

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

% **Judgment reserved on : 18th May, 2016**
Judgment pronounced on: 1st June, 2016

+ **Arb. P. No. 37/2016**

P.P.S CONSTRUCTION COMPANY PVT LTD Petitioner
Through Mr.K. Sunil, Adv.

Versus

ADVANCE VALVES PVT LTD Respondent
Through Ms.Maneesha Dhir, Adv. with
Ms.Geeta Sharma and Mr.Nishant
Piyush, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition has been filed on behalf of the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for seeking appointment of Arbitrator.
2. The brief facts of the case as per the petition are that the petitioner had entered into an Agreement on 12th June, 2013 for construction of a factory building bearing No. D-7, Surajpur Ind. Area, Site- B, Surajpur, Greater Noida, U.P.
3. As required as per the agreement, the petitioner raised first running bill dated 22nd July, 2013 and thereafter, the petitioner has also many bills with the respondent. The respondent always gave impression to the petitioner that the respondent would be releasing the amount against the bills submitted by petitioner and would be

holding an amount out of the said bill being regularly submitted by the petitioner.

4. It is submitted by the petitioner that the respondent by way of email dated 17th September, 2013 wrote to the petitioner that they need to deduct 5% retention amount from each of the Bill, which will be paid back to the petitioner at the expiry of the defects liability period and in view of various changes continuously made, revised time line schedule has to be made but the respondent has deducted excess amount, the detail was sent vide emails dated 20th September, 2013 and 23rd September, 2013. It is submitted that the respondent had deducted the said amount malafidely and in a pre-planned manner with a view to coerce and harass the petitioner.

5. The petitioner had to once again write to the respondent vide email dated 28th January, 2015 by which the petitioner had expressed its complaint about the non release of the amount due and payable by the respondent to the petitioner, even by the letter dated 12th March, 2015 by which the respondent was communicated about the balance money which has been withheld by the respondent which was otherwise payable by the respondent to the petitioner. Another letter dated 20th March, 2015 was also sent in this regard.

6. Thereafter, on 14th August, 2015 and 26th October, 2015 the petitioner had served a legal notice thereby demanding various amount payable by the respondent to the petitioner who had pointed out that how the respondent adopted unscrupulous method to deprive the petitioner from claiming the amount to force the petitioner to succumb to no dues statement despite the fact that the petitioner is entitled to various amount. The reply sent by the

respondent was a false and frivolous one thereby alleging that the petitioner of his own and free will has executed no dues certificate.

7. In reply, it is stated that the petitioner has filed the petition with ulterior motive and unjust gain to itself as no cause of action has arisen in favour of the petitioner against the respondent. The petitioner has accepted its payments in full and final settlement of its dues and having certified that "no payment is due against the tender". The petitioner now cannot claim that a dispute exists between the parties. Even, it is confirmed the ledger/ account has zero balance, thus, no arbitrable dispute exists between the parties which can be referred to the Arbitrator for adjudication.

8. It is submitted that it is settled proposition of law that where both the parties to the 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, the courts will not refer any subsequent claim or dispute to the arbitration.

9. The petition is not maintainable, it is merely a bald plea of fraud, coercion, duress and undue influence even the said assertions are made without any supporting documents.

10. Admittedly, the project was completed by the petitioner before 9th February, 2015 and the site was handed over to the respondent. The petitioner by letter dated 9th February, 2015, had intimated to the respondent that it has rectified all odd job work which were identified and the same were checked by Mr. Chander Shekhar. The petitioner requested for release of balance payments due in the

account maintained by the respondent and the retention money held as per the Agreement.

11. The respondent made the following payments to the petitioner:-

- i) Cheque No. 376086 dated 20th February, 2015 for Rs. 3,48,876/- (against Bill No. 13 & 12). This amount was credited to the account of the petitioner on 25th February, 2015.
- ii) Cheque No.376565 dated 15th June, 2015 for Rs.12,85,389 (against Retention Money) and
- iii) Cheque No. 376563 dated 15th June, 2015 for Rs.5,28,840/- (against Bill No.01) the petitioner had confirmed the ledger as zero balance.

Both the amounts stated in para (ii) & (iii) were credited to the account of the petitioner on 17th June, 2015.

