

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Order Reserved on : 9/5/2017****Order delivered on: 19/5/2017****Arbitration Application No.40 of 2016**

M/s M.A. Builders, Through Partner :- Shri Arjundas Jethani, Aged about 61 years, S/o Late Heeranand Jethani, R/o:- Block No.306A, Sai Niwas, Choudhary Chowk, Jaripatka, Nagpur-440014

----Applicant**Versus**

1. Union of India, Through: By. Chief Bridge Engineer (Br/line), S.E.C. Railway, Bilaspur
2. General Manager, SEC Railway, Bilaspur

---- Respondents

 For Applicant : Mr.Hemant Gupta, Advocate
 For Respondents : Mr.Abhishek Sinha, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Order**

1. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "Act of 1996") for appointment of arbitrator to resolve the disputes that have arisen between the parties.
2. The applicant and the respondents entered into an agreement on 6.11.2012 for painting in steel girder bridges and miscellaneous maintenance work in steel & PSC girder bridges in the jurisdiction of SSE/Bridge/Bilaspur of Bilaspur division. The said contract was terminated after giving notice

to the applicant vide termination letter dated 16.10.2014 in terms of clause 62 of the General Conditions of Contract (hereinafter called as 'GCC'). Thereafter, joint final measurement was done on 29.11.2014. The applicant has given 'No Claim Certificate' in respect of the payments due to him in accordance with clause 43(2) of the GCC. Thereafter, he made a demand on 31.8.2015 claiming that he is entitled for ₹16,20,000/- and if claims are not settled, the arbitrator be appointed in terms of clause 64 of the GCC.

3. This letter was not replied by the respondents leading to filing of an application under Section 11(6) of the Act of 1996.
4. Reply has been filed by the respondents stating inter-alia that no arbitral dispute exists between the parties as 'No Claim Certificate' was given by the applicant without protest or demur either before or after signing of 'No Claim Certificate', therefore, the contract stood discharged. No fresh claim can be raised at this stage after having received the settled claim and in view of clause 43 (2) read with clause 62 (i) to (viii) of the GCC, the dispute cannot be referred to the arbitrator.
5. Mr.Hemant Gupta, learned counsel for the applicant, would submit that this High Court is an appropriate High Court to appoint the arbitrator to resolve the dispute. He would further submit that the applicant and respondents both are parties to the dispute and there is live claim raised by the applicant with the respondent to be adjudicated by the arbitrator. He would also submit that 'No Claim Certificate' was signed by

the appellant under duress and coercion and not voluntarily. 'No Claim Certificate' got signed by the officers of the respondents stating that his security deposit will not be released and bank guarantee will not be encashed unless 'No Claim Certificate' is signed and therefore, to meet his liabilities towards his creditors and to overcome his financial hardship, 'No Claim Certificate' was signed as it was printed form, which proves that he was forced to sign 'No Claim Certificate' and therefore, such an application for appointment of arbitrator deserves to be allowed.

6. Mr. Abhishek Sinha, learned counsel appearing for the respondents, would submit 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. He would further submit that plea of 'No Claim Certificate' under duress or coercion is an act of afterthought and is not established by material on record. He would further submit that there was no averment or allegation in the application filed under Section 11(6) of the Act of 1996 alleging that 'No Claim Certificate' was signed by the applicant under fraud or coercion or financial duress. Thus, it is bald plea, as such, application for appointment of arbitrator deserves to be rejected. He would place reliance upon the judgments of the Supreme Court in the matters of **National Insurance Company Limited Vs. Boghara Polyfab**

Private Limited¹ and New India Assurance Company Limited Vs. Genus Power Infrastructure Limited².

7. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.
8. The question for consideration would be whether accord and satisfaction in the present case upon acceptance of entire money and issuance of 'No Claim Certificate' was not voluntary and whether the applicant was subjected to duress or coercion and as such, he can validly invoke the jurisdiction of this Court under Section 11 (6) of the Act of 1996 for appointment of arbitrator.
9. Law on this point is very much well settled. In the matter of **Boghara Polyfab Private Limited** (supra), the Supreme Court has held that the party plead duress or coercion in issuance of No Claim Certificate is required to establish the same. It was held as under:-

“25. We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains - neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both parties to a contract

¹ (2009) 1 SCC 267

² (2015) 2 SCC 424

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 due 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 he seek reference to arbitration in respect of any claim.

