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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P 598/2015

MIHIR BUILDCON (PVT) LTD.

..... Petitioner

Through: Mr. Manish Sharma with Ms. Chandni Mehra, Advocates.

versus

AJNARA INFRASTRUCTURE (P) LTD.

..... Respondent

Through: Mr. Ravi Sikri, Senior Advocate with Mr. Deepak Yadav and Mr. Deepak Sharma, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

23.09.2016

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1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') by the Petitioner, Mihir Buildcon Pvt. Limited against the Respondent, Ajnara Infrastructure (P) Limited, seeking the appointment of an Arbitrator to adjudicate the disputes between them.

2. It is stated that the Respondent issued a Work Order dated 21st September, 2012 to the Petitioner for construction work to be carried out in towers 'I, J, K, L, M and N' in a group housing residential project, 'Ajnara Homes' in Sector 16B, Noida (Uttar Pradesh). In terms of the Work Order, 60% of the monthly RA bills were to be released by the Respondent within seven days of submission. The balance payment was to be released after the bills were checked within 15 days. The project was to be completed within 24 months.

The defect liability period for the project of 12 months. Annexure A to the Work Order comprises the general terms and conditions. Clause 34 thereof contains the arbitration clause which provides that in the event an amicable settlement is not possible between the parties in connection with the disputes arising out of the contract, it should be referred to the sole arbitration of the person having adequate technical knowledge of the trade. The venue of the arbitration was to be in Delhi.

3. According to the Petitioner, soon after receipt of the work order it began procuring the equipment from various suppliers and hiring labour. However, according to it, the Respondent did not facilitate the progress of work. A reference has been made to the letter dated 7th January, 2013 whereby the Petitioner requested the Respondent that a sum of Rs. 15 lakhs be released as payments were to be made to the labour, staff and suppliers. The disputes as regards payment of the running bills appears to have remained unresolved.

4. On 24th March, 2015 the Respondent wrote a letter to the Petitioner terminating the Work Order. The letter listed out the grievances including the slow progress of work which had pushed the delivery of the said towers of the project "very much behind the agreed schedule." The Respondent asked the Petitioner to submit its final bill after preparing the same together with their site staff/Project-in-Charge within seven days of the date of the said letter. This was to be treated as the final bill after which the Petitioner "shall have no further claim." It was stated that the left over work would be got completed by the Respondent at the Petitioner's sole cost and liability in

terms of Clause No. 3 of the Terms and Conditions mentioned in Annexure 1 of the Work Order.

5. By a letter dated 27th March, 2015, the Petitioner replied to the above termination notice terming it as "an illegal, unjustified, arbitrary and untenable action." *Inter alia* the Respondent was asked to make the following payments:

- (i) 25th R/A bill amounting to Rs. 2.17 crores;
- (ii) various claims for losses and damages amounting to approximately Rs. 3 crores;
- (iii) the final bill which was under preparation and was approximately Rs. 3 crores.

6. Further, the Petitioner demanded interest @ 18% per annum on the aforementioned payments from the date they fell due till the date of payment. According to the Petitioner, as of that date, a sum of over Rs. 10 crores as reflected in its final bill dated 1st April, 2015 was owed by the Respondent to the Petitioner.

7. It appears that certain negotiations thereafter took place between the parties. Although in the petition there is no mention of letter dated 23rd May, 2015 written by the Petitioner to the Respondent, the said letter was brought to the attention to this Court by the Respondent at the hearing on 13th January, 2016. The order passed by this Court on that date reads as under:

“Reply is already on record. Learned counsel for the Respondent has furnished the copy of the letter dated 23rd May 2015 written by the Petitioner to the Respondent prior to the date of the MoU. The

contents of the same are read as under:

“This is with referenced to meeting held in chamber of your goodself at your head office after series of negotiation we hereby settle out final bill of Rs. 2,01,00,000 from which an amount of Rs. 50.95 lakhs which has been paid to the Labour and PRWs on 18th May 2015 on our behalf be deducted. So, the net amount payable to us of Rs. 1,50,05,000. This is the net amount no deduction from this amount is to be made whatsoever. Kindly make the payment of Rs. 1,50,05,000 to us and close our agreement.’

