

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

% *Judgment delivered on: April 21, 2014*

+ **ARB.P. No.424/2012**

ESSAR PROJECTS (INDIA) LTD & ORS Petitioners
Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.Umang Gupta, Adv.

versus

GAIL (INDIA) LTD Respondent
Through Mr.Ramji Srinivasan, Sr. Adv. with
Ms.Ranjana Gawai and Mr.Shailesh
Suman, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order I propose to decide the present petition filed by the petitioners under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitral Tribunal to adjudicate all disputes between the parties in terms of Clause 59 of the Contract dated 24th December, 2008 (hereinafter referred to as “the Contract”).

Petitioners’ Case

2. The case of the petitioners is that the petitioners Consortium (the Contractor) and respondent (the Employer) entered into the Contract for laying, testing and commissioning of Vijaipur-Dadri Pipeline Section and Associated Facilities (Section-C) for Vijaipur-Dadri-Bawana Pipeline Project of the respondent that was awarded to the consortium on 12th September, 2008.

3. It is submitted by the petitioners that while the petitioners consortium has duly fulfilled its obligations under the contract, the respondent and its consultant Engineers India Ltd. (EIL) failed to duly fulfil its obligations. As a result, there was delay in completion of the project for reasons wholly attributable to the respondent and its consultant, due to which the petitioners have suffered a huge loss for which they have unjustly not been compensated by the respondent despite several requests, representations and reminders. As a result, disputes have arisen between the petitioners/contractor and the respondent/employer that can be resolved only through arbitration as agreed by the parties in the said contract dated 24th December, 2008.

3.1 There were numerous reasons for the inordinate delay in completion of the contract including but not limited to Release of Right of Use (ROU) by the respondent being discontinuous and beyond grace period; frequent interferences and work stoppages by land owners for various reasons attributable to the employer/respondent and its consultant.

3.2 The petitioners had to maintain resources beyond the contractual completion date to complete the works in all respects and for doing the same the petitioners had to incur additional costs.

3.3 While asking for extension of time for completion of the said contract, the petitioners also sought for extended stay compensation vide letter dated 14.07.2010 wherein it clearly highlighted that due to the delay in RoU release for which the employer/consultant were solely responsible, the petitioners were entitled to invoke Clause 42.0 of the Special Conditions of the Contract (SCC).

3.4 Vide letter dated 12th April, 2011, the petitioners again raised its legitimate claim for extended stay compensation under clause 42 of the SCC

wherein it clearly demonstrated its eligibility for extended stay compensation by highlighting the non-fulfilment of numerous contractual obligations on part of the respondent and its consultant resulting in delay of completion of the said contract.

4. It is alleged that the petitioners' legitimate claim for compensation by letter dated 12th April, 2011 was not considered favourably by the Engineer-in-Charge (EIC), who by letter dated 23rd April, 2011 unjustifiably alleged contributory delay on part of both parties whereas it was amply clear that the delay in completion of the contract dated 24th December, 2008 was caused due to reasons that were wholly attributable to the respondent and its consultant. The rejection by the EIC by letter dated 23rd April, 2011 is wholly illegal, contrary to the terms of the contract, unsustainable and unjustified.

5. It is averred that the respondent misused its dominant position and along with its consultant threatened to withhold payment of the undisputed amount of Rs.11,08,83,385/- for work done by the petitioners under the said contract along with retention money for a sum of Rs.19,69,72,667/- whilst further threatening to withhold the release of the performance bank guarantees furnished by the petitioners under the contract unless the petitioners agreed in writing that there was concurrent delay on its part and issue No-Claim Certificate and a No-Dues Certificate.

6. In view of the aforesaid threat, the petitioners in order to get the undisputed amount of Rs.11,08,83,385/- for work done under the contract and to secure the release of the bank guarantees and the retention money was coerced to take the following steps:

- (i) Issue letter dated 18th May, 2011 seeking extension of the contract at least till 17th January, 2011 without any penalties

and reductions and without any financial implications. The petitioners were forced to aver in the said letter that there were concurrent delays on either side for completion of the project work.