12. At the time of receiving the last cheque, the petitioner had certified the accounts and stated that "*The work order awarded is complete in all respect and no payment is due against the tender.*"

13. The petitioner accepted cheque No. 376086 dated 20th February, 2015, cheque No.376565 dated 15th June, 2015 and cheque No.376563 dated 15th June, 2015 in full and final settlement of its dues and also confirmed zero balance in the ledger of the respondent pertaining to the petitioner. The petitioner had confirmed the same who had accepted that the Agreements dated 12th June, 2013 and 1st March, 2014 have come to an end. Consequently all the terms and conditions contained in the agreements stood discharged including the arbitration clause.

14. The amount retained by the respondent in terms of clause 2 and 3 of the Agreement was paid to the petitioner on 17th June, 2015. The said payment was duly acknowledged by the petitioner who himself had certified that "no payment is due against the tender".

15. It is settled proposition of law that after receipt of payment in full and final settlement, the contract binding the parties comes to an end and no arbitrable dispute survives between the parties.

16. The respondent has admitted the receipt of legal notice dated 14th August, 2015 from the petitioner which was duly replied by the respondent vide its letter dated 22nd August, 2015. It was stated in the reply that the petitioner had raised certain bills duly approved and after due consideration all outstanding bills were settled amicably. Another legal notice dated 26th October, 2015 was received by the respondent which was duly replied through its counsel vide a letter dated 9th December, 2015. It was denied that the respondent further manipulated and forced the petitioner to sign such documents by which the petitioner could not claim any amount.

17. The petitioner had accepted the amount in third week of June, 2015 who accepted the settlement agreement on 15th June, 2015. The legal notice for raising the claims was received by the respondent on 20th August, 2015. In its reply dated 22nd August, 2015, the respondent disputed the plea raised by the petitioner. Copy of final settlement agreement was also attached. The same was not filed by the petitioner along with the petition. The petitioner has not denied the factum of execution of document. The details of coercion and alleged pressure have not been given.

18. The Supreme Court in the case of ***New India Assurance Company Limited v. Genus Power Infrastructure Limited*** (2015) 2 SCC 424 had rejected such plea which was raised by the contractor after the expiry of three weeks wherein in para 4,7,8 to 10 it was held as under:-

"4. After nearly three weeks i.e. on 31-3-2011 the respondent issued a notice to the appellant stating that the discharge voucher was signed under extreme duress, coercion and undue influence exercised by the appellant who took undue advantage of the extreme financial difficulties of the respondent. The respondent further sought to appoint its nominee arbitrator. On 21-4-2011 the appellant replied that there was no arbitrable dispute which existed between the parties inasmuch as the respondent had voluntarily signed the letter of subrogation and had accepted payment in full and final settlement of its claim. In the meantime on 5-4-2011 the respondent had filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act", for short) before the High Court of Delhi alleging that it had accepted the payment as stated above because of extreme financial difficulty, duress and coercion. On 10-5-2013 the High Court after recording rival submissions of the parties adjourned the matter which was then taken up on 30-5-2013 [*Genus Power Infrastructure Ltd. v. New India Assurance Co. Ltd.*, Arbitration Petition No. 212 of 2011, order dated 30-5-2013 (Del)] when the High Court observed:

"Vide order dated 10-5-2013, this Court has already observed that there is a valid arbitration agreement between the parties and there are disputes which are covered under the arbitration agreement. The learned counsel for the respondent submits that the disputes are not arbitrable. The respondent can raise this objection before the learned arbitrator."

In that view of the matter the High Court proceeded to appoint a sole arbitrator to adjudicate the disputes between the parties.

7. The question that arises is whether the discharge in the present case upon acceptance of compensation and signing of subrogation letter was not voluntary and whether the claimant was subjected to compulsion or coercion and as such could validly invoke the jurisdiction under Section 11 of the Act. The law on the point is clear from following decisions of this Court. In **National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.** [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] in paras 26 and 51 it was stated as under: (SCC pp. 284-85 & 294)

"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 practised 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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51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant

was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance."

8. In the decision rendered in *Union of India v. Master Construction Co.* [(2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] this Court observed as under: (SCC pp. 355-56, paras 18-19 & 22)

"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 a necessity to refer the dispute for arbitration at all.

19. It cannot be overlooked that the cost of arbitration is quite hugemost of the time, it runs into six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an afterthought, make-believe or lacking in credibility, the matter must be set at rest then and there.

