

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

+ **ARB.P. 367/2011**

M/S LALL CONSTRUCTIONS CO Petitioner
Through: Mr. J.P. Sengh, Sr. Advocate
 with Mr. Shankar Kumar Jha,
 Mr. Sumeet Batra and
 Ms. Ankita Gupta, Advocates.

versus

THE GENERAL MANGER
NORTHERN RAILWAY Respondent
Through: Mr. R.V. Sinha with
 Mr. R.N. Singh, Advocates.

% 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 Petitioner – M/s. Lall Constructions Co. has moved the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) for the appointment of an impartial and neutral Arbitrator to arbitrate upon the disputes between the parties.

2. The instant dispute arises out of a contract bearing No.74-W1/1/397/WA/UMB dated 01.08.2007 which was awarded to the Petitioner by the Respondent for “Supplying and laying blanketing

material 600 mm thick over top of formation from Km 0.00 to Km 16.250 in connection with Abohar-Fazilka new BG Railway line.” A copy of the letter of intent dated 25.05.2007 along with a copy of the aforesaid contract containing the arbitration clause, viz., Clause No.64 of Northern Railway General Conditions of Contract 1999 is enclosed with the petition. The Petitioner claims that upon completion of the execution of the work on 15.08.2009 in all respects, the Petitioner by its letters dated 17.12.2009 and 11.01.2010 addressed to the Deputy Chief Engineer/Construction, Ambala Cantt requested for the release of the security deposit. By his letter dated 23.01.2010, the Deputy Chief Engineer certified to the Chief Engineer concerned as under:-

“In continuation to this office letter of even number dated 16.1.2010, it is also certified that the work has been executed and completed by the contractor M/s. Lall Construction Co:AA-105, Shalimar Bagh, Delhi on 15.8.2009 in all respects and all the contractual obligations have been fulfilled by the contractors and that there is nothing due from the contractor to Railways against the contract for the subject work.”

3. In terms of the said certificate, the Deputy Chief Engineer, Ambala Cantt prepared Pay Order No.109379 dated 04.02.2010 for the release of the security deposit and submitted the same to the Accounts Branch. Instead of passing the Pay Order for refund of security deposit, the Senior Assistant Financial Adviser vide letter dated 05.02.2010 returned back the Pay Order stating that as per Railway Board Instructions security deposit may be released only after passing of final Bills. The Petitioner by letter dated 09.02.2010 protested against the imposition of this condition linking the release of

the security deposit of ₹ 42,43,850/- and performance guarantee of ₹ 42,43,850/- with the passing of the Final Bill and the amounts payable from Running Bills which had been held up.

4. The Respondent eventually prepared the Final Bill on 12.02.2010. On 14.02.2010, the Petitioner was made to sign a “Supplementary Agreement” in the nature of full and final certificate, to which I shall presently advert. Thereafter, by a letter dated 20.02.2010, the said Final Bill and the purported Supplementary Agreement were forwarded by the Deputy Chief Engineer, Ambala Cantt, for releasing the payment to the Petitioner. The said letter, however, mentioned that:

“.....In this connection it is to inform that the PVC bill is under process of preparation and will take some more time due to non-availability of final price index of RBI Bulletin.....”.

5. It is the case of the Petitioner that post-signing of the Supplementary Agreement, the balance of the Running Bills (Final Bill), being ₹ 9,52,826/- was released and credited through ECS on 03.03.2010, and that security deposit of ₹ 25,33,850.00 and ₹ 17,10,000.00 was also released and credited through ECS on 03.03.2010. The performance guarantee was released on the next day, i.e., on 04.03.2010. It is further the case of the Petitioner (and this position is not disputed by the Respondent) that the Final PVC Bill No.PVC/Final -0/blanketing/km.000 to 16.250/ABS-FKA was prepared on 24.02.2010 (subsequent to the execution of the Supplementary Agreement dated 14.02.2010) as detailed below:-

- (i) Total PVC payable : 13,28,777.10
(ii) Less already PVC paid : 10,05,192.84
(iii) **Net amount of Final PVC : ₹ 32,35,84.26**

The aforesaid Final PVC Bill was then sent to the Accounts Department on 25.02.2010. The said Bill was, however, not paid.

