

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBA No. 32 of 2017**

M/s Todarmull Infrastructure Pvt. Ltd., [formerly M/s. Todarmull Infrastructure Developers JV] Through Its Authorized Signatory Shri Suresh Suntwal, Aged About 46 Years S/o Late Shri Balchand Sharma Shankar Nagar, Raipur, Chhattisgarh- 492007

---- Petitioner**Versus**

South East Central Railways Through Its General Manger, Office of General Manager, Bilaspur, Chhattisgarh - 495004

---- Respondent

For Applicant	:	Mr. Abhishek Vinod Deshmukh, Advocate.
For Non-applicant	:	Mr. Abhishek Sinha and Ms. S. Harshita, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****10/11/17**

1. This is the application for appointment of arbitrator, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act').
2. South East Central Railway (SECR), the non-applicant herein, invited bids for construction of new Divisional Office Complex and other allied and miscellaneous work in connection with setting up new Division at Raipur. The applicant's bid was accepted and ultimately, an agreement was executed between the parties on 23.08.2007 for execution of work for contract value of Rs. 8,23,30,002/- (Rupees Eight Crore Twenty Three

Lakhs Thirty Thousand and Two Only). Acceptance letter was issued with scheduled period of completion of work within 18 months from the date of acceptance letter i.e. from 23.03.2007 to 22.09.2008 providing for applicability of Section 64(1) GCC which provides for demand of arbitrator under Section 61 read with Section 64 of the GCC in accordance with provisions of Arbitration and Conciliation Act, 1996. It is a case of the petitioner that he has completed the work successfully and 'No-Claim Certificate' was issued as required in clause 16(2) of the GCC. The work was executed and certain disputes arose during the course of execution of work between the parties which were not settled amicably and accordingly, the applicant made an application requesting the non-applicant for appointment of arbitrator on 27.2.2014 which was not done and ultimately, on 09.07.2014 the application for appointment of arbitrator has been rejected on the ground that 'No-Claim Certificate' was signed by the petitioner and, therefore, there is no dispute against the subject work. Upon failure on the part of the non-applicant SECR, the applicant has filed this application under Section 11 (6) of the Act for appointment of arbitrator to dissolve the dispute.

3. Learned counsel for the applicant, submits that in appropriate cases, the High Court should appoint arbitrator to resolve the arbitral dispute that has arisen between the parties, therefore, arbitrator be appointed in this application for resolution of dispute between the parties and that 'No Claim Certificate' was signed as a condition for making payment of final bill and the security deposit. Therefore, that would not

come in the way of the petitioner.

4. On the other hand, learned counsel for the non-applicant SECR, submits that the applicant has signed the 'No-Claim Certificate' on 18.03.2011. She further submits that there is no arbitral dispute exists as 'No Claim Certificate' was given by the applicant willingly and without protest or demur either before or after signing of 'No Claim Certificate', therefore, the contract stood discharged and as such the application for appointment of arbitrator deserves to be rejected.

5. While submitting rejoinder submission, Mr. Abhishek Vinod Deshmukh, learned counsel appearing for the applicant, would contend that in the application filed for appointment of arbitrator in Arbitration Application No.32/2017 (M/s. Todarmull Infrastructure Pvt. Ltd. – Versus – South Eastern Central Railways), the applicant has pleaded that no claim certificate has been signed under duress.

6. I have heard learned counsel for the parties and considered their rival submissions and also gone through the records with utmost circumspection.

7. In order to resolve the dispute between the parties, it would be appropriate to notice clauses 16.(2) and 43.(2) of the general conditions of contract which deal with recovery of security deposit and signing of no claim certificate, respectively. Clauses 16.(2) (relevant portion) and 43.(2) of the general conditions of contract read as follows: -

“16.(2) Recovery of Security Deposit :

Security Deposit shall be returned to the contractor after the expiry of the maintenance period in all the cases other than Note (i) mentioned below and after passing the final bill based on No Claim Certificate with the approval of the Competent Authority. The Competent Authority shall normally be the authority who is competent to sign the contract. If this Competent Authority is of the rank lower than JA Grade, then a JA Grade Officer (concerned with the work) should issue the certificate. The certificate, inter alia, should mention that the work has been completed in all respects and that all the contractual obligations have been fulfilled by the contractor and that there is no due from the contractor to Railways against the contract concerned. Before releasing the SD, an unconditional and unequivocal 'No Claim Certificate' from the contractor concerned should be obtained.

43.(2) Signing Of “No Claim” Certificate : The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a “No Claim” Certificate in favour of the Railway in such form as shall be required by the Railway after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of the items covered by “No Claim” Certificate or demanding a clearance to arbitration in respect thereof.”

8. In the present case, admittedly, no claim certificate was signed on 18.03.2011 and thereafter, the applicants issued notice for appointment of arbitrator on 27.02.2014 demanding for arbitration on the ground that the work was dragged for many years beyond the original date of commencement for want of funds. The said letter was replied by the SECR Railway on 09.07.2014 in which the Railways did not protest the application for appointment of arbitrator on the ground that since the applicant has signed 'No Claim Certificate' therefore, arbitrator cannot be appointed as there is no dispute against the subject work.