- (ii) To issue a No-Claim Certificate and a No-Dues Certificate dated 18th May, 2011 even though it had further claims in the form of Extended Stay Compensation and retention money.
- (iii) Submit Bill No.STG-ECIL/VDPL/SECTION-C/FINAL BILL dated 30th March, 2011 for Rs.11,08,83,385/- under the cover of letter dated 20th May, 2011 on 26th May, 2011 that only included payment for the work done by the petitioners under the contract and not claim for extended stay compensation of Rs.33,53,15,996/- and retention money for a sum of Rs.19,69,72,667/-.

7. It is submitted by the petitioners that under duress forwarded the above mentioned final bill to the consultant for the work completed by it under the contract. The said bill as raised by the petitioners did not include the sum of Rs.19,69,72,667/- towards retention money and the legitimate claims of the petitioners.

8. The petitioners submit that the aforesaid certificate were issued as a result of the undue influence and relentless pressure exercised by the respondent and its consultant by misusing their dominant position under the said contract as alleged by the petitioners.

8.1 By e-mail dated 8th July, 2011, the respondent through the consultant again coerced the petitioners to specifically withdraw its claims for extended stay compensation raised vide the letter dated 12th April, 2011 in order to secure its other legitimate dues arising from fulfilment of the terms and

conditions of the contract including release of the performance bank guarantees furnished by the petitioners.

8.2 The petitioners, under duress, was left with no option but to withdraw its legitimate and genuine claims for extended stay compensation vide letter dated 8th July, 2011 in order to secure atleast the undisputed amount due and payable by the respondent along with the retention money and to further secure release of its bank guarantees.

8.3 Pursuant to coercing the petitioners to withdraw its legitimate claim for extended stay compensation, the respondent upon completion of the contract paid only Rs.27,21,46,148/- to the petitioners in two parts i.e. the above-mentioned ADHOC payment of Rs.8,43,06,716/- on 16th June, 2011 and balance of Rs.18,78,39,422/- on 8th August, 2011 whilst further retaining a sum of Rs.3,57,09,904/-. In light of the illegal conduct of the respondent, the petitioners had no option but to wait for the respondent to make the payment for a sum of Rs.3,57,09,904/- as retained by the respondent while making the inadequate payment of Rs.18,78,39,422/- on 8th May, 2011 and to further wait for release of the petitioners' bank guarantee, before reiterating its claim for extended stay compensation. After numerous efforts made by the petitioners, the respondent finally released the bank guarantees furnished by the petitioners under the contract on 26th March, 2012.

Once the bank guarantees were released on 26th March, 2012 and the retention money was paid, the petitioners reiterated the demand for payment of extended stay compensation.

8.4 The respondent refused to even consider payment of extended stay compensation. Therefore, in order to legitimately claim the amount for extended stay compensation and to settle other disputes between the parties, the petitioners was left with no option but to issue notice dated 25th May,

2012, inter alia, invoking the arbitration clause at Clause 59 of the Special Conditions of the Contract which form part of the contract.

9. It is alleged in the petition filed before this Court that the petitioners are legally entitled to an amount of Rs.33,53,15,996/- towards extended stay compensation but the respondent had misused its dominant position to coerce the petitioners to give No Claim and No Dues Certificates under duress along with the withdrawal letter dated 8th July, 2011.

Respondent's Case

10. The respondent has filed its reply. The main contention of the respondent is that the contract dated 24th December, 2008 entered into between the parties stood completely discharged by the performance of respective obligations by the parties. There are no arbitrable disputes between the parties. The present petition filed by the petitioners is misconceived, frivolous and baseless.

11. It is submitted by the respondent that there was full and final settlement of all claims with respect to contract dated 24th December, 2008 resulting in discharge by accord and satisfaction which is also evident from (i) issuance of 'No Claim & No Dues Certificates' dated 18th May, 2012 by the petitioners/contractor, (ii) issuance of Completion Certificate by respondent/GAIL, (iii) receipt of part payment of Rs.8,43,06,716/- under Final Bill dated 30th March, 2011 (revised on 26th May, 2011) made on 16th June, 2011, (iv) voluntarily and unconditionally withdrawal of claim for the extended stay compensation by the petitioners/contractor vide its letter dated 8th July, 2011 and (v) receipt of balance payment of Rs.18,78,39,422/- as per final bill (revised on 26th May, 2011). As such upon 8th August, 2011, the contract dated 24th December, 2008 stood closed and all claims and issues between the parties came to an end. However, the petitioners with an

intention to extort money from the respondent is now falsely alleging that the said voluntarily and unconditional withdrawal of ESC was under coercion and duress and maliciously seeking to reopen the contract dated 24th December, 2008 which is impermissible. As such the present application is liable to be dismissed.

