORPORATION OF DELHI & ANR

..... Respondents

Through: Ms. Mini Pushkarna, Advocate.

And

O.M.P. 297 of 2005

MUNICIPAL CORPORATION OF DELHI Petitioner

Through: Ms. Mini Pushkarna, Advocate.

versus

M/S. GURMUKH SINGH AND CO. Respondent

Through: Mr. Sandeep Sharma, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

27.08.2012

1. These are two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') directed against the impugned Award dated 20th April 2005 passed by the sole Arbitrator in the dispute between the Municipal

Corporation of Delhi ('MCD') and M/s Gurumukh Singh and Co. ('GSC') arising out of a work order dated 4th July 1989 awarded to GSC by the MCD for the work of construction of a multi-level car and scooter parking at Church Mission Road, Delhi.

2. GSC has filed OMP No. 196 of 2005 seeking setting aside of the Award to the extent that GSC's Claim Nos. 14, 18, 19 and 20 have been rejected. On the other hand, MCD has filed OMP No. 297 of 2005 to the extent that the impugned Award has allowed the remaining claims of GSC and has rejected the counter claims of MCD.

3. In terms of the contract, the work was to be completed within 24 months from 13th July 1989. It was a lump sum contract for the sum of Rs. 3,91,00,000. Although the date of completion of work as per the agreement was 12th July 1991, the actual date of completion was 3rd September 1997. Extension of time ('EOT') was granted by the MCD up to 3rd September 1997 without levy of compensation in terms of Clause 2 of the agreement. It appears that the 28th and final bill was prepared and accepted by GSC on 27th October 1999 in the bill form with the remarks: "Final bill and measurement accepted as full and final settlement of accounts". Thereafter, the 10 CC Bill was also prepared and a similar endorsement was made by GSC on the bill form on 10th September 2001.

4. It is not in dispute that the amounts under both the bills were paid to GSC. On 10th July 2002, GSC requested the Executive Engineer ('EE') of MCD to settle the dispute arising out of the contract and on 1st August 2002, a legal

notice was served on the MCD seeking reference of the dispute to arbitration. Thereafter, by an order dated 24th February 2003 passed by this Court in Arbitration Application No. 200 of 2002, a sole Arbitrator was appointed to adjudicate the claims and counter claims of the parties.

5. Before the learned Arbitrator, on 16th March 2004, MCD filed an application under Section 16 of the Act raising a preliminary objection against the maintainability of GSC's claims. Enclosing the copies of 28th and final bill and 10 CC Bill, both of which contain the aforementioned endorsement by GSC in acceptance of the full and final settlement of the accounts, the MCD submitted that GSC was precluded from raising any further claims contrary to the above undertaking. Secondly, it was submitted that the claims were time barred in terms of Clause 25 of the agreement in terms of which GSC had to apply for arbitration within 90 days of the intimation from the department that the final bill was ready for payment. GSC invoked the arbitration clause on 1st August 2002 whereas the work was completed on 3rd September 1997.

6. The learned Arbitrator heard submissions of both parties on the above application on 24th March, 20th April, 5th May and 15th May 2004. Thereafter, on 1st June 2004, the Arbitrator passed an order dismissing the application filed by MCD under Section 16 of the Act, the operative portion of which reads as under:

“(1) That there is no “Accord and Satisfaction” towards full and final settlement between the parties. It is evident from the endorsements made by the claimant on the 28th and final bill on page 44 of M.B. no. 5173. This bill is the final bill of the work done (except 10 CC bill) and has been accepted by the claimant on 6.10.99. There are three different acceptance endorsements

by the claimant on this bill, two of which are conditional. This itself shows that there is no “Accord and Satisfaction” towards full and final settlement.

(2) Cause of action to invoke the arbitration clause starts from this date i.e. 6.10.99 when the claimant comes to know as to what is being paid to him and what is not being paid to him.

(3) Through various judgments of various courts including those of Apex Court cited by the claimant, claimant has been successful in establishing that Art. 137 of Limitation Act applies in this case as regards the question of limitation is concerned.”

7. In O.M.P. No. 297 of 2005, one of the principal objections raised by the MCD in ground F and ground G is that since there was ‘accord and satisfaction’ of the claims of GSC, none of the claims made by GSC were maintainable. It was submitted by Ms. Mini Pushkarna, learned counsel for the MCD that the conclusion drawn by the learned Arbitrator that there was no accord and satisfaction since there were three different acceptance endorsements on the final bill, two of which were conditional, was contrary to the record. She places reliance on the decision in ***National Insurance Company Limited v. Boghara Polyfab Private Limited (2009) 1 SCC 267*** to contend that in such instances, GSC’s claims could not have been entertained by the learned Arbitrator.

