

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

+ **ARB.P. 286/2010**

PACIFIC GARMENTS PVT. LTD. Petitioner
Through: Mrs. Shantha Devi Raman,
Advocate.

versus

ORIENTAL INSURANCE CO. LTD. Respondent
Through: Ms. Manjusha Wadhwa.
Advocate.

% Date of Decision : November 20, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. The aforesaid petition has been filed by M/s Pacific Garments Pvt. Ltd. for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

2. Shorn of details, the facts are that a fire accident occurred on 22.04.2008 in the factory of the petitioner, in which huge stocks of raw and finished materials were lost, apart from the massive and enormous damage to the building. A claim was lodged by the petitioner with the respondent for Rs.4,46,61,615/-. After the lodging of the said insurance claim and exchange of various letters between

the parties, the respondent – M/s Oriental Insurance Company Limited settled the claim for Rs.1,58,35,377/-. The petitioner claims that the said amount was accepted under protest and the signature of the petitioner on the discharge voucher was obtained by the respondent on the dotted lines because the petitioner was in great need of money. Since the respondent failed to honour their obligations under the insurance contract and failed to indemnify the genuine losses of the petitioner, the petitioner served a legal notice dated 28.04.2010 invoking the arbitration clause under the contract being Clause 13 which reads as under:-

“If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained.”

3. The aforesaid arbitration invocation notice was received and replied by the respondent vide its reply dated 20th May, 2010 stating that there does not exist any dispute between the parties, the claim amount having been accepted by the petitioner by signing the discharge voucher. The petitioner rejoined to the said notice vide letter dated 28.06.2010 stating that there is a genuine dispute which needs to be agitated before the Arbitrator. The respondent having refused to appoint the Arbitrator, the petitioner was left with no other efficacious remedy; hence the present petition.

4. In the reply filed by the respondent, the respondent submitted that the present petition is not maintainable since the petitioner has accepted the amount under the Insurance Policy No. 271501/11/2008/238, 271501/11/2008/73 and 27150/48/2008/1605 on 31.12.2009 in full and final settlement of its claim through signing the discharge voucher.

5. It is further submitted that the petitioner having accepted the amount after mutual settlement, cannot now allege that the settled amount obtained by him was under pressure and undue influence by the insurance company. It is stated that the surveyor submitted his report on 25.09.2009 observing that the respondent company was liable for an amount of Rs. 1,58,35,377/- against the claim of Rs.4,46,61,615/-. The petitioner was duly informed about the basis of the assessment of loss to the tune of Rs.1,58,35,377/- and in response to the same, the petitioner had sent an authority letter dated 22.12.2009. The petitioner received the aforesaid amount by signing

the discharge voucher on 31.12.2009. The aforesaid discharge voucher was accepted by the petitioner unconditionally in full and final settlement of all its claims and was endorsed by the hypothecating bank, that is, United Bank of India – Overseas Branch, New Delhi with respect to the full and final settlement of the fire claim. On 18.01.2010, for the first time, the petitioner raised dispute about the settlement of claim and demanded a copy of the survey report, which was duly given to the petitioner vide letter dated 29.01.2010. The petitioner thereafter invoked the arbitration clause in a highly arbitrary and malafide manner. Thus, the present controversy is beyond the ambit of the arbitration agreement since there exists no arbitral dispute or difference. It was only after the settlement was made between the parties and voucher handed over to the petitioner and accepted by the petitioner without any protest and also got notarized by the petitioner from its bankers that the petitioner raised an objection as to the claim amount.

6. Arguments were addressed by Mrs. Shantha Devi Raman, Advocate on behalf of the petitioner and Ms. Manjusha Wadhwa, Advocate on behalf of the respondent.

7. Mrs. Raman relied upon the judgment of the Hon'ble Supreme Court in *National Insurance Company Limited Vs. Boghara Polyfab Private Limited (2009) 1 SCC 267* and *R.L. Kalathia & Co. Vs. State of Gujarat (2011) 2 SCC 400* in support of her contention that the petitioner was entitled to the claim amount of Rs.4,46,61,615/-, and that the discharge voucher would not be an absolute bar to the

petitioner raising claims which are genuine, even after the submission of such discharge voucher.

8. Reliance in particular was placed on the following observations made by the Hon'ble Supreme Court in the case of ***Boghara Polyfab Private Limited (supra): (SCC, Pages 284 and 293)***

“26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practiced by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.

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49. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be

used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government departments, statutory corporations and government companies for issue of undated “no-dues certificates” or “full and final settlements vouchers” acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.”

