IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 15.12.2016

\+ **O.M.P. (COMM) 36/2016**

M/S ANS CONSTRUCTIONS LTD. ..... Petitioner

Versus

UNION OF INDIA ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Kuriakose Varghese and Mr V. Shyamohan, Mr Surya Prakash and Ms Saumya Sharma.

For the Respondent : Dr Ashwani Bharadwaj, Mr Rishabh Sahu and Mr Sameer Sharma.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. M/s ANS Constructions Ltd. (hereafter 'ACL') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 07.10.2015 (hereafter 'the impugned award') published by the Sole Arbitrator.

2. By the impugned award, the Sole Arbitrator has rejected all the claims made by ACL in view of the No Claim Certificate issued by ACL on 09.12.2011. ACL claims that the said No Claim Certificate was drafted by the respondent and ACL was constrained to issue the same under *"economic coersion and financial duress to receive the payments admittedly due and payable to us"*. It is contended that the respondent had withheld the amounts admittedly due to ACL and had declined to release

the same until ACL issued such a certificate. ACL claims that it was under severe economic pressure and had no option but to issue the No Claim Certificate for release of its claims.

3. Briefly stated, the relevant facts necessary to address the controversy are as under:-

3.1 On 12.04.2005, the respondent invited tenders for the landscape works at Little Binaga Bay and Shankrubagh at Naval Base for Project Seabird at Karwar (Package: A2).

3.2 ACL's bid for the aforesaid works was accepted and the respondent issued a Letter of Acceptance on 12.04.2005 for works valued at ₹2.239 crores. The parties entered into a formal contract (hereafter 'the Agreement') on 08.06.2005. The Agreement was foreclosed on 30.06.2011 and certain disputes arose between the parties with regard to the amounts payable by respondent to ACL under the Agreement. Prior to the same, ACL had submitted its final bill on 25.05.2011.

3.3 ACL claims that the respondent exerted undue influence and economic coercion by withholding the admitted amounts until ACL issued a No Claim Certificate. It is further claimed that ACL succumbed to the pressure and issued the No Claim Certificate on 09.12.2011. The respondent released the payments to ACL in March, 2012. Thereafter, on 12.09.2012, ACL addressed another communication raising several claims, which were rejected by the respondent on 22.10.2012.

3.4 ACL invoked the arbitration clause on 01.11.2012. Since the respondent did not appoint an arbitrator, ACL approached this Court for appointment of an arbitrator by filing a petition (Arb.P. 293/2013) on

03.07.2013. By an order dated 25.02.2014, this Court appointed Mr K.L. Katyal (Retd.) Superintending Engineer, NDMC as the Sole Arbitrator to adjudicate the disputes between the parties.

Submissions

4. Mr Kuriakose Varghese, learned counsel appearing for ACL earnestly contended that the arbitrator has simply accepted the No Claim Certificate and has rejected all the claims without examining the merits of the claims and without considering ACL's claim that the No Claim Certificate was obtained by undue influence and by coercion. He referred to the decision of the Supreme Court in ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.***: **(2009) 1 SCC 267** and submitted that the Supreme Court had clearly held that in cases where admitted amounts due to a party have been withheld and a No Claim Certificate is demanded as a condition for release of the same, the same would not preclude the parties from agitating their claims. He submitted that a No Claim Certificate obtained by coercion or undue pressure is invalid and would not discharge the Agreement by accord and satisfaction.

5. Mr Varghese drew the attention of this Court to the fact that the No Claim Certificate had been drafted by the respondent and ACL had recorded this fact in the covering letter forwarding the No Claim Certificate. The learned counsel further submitted that this Court had allowed ACL's petition for appointment of an arbitrator and, therefore, the respondent could not raise the defence of accord and satisfaction, thereafter.

6. Dr Ashwani Bharadwaj, learned counsel appearing for the respondent countered the submissions made on behalf of ACL.

Reasons and Conclusion

7. The works under the Agreement were to commence on 22.04.2005 and were to be completed within a period of 33 months from the date of commencement. However, the works were delayed and the respondent granted an extension of time till 30.06.2010 without levy of compensation. Finally the Agreement was foreclosed on 30.06.2011. At that stage, certain bills were pending clearance with the respondent. The respondent was also insisting on levy of liquidated damages. Finally, ACL accepted a deduction of ₹17,10,737.85/- as liquidated damages and also other statutory dues and agreed to accept the amount of ₹39,80,733.29/- against its bills as accepted by the respondent. Admittedly, ACL issued a No Claim Certificate confirming to accept ₹39,80,733.29/- as full and final payment against its bills. The No Claim Certificate issued by ACL on 09.12.2011 reads as under:-