Learned counsel for the Petitioner seeks time to take instruction in view of the letter produced in Court.
List on 29th February 2016.”

8. The fact of the matter is that the Petitioner had not denied the aforementioned letter written by it to the Respondent. Following the above letter, the parties entered into a Memorandum of Understanding (‘MoU’) on 9th June, 2015. It was signed on behalf of the Petitioner by its Director/ authorized signatory Mr. Ashok Sharma, who as noted in the MoU, was duly authorized by Resolution dated 2nd June 2015 passed by its Board of Directors authorizing him to execute the present MoU.

9. The relevant para of the Preamble of the MoU reads as under:

“And whereas the parties have now mutually agreed to amicably resolve and settle the disputes/disagreement and forgo their rights, claims etc. against each other on the terms and conditions set forth hereinafter:”

10. The following clauses of the MoU are relevant for the present petition:

“2. That the parties have further amicably resolved and settled that all kinds of advances received by the Second Party (MBPL) from the First Party (AIPL) from time to time stand adjusted and an amount of

Rs. 1,97,64,505 (Rupees one crore ninety seven lakhs sixty four thousand five hundred five only) which includes service tax, has been paid after deduction of applicable TDS and WCT amounting to Rs. 6,81,455 (Rupees six lakhs eighty one thousand four hundred fifty five only) by the First Party (AIPL) to the Second Party (MBPL) in the manner mentioned hereinafter towards full and final settlement of all the liabilities of the First Party (AIPL) towards the Second Party (MBPL) till date as claimed by the Second Party (MBPL) in respect of extra items, balance works, materials, machineries, equipments, shuttering and scaffolding on site and any kind of rental etc., and/or any other item/head and all other liabilities whatsoever including liabilities towards vendors, suppliers, sub-contractors, PRWs (Piece Rate Workers), labourers etc. for the materials supplied and/or work done and/or any other liability till the date of termination notice dated 24th March 2015 with respect to the said agreement/work order relating to the project. This amount has arisen after the settlement of all the liabilities of any nature whatsoever of the First Party (AIPL) towards the Second Party (MBPL) regarding the said agreement/work order. That the second party (MBPL) does hereby agree and undertake to raise and supply the Bill(s) in the name of the First Party (AIPL) as per the requirement and instructions of the First Party (AIPL) in accordance with the settlement amount mentioned in the present MOU. That the Second Party (MBPL) does hereby further agree and undertake to pay the applicable service tax and any other statutory taxes/cesses etc. with respect of the above stated settlement amount of Rs. 1,97,64,505 (Rupees one crore ninety seven lakhs sixty four thousand five hundred five only) and any other statutory taxes/cesses etc. as may be imposed and found due by any governmental or statutory authority with respect to the said agreement./work order.

3. That after the payment of the above mentioned amount of Rs. 1,97,64,505 (Rupees one crore ninety seven lakhs sixty four thousand five hundred five only) which includes service tax, in the manner as mentioned herein, no further amount shall be payable by the First Party (AIPL) to the Second Party (MBPL) in respect of all the liabilities of the First Party (AIPL) under the said agreement/work order relating to the project as mentioned herein or otherwise.