6. In view of the aforesaid facts, the Petitioner by its letter dated 27.04.2010 protested against the late release of security deposit; forced extension of performance guarantee for six months from 05.09.2009 to 04.03.2010 and non-payment of PVC Bill till the said date for each quarter under proper class and sought arbitration in the event of the Respondent not accepting its claims. The Respondent by its letter dated 06.07.2011 refused to appoint an Arbitrator, stating that in view of the Supplementary Agreement, the arbitration clause had perished. The Petitioner by letter dated 20.07.2011 reiterated its claim and refuted the stand of the Respondent. The present petition was thereafter filed on 9th November, 2011.

7. Reply affidavit to the aforesaid petition was filed on behalf of the Respondent. The anchor-sheet of the Respondent's case is that the Supplementary Agreement was in the nature of full and final certificate, the relevant portion whereof is produced hereunder:-

“Now it is hereby agreed by and between the parties in the consideration of sums already paid (by party hereto of the first part to the party hereto of the second part against all outstanding dues and claims for, all works done under aforesaid principal agreement including/excluding the security deposit the party hereto of the second part have no further dues or claims against the party hereto of first part under the said principal

agreement. It is further agreed by and between the parties that party hereto of the second part has accepted the said sums mentioned above in full and final satisfaction of all its dues and claims under the said principal Agreement.”

“It is further agreed and understood by and between the parties that in consideration of the payment already made, under the agreement, the said principal agreement shall stand finally discharged and rescinded all the terms and conditions including the arbitration clause.”

“It is further agreed and understood by and between the parties that the arbitration clause contained in the said principal agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes.”

8. It is submitted by the Respondent that the work was completed on 15.08.2009, the maintenance period of six months expired on 15.02.2010 and the performance guarantee was released on 04.03.2010, within the minimum possible time. It is further submitted that the Supplementary Agreement was mandatory as per the Principal Agreement viz., Clause No.9.8 of Special Tender Conditions and Instructions to Tenderers of the Agreement. It is stated that in view of the signing of the Supplementary Agreement, the arbitration clause had ceased to exist; hence the contractor's demand to refer the claims to arbitration is not tenable.

9. Arguments were addressed at the bar by Mr. J.P. Sengh, Senior Advocate on behalf of the Petitioner and by Mr. R.V. Sinha, Advocate on behalf of the Respondent.

10. Learned senior counsel for the Petitioner contended that the Petitioner was kept under financial coercion during the execution of the work and thereafter by delaying final payments. The Petitioner had protested against the delayed payments in its letter dated 27.04.2010, after the contract was concluded on 15.08.2009. He further contended that in the circumstances, the Petitioner had no option except to sign on the dotted line of the Supplementary Agreement dated 14.02.2010 to get the undisputed payments, which would certainly have not been paid to the Petitioner had the Petitioner not signed the Supplementary Agreement on 14.02.2010. Learned counsel emphasized that it was after the signing of the Supplementary Agreement that the balance of the running Bills (Final Bill), being ₹ 9,52,826.00 was released and credited to the Petitioner on 03.03.2010. The security deposit and performance guarantee too were released to the Petitioner thereafter ,on 04.03.2010. The Price Variation Bill (PVC Bill) dated 24.02.2010 was however not part of the alleged settlement dated 14.02.2010, having been prepared subsequent to 14.02.2010. Even otherwise, there was no consideration for the Petitioner to waive its claim under the PVC Bill, which admittedly was the subject matter of another independent Bill for which payment also came independently. Insofar as Clause 9.8 is concerned, it was submitted that the said clause provides that the Agreement be made by “mutual consent” and there was no mutual consent in the instant case.

11. Reliance was placed by Mr. Singh on behalf of the Petitioner on the following judgments:-

- (i) *Ambica Construction vs. Union of India, (2006) 13 SCC 475,*
- (ii) *Chairman & M.D., N.T.P.C. Ltd. vs. M/s. Reshmi Constructions, Builders & Contractors, 2004 (1) SCALE 70,* and
- (iii) *R.L. Kalathia and Company vs. State of Gujarat, (2011) 2 SCC 400.*

12. In the case of *Ambica Construction vs. Union of India (supra)*, the Hon'ble Supreme Court had considered a clause in a contract which required the contractor to give a no-claim certificate, in the form required by the Railways, **after the final measurement was taken** and further provided that the contractor shall be debarred from disputing the correctness of the items covered by the "no-claim certificate" or demanding a reference to arbitration in respect thereof. The Court after consideration of the material on record came to the conclusion that the "No-claim certificate" had been given under coercion and duress and unless a discharge certificate had been given in advance, payment of Bills would have been delayed by the Railways. This conclusion was arrived at by the Court in view of the fact that the work was yet to be completed and there was nothing to indicate that the works, as undertaken by the contractor, had been finally measured.