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22. The above certificates leave no manner of doubt that upon receipt of the payment, there has been full and final settlement of the contractor's claim under the contract. That the payment of final bill was made to the contractor on 19-6-2000 is not in dispute. After receipt of the payment on 19-6-2000, no grievance was raised or lodged by the contractor immediately. The authority concerned, thereafter, released the bank guarantee in the sum of Rs 21,00,000 on 12-7-2000. It was then that on that day itself, the contractor lodged further claims."

9. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prima facie establish the same by placing material before the Chief Justice/his designate. Viewed thus, the relevant averments in the petition filed by the respondent need to be considered, which were to the following effect:

"(g) That the said surveyor, in connivance with the respondent Company, in order to make the respondent Company escape its full liability of compensating the petitioner of such huge loss, acted in a biased manner, adopted coercion, undue influence and duress methods of assessing the loss and forced the petitioner to sign certain documents including the claim form. The respondent Company also denied the just claim of the petitioner by their acts of omission and commission and by exercising coercion and undue influence and made the petitioner Company sign certain documents, including a pre-prepared discharge voucher for the said amount in advance, which the petitioner Company were forced to do so in the period of extreme financial difficulty which prevailed during the said period. As stated aforesaid, the petitioner Company was forced to sign several documents including a letter accepting the loss amounting to Rs 6,09,55,406 and settle the claim of Rs 5,96,08,179 as against the actual loss amount of Rs 28,79,08,116 against the interest of the petitioner Company. The said letter and the

aforesaid pre-prepared discharge voucher stated that the petitioner had accepted the claim amount in full and final settlement and thus, forced the petitioner Company to unilateral acceptance of the same. The petitioner Company was forced to sign the said document under duress and coercion by the respondent Company. The respondent Company further threatened the petitioner Company to accept the said amount in full and final or the respondent Company will not pay any amount towards the fire policy. It was under such compelling circumstances that the petitioner Company was forced and under duress was made to sign the acceptance letter."

10. In our considered view, the plea raised by the respondent is bereft of any details and particulars, and cannot be anything but a bald assertion. Given the fact that there was no protest or demur raised around the time or soon after the letter of subrogation was signed, that the notice dated 31-3-2011 itself was nearly after three weeks and that the financial condition of the respondent was not so precarious that it was left with no alternative but to accept the terms as suggested, we are of the firm view that the discharge in the present case and signing of letter of subrogation were not because of exercise of any undue influence. Such discharge and signing of letter of subrogation was voluntary and free from any coercion or undue influence. In the circumstances, we hold that upon execution of the letter of subrogation, there was full and final settlement of the claim. Since our answer to the question, whether there was really accord and satisfaction, is in the affirmative, in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not therefore justified in exercising power under Section 11 of the Act."

19. In similar circumstances in the case reported in ***Union of India & Ors. v. Master Construction Company*** (2011) SCC 349, the same view was taken wherein in para 10, 11, 15, 18 to 20 it was held as under:-

"10. The controversy presented before us does not concern the existence of arbitration agreement but it relates to whether after furnishing "no-claim certificates" and the receipt of payment of final bill, as submitted by the contractor, any arbitrable dispute between the parties survived or the contract stood discharged.

11. Before we turn to the factual aspect, it is appropriate to carefully consider the decision of this Court in *Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 177] at some length as the learned Senior Counsel for the contractor placed heavy reliance on it. In *Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 177] , this Court surveyed a large number of earlier decisions of this Court, namely, *Union of India v. Kishorilal Gupta & Bros.* [AIR 1959 SC 1362] , *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [AIR 1968 SC 522] , *Damodar Valley Corpn. v. K.K. Kar* [(1974) 1 SCC 141] , *BHEL v. Amar Nath Bhan Prakash* [(1982) 1 SCC 625] , *Union of India v. L.K. Ahuja* [(1988) 3 SCC 76] , *State of Maharashtra v. Nav Bharat Builders* [1994 Supp (3) SCC 83] , *P.K. Ramaiah & Co. v. NTPC* [1994 Supp (3) SCC 126] , *Nathani Steels Ltd. v. Associated Constructions* [1995 Supp (3) SCC 324] , *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.* [(1996) 1 SCC 54] , *United India Insurance v. Ajmer Singh Cotton & General Mills* [(1999) 6 SCC 400] , *Jayesh Engg. Works v. New India Assurance Co. Ltd.* [(2000) 10 SCC 178] , *SBP & Co. v. Patel Engg. Ltd.* [(2005) 8 SCC 618] , *National Insurance Co. Ltd. v. Nipha Exports (P) Ltd.* [(2006) 8 SCC 156] and *National Insurance Co. Ltd. v. Sehtia Shoes* [(2008) 5 SCC 400] .