9. It was contended that in the case of ***R.L. Kalathia & Co. (supra)***, the following principles of law were culled out from the decisions of the Supreme Court in ***NTPC Limited Vs. Reshmi Constructions Builders & Contractors (2004) 2 SCC 663***, ***Ambica Construction Vs. Union of India (2006) 13 SCC 475*** and ***Boghara Polyfab Private Limited(supra): (SCC, Page 406)***

“(i) Merely because the contractor has issued “no dues certificate”, if there is acceptable claim, the court cannot reject the same on the ground of issuance of “no dues certificate”.

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such “no-claim certificate”.

(iii) *Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning “without prejudice” or by issuing ‘no dues certificate’.*”

10. Per contra, Ms. Manjusha Wadhwa, Advocate, on behalf of the Insurance Company, contended that since the petitioner executed the discharge voucher and accepted the amount in full and final settlement of the claim, the present petition does not lie in view of the judgments of the Hon’ble Supreme Court in (i) *National Insurance Company Limited Vs. Boghara Polyfab Private Limited (2009) 1 SCC 267*; (ii) *Nathani Steels Limited Vs. Associated Constructions 1995 Supp (3) SCC 324*; (iii) *State of Maharashtra Vs. Nav Bharat Builders 1994 Supp (3) SCC 83*; (iv) *Messrs P.K. Ramaiah and Company vs. Chairman and Managing Director, National Thermal Power Corporation 1994 Supp(3) SCC 126*; (v) *M/S Bhagwati Prasad Pawan Kumar Vs. Union of India 2006 (2) IAC 434 (SC)*; and (vi) *Union of India and Others Vs. Master Construction Company (2011) 12 SCC 349*.

11. In all the aforesaid cases, it is held that once the petitioner has executed the discharge voucher and accepted the amount in full and final settlement of the claim, the petitioner is estopped from claiming any further amounts. The only exception carved out by the Supreme Court to the said rule is that the acceptance of the insurance claim would not bar the insured from making further claim from the insurer,

in case the discharge voucher has been obtained in circumstances, which could be termed fraudulent or by exercise of undue influence or misrepresentation or the like.

12. In the instant case, Ms. Wadhwa contended that the petitioner accepted the amount after mutual settlement, and now alleges that the settled amount obtained by it was due to financial crisis. The petitioner while accepting the claim in full and final settlement **did not make any kind of protest** and thus is now estopped from claiming any further amount.

13. It is further contended by Ms. Wadhwa that Clause 13 of the Insurance Policy postulates that the dispute shall be referred to arbitration if there exists dispute as to what is to be paid. This Clause impliedly excludes the situation where full and final settlement has been made and the claim amount has been received by the claimants. In such a situation, no dispute arises within the meaning of the arbitration clause, which contains a specific bar to the reference of a dispute to arbitration other than a dispute **as to the quantum to be paid** under this policy.

14. Distinguishing the judgment of the Hon'ble Supreme Court in *Boghara Polyfab Pvt. Ltd.(supra)*, she stated that the facts of the said case were that on 5.8.2004, the respondent reported loss/damage to their stocks on account of heavy rains and flooding which took place on 2/3.8.2004 and made a claim in that behalf. The surveyor submitted a preliminary report dated 14.8.2004, followed by a final survey report dated 6.12.2004 according to which the net assessed loss (payable to respondent) was Rs.3,18,26,025/-. The said sum was arrived at on the

basis that the sum insured was Rs. 12 crores whereas the sum insured was only Rs. 6 crores. The surveyor therefore gave an addendum to the final survey report on 22.3.2005 reassessing the net loss as Rs.2,34,01,740/- by taking the sum insured as only Rs. 6 crores. The respondent protested against the loss being assessed by taking the sum insured as only Rs. 6 crores. The respondent alleged that the appellant forced the respondent to accept a lower settlement; that the appellant informed the respondent that unless and until the respondent issued an undated 'discharge voucher-in-advance' in the prescribed form acknowledging receipt of Rs.2,33,94,964/- in full and final settlement, no amount would be released towards the claim; that in that behalf, the appellant sent the format of the discharge voucher to be signed by *respondent on 21.3.2006*; that on account of the non- release of the claim, it was in a dire financial condition and it had no alternative but to yield to the coercion and pressure applied by the appellant; that therefore the respondent signed and gave the said discharge voucher, undated, as required by the insurer during the ***last week of March, 2006***. The payment was released by the appellant only after receiving the said discharge-voucher. **Simultaneously** the respondent lodged ***a complaint dated 24.3.2006*** with the Insurance Regulatory and Development Authority wherein, after setting out the facts, it alleged that:-

"We lodged a claim with our insurers immediately and pursued the matter with them. Even after the Surveyor Mr. Mehernosh Todiwala of M/s.Bhatawadekar & Co. had submitted his report on 22-3-2005, the insurers refused to settle our claim on various counts. We had various

meeting at the Divisional, Regional and even the Head Office of the insurers, but to no avail.