13. In *Chairman & M.D., N.T.P.C. Ltd. vs. Reshmi Constructions (supra)*, upon completion of work, the Respondent-contractor submitted the Final Bill which was not accepted by the employer. The employer prepared a Final Bill and forwarded the same along with a

printed format being a “No Demand Certificate”. The contractor signed the said “No Demand Certificate” and submitted it to the employer. But on the same day, the contractor also wrote a letter to the employer stating that it had issued the said certificate in view of the threat that until the said document was executed, payment of the Bill will not be released. In those circumstances, after considering the decision rendered by it in ***P.K. Ramaiah and Company vs. Chairman & Managing Director, National Thermal Power Corpn., 1994 Supp (3) SCC 126*** and ***Nathani Steels Ltd. vs. Associated Constructions, 1995 Supp (3) SCC 324***, the Hon’ble Supreme Court held:- (SCC, page 676, paras 26–29)

“26. The appellant herein did not raise a question that there has been a novation of contract. The conduct of the parties as evidenced in their letters, as noticed hereinbefore, clearly goes to show that not only the final bill submitted by the respondent was rejected but another final bill was prepared with a printed format that a "No Demand Certificate" has been executed as otherwise the final bill would not be paid. The respondent herein, as noticed hereinbefore, categorically stated in its letter dated 20.12.1990 as to under what circumstances they were compelled to sign the said printed letter. It appears from the appendix appended to the judgment of the learned Trial Judge that the said letter was filed even before the trial court. It is, therefore, not a case whether the respondent's assertion of "under influence or coercion" can be said to have been taken by way of an afterthought.

27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement

can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No-Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

28. *Further, necessitas non habet legem is an old-age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.*

29. *We may, however, hasten to add that such a case has to be made out and proved before the arbitrator for obtaining an award."*

14. In the case of ***R.L. Kalathia and Company vs. State of Gujarat*** (*supra*), the Hon'ble Supreme Court, relying upon its earlier decisions in ***National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd.***, (2009) 1 SCC 267, ***Chairman & M.D., N.T.P.C. Ltd. vs. Reshmi Constructions*** (*supra*) and ***Ambica Construction vs. Union of India*** (*supra*), held that merely because the contractor had accepted the Final Bill and issued 'No-Dues Certificate', it cannot be deprived of its right to claim damages if it had incurred additional amount and has an acceptable claim, 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 the submission of such “No-Claim Certificate”.

15. Mr. R.V. Sinha, the learned counsel for the Respondent while admitting the facts set out in the petition nevertheless contested the appointment of an Arbitrator. He placed reliance upon the judgment of the Supreme Court in *Union of India and Ors. vs. Master Construction Co., (2011) 12 SCC 349* and Civil Appeal No.7970/2010 (arising out of SLP(C) No.8306/2008) *Union of India and Ors. vs. Hari Singh* decided on 10.09.2010.

16. In *Union of India and Ors. vs. Master Construction Co. (supra)*, the appointment of an Arbitrator having been sought for by the respondent, the appellant submitted that no arbitrable dispute existed between the parties as full and final payment had been received by the contractor. The Supreme Court observed that the fact that payment of Final Bill was made to the contractor was not in dispute. It further held that mere allegation that No-Claim Certificates had been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute. It further held that where the dispute raised by the claimant with regard to the validity of the Discharge Certificate 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.

17. In the case of *Union of India vs. Hari Singh (supra)* also, it was held by the Supreme Court, after referring to a number of its earlier decisions, that the settled legal position is that when the parties

by a Supplementary Agreement obtained a full and final discharge after paying the entire amount, which was due and payable to the contractor, the contractor would not be justified in invoking arbitration.