5. That it is hereby acknowledged, accepted and duly confirmed by the Second Party (MBPL) that the First Party (AIPL) has already paid an amount of Rs. 51,94,447 (Rupees fifty one lakhs ninety four thousand four hundred forty seven only) to the labourers, which includes debit of Rs. 1,00,000 (Rupees one lakh only) paid to the labourers (as per the list of Labour Payment annexed herewith) for and on behalf of the second party (MBPL) against the liabilities and the first party (AIPL) has drawn various cheques in favour of the various vendors/suppliers (as per the list supplied by the Second Party (MBPL) annexed herewith) for a total amount of Rs. 1,11,76,090 (Rupees one crore eleven thousand seventy six thousand ninety only) to be handed over to these vendors/suppliers directly for and on behalf of the Second Party (MBPL) against the liabilities of the Second Party (MBPL) towards the said Vendors/Suppliers with respect to the said Agreement/Work Order relating to the project. The balance amount of Rs. 27,12,513 (Rupees twenty seven lakhs twelve thousand five hundred thirteen only) out of the above mentioned settled amount has been paid by the First party (AIPL) to the Second party (MBPL) through cheque bearing No. 806107 dated 8th June 2015 drawn on Corporation Bank, Dilshad Garden, Delhi in favour of the Second Party (MBPL) as full and final settlement of all the liabilities of the First Party (AIPL) with respect to the said agreement/work order. The second Party (MBPL) does hereby assure, warrant, confirm and duly undertake that it shall not make any claim or dispute of any nature whatsoever under any circumstances against the First Party (AIPL) regarding any transaction with respect to the said Agreement/work order.

6. That the Second Party (MBPL) does hereby assure, pledge and duly undertake to discharge its all the liabilities/obligations without any demur or delay and to make all the due payments to the vendors, suppliers, sub-contractors, PRWs (Piece Rate Workers), labourers etc. for the material supplied and/or work done and/or rental and/or any other liability of any nature whatsoever including the liabilities as mentioned herein till the date of termination notice dated 24th March 2015 with respect to the said agreement/work order relating to the project or otherwise. That the Second Party (MBPL) further assures,

confirms and undertakes that the First Party (AIPL) shall in no way be liable or responsible for the above said liabilities of the Second Party (MBPL) and the same shall be borne and paid solely by the Second Party (MBPL) from its own funds and resources.

7. That all disputes/disagreements between the parties in respect of the said agreement/work order relating to the project have now been fully and finally settled by the parties amicably with their sweet and free will and without any kind of pressure, force, threat, coercion, intimidation, compulsion or undue influence of any kind whatsoever. Both the parties have mutually agreed and accepted that no further claims or disputes of any kind whatsoever under any circumstances in respect of, relating to or arising from the said Agreement/Work Order shall be made or entertained by any of the parties against the other and that the parties have specifically and voluntarily forgone their respect rights, claims etc. in this regard.

8. That the said Agreement/Work order relating to the project entered into between the parties is hereby mutually rescinded/terminated for all intents and purposes by the parties from the date of execution and signing of this Memorandum of Understanding. That the Second Party (MBPL) does hereby undertake to indemnify the first Party (AIPL) and to keep the first Party (AIPL) indemnified and harmless for all times to come against all claims, demands, actions, proceedings, liens, damages, costs, losses, charges and expenses etc., which may be brought a command against the First Party (AIPL), on which the First Party (AIPL) may or may have to incur or may have to suffer, directly or indirectly, with respect to the Said Agreement/Work Order and/or as a result of present settlement between the Parties and/or due to failure of the Second Party (MBPL) in discharging its liabilities/obligations as mentioned herein for all intents and purposes. The Second Party (MBPL) does hereby further undertake that if the First Party (AIPL) suffers or may have to suffer, directly or indirectly, any expenses, costs, losses and/or charges etc. of any nature whatsoever for any default of the Second Party (MBPL) in discharging its liabilities/obligations as mentioned herein or otherwise, then the Second Party (MBPL) shall pay all such expenses, costs, losses and/or charges etc. along with penal interest @ 5% per

month compounded monthly and all the damages to the First Party (AIPL) immediately on demand without any objection.”