8. Mr. Sandeep Sharma, learned counsel for GSC referred to the reply filed by it to the application of the MCD under Section 16 of the Act in which it claimed that “it is essential and customary that in MCD not a single payment is released without extracting the acceptance from the contractor which is

always under duress”. It was contended by GSC that the final bill paid on 27th October 1999 did not reflect all the works executed. It was stated that the 10 CC Bill in the sum of Rs. 42,38,602 was passed on 30th November 2001 “and whatever amount was being paid, it was accepted by the claimant under duress.” It was stated that “consequently, the claimants under duress/coercion recorded acceptance on 14th September 2001 (Annexure D) and on 19th September 2001 the claimants intimated the respondent EE that acceptance was given under duress and accordingly it was not voluntary.” Mr. Sharma also referred to the proceedings of the learned Arbitrator dated 20th April, 5th May and 15th May 2004 recording the submissions of both the parties. He maintained that GSC had merely signed the final bill, and that too under duress and coercion, and it was the EE who affixed a rubber stamp over the signature later on. He contended that the fact that the measurement book (‘MB’) had been signed thrice by GSC itself showed that the signature was obtained under duress. Reliance was placed on the decision in ***Pandit Construction Company v. Delhi Development Authority 2007 (3) Arb.LR 205 (Delhi)***. Lastly, it was submitted that the 28th and final bill as well as the 10 CC bill did not cover Claim Nos. 7, 8, 9 and 11 and therefore they were arbitrable.

9. The record contains a letter dated 19th September 2001 from GSC stating that the letter dated 14th September 2001 was given “under pressure” and “keeping in view my financial position, I had given you that letter”. As regards the above letter, the learned Arbitrator has recorded the submission of the MCD in the proceedings dated 20th April 2004 that “no such letter is appearing in the relevant diary register and hence it is concluded that no such

letter has been received.” A copy of the letter dated 14th September 2001 has been produced before the Court by counsel for GSC. It does not talk of GSC having accepted any final bill. It is therefore not clear why GSC stated in the letter dated 19th September 2001 that the letter dated 14th September 2001 was given ‘under pressure’. Given that MCD had disputed receiving the letter dated 19th September 2001, it was obligatory for the learned Arbitrator to have dealt with that aspect in his order dated 1st June 2004 dismissing MCD’s application under Section 16 of the Act. He also failed to give any finding on GSC’s claim that its signatures both on the final bill and the 10 CC bill were obtained under duress. In fact GSC did not produce any evidence to substantiate that allegation.

10. In ***National Insurance Company Limited v. Boghara Polyfab Private Limited*** the Supreme Court explained the law in relation to ‘accord and satisfaction’. It referred to the earlier decisions in ***State of Maharashtra v. Nav Bharat Builders 1994 Supp. (3) SCC 83***; ***P.K. Ramaiah & Co. v. NTPC 1994 Supp (3) SCC 126***; ***Damodar Valley Corporation v. K.K. Kar (1974) 1 SCC 141***; ***Nathani Steels Ltd. v. Associated Constructions 1995 Supp (3) SCC 324***; ***Ambika Construction v. Union of India (2006) 13 SCC 475*** and ***United India Insurance v. Ajmer Singh Cotton and General Mills (1999) 6 SCC 400***. In para 52, the Supreme Court set down some of the illustrations on accord and satisfaction. Relevant for the purpose of the present case are illustrations (ii), (iii) and (v) which read as follows:

“52..... (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.

(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.”

11. The above illustrations set out possible fact situations which have to be

shown to exist by the party pleading it. How they should be proved has been explained in para 50 of the decision which reads thus:

“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.”

12. In ***Union of India v. Master Construction Co. (2011) 12 SCC 349*** the Court reiterated that the burden was on the person setting up the plea of duress and coercion to prove it. The said decision, as was the one in ***Boghara Polyfab***, was in the context of appointment of an Arbitrator under Section 11 of the Act. Nevertheless the law explained in relation to ‘accord and satisfaction’ would apply *afortiori* to a plea of coercion and duress taken by a party in arbitration proceedings. In ***Master Construction Co.*** the Court observed:

“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 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.”

