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

% *Judgment Reserved on: 2nd March, 2016*
Judgment Pronounced on: 8th March, 2016

+ **ARB. P. No.368/2015**

S.K.CONTRACTOR Petitioner
Through Mr.S.W. Haider, Adv.

versus

UNION OF INDIA Respondent
Through Mr.V.S.R Krishana, Adv.

+ **ARB. P. No.369/2015**

B.S.SANGWAN Petitioner
Through Mr.S.W. Haider, Adv.

versus

UNION OF INDIA Respondent
Through Mr.V.S.R Krishana, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this order, I propose to decide the abovementioned two petitions filed by the petitioners under Section 11 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC for appointment of the independent Arbitrator.

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2. The brief facts are that the petitioners are engaged in the business of construction and railway contracts.

3. In arbitration petition No.369/2015, the work pertaining to Linking of New Track (BG), laying of turn outs with PSC layout, traps, SEJs, Glued joints, leading to P Way material, handling, leading, lifting and putting of stone ballast and other connected works related to PNI & NI period between Sanehwal (including) and Ludhiana (excluding) on Ambala-Ludhiana section in connection with 3rd line from Sanehwal to Ludhiana on Chandigarh-Ludhiana New B.G. Rail Link was awarded to the petitioner-firm vide Agreement No.59-W/Dy.GE/C-II/CDG dated 24th July, 2008 amounting to Rs.1,70,94,451.71/- and the stipulated date of completion of work was 11 months from the date of issuance of acceptance letter dated 3rd January, 2008 i.e., the work awarded was to expire on 3rd December, 2008.

4. In Arbitration petition No.368/2015, the work pertaining to construction of various infrastructural facilities for maintenance of 24 Coach train at Chandigarh (like of washable aprons and storage room etc.) & balance earthwork & other works in c/w Chandigarh Freight Terminal was awarded to the petitioner vide Agreement No.140-W/C/CDG dated 12th February, 2013 for Rs.5,23,54,020.14/- and the stipulated date of completion of work was 9 months from the date of issuance of acceptance letter on 19th November, 2012, i.e., the work awarded was to expire on 18th August, 2013.

5. It is contended by the petitioners that the petitioners had made all the arrangements for execution of the work in right earnest, but work could not be completed due to failings on the part of the respondent and consequently the work was twice extended in both the matters. During the course of the

execution of the aforesaid work, various claims, clarifications and disputes arose between the parties which the petitioners brought to the notice of the concerned authority and upon which the petitioners were advised to provide full attention on the progress of the work instead of making correspondence and were assured that the dues of the petitioners would be paid along with the final bills.

6. However, on account of some technical difficulty faced by the respondent, the aforesaid work awarded to the petitioner M/s S.K. Contractor was closed on administrative ground. It is the case of the said petitioner that for execution of complete work, the petitioner had mobilized all resources, deployed machinery, deputed the staff and arranged labour, material etc. at site for construction.

The petitioners kept on following the respondent about the preparation/payment of the final bill but it kept on evading on one pretext or the other. Finally, the petitioners upon an enquiry were told that unless they sign the final bill as well as Supplementary Agreement in advance without protest, they would not get anything. Thus, under the aforesaid circumstances as well as under immense coercion/pressure, the petitioners signed the final bills and Supplementary Agreements under protest.

The element of coercion/ duress as suffered by the petitioners were, in fact, placed on record vide their letters dated 17th March, 2014 and 15th October, 2014 respectively, issued to the respondent, wherein they had duly intimated the respondent about its grievances and the possibility of raising further claims.

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7. The petitioner M/s S.K. Contractor in Arb.P. No.368/2015 submits that as anticipated by the said petitioner, the final bill prepared by the concerned department of the respondent did not include many of its claims against various items executed by the petitioner. Upon this, the petitioner having no option left but to invoke the arbitration clause as contained under clause 64 of the General Conditions of the Contract as applicable to the parties, calling upon the respondent to make the payment of the claims of the petitioner. However, now, after a considerable lapse of time, the respondent issued a reply dated 11th June, 2015, whereby to the utter shock and surprise of the petitioner, the respondent rejected the genuine arbitration claims of the petitioner taking the stand that since the petitioner had signed the Supplementary Agreement dated 31st March, 2014, the claims as such cannot be referred to arbitration.

8. Similarly, the petitioner M/s B.S. Sangwan in Arb.P. No.369/2015 also vide its letter dated 12th March, 2015 invoked the arbitration clause as contained under Section 64 of the General Conditions of the Contract. However, the respondent, till the date of filing the petition, failed to respond to the aforesaid invocation notice of the petitioner.