11. In para 19 of the petition, it is stated that “the Respondent told the Petitioner that it would only clear the dues of the labour, sub-contractor, if the Petitioner agreed to take a much lesser amount and if the Petitioner agreed to enter into an MoU on terms prepared and dictated by the Respondent. The Petitioner was under a lot of pressure both financial and mental on account of large unpaid bills and dues for work done and was facing a lot of pressure from its sub-contractors and labour. The Petitioner having no option agreed to the Respondent’s terms and it is in those circumstances, based on force, pressure and coercion coupled with fraud that the MoU dated 9th June 2015 came to be executed with the Petitioner signing as a reluctant signatory with no option.” It is further alleged that the “wording, content and import clearly show it to be a one sided, unilateral document which favours only the Respondent.”

12. Further, in para 19, it has been averred by the Petitioner that “the Petitioner actually did not get a penny in terms of the MoU and its conditions clearly reveal that the MoU is a self serving document prepared by the Respondent only to clear its own statutory/labour/tax related liabilities and no payment in terms of the MoU actually came to the Petitioner.” In terms of the MoU, the Respondent issued a cheque bearing No. 806107 dated 8th June, 2015 drawn on Corporation Bank, Dilshad Garden, Delhi in favour of the Petitioner for an amount of Rs. 27,12,513. It is averred in para 20 that “but to the utter shock of the Petitioner, the said cheque when presented got dishonoured. The same is evidenced by the

return Memo dated 11th June, 2015."

13. It is then stated in para 21 that the fact of dishonour of cheque was brought to the notice of the Respondent by two separate notices dated 15th June, 2015 and 28th June, 2015. In the first notice dated 15th June, 2015, the Petitioner asserted *inter alia* as under:

"In order and with intention to further exploit MBPL you intentionally arranged to dishonour the cheque of In order and with intention to further exploit MBPL you intentionally arranged to dishonour the cheque of Rs. 27,12,513/- (Twenty Seven lac Twelve Thousand Five Hundred And Thirteen Only) bearing no. 806107 dated 08.06.2015 drawn on Corporation Bank, Dilshad Garden, Delhi issued in favour of MBPL, which was returned by your banker for the reasons "INSUFFICIENT FUNDS". The undersigned was again made to run from one door to another and was told to represent the said cheque again without citing any cogent reason by your company for the return of the above said instrument."

14. In the next notice dated 28th June, 2015, it was reiterated as under:

"Without prejudice to our claim against you it is stated that whereas on one hand you deliberately caused to dishonour the cheque no. 806107 dated 08.06.2015 drawn on Corporation Bank, Dilshad Garden, Delhi of Rs. 27,12,513/- issued to us by you after a long waiting period, on the other hand also you have not made any payment of Rs. 1,70,51,992 /- to our vendors, contractors and suppliers on behalf of our company (MBPL) as claimed by you in the MOU drafted by you and executed under coercion and compulsion. Therefore you have rendered your own document, though caused to be executed with coercion and compulsion by you, as NULL AND VOID. This shows that you never intended to actually make the payments to MBPL and its contractors etc. with regards to the project in question."

15. On 9th July, 2015, the Respondent replied denying the allegations in

relation to the dishonour of the cheque. It is stated that it was presented on 15th June, 2015 and “it is very much obvious from the banking record that the abovesaid cheque was honoured by our banker on the same day i.e., on 15th June, 2015 itself.” It is further asserted that the Respondent had made payments for a total sum of Rs. 1,11,76,090 to the bankers and more so the cheques issued had been encashed by the said vendors/suppliers and the remaining cheques were in the process of being encashed by the said vendors/suppliers.

16. To the above letter, the Petitioner replied on 1st August, 2015 again reiterating that the letter dated 23rd May, 2015 was not issued to you “by our free will.” It was further denied that the vendors had been paid as agreed between the parties. It was reiterated that a sum of Rs. 8,54,99,473 was still payable by the Respondent. The Respondent then nominated the Engineer to be sole Arbitrator in terms of the arbitration clause. Thereafter, the present petition was filed.