13. In the present case, apart from pleading that the no claims certificate was given under duress or coercion, GSC would have had to, in terms of the above decision in ***Boghara Polyfab*** produce evidence to make good that plea. The extent of evidence that would have to be led will of course vary from case to case. But in no instance can it be said that the mere plea that the no claims certificate was given under coercion or duress is sufficient. In the order dated 1st June 2003 the learned Arbitrator simply concluded that there was no accord and satisfaction since there were three different endorsements. The endorsements as to accord and satisfaction in the 28th and final bill as well as the 10 CC bill are identically worded. They bear the signatures of the authorised signatory of GSC. Merely because the signatures were taken on the MB as well, will not automatically mean that the signatures were taken under coercion and duress. Further, the letter dated 19th September 2001, the receipt of which is denied by the MCD, does not state that GSC’s

endorsement either on the 10 CC bill or the 28th and final bill was obtained under duress. It only refers to a letter dated 14th September 2001 having been given “under pressure”. As already noticed, the letter dated 14th September 2001 appears not to deal with the issue of full and final payment. No other evidence of any sort was led by GSC to make good its plea that it appended its signatures of accord and satisfaction under coercion and duress. The order dated 1st June 2004 of the learned Arbitrator holding that there was no ‘accord and satisfaction’ towards full and final settlement is unsustainable in law. The learned Arbitrator ought to have allowed the application of the MCD under Section 16 of the Act and declined to entertain the claims of the Contractor.

14. It is urged by Mr. Sandeep Sharma that on the strength of the decision in ***BSNL v. Canara Bank 169 (2010) DLT 253 (DB)***, this Court should in exercise of its powers under Section 34(4) of the Act remit the matter to the learned Arbitrator for a fresh decision in regard to the application of the MCD under Section 16 of the Act. This Court is not inclined to do this as it would not serve any purpose. For the reasons discussed, the Court is satisfied that the application filed by the MCD under Section 16 of the Act ought to have been allowed since in the present case, GSC has been unable to prove that the endorsement as to full and final settlement on the 28th and final bill and on the 10 CC bill was obtained under duress or coercion.

15. Even on other grounds the impugned Award deserves to be set aside. Claim No. 7 was for a sum of Rs. 1,47,95,515 (subsequently reduced to Rs. 1,30,39,418) towards de-watering. The learned Arbitrator observed in para 71 that the registers produced by GSC, said to be log books forming the basis of

the calculations, “are not the original ones but manipulated”. Thereafter, the learned Arbitrator proceeded to adopt a yardstick suggested by GSC in its letter dated 22nd May 1990 to award it a sum of Rs. 4,81,406. This Court is unable to understand how the learned Arbitrator could have proceeded to award this amount to GSC once he came to the conclusion that the records on the basis of which the claim was being made were manipulated. Further, it is indeed telling that despite the claim of over Rs. 1.3 crores being allowed only to the extent of Rs. 4.81 lakhs, GSC has not challenged the Award in regard to Claim No. 7. The Award in regard to Claim No. 7 suffers from patent illegality as it is not based on any acceptable evidence and is opposed to the public policy of India.

16. As regards the remaining claims of GSC that have been allowed, there is merit in the contention of the MCD many aspects thereof were part of the final bill and the 10 CC bill both of which contained the endorsement of full and final settlement and therefore, could have been claimed by GSC. This apart the learned Arbitrator has given cogent reasons for rejecting Claim Nos. 14, 18, 19 and 20 and that part of the impugned Award does not call for interference. The learned Arbitrator observed that GSC had not been able to produce any documentary evidence to show that its machinery and material remained under utilized. As explained by the Supreme Court in ***Bharat Coking Coal Ltd. v. L.K. Ahuja (2004) 5 SCC 109***, GSC was to prove that if it had received the amount due under the contract in time, it could have utilized the same for some other business from which it could have earned profits. Claim No. 20 by GSC for loss of profit was rightly rejected. The reasons for rejection of MCD’s counter claims were also justified.

17. In conclusion, it is held that the impugned Award dated 20th April 2005 of the learned Arbitrator to the extent it rejects Claim Nos. 14, 18, 19 and 20 of GSC and the counter claim of MCD does not call for interference. However, the impugned Award dated 20th April 2005 to the extent it allows Claim Nos. 7, 8, 9, 11, 13, 16, 18, 21 and 22 of GSC is hereby set aside.

18. OMP No. 196 of 2005 of GSC is dismissed and OMP No. 297 of 2005 is disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J.

August 27, 2012

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