9. In the replies filed in both the matters, it is submitted that the arbitration petitions are liable to be hit by the doctrine of promissory estoppel(s) since the petitioners have been paid all their legitimate dues payable under the contract including payment of final bills and signed the Supplementary Agreements under clear signatures and without any protest. The Supplementary Agreement dated 31st March, 2014 would show that it categorically stipulates that:-

“.....It is further agreed by and between the parties that the party hereto of the second part (Contractor) 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 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.”

10. Lastly, it is submitted by the respondent that in view of the final settlement and signing of the Supplementary Agreements between the parties, the question of invoking the arbitration clause of the agreement does not arise at all. The petitioners have filed these misconceived petitions on the ground that inspite of having signed the agreements, they are not bound by the terms of the agreements entered into by them. The petitioners cannot resile from this position until the supplementary agreements exist.

11. Learned counsel for the respondent has referred a decision of the Supreme Court in the case of *Union of India & Ors. v. Hari Singh*, (2010) 15 SCC 201. Relevant Paras 9-13 of the same read as under:-

”9. This Court in *Nathani Steels Ltd. v. Associated Constructions* [1995 Supp (3) SCC 324] also had an occasion to examine a similar case. The Court observed that after settling the entire matter and receiving the payment, it was not open to the respondent to treat the settlement as non est and proceed to invoke the arbitration clause.

10. This Court in a relatively recent case has examined the legal position once again in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] In para 25 of the said judgment, the Court observed as under: (SCC p. 284)

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“25. Where both the 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-dues 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 it seek reference to arbitration in respect of any claim.”

11. The Court further observed in para 29 as under: (*Boghara Polyfab case* [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117], SCC pp. 285-86)

“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 the 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 are no outstanding claims or disputes.”

In this case the Court relied on earlier judgments of this Court and reiterated the legal position which has been crystallised by a series of judgments where both the parties to a contract confirmed in writing that the contract has been fully and finally discharged by the parties and there was no outstanding claim or dispute and thereafter the matter could not have been referred to arbitration.

12. In a celebrated book, *Russell on Arbitration*, 19th Edn., p. 396, it is stated that “an accord and satisfaction may be pleaded in an action on award and will constitute a good defence”.

13. In our considered view, on the basis of the above settled legal position 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, thereafter the contractor would not be justified in invoking arbitration because there was no arbitral dispute for reference to arbitration.”

12. However, it is pertinent to mention here that as per pleadings of the respondent in both the matters, it was admitted that the documents were signed under protest and thereafter supplementary agreements were executed. Record would also show that in one of the matters, as the petitioner apprehended to stop the payment, sent the letter in advance to the respondent to put the pressure for the purpose of receiving the payment. The said facts have not been denied by the counsel for the respondent. Hence,

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there is a force in the submission of the learned counsel for the petitioner that the earlier agreement which contained the arbitration clause would continue at this stage and the objections now raised by the respondent can be considered by the Arbitral Tribunal as per merits.

13. The other important factor in these cases is that under similar circumstances, in Arb. P.168/2015 between **Pradeep Vinod Construction Co. v. Union of India**, Mr. Justice S.Muralidhar on 15th May, 2015 has, *inter alia*, passed the following orders:

✓ "1. One of the objections raised by Mr. Jasjit Singh, learned counsel for the Respondent, is that the Petitioner has accepted the full and final payment and has also signed the supplementary agreement. Secondly, he submits that the Respondent should be permitted to appoint an Arbitrator in terms of the agreement between the parties.

2. Counsel for the Petitioner contests the above submission. He points out that a specific plea has been taken in the petition that the Petitioner was made to sign the supplementary agreement under duress and coercion.

3. The Court is of the view that the above question whether the discharge certificate and supplementary agreement were signed by the Petitioner under duress, would require evidence to be led and is therefore required to be examined by the learned Arbitrator. As far as the appointment of an Arbitrator is concerned, it is seen that the Respondent forfeited its right under the arbitration clause since it failed to appoint an Arbitrator despite invocation of the arbitration clause by the

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Petitioner on 5th May 2014, followed by another letter dated 12th January 2015.”

14. The findings arrived in the above referred order are binding in nature as the facts are identical. Therefore, the prayers in these petitions are liable to be allowed.

15. Thus, Justice S.K. Aggarwal, Retd. Judge of this Court is appointed as sole Arbitrator to adjudicate the disputes between the parties as mentioned in the present petitions, including their claims and counter-claims. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (‘DAC’). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings (Arbitrators’ Fees) Rules.

16. Both petitions are accordingly disposed of.

Copies of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.


(MANMOHAN SINGH)
JUDGE

MARCH 08, 2016