26. When we refer to a discharge of contract by an agreement signed by both 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 who 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 practiced 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.”

10. In **Union of India and others Vs. Master Construction**

Company³, the Supreme Court has held that 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. It was observed 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

³ (2011) 12 SCC 349

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 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 in 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 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 after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.

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 concerned authority, 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.”

11. Recently, in **Genus Power Infrastructure Limited** (supra), Their Lordships again emphasized the need for material to be placed before the Chief Justice/his designate establishing the plea of coercion or duress and held as under:-

“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 31.03.2011 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."

12. The question for consideration would be whether the applicant has able to establish the plea of coercion and duress in issuance of No Claim Certificate.
13. The applicant signed 'No Claim Certificate' on 31.3.2015 which states as under:-

“ NO Claim Certificate

I hereby declare that I have no claims for the works entrusted to me against Agrt. No.07/Engg./BL/2012-13, Dtd.06.11.2012. The Variation against this work has been prepared and accepted by me.

Sd/-
Contractor

Certified that the above work entrusted to the contractor M/s M.A. Builders Nagpur against the

Agreement No.07/Engg./BL/2012-13, Dtd 06.11.2012 has been measured and billed for .

There is no outstanding claim on any materials due in this regard.

Sd/-
Asstt.Executive Engineer (Br./Line)
S.E.C. Railway, Bilaspur”

Thereafter, the applicant kept mum and only on 31.8.2015 i.e. after one year sent notice to the respondents claiming an amount of ₹ 16,20,000/- and stated in that notice that if the claims are not settled, this notice itself shall be treated as our notice to demand arbitration under clause 64 of the GCC. This notice is blissfully silent with regard to signing of 'No Claim Certificate' by the applicant on 31.3.2015. Then application for appointment of arbitrator was filed before this Court on 18.5.2016. There is no whisper in the said application about 'No Claim Certificate' having been signed by the applicant. The applicant omitted to take such plea about duress or coercion while signing 'No Claim Certificate' in the application for appointment of arbitrator filed before this Court.

14. The respondents herein filed their reply before this Court on 20.7.2016 taking a plea that the applicant has already signed 'No Claim Certificate' on 31.3.2015, therefore, now he cannot turn around and raise any claim for payment under contract and as such, the dispute is not arbitrable, only thereafter, the applicant filed his rejoinder affidavit on

22.11.2016 in which in para 4 he first time raised a plea that 'No Claim Certificate' was signed in printed form and under duress and coercion and it was not voluntary. Para 4 of the counter affidavit states as under:-

“4. That, “No claim Certificate” was signed by applicant under duress and coercion and was not voluntary, since it was forced by respondent by placing before him the printed form of 'No Claim' saying that his balance payment of Final Bill and Security Deposit will not be released, and Bank Guarantee will be encashed, unless 'No Claim' is signed. Hence to meet his liabilities towards his creditors and his financial hardships, he was perforce required to sign it. Hence by no stretch of imagination it can be said voluntary. Moreover, 'No Claim' was taken by respondent on their printed form and not on Petitioner's letter head, which proves that it was taken by coercing him.”

15. In my considered opinion, the applicant has failed to establish the plea that 'No Claim Certificate' has been signed under duress or coercion. No material has been brought on record to establish such plea. No details and particulars have been given and no protest or demur was made by the applicant at the time when 'No Claim Certificate' was signed on 31.3.2015 or soon after the letter was signed on 31.3.2015. It was signed on 31.3.2015 and after one year, notice was served to the respondents on 31.8.2015, which is conspicuously silent about 'No Claim Certificate'. Such a plea is missing and only when reply was filed by the respondent in this Court that since 'No Claim Certificate' has been issued by the applicant, therefore, dispute is not arbitrable in view of clause 43 (2) of the GCC, then only plea of duress or coercion

has been raised in the rejoinder by the applicant. Such a plea is result of afterthought. The applicant has not able to show that his financial condition was not so good that it was left with no other remedy except to accept the amount offered by the respondents. Therefore, I am of the considered opinion that accord and satisfaction accorded by the applicant by accepting the final bill and issuing 'No Claim/No dues Certificate' was voluntary and not under duress or coercion. It was full and final satisfaction of the claim and therefore, no arbitral dispute exists in order to exercise the power under Section 11(6) of the Act of 1996.

16. Accordingly, the application for appointment of arbitrator deserves to be and is hereby rejected.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-