In March 2005, the insurer Company forced us to accept a lower settlement and we were told that we would have to agree to a lower settlement to ensure expeditious settlement of the claim. Accordingly on and around 15-3-2005, nearly 8 months after the loss, we gave our forced consent to the lower settlement offered in the hope that the claim amount would be received immediately.

Thereafter for the next 1 year, the insurers failed to settle our claim and made us run from pillar to post for the settlement.

Finally on March 21-3-2006 the insurers have sent us a voucher for the sum of Rs.2,33,94,964 which considering our dire financial condition, and the continuous failed promises from the insurers, we have had no choice but to accept.

Sir, subsequent to the loss, since we could not pay our international suppliers on time they almost completely stopped all our shipments. This has resulted in tremendous financial loss to us. We have lost our long hard earned reputation in the market by becoming defaulters. The insurers have deliberately starved our unit of funds to ruin us financially.

You will appreciate that we are now faced with a situation where we have no choice but to accept the payment being released to us unconditionally as the insurers have made it very clear that the payment will not be released if there is any conditional discharge of the vouchers. In order to safeguard our right to claim the difference amount and any other claims arising out of the financial losses incurred by us a direct result of the deliberate delay in settlement of our claim by the insurers, we make a humble request to the IRDA to take up the matter with the insurers to ensure that

justice prevails and we are paid the entire compensation due to us.”

15. It is contended that in the instant case, the petitioner did not file any complaint with Insurance Regulatory and Development Authority; nor it approached the Insurance Company on immediate basis to prove that it had signed the discharge voucher on account of financial crisis as alleged by it. For the first time, vide letter dated 18.01.10, received by the respondent/Insurance Company on 20.01.10, the petitioner sought to claim the balance amount without any basis for the same. Further, in the instant case, there is no time gap between the signing of discharge voucher and the release of money, which is indicative of the fact that no pressure or undue influence was brought to bear upon the petitioner to sign the same. The petitioner signed discharge voucher on 31.12.09 and received payment also on the same date. The petitioner except alleging that it was compelled to sign the discharge voucher because of financial distress has failed to prove any document on record to show that it had obtained any loan or suffered any financial losses or the like. Moreover, the Petitioner neither accepted the said amount “WITHOUT PREJUDICE” nor the Petitioner made any immediate complaint to the Respondent or to the Insurance Regulatory and Development Authority. The Petitioner has also failed to point out any error in the surveyor report.

16. Reliance was also placed by Ms. Wadhwa on the following observations made by the Hon’ble Supreme Court in the case of *M/S Bhagwati Prasad Pawan Kumar (Supra)*:

“In the instant case there is neither pleadings nor evidence on record as to the date on which the cheques were received and the date on which the same were sent for encashment. It is, therefore, not possible to record a categorical finding as to whether the letters of protest were written after encashing the cheques or before encashing the cheques. It was for the appellant to plead and prove that it had not accepted the offer and had called upon the Railways to pay the balance amount. This it must have done before encashing the cheques. If the appellant encashed the cheques and then wrote letters of protest to the Railways, it cannot be held that it had not accepted the offer by conduct, because at the time when it sent the cheques for encashment, it had not conveyed its protest to the offerer. In the absence of any pleading or evidence to establish that the encashment of the cheques was subsequent to the protest letters by the appellant, it is not possible to hold that by encashing the cheques the appellant had not adopted the mode of acceptance prescribed in the letters of the Railways dated April 7, 1993. In the absence of such evidence it must be held that by encashing the cheques received from the Railways, the appellant accepted the offer by adopting the mode of acceptance prescribed in the offer of the Railways.”

17. Ms. Wadhwa also relied upon the judgment of the Hon’ble Supreme Court in the case of **Master Construction Company (Supra)** wherein the Hon’ble Supreme Court observed as follows:-

“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. It cannot be overlooked that the cost of arbitration is quite huge – most of the time, it runs in 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 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 after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there”.