12. It is alleged that after voluntarily issuing 'No Claim & No Dues Certificates' dated 18th May, 2011, the petitioners is falsely alleging that the same were issued under undue influence and pressure by the respondent and its consultant. The inference sought to be drawn by the respondent that since the said 'No Claim & No Dues Certificates dated 18th May, 2011 and also Completion Certificate dated 25th May, 2011 were issued before final bill dated 30th March, 2011 (revised on 25th May, 2011) were raised, the said 'No Claim & No Dues Certificates dated 18th May, 2011 was issued under undue influence and pressure is false and incorrect. There remains no arbitrable dispute between the parties once 'No Claim & No Cues Certificates dated 18th May, 2011 was issued voluntarily by the contractor and by merely alleging duress and coercion the contractor seeks to reopen a contract which already stood discharged. It is submitted that whether the issuance of 'No Claim & No Dues Certificates dated 18th May, 2011 and withdrawal of ESC were voluntary or under coercion as alleged by the petitioners are not arbitrable disputes under the contract and as such the present application is liable to be dismissed.

13. The learned counsel appearing on behalf of the respondent has not disputed the law that after issuance of No Claim Certificate or No Due Certificate by a contractor and completion of the contract work, the contractor cannot be barred from raising its claims. However, is contention is that while pressing the prayer for referring the disputes to the Arbitrator,

the petitioners prima facie has to establish before Court that the disputes raised by the petitioners are bonafide and genuine. Mere the bald plea of fraud, coercion, duress or undue influence is not enough to a party for seeking prayer of appointment of arbitrator. The said party has to prima facie establish the same by placing the material before the Court. His submission is that in case the conduct of the petitioners is seen in a meaningful manner, it is apparent on the face of it that the dispute raised by the petitioners is not bonafide and genuine and there is no material placed on record by the petitioners before this Court to show that the plea of fraud, coercion, duress and undue influence is genuine. It is merely a bald plea. Therefore, despite of settled law on this aspect, the dispute raised by the petitioners cannot be referred for arbitration.

14. Let me now consider the rival submissions of the parties.

15. The petitioners have not disputed the fact that in the present case the petitioner had issued No Claim and No Due Certificates to the respondent who issued the completion Certificate. The petitioners in its letter and claim dated 12th April, 2011 raised contentions for Extended Stay Compensation (hereinafter referred to as “ESC”). The same was replied by the respondent by letter dated 23rd April, 2011 wherein it was clarified by the respondent that the petitioners ESC was not tenable in terms of the contract dated 24th December, 2008. The said claim is only entertainable under Clause 42 when the reasons for the delay are “solely attributable to Employer/Consultant”.

16. It is not disputed by the learned counsel for the petitioners that at the time of sending the final bill, the claim of ESC was not included. The relevant extracts of the said letter dated 23rd April, 2011 is reproduced as under:

“The above reaffirms the fact that M/s STG-ECIL on their part had delayed all the back and activities, completion of which were vital for completing the restoration and in this respect please refer to earlier EIL letter no.EIN/6921/303/03/164 Dated 31.08.2010 vide which M/s STG ECIL were informed about non completion of restoration even five months beyond ACHIEVING COMMISSIONING between IP3 to IP 4.

As per the clause no.42.0 of SCC, Extended stay claim IS TENABLE ONLY for the delay solely attributable to the owner and from the above fact it is evident that the date from which M/s STG-ECIL have put forward the claim, there were many deliverable delayed mainly on account of delayed/inadequate mobilisation by M/s STG-ECIL. Further, M/s STG-ECIL had progressively demobilised the manpower and machinery without any prior permission from GAIL/EIL except for the auto welding unit.