9. In the rejoinder filed on behalf of the applicant in which in paragraph 4, the applicant has signed the no claim certificate as per clause 16.(2) of GCC and stated as under :-

"It is stated that the Applicant to give the 'No Claims Certificate' as in absence of such certificate the Respondent would not have released the security deposit. That, Clause 16.2 of GCC provides that *"Security Deposit shall be returned to Contractor after expiry of the maintenance period in all the cases... and after passing the final bill based on No Claim Certificate with the approval of competent authority... Before releasing the SD an unconditional and unequivocal 'No Claim Certificate' from the Contractor concerned be obtained."* Therefore, the Applicant was under compulsion to issue no claim certificate to get the SD returned.

It is denied that there was no dispute or claim raised by

the Applicant at any stage, either at the time of measurement, preparation of final bill of quantity, issuance of work completion certificate, payment of final bill in October, 2010, issuance of 'No claim Certificate' or at time of refund of security deposit in the month of June, 2011 or even thereafter. It is stated that the Applicant on several occasions had made representations to the Respondents. It is therefore, stated that the no claim certificate was given under economic duress. Copy of letters dated 13.12.2008 and 20.01.2009 sent by the Applicant where under the claims were made to the Respondent on different point are annexed herewith and marked as **Annexure “O (Colly.)”**.

10. A bare perusal of the aforesaid statement of the applicant in the rejoinder submitted by them would show that the applicant has clearly said that in absence of such certificate, the non-applicant would not have released security deposit, performance guarantee and final bill.

11. The aforesaid narration of facts would show that the general conditions of contract itself provides that security deposit shall not be released without the issuance of unequivocal and unconditional no claim certificate by the contractor. The applicant in the documents filed along with the arbitration application has clearly stated that no claim certificate has been filed under duress. Once the issuance of no claim certificate is a part and parcel of the general conditions of contract applicable between the parties, it cannot be held that issuance of no claim certificate is voluntary. It is out and out a part of the contract

emanating from the general conditions of contract. Therefore, the plea raised in this behalf that since the no claim certificate has been signed, therefore, the dispute is not arbitrable, cannot be accepted.

12. At this stage, it would be appropriate to have a glance on the judgment of the Supreme Court in the matter of **Ambica Construction v. Union of India**¹ in which Their Lordships have clearly held that issuance of no claim certificate is not an absolute bar to raise genuine claims. Paragraphs 16, 17, 18 and 20 of the report are more important which state as follows: -

“16. Since we are called upon to consider the efficacy of Clause 43(2) of the General Conditions of Contract with reference to the subject-matter of the present appeals, the same is set out hereinbelow:

"43. (2) *Signing of 'no-claim' certificate.*—The Contractor shall not be entitled to make any claim whatsoever against the Railways under or by virtue of or arising out of this contract, nor shall the Railways entertain or consider any such claim, if made by the contractor, after he shall have signed a 'no-claim' certificate in favour of the Railways, in such form as shall be required by the Railways, after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by 'no-claim certificate' or demanding a reference to arbitration in respect thereof."

17. A glance at the said clause will immediately indicate

1 (2006) 13 SCC 475

that a no-claim certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a no-claim certificate had been issued by the appellant. On the other hand, even the first arbitrator, who had been appointed, had come to a finding that no-claim certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such no-claim certificate had not been submitted under coercion and duress.

18. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in *Reshmi Constructions*² it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no-claim certificate.

20. In such circumstances we are inclined to hold that notwithstanding Clause 43(2) of the General Conditions of Contract and the submission of a no-claim certificate

² Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors; (2004) 2 SCC 663

by the appellant, the appellant was entitled to claim a reference under the contract and the Division Bench of the Calcutta High Court was wrong in holding otherwise.”

13. The judgment of the Supreme Court in **Ambica Construction** (supra) squarely applies to the facts of the present case notwithstanding the alleged no claim certificate and in view of clause 43(2) of the general conditions of contract, the applicant is entitled to claim a reference to the sole arbitrator and it will not preclude the applicant to claim for reference to the sole arbitrator.

14. The principles of law laid down in **Ambica Construction** (supra) have been followed with approval by the Supreme Court in the matter of **Associated Construction v. Pawanhans Helicopters Limited**³.

15. Similarly, the Supreme Court in the matter of **R.L. Kalathia and Company v. State of Gujarat**⁴ while following the judgment in **Ambica Construction** (supra) held as under: -

“13. From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "no-dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor,

³ (2008) 16 SCC 128

⁴ (2011) 2 SCC 400

payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able is to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

16. As a fallout and consequence of aforesaid discussion, in exercise of power under Section 11(6) of the Act, I hereby appoint Hon'ble Mr. Justice V.K. Agarwal, former Judge of M.P. High Court, B-12, Akriti Garden, Nehru Nagar, Bhopal (M.P.) 462 003 (Mob. No.9425206177) to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr. Justice V.K. Agarwal who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act and will adjudicate the dispute expeditiously.

17. The arbitration application is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
 Judge