15. The Court in *Boghara Polyfab case* [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 177] , however, noted an exception to this proposition. The exception noticed is that 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. Yet another

exception noted therein is with regard to those cases 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. It was observed that issuance of full and final discharge voucher or no-dues certificate of that kind amounts to discharge of the contract by acceptance or 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.

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 a necessity to refer the dispute for arbitration at all.

19. It cannot be overlooked that the cost of arbitration is quite huge—most of the time, it runs into six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an afterthought, make-believe or

lacking in credibility, the matter must be set at rest then and there.

20. In light of the above legal position, we now turn to the facts of the present case. At the time of receiving payment on account of the final bill, the contractor executed the certificate in the following terms:

"(a) I/we hereby certify that I/we have performed the work under the condition of Contract Agreement No. CEBTZ-14/95-96, for which payment is claimed and that *I/we have no further claims under CA No. CEBTZ-14/95-96.*

(b) Received rupees two lakh fifteen thousand one hundred seventy-eight only. *This payment is in full and final settlement of all money dues under CA No. CEBTZ-14/95-96 and I have no further claims in respect of CA No. CEBTZ-14/95-96.*" (emphasis supplied by us)

21. Even this Court has taken the same view under similar circumstances in the case reported in ***Essar Projects (India) Ltd. & Ors. v. Gail (India) Ltd.*** (2014) 209 DLT 754.

22. The decision referred by the petitioner in the case reported in ***Chairman & Md. NTPC Ltd. v. Reshmi Constructions, Builders & Contractors*** (2004) 2 SCC 663 does not help the case of the petitioner as the party in that case raised the protest of coercion on the next day itself. But the situation in the present case is different.

23. It is also settled law that if the original contract has no legal existence, the arbitration clause also cannot operate as since "the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it". Reliance is placed on ***Union of India v. Kishorilal Gupta*** AIR 1959 SC 1362 (para 10), ***Damodar Valley Corporation v. K.K.Kar*** AIR 1974 SC

158 (para 7), **Young Achievers v. IMS Learning Resources** 191 (2012) DLT 378.

i. In the case of **Kishorilal Gupta** (supra) it was held as under:-

"29. This decision is not directly in point; but the principles laid down therein are of wider application than the actual decision involved. If an arbitration clause is couched in widest terms as in the present case, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is not because the arbitration clause survives, but because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain purposes. But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it. The argument, therefore, that the legal position is the same whether the dispute is in respect of repudiation or frustration or novation is not borne out by these decisions. An equally illuminating judgment of Das, J., as he then was, in *Tolaram Nathmull v. Birla Jute Manufacturing Co. Ltd.* [ILR (1948) 2 Cal. 171] is strongly relied upon by the learned counsel for the appellant. There the question was whether an arbitration clause which was expressed in wide terms would take in a dispute raised in that case. It was contended on one side that the contract was void ab initio and on the other side that, even on the allegations in the plaint, the contract was not ab initio void. The learned Judge, on the facts of that case, held that no case had been made out for staying the suit and therefore dismissed the application filed by the defendant for stay of the suit. The learned Judge exhaustively considered the case-law on the subject and deduced the principles and enumerated them at p. 187. The learned Judge was not

called upon to decide the present question, namely, whether an arbitration clause survived in spite of substitution of the earlier contract containing the arbitration clause by a fresh one, and therefore we do not think that it is necessary to express our opinion on the principles culled out and enumerated in that decision.

23. The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

- ii. In the case of ***National Insurance Company Limited*** (supra) it was held as under :-

"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.”

24. Under these circumstances, the prayer made in the petition is misconceived. The petitioner even at the time of filing the petition did not file the copy of the final settlement agreement which was in its possession. The present petition is filed as an afterthought. No ground is made out to allow the prayers.

25. The petition is accordingly dismissed with cost of Rs.20,000/- as counsel fee which shall be paid by the petitioner to the respondent through counsel within six weeks from today.

(MANMOHAN SINGH)
JUDGE

JUNE 01, 2016