18. Reference was also made by learned counsel for the Respondent to the judgment of this Court in *M/s. Polytron & Fragrance Industries (P) Ltd. vs. National Insurance Co. Ltd., 2009 (4) R.A.J. 407 (Del)* and *Hari Vansh Chawla vs. Prem Kutir Cooperative Group Housing Society Limited, 2009 (1) R.A.J. 140 (Del) (DB)*. In the *Polytron* case (*supra*), after referring to a large number of judgments, this Court held as follows:-

“11. In terms of the arbitration clause, the only dispute that could be referred to arbitration was the one which pertained to quantum to be paid under the policy. The quantum stood crystallized in view of the petitioner having accepted the sum of Rs. 1,50,72,523/- by way of full and final settlement. The receipt dated March 29, 2006 bears testimony to this fact. It is, therefore, not open to the petitioner to contend that the amount was accepted under any kind of duress or coercion from the respondent. At least, the Arbitral Tribunal is not the forum to raise such a dispute. It does not fall within the ambit of the arbitrable dispute. As observed by the Apex Court in Nathani Steels Ltd. v. Associated Constructions (supra), the petitioner may have its remedy elsewhere in some other proceeding but not before the Arbitrators. Again, as said by the Apex Court, if such a plea is allowed to be taken after the acceptance of the amount in full and final settlement, the sanctity of the settlement would be wholly lost.”

19. In *Hari Vansh Chawla (supra)*, a Division Bench of this Court, taking all the facts into consideration including the fact that the parties had entered into a full and final settlement with regard to the subsisting disputes and had acknowledged the same in writing, held that there was complete accord and satisfaction on the part of the contractor by accepting final settlement of claims.

20. After carefully considering the rival contentions of the parties and going through the precedents cited at the bar, I am of the opinion that on the facts of the instant case it cannot be said that there was a full and final settlement of the claims of the Petitioner on 14.02.2010 the date on which the Petitioner signed the purported “Supplementary Agreement”. I say so for the reason that it is not in dispute that by its letter dated 20th February, 2010 the Final Bill prepared by the Respondent on 12.02.2010 and the aforementioned Supplementary Agreement were forwarded by the Respondent to the Petitioner. The said letter contains mention of the fact that **“the PVC Bill is under process of preparation and will take some more time due to non-availability of final price index of RBI Bulletin.”** It is also not in dispute that the final PVC Bill, i.e., the Price Variation Bill was prepared on 24.02.2010 by the Respondent and sent to the Accounts Department on 25.02.2010. Subsequent thereto, balance payments of Running Bills were made on 03.03.2010 and security deposit and performance guarantee released post 14.02.2010, on 03.03.2010 and 04.03.2010. Thus, the signing of the Supplementary Agreement to show that the Petitioner had accepted the sums mentioned in the Supplementary Agreement in full and final satisfaction of all its dues

and claims was mere eye-wash, as not even all the Bills had been prepared by the Railways on the said date. The refusal of the Respondent to appoint an Arbitrator in view of the Supplementary Agreement, therefore, in my view, is wholly untenable. At the risk of repetition, it is stated that when it is the admitted case of the parties that even the Bills had not been finalized on the date when the Supplementary Agreement was signed by the Petitioner, the said Supplementary Agreement cannot be treated as a bar to the raising of disputes by the Petitioner, who received balance payments subsequent to the date of the Supplementary Agreement and even raised protest to the PVC Bill prepared subsequent to the execution of the Supplementary Agreement. Even security deposits and performance guarantee were released post signing of the alleged Supplementary Agreement in the month of March, 2010.

21. In *Ambica Construction vs. Union of India (supra)*, it was held by the Hon'ble Supreme Court that where the work was pending and final measurements had yet to be made, the preparation of a No-Claim Certificate was meaningless. The dicta laid down in the said case squarely applies to the present case though the facts are somewhat different. In the instant case, even the Price Variation Bill was prepared after the execution of the so-called Supplementary Agreement, lending credence to the contention of the Petitioner that he was made to sign on the dotted lines of the Supplementary Agreement under duress/coercion. Even otherwise, it is amply clear that the disputes raised by the Petitioner vide letter dated 27.04.2010 do not relate to "sums already paid" under the Supplementary Agreement and

admittedly the Supplementary Agreement dated 14.02.2010 excluded issue of security deposit and did not take care of payments to be made for price variation. In this view of the matter, it is not possible to hold that the original Agreement stood extinguished and the arbitration clause contained therein ceased to exist and perished along with the original Agreement. When the claim itself had not been computed in its entirety, there was no question of accord and satisfaction prior to the computation thereof.

22. In view of the aforesaid, the petition is allowed by appointing Justice Jaspal Singh (Retired Judge of this Court) to arbitrate upon the disputes between the parties. 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.

23. The petition stands disposed of in the above terms. List before the Delhi High Court Arbitration Centre on 3rd December, 2012.

**REVA KHETRAPAL
JUDGE**

November 20, 2012

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