17. In response to the notice issued to the Respondent on 2nd November, 2015 by this Court, a reply was filed by the Respondent stating *inter alia* that in terms of the MoU dated 9th June 2015, there had been a full satisfaction of the outstanding claims of the Petitioner. It was pointed out that MoU had been acted upon by the Respondent for making payment to the labourers, vendors, suppliers of the Petitioner. It was stated that having derived the benefits under the MoU, the Petitioner could not challenge its validity. It was pointed out that the Petitioner had falsely alleged that the cheque of Rs. 27,12,513 issued to it by the Respondent in terms of the MoU

had been dishonoured when in fact the same had been honoured and paid on 15th June, 2015. The extract of the bank statement of the Respondent proving the said fact was included in the documents produced by the Respondent. It was further pointed out that the letter dated 15th June, 2015 sent by the Petitioner had in fact been ante-dated as the same was posted only on 20th June, 2015, i.e., after the cheque had been cleared. It is contended that the petition is in blatant abuse of the process of the court. A detailed parawise reply was also furnished by the Respondent.

18. The order dated 13th January, 2016 was passed after the above reply was filed. A rejoinder was thereafter filed by the Petitioner on 11th February 2016 in which it was stated as under:

“It is humbly submitted that the letter dated 23rd May 2015 which was admittedly written to the Respondent, refers to what transpired and agreed upon in a meeting which was held between the Petitioner and Respondent wherein a final bill of Rs. 2,01,00,000 (Rupees two crore one lakh only) was settled after a series of negotiations. The said letter very specifically mentions about the net amount payable to the Petitioner would be Rs. 1,50,05,000 (Rupees one crore fifty lac five thousand only). It clearly states that out of the settled amount of two crores as a final bill, an amount of Rs. 50.95 lakhs was to have paid to the labour and PRWs on 18th May 2015 on behalf of the Petitioner. It was further agreed in the meeting that no deduction to the said amount of Rs. 1,50,05,000 was to be made whatsoever. This letter was also given on the asking of the Petitioner as it had exerted a lot of force and pressure on the Respondent for resolving the dispute by coercing it and misleading it with regard to an alleged settlement.”

19. It is further averred in the rejoinder that even after the issuance of the letter dated 23rd May 2015 till 9th June 2015 when the MoU was executed, "the Petitioner was put under immense pressure, force and coercion with

regard to its pending dues." The case of the Petitioner is that the letter dated 23rd May, 2015 and the MoU were completely different and the Respondent in fact did not honour the terms of the letter dated 23rd May, 2015.

20. When the matter was listed before the Court thereafter on 3rd August, 2016, learned counsel for the Petitioner sought time to file an additional affidavit for which the permission was granted. Pursuant thereto, Mr. Ashok Sharma, Director of the Petitioner filed an additional affidavit dated 6th September, 2016 in which *inter alia* it was stated that "on the asking of the Respondent and having no option, the Petitioner issued a letter dated 23rd May, 2015 making it clear that Rs. 1,50,05,000 was the net amount that was to come to it." It was reiterated that the MoU was a completely one sided document prepared by the Respondent. It was now admitted that the letter dated 15th June 2015 was posted on 20th June 2015 with the postal receipt having been placed on record by the Petitioner itself. It is contended that either which way, the Petitioner on the sixth or the tenth day from the MoU dated 9th June, 2015 challenged the same.