18. After carefully considering the rival contentions of the parties, this court is of the opinion that there is *prima facie* material on the record to suggest that the discharge voucher in the instant case was not given by the petitioner of its own free will and volition. The fire from which the present insurance claim has emanated took place on 22.04.2008. The survey report was obtained by the insurance company on 25.09.2009 of which no copy was admittedly given to the insured/petitioner. However, **even before the survey report was obtained on 25.09.2009, a letter was sent by the petitioner agreeing to settle the claim in the sum of Rs.1,64,72,101/- (Rupees One Crore**

Sixty Four Lac Seventy Two Thousand One Hundred One Only). The said letter reads as under:-

“Date: August 06, 2009

*To,
M/s S. Soni & Co.
1047/16, Hari Nagar Nalwa Street,
Karol Bagh,
New Delhi-110-005*

Ref: FIRE LOSS ON 22ND APRIL 2008

Dear Sir,

We have gone through your assessments and agree the amount Rs.16,472,101.00 (Rupees One Crore Sixty Four Lac Seventy Two Thousand One Hundred One Only), as settlement.

Thanking you,

*Yours truly,
For PACIFIC GARMETS PVT. LTD.*

*Sd/
Director”*

19. As noticed above, the survey report was submitted by the surveyor subsequently, that is, on 25.09.2009, more than a month after the aforesaid settlement letter was sent by the petitioner. There is reference in the said letter to the petitioner having gone through some “assessments”. The respondent has not been able to explain what was the nature of the said “assessments”. Even after this, the sequence of

events shows that authority letter was sought for by the Insurance Company and given by the petitioner on 22.12.2009 and the discharge voucher executed on 31.12.2009, and that too for a sum of Rs.1,58,35,377/- only. This discharge voucher was obtained in advance by the Insurance Company and only upon signing the discharge voucher by the petitioner, the cheque in the sum of Rs.1,58,35,377/- was handed over to the petitioner on 1.1.2010. It is also not in dispute that copy of the survey report was given to the petitioner for the first time on 29.01.2010 on the petitioner demanding the same vide its letter dated 18.01.2010. All these circumstances taken cumulatively, are *prima facie* suggestive of the fact that the discharge voucher was not signed by the petitioner of its own free will and accord, but on account of the petitioner's indebtedness to the banks as set out in its protest letter dated 18.01.2010.

20. On an overall conspectus of the facts and circumstances in the present case, I am of the opinion that the respondent's contention that the petitioner has accepted the amount after mutual settlement and is, therefore, estopped from raising any further claims cannot be accepted without giving any opportunity to the petitioner to prove by adducing cogent evidence that the discharge voucher was executed by it under pressure and on account of undue influence. In the case of ***Boghara Polyfab Private Limited(supra)***, the Hon'ble Supreme Court has adumbrated three categories of issues that may arise for consideration in an application under Section 11 of the Act. First category comprises of issues relating to jurisdiction and existence of arbitration agreements etc. which the Court hearing the application must decide.

Issues falling in the second category are those that the Court may choose to decide or leave for the arbitrator to decide and includes issues relating to bar of limitation or estoppel. Third category comprises of issues that should be left exclusively for determination by the arbitrator and includes issues as to arbitrability of claims and merits of the claims. It has been further held that, where the Chief Justice or his designate is satisfied that *prima facie* the discharge voucher was not issued voluntarily and the matter deserves detailed consideration, he may refer the matter to the arbitral tribunal with the specific direction that the said question should be decided at the first instance. In the instant case, the respondent has raised the plea of estoppel and the issue arises as to whether parties have concluded the contract/transaction by the petitioner recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection. The said issue, in my view, falls in the second category and I am of the considered opinion that it is in the interest of justice that the dispute be referred to arbitration in the instant case with a direction to the arbitrator to determine first whether there has been accord and satisfaction or discharge of the contract as alleged by the respondent.

21. I accordingly appoint Mr. Justice A.P.Shah (Retired Chief Justice of this Court) as Arbitrator to arbitrate upon the disputes between the parties. If the learned Arbitrator comes to the conclusion that there was a valid discharge of the contract by voluntary execution of discharge voucher, he will refuse to examine the claim on merits and reject the claim as not maintainable. On the other hand, if the

learned Arbitrator comes to the conclusion that such discharge of contract was vitiated by any of the circumstances relied upon by the petitioner, he will proceed to decide the claim on merits. The arbitration shall take place under the aegis of Delhi High Court Arbitration Centre. The fees of the arbitrator shall also be in terms of the Delhi High Court Arbitration Centre (Arbitrator's Fees) Rules.

22. The petition is allowed in the above terms. List before the Delhi High Court Arbitration and Conciliation Centre on 3rd December, 2012.

A copy of this order be sent to the learned arbitrator as well as to the Delhi High Court Arbitration Centre.

**REVA KHETRAPAL
JUDGE**

November 20, 2012
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