As regards to the station works, not barring the initial delay of plot handing over for IP4 the delay in procurement of the piping materials in scope of M/s STG ECIL were also delayed and the work could commence from second week of August 2009 and delay is recorded in the overall completion of all the station works including civil, electrical and instrumentation.

Summarising the above, there are major contributing factors in terms of delayed/inadequate mobilisation of machinery and manpower by M/s STG-ECIL which had a cascading effect on the overall completion of the project and had also posed major hindrances for opening new ROU.

As explained above, the claim for extended stay compensation put forth by M/s STG-ECIL is not tenable and under the above circumstances M/s STG-ECIL is also advised to explain the Non Tenability of the PRS requested by M/s STG-ECIL vide letter no STG-ECIL/VDPL/Section-A/EIL/046 dated 12th April, 2011, MCEDS recovery on account of the already demobilised machinery during the course of pipeline construction from Ch 478 to 497 and reasons to exempt back charging of the

additional financial burden incurred by client on account of additional crop compensation.”

17. After the receipt of the letter dated 23rd April, 2011, the petitioners issued a letter dated 18th May, 2011. The relevant extract of the letter dated 18th May, 2011 reads as under:

“In continuation to our previous correspondences, your reply thereto, vides letters referred as above, we wish to clarify that the additional crop compensation incurred by GAIL was a result of hindrances from villagers who had issues pertaining to delayed/lesser compensations. There was inordinate delay in disbursement of compensation to villagers hence they had hindered all the activities frequently. Thus, the additional crop burden of GAIL cannot be attributed to the contractor. It is well known that GAIL had sought intervention from Local Commissioner administration to mitigate issues of villagers.

Due to stiff resistance from villagers, RoU, this is a sole obligation of GAIL/EIL, from Ch.471 to Dadri receipt terminal was provided beyond the contractual completion date i.e. 11.09.2009.

As asked, to explain the non tenability of PRS, we feel that the reasons provided in our earlier letter for time extension till 17th January, 2011 are very well justified to withstand our request to grant time extension without any levy of PRS/penalties and reductions.

It is observed that there was a concurrent delay on either side which has, consequently delayed the completion of project work and hence the Contractor sincerely requests for extension of Contract duration at least till January 17th 2011 without any penalties and reductions (vide Cl 27, Cl 62 and MCEDS) and without any financial implication on either side and assist in closing out formalities of the Contract.”

18. On the same date i.e. 18th May, 2011, the petitioners issued the No Claim Certificate and No Dues Certificate. The contents of the same are reproduced as under:

“NO CLAIM CERTIFICATE

.... This is to certify that we don't have any claim of whatsoever nature except the balance dues against the final bill.

We further certify that the payment certified against this bill shall be full and final settlement of work executed against the subject contract.”

NO DUES CERTIFICATE

.... We do hereby certify that we have paid and satisfied all dues and claims for the work of labourers. Materials supplied equipment and all other entitlement whatever touching or affecting the contract. We undertake to indemnify and to keep indemnified the Owner from and against all claims, demands, liens, obligations and liabilities whatever arising there from and relating thereto.”

19. On issuance of No Claim Certificate and No Dues Certificate, the petitioners sent a letter dated 20th May, 2011 along with the final bill dated 30th March, 2011 with a gross amount of Rs.23,95,53,775/-. The completion certificate thereafter was issued by the respondent on 25th May, 2011. The contents of the same read as under:

“COMPLETION CERTIFICATE

....This is certify that the agency has performed all its obligations under the contract.”

20. Petitioners vide its letter dated 8th July, 2011 withdraw their claim for ESC in which it was expressly agreed for recovery against pipes/materials

provided by respondent and have specifically withdrawn the claim ESC without any condition. The contents of the same read as under:

“As conveyed through email dated 08.07.2011 from M/s EIL, please find herewith our reply to your queries pertaining to the contract closure:

1. Confirmation towards withdrawal of extra claim raised vide letter STG-ECIL/VDPL/NOIDA/EIL/047 dated 12.04.2011.

STG-ECIL reply.