21. Mr. Manish Sharma, learned counsel appearing for the Petitioner submitted that the present case would be covered by the two illustrations given by the Supreme Court in its decision in ***National Insurance Co. Limited v. Bophara Polyfab (P) Limited (2009) 1 SCC 267***. He in particular referred to the illustrations in para 52 (ii) and (iv) of the said judgment. Mr. Sharma, also referred to the decision dated 28th September, 2012 of this Court in Arbitration Petition No. 353 of 2011 (***Wishwa Mittar Bajaj & Sons (Constructions) Pvt. Ltd. v. BPTP Limited***). This Court in that decision,

after referring to the above decision, and the decision in *Union of India v. Master Construction Company (2011) 12 SCC 349*, opined that the question whether the Petitioner in that case was made to sign the settlement deed, indemnity bond and affidavits under duress and coercion could be decided only after examination of witnesses as well as the documents in light of their depositions and that it was not possible for the Court to conclusively hold at that stage that the Petitioner's plea was "an afterthought, make-believe or lacking in credibility". The Court was of the view in the said case that the appropriate course would be to permit the parties to raise a preliminary issue regarding full and final satisfaction in the arbitral proceedings and depending upon the answer to the said issue, the learned Arbitrator should be asked to proceed to consider the other claims of the Petitioner.

22. Resisting the above plea, Mr. Ravi Sikri, learned Senior counsel appearing for the Respondent pointed out that there was a deliberate misrepresentation and suppression of material facts by the Petitioner. It is submitted that in the first place, the Petitioner suppressed the letter dated 23rd May, 2015 whereby the Petitioner itself offered to accept a sum of Rs. 1,500,5000 and "close our agreement" after offering to settle the final bill of Rs. 2,01,00,000 less a sum of Rs. 50.95 lakhs that had been paid by the Respondent to the Labour and PRWs. Mr. Sikri submitted that the conduct of the Petitioner arose from false submissions made in relation to dishonour of the cheque issued by the Respondent to the Petitioner in a sum of Rs. 27,12,513. The bank statement of the Respondent affirmed that the said cheque was encashed on 15th June, 2015 itself. Thirdly, it is pointed out that

unless the Petitioner was able to place on record the materials to show that even *prima facie* that it was compelled to sign the MoU, the Court should not refer the parties to the arbitration. Apart from relying on the decision of the Supreme Court in *Union of India v. Master Construction Company* (*supra*), Mr. Sikri placed reliance on the decisions in *New India Assurance Company Limited v. Genus Power Infrastructure Limited* (2015) 2 SCC 424, *Essar Projects (India) Limited v. Gail (India) Limited* (2014) 209 DLT 754 and *Prabhu Dayal Trilok Chand v. Oriental Insurance Company Limited* (2015) 217 DLT 121.

23. At the outset, the Court would like to observe that the Petitioner has not come forward with any convincing explanation why the petition as originally filed made no mention of the letter dated 23rd May, 2015 written by the Petitioner to the Respondent. This is a critical document having an important bearing on the issue raised by the Petitioner in the petition viz., that the MoU was signed by it was under duress and coercion. The said letter reveals that by that date the Petitioner had already agreed to settle the final bill for Rs. 2,01,00,000 and further agreed that an amount of Rs. 50.95 lakhs from the said amount had already been paid to the labourers and PRWs on 18th May, 2015 and that therefore the sum had to be deducted. No doubt it is stated by the Petitioner in the said letter dated 23rd May, 2015 that the net amount payable was Rs. 1,50,5000 and that there should be no deduction whatsoever from the said amount, there is nothing to show that the Respondent agreed to that condition.