> "We hereby confirm that the release of Gross Amount of Rs. 39,80,733.29 (Rupees Thirty Nine Lakhs Eighty Thousand Seven Hundred and Thirty Three Twenty Nine Paise Only), deduction against liquidity damages of Rs.17,10,737.85 and other statutory deductions as per provision of Contract Agreement no. DGSB-02/2005-06 for Land Scapping Works in Little Binaga Bay & Shankrubagh at Naval Base, Karwar for Project Seabird, against IPC No. 09 & Final. We shall have no further claim on Project Seabird and the aforesaid order shall stand closed from our end. We confirm that this closure order shall not absolve us of our responsibilities under the subject order and we shall continue to discharge our

> responsibilities as provided under the terms and conditions of subject order.
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> We further confirm that in case of any liability against the order raises in future towards violation of any statutory requirements like PF of employees, claim from sub contractor, Minimum wages, Statutory taxes and duties, legal notice etc. for works executed by us, We shall bear the same fully keeping M/s MECON Limited and Project Seabird indemnified against the same in all respects."

8. The aforesaid sum of ₹39,80,733.29/- was released by the respondent to ACL in March, 2012. Although, it is stated that the No Claim Certificate was issued under coercion and undue influence but no protest of any kind was made by ACL at any stage prior to receipt of the sum of ₹39,80,733.29/- or even immediately thereafter. After ACL had received the sum, it sent a communication on 12.09.2012 raising further claims. It is also relevant to note that ACL had not invoked the arbitration clause on account of any dispute prior to 01.11.2012.

9. Even after invoking the arbitration clause, ACL did not take any immediate step for appointment of an arbitrator and the petition under Section 11 of the Act was filed by ACL more than one and a half year later, that is, on 03.07.2013.

10. The contention that the defence of accord and satisfaction was not taken by the respondent in proceedings for appointment of the Arbitrator (Arb.P. 293/2013) and thereby, the respondent had given up the same, cannot be accepted. It is seen that the order dated 25.02.2014 disposing of the petition under Section 11 of the Act (Arb.P. 293/2013) does not indicate that the controversy regarding discharge of the Agreement by accord and satisfaction was discussed or considered by the Court.

11. It is also important to refer to the provisions of Section 16(2) of the Act which reads as under :

> "16. Competence of arbitral tribunal to rule on its jurisdiction.—
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> (1) * * ** ** **
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> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator."

12. Thus, on a plain reading of Section 16(2) of the Act, the respondent would not be precluded from raising any dispute merely on the fact that it had participated in the proceedings for appointment of the Arbitrator. Thus, on the same analogy if an arbitrator is appointed by the Court without any resistance from a party, the same would not disentitle the said party to claim that the contract in question stood discharged by accord and satisfaction.

13. As stated earlier, this is not a case where the import or effect of the No Claim Certificate was considered and decided by the Court so as to enable the ACL to raise a plea of *res judicata*.

14. Before the Arbitrator, ACL had claimed that the No Claim Certificate had been issued under coercion; however, this was rejected by the Arbitrator.

15. This is plainly clear from the impugned award. The Arbitrator had reproduced the No Claim Certificate issued by ACL and thereafter observed as under:-

"Thereafter, the respondent has release the final payment of Rs. 39,80,733.29/-. However, in the application filed by the claimant have stated that the respondent threaten to withhold the entire dues if the claimant, unless the claimant furnish No Claim Certificate in the prescribed format demanded by the respondent. However, it is perusal from the record that there is no written letter by the claimant to the respondent regarding the threatened and the bill was signed under caution"(*sic*)[recte coercion]

16. No claim certificate was issued on 09.12.2011 and the admitted amount was released by the respondent to ACL in March, 2012. It is seen that even after receipt of the said amount, ACL did not raise any dispute. There is no communication that was issued by ACL alleging that No Claim Certificate was executed under duress or economic coercion. The Arbitrator had taken note of the same and had proceeded on the basis that the No Claim Certificate was valid and binding. It is on this basis that the Arbitrator rejected all the claims raised by ACL.

17. The aforesaid view is not amenable to judicial review under Section 34 of the Act since it is neither patiently illegal nor can be claimed to be opposed to public policy of India as indicated above. Accordingly, the present petition is dismissed. No orders as to costs.

VIBHU BAKHRU, J

DECEMBER 15, 2016
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