With reference to your email, in order to facilitate expeditious closure of contract, we hereby confirm withdrawal of our extra claim towards extended stay compensation for section C.M. No. 2. Please refer to the retention made towards the PENDING RETURN OF 48” X 27 MM THK BARE PIPE & RETENTION ON ACCOUNT PENDING RETURN OF 56” X 15.9 MM THK Casing PIPE. Kindly confirm whether the said pipes have been returned by the contractor or not. If not returned till date whether any recovery along with over head charges should be made instead of retention.

STG-ECIL reply

We agree to recovery of amount as per contract for these pipes. The recovery will be as below:

a) For 48” x 27 mm WT pipes (Length of 10.070 meters) = INR 901023.92/-

b) For 56” x 15.9 mm WT pipes (Length of 51011 meters) = INR 3803908.63/-

A total amount of INR 4704932.55/- (Rupees Forty Seven Lakh Four Thousands Nine Hundred Thirty Two and Paise Fifty Five Only) is agreed for recovery Since this recovery is as per contract, there shall be no overhead charges applicable.

3. Retention of Rs.1.03 cr on account of non submission of cenvatable invoices towards ED, Custom Duty, CVD and additional services tax. Till date no such invoices submitted by the vendor therefore recovery should be made instead of retention.

STG-ECIL reply

We have duly submitted the original invoices amounting to INR.6452043.16/- (Rupees Sixty Four Lakh Fifty Two Thousands Forty Three and Paise Sixteen Only) vide letter STG-ECIL/VDL/NOIDA/GAIL/050 dated 04.07.211 to your office. For the invoices for balance amount, we would request you to kindly give us 2 weeks for submission. We have shifted our office documents to our central documentation cell in Gujarat and these documents will be collected from that office for onward submission to GAIL for availing of Cenvat credit.

We hope that above confirmation is sufficient and will aid in earliest processing of our request for extension of time for VDPL section.

Lastly it is requested to kindly approve our request for extension of time for section C and release the retention amount towards PRS and MCEDS with the final bill payments.”

21. It is contended by the respondent that upon completion of work, the respondents raised its final bill dated 30th March, 2011 and upon the requests of the petitioner, on 16th June, 2011 an on-account of payment of 80% of net payable amount as per final bill dated 30th March, 2011 as released to the petitioner to mitigate the financial difficulties of the petitioner. Subsequently to the receipt of 80% of net payable amount, petitioner on 18th May, 2011 issued “No Claim & No Dues Certificates” to the respondent. Upon issuance of No Claim & No Dues Certificates, respondent’s consultant, Engineers India Limited on behalf of the respondent, issued

Completion Certificate dated 25th May, 2011. Thereafter on 26th May, 2011 the petitioner issued a (revised) bill dated 30th March, 2011 seeking payment of balance amount (after payment of 80% of net payable amount as per original bill dated 30th March, 2011). On 8th August, 2011, the respondent made payment of Rs.18,78,39,422/- to the petitioner towards the balance as per (revised) bill dated 30th March, 2011 (revised on 26th May, 2011) and as such on 8th August, 2011 contract dated 24th December, 2008 stood closed upon the payment of entire due amount.

22. It is the contention of the respondent that if respondent intended to keep retention amount, it would not have made any part payment at all before withdrawal of ESC on 8th July, 2011 and it is falsely alleged that the respondent vide an email dated 8th July, 2011 by Mr.Jana further coerced petitioners to withdraw ESC and the contents of the said email dated 8th July, 2011 nowhere even suggests any coercion/duress and in fact merely seeks confirmation of withdrawal of ESC. It is argued by the respondent that as per conduct of the petitioners themselves all issues with respect to the contract dated 24th December, 2008 were settled between the parties and the contract stood discharged by performance. It is being now done by petitioners, with the intention to extort money from the respondent by raising false and frivolous claims despite of unconditional withdrawal of ESC on the false grounds of coercion and duress who wants to reopen the contract dated 24th December, 2008 which already stood discharged. The petitioners in view thereof on 26th July, 2011 submitted the revised bill. Even in the revised bill there was no mention any ESC. The respondent on 8th August, 2011 made a payment of Rs.18,78,39,422/- to petitioner No.3 towards the balance 20% under the final bill and towards retention amount under the contract which was accepted by petitioners without any objection

whatsoever and nothing remained due and payable under the contract. There cannot be any threat or coercion as alleged by the petitioners.