24. Thereafter, the MoU dated 9th June, 2015 was entered into between

them. It is, therefore, difficult to believe that the letter dated 23rd May, 2015 was also issued under duress and coercion and that this continued upto the stage of the MoU dated 9th June, 2015. The MoU dated 9th June, 2015 had sufficient number of recitals which go to show that it was not signed under duress or coercion. As already noticed earlier, it referred to the resolution passed by the Board of Directors of the Petitioner authorizing Mr. Ashok Sharma to sign the MoU on its behalf. This shows that the decision to enter into the MoU was after deliberation. Secondly, the MoU contains a detailed narration of facts leading to the signing of the MoU. It appears to be a document signifying the consensus between the parties at least at the time of its execution. Thirdly, the calculation show that the amount payable to the Petitioner was calculates as Rs. 1,97,64,505 inclusive of service tax and works contract tax. The MoU accounts for payment in the sum of Rs. 51,94,447 already made to the labourers, including Rs. 1,00,000 paid to them on behalf of the Petitioner. It notes the fact that the cheques were drawn in favour of the vendors for a total amount of Rs. 1,11,76,090 to be handed over directly for and on behalf of the Petitioner and the balance sum of Rs. 27,12,513 has been paid by the Respondent to the Petitioner. The payment to the labourers and the vendors had otherwise to be made by the Petitioner.

25. The Court also finds that the Petitioner has made false assertions in both the notices dated 15th June, 2015 as well as 28th June, 2015 and has persisted with them in the petition. In particular, the false assertion regarding the dishonour of the cheque issued by the Respondent to the Petitioner on 15th June, 2015 in the sum of Rs. 27,11,513. It is not in dispute that when it was

first presented, the said cheque was dishonoured. The documents placed on record show that the said cheque was represented and in fact encashed by the Petitioner at 11:06:32 hours on 15th June, 2015. The bank statement produced by the Respondent giving the above details has not been disputed by the Petitioner. The letter dated 15th June, 2015 itself was dispatched, even as per the Petitioner, only on 20th June, 2015. Therefore, the Petitioner was fully aware that on the second presentation of the cheque, it was in fact encashed on that date itself. Despite this, the Petitioner continued to dispatch the above letter containing the false assertion regarding dishonour of the cheque even five days thereafter. The Petitioner persisted with the falsehood in the letter written by it on 28th June, 2015 and again when the present petition was drafted and filed on 19th October, 2015.

26. The Court is not satisfied with the weak explanation offered by the Petitioner through the rejoinder and the additional affidavit to gloss over the false statements. The Petitioner has not only come to court with unclean hands, but its story that it was made to sign the MoU dated 9th June, 2015 under duress and coercion is unbelievable and cannot be accepted.

27. The illustrations given by the Supreme Court in its decision in ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*** (*supra*) talks of a 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.” The present case is not one such. There is first a letter dated 23rd March, 2015 followed by the MoU which cannot be said to be instances of the

Petitioner having to sign on the dotted line. The other illustration talks of the claimant issuing an “antedated, discharge voucher in full and final settlement”. This is not a one-side case either. The amount in terms of the MoU issued by way of a cheque was in fact received by the Petitioner on 15th June, 2015.

28. In *Union of India v. Master Construction Con. Ltd.* (*supra*), the Supreme Court reminded that there was an exception to the proposition formulated in *Boghara Polyfab (P) Ltd.* (*supra*). This was where both the parties to a contract confirmed in writing that the contract had been fully and finally discharged by performance of all obligations and that there were no outstanding claims or disputes, then courts will not refer any subsequent claim or dispute to arbitration. Then it was observed in paras 18 and 19 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 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.”

29. Subsequently, in *New India Assurance Co. Ltd. v. Genus Power Infrastructure Limited* (*supra*), the Court reiterated the above principles and stated 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. The Court in that case declined to refer the dispute to arbitration since the plea raised by the claimant was “bereft of any details and particulars.” The letter of protest or demur raised on 15th June, 2015 might have been only one week after the cheque was issued by the Respondent to the Petitioner in terms of the MoU, noticed hereinabove. However, the letter contained a false assertion which was persisted by the Petitioner in a subsequent letter dated 28th June, 2015, and even in the petition filed much later on 19th October, 2015.

30. The Court is, therefore, satisfied that the present petition has nothing but an abuse of the process of law and deserves rejection with costs. The petition is dismissed with costs of Rs. 10,000 which shall be paid by the Petitioner to the Respondent within four weeks from today.

S. MURALIDHAR, J

SEPTEMBER 23, 2016/Rm