23. Admittedly, on 23rd January, 2012, after a gap of more than six months from withdrawal of ESC and five months of receiving payments, petitioners by its letter dated 23rd January, 2012 asked to respondent for releasing bank guarantee. There was not even a whisper of any coercion/duress. The respondent released the bank guarantees on 26th March, 2012.

24. After a gap of around 2 months from release of bank guarantee, by letter dated 25th May, 2012, the petitioners invoked arbitration clause 59 of Contract dated 24th December, 2008. The main reasons stated by the petitioners is that withdrawal of ESC was only on account of apprehension of delay in final bill payment and that original bill dated 30th March, 2011 was revised on 26th July, 2011 after issuance of No Claim/No dues Certificate on 18th May, 2011 highlights that the petitioners had been forced into first issuing the said certificates and then raising the final bills for an amount that was far lesser than what was actually due and payable are absolutely baseless and untenable for the reason that the alleged ESC was neither mentioned in original bill dated 30th March, 2011 nor at revised Bill dated 30th March, 2011 (revised on 26th July, 2011).

25. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the petitioners, on the other hand, argued that the petitioners can raise any dispute for referring to the arbitration after the contract comes to an end by completion of work and acceptance of the final bill in full and final satisfaction and after issuance of No Due Certificate by the petitioners. It is also submitted by the petitioners that while deciding the present petition, this Court is not deciding the disputes raised by the petitioners. The said

disputes have to be determined by the Arbitral Tribunal. Therefore, at least the prayer made in the present petition be allowed. The learned Arbitrator would consider the claim of the petitioners and will decide as to whether the dispute raised of the petitioners is bonafide and genuine or not in view of the contention of the petitioners that by virtue of coercion and duress, the letter dated 8th July, 2011 was issued by the petitioners. This Court at this stage is not competent to decide the issue of coercion and duress, it has to be considered by the Arbitral Tribunal even ultimately, such claim may fail. Thus, the petitioners are not entitled for the prayer made in the petition.

26. In support of his case, counsel has referred to para 52 of the judgment of the Supreme Court in the case of *National Insurance Company Ltd. vs. Boghara Polyfab Private Ltd.*, (2009) 1 SCC 267, which reads as under:

“52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject :

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the Conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(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.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The 'accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes 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.”

27. Counsel says that his client is covered under the heading of sub-paras (iii) & (iv) of para 52 of the said judgment. He argues that letters issued by the petitioners in order to discharge contract completely under economic duress on account of coercion employed by the respondent. Thus, the petitioners are entitled under Clause 59 of the Arbitration Agreement to invoke the arbitration clause to refer the dispute for arbitration.

28. With regard to the decision referred by the petitioners in the case *National Insurance Company Ltd. vs. Boghara Polyfab Private Ltd.* (supra) and reference of para 52 by the petitioners, it is necessary to refer paras 25, 26 and 29 of the judgment which read as under:

“25. We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains - neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no due certificate as the case may be) confirming that he has received the payment in

full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim. Nor can he seek reference to arbitration in respect of any claim.

26. When we refer to a discharge of contract by an agreement signed by both 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 who 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.

29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both parties or by the party seeking arbitration) :

(a) Where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt. Nothing survives in regard to such discharged contract.

(b) Where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations.

(c) Where the parties to a contract, by mutual agreement, absolve each other from performance of their respective

obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there is no outstanding claims or disputes.”

29. In case paras 24, 25, 26, 29 of *Boghara Polyfab Private Ltd.* (supra) and paras 18 and 19 of *Master Construction Co.* (supra) are read together, both the judgments mandate that whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute with regard to said question i.e. arbitrable. But there is an exception. Where both parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all the obligations and there are no outstanding claims or disputes, the court will not refer any subsequent claim or dispute to arbitration. Similarly, it is mandated in subsequent judgment that a bald plea of fraud, coercion, duress and undue influence taken by the claimant is not enough and the party who sets up such a plea must prima facie establish the same by placing the material before the Court.

30. It is relevant here to mention here that ESC is sought by the petitioners under Clause 42 of the contract in order to understand the consequences thereto. The same reads as under:

“Clause 42 – Compensation for Extended Stay

42.1.1. – In case the time of completion of work is delayed beyond the time schedule indicted in the bidding document plus a grace period equivalent to 1/5th of the time schedule or 8 weeks whichever is more, due to the reasons solely attributable to Employer/Consultant, the Contractor shall be paid extended stay compensation in order to maintain necessary organizational set up and construction tools, tackles, equipments etc. at site of work. The bidder shall mention the rate for such extended stay compensation per month in the ‘Priced Part’ which will be considered for valuation. The period for the purpose of

evaluation shall be 1/5th of the time schedule or 1 (One) month whichever is less.

42.1.2 – In case bidder does not indicate the rate for extended stay compensation as per the proforma in Priced Part, it will be presumed that no extended stay compensation is required to be paid to the Contractor.

42.1.3 – In case the completion of work is delayed beyond a period of one month after the grace period then both the Employer/Consultant and the Contractor shall mutually decide the future course of action including payment of further extended stay compensation.

42.1.4 – Bidder to note that in case they don't indicate the rate for extended stay compensation as per proforma, provisions of Clause 42.0 will not be applicable for them.”

31. In case Clause 42 is read carefully, it is stipulated that the compensation for extended stay can be claimed by the contractor due to reasons solely attributable to Employer/Consultant. However, in the present case, the petitioners in its letter dated 18th May, 2011 has made the following admissions:

“It is observed that there was a concurrent delay on either side which has, consequently delayed the completion of project work and hence the Contractor sincerely requests for extension of Contract duration at least till January 17th 2011 without any penalties and reductions (vide Cl 27, Cl 62 and MCEDS) and without any financial implication on either side and assist in closing out formalities of the Contract.”

32. It is not disputed by the petitioners that Clause 42 is only applicable if the delay of the project is solely attributable to the respondent.

33. The decision in Boghara's case (supra) has been again considered by the Supreme Court in the case of ***Union of India vs. Master Construction***

Co., (2011) 12 SCC 349 wherein paras 26 and 24 of *Boghara Polyfab Private Ltd.* (supra) have been extensively dealt with about the exception. In paras 18 and 19 of the said judgment, the Hon'ble Supreme Court gave its opinion that there is no rule of the absolute kind. The said paras read as under:

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

34. In the present case, on the face of it there is no material available on record placed by the petitioner which may establish any coercion and duress on the part of the respondent. Rather, it is evident from the record that after issuance of No Claim and No Due Certificate, the petitioners themselves have written a letter dated 18th May, 2011 admitting that there was a concurrent delay on either side which has consequently delayed the completion of project. The petitioners have disputed that Clause 42 of the Contract is not applicable if delay of project is solely attributable to the respondent and only on that condition the petitioners were entitled for compensation for extended stay.

Admittedly, the petitioners have received the entire payment on 8th August, 2011. There is no whisper about the pending claim of ESC. It was raised after two months from the date of release of bank guarantee on 26th March, 2012. If there was a coercion and duress at least from 8th August, 2011 when the contract dated 24th December, 2008 stood closed, the petitioners had the opportunity to raise such claim of ESC. The explanation given by the petitioner is without any substance that it could not raised because of non release of bank guarantee. The said submission is apparently an afterthought. The conduct of the petitioners w.e.f. 18th May, 2011 till the date of raising the claim by virtue of notice dated 25th May, 2012 speaks for itself.

Hence, there is no material placed by the petitioners on record that there was coercion or duress from the side of the respondent. In fact, the facts in the present case are clearly covered within the four corners of exception as described in para 25 of the judgment of **Boghara**'s case (supra). Both the parties here closed the contract on 8th August, 2011 even as per conduct of the petitioners. The same has been fully and finally discharged

by performance of all the obligations. There are no outstanding claims or disputes. The claims raised by the petitioners are hence not arbitrable. The petition is accordingly dismissed.

(MANMOHAN SINGH)
JUDGE

APRIL 21, 2014