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HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.44 of 2017

M/s. Todarmull Balchand Suntwal, Through its Authorized Signatory Shri Suresh Suntwal, age 46 years, S/o Late Shri Balchand Sharma, 18/254, Bharat Cottage, Shankar Nagar, Raipur (C.G.) - 492 007

---- Applicant

Versus

South East Central Railways, Through its General Manager, Office of General Manager, Bilaspur (C.G.) – 495 004

---- Non-applicant

AND

Arbitration Application No.45 of 2017

M/s. Todarmull Infrastructure Pvt. Ltd., Through its Authorized Signatory Shri Suresh Suntwal, age 46 years, S/o Late Shri Balchand Sharma, 18/254, Bharat Cottage, Shankar Nagar, Raipur (C.G.) - 492 007

---- Applicant

Versus

South East Central Railways, Through its General Manager, Office of General Manager, Bilaspur (C.G.) – 495 004

---- Non-applicant

For Applicants:	Mr. Abhishek Vinod Deshmukh, Advocate.
For Non-applicant:	Mr. Abhishek Sinha, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

01/09/2017

1. Since common question of law and fact is involved in these two arbitration applications, both the applications were clubbed together and they were heard together and are being disposed of by this common order.

2. These are the applications for appointment of arbitrator, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act').
3. South East Central Railway (SECR), the non-applicant herein, invited bids for construction of 64 units Type-II quarters, one unit Type-IV quarter, drain, road, dismantling of buildings and other allied and miscellaneous works along with related electrical general works in connection with replacement of quarters Type-I 64 units with Type-II 64 units and Type-IV one unit at Durg. The applicant's bid was accepted and ultimately, an agreement was executed between the parties on 26-4-2011 for execution of work. 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 19-11-2016 which was not done and the non-applicant insisted for waiving off the applicability of Section 5 of the Act. Upon failure on the part of the non-applicant SECR, the applicants have filed these applications under Section 11 (6) of the Act for appointment of arbitrator.
4. Mr. Abhishek Vinod Deshmukh, learned counsel for the applicants, 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 these two applications for resolution of dispute between the parties.

5. On the other hand, Mr. Abhishek Sinha, learned counsel for the non-applicant SECR, submits that the applicants have signed no claim certificate on 4-1-2016. He further submits that there is no arbitral dispute exists as 'No Claim Certificate' was given by the applicants willingly and without protest or demur either before or after signing of 'No Claim Certificate', therefore, the contract stood discharged. He also submits that the plea of 'No Claim Certificate' under duress or coercion is an act of afterthought and is not established by material on record. There was no averment or allegation in the applications filed under Section 11(6) of the Act alleging that 'No Claim Certificate' was signed by the applicants under fraud or coercion or financial duress. Thus, it is a bald plea, as such, the applications for appointment of arbitrator deserve to be rejected.
6. While submitting rejoinder submission, Mr. Abhishek Vinod Deshmukh, learned counsel appearing for the applicants, would contend that in the application filed for appointment of arbitrator in Arbitration Application No.45/2017 (M/s. Todarmull Infrastructure Pvt. Ltd. – Versus – South Eastern Central Railways), the applicant has pleaded that no claim certificate has been signed under duress.
7. I have heard learned counsel for the parties and considered their rival submissions and also gone through the records with utmost circumspection.
8. 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."

9. Now, I shall come to the facts of the case. In the present case, no claim certificate was signed on 4-1-2016 and thereafter, the applicants issued notice for appointment of arbitrator on 19-11-2016 demanding for arbitration on the ground of short-closer of contract agreement, as the work was dragged for two more years beyond the original date of commencement, for want of funds. The said letter was replied by the Railways on 19-12-2016 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, rather the non-applicant Railways insisted for waiving-off of the applicability of Section 5 of the Act to proceed further with the application for appointment of Arbitrator. Though in the applications for appointment of arbitrator, the applicants did not aver that no claim certificate has been filed under duress and such issue has been raised by SECR in the return filed by its, but thereafter, rejoinder was filed on behalf of the applicants in which in paragraph 7, the applicants have stated as follows: -

"It is further stated that the issue whether an subject matter is arbitrable, has to be decided by the Arbitrator. It is stated that the Applicant was compelled to give the 'No Claims Certificate' as in absence of such certificate the Respondent would not have released the security

deposit, performance guarantee and final bill, which totalled to about Rs. 50 Lakhs. 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 and PG returned as also the release of Final bill.”

10. A bare perusal of the aforesaid statement of the applicants in the rejoinder submitted by them would show that the applicants have clearly said that in absence of such certificate, the non-applicant would have released released security deposit, performance guarantee and final bill total amounting to ₹ 50 lakhs.
11. The aforesaid narration of facts would show that the general conditions of contract itself provides that security deposit shall not be issued without the issuance of unequivocal and unconditional no claim certificate from the contractor. The applicants in the documents filed along with the arbitration applications have clearly stated that no claim certificate has been filed under duress. Once the issuance of no claim certificate is 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 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 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

¹ (2006) 13 SCC 475

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 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

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

notwithstanding the alleged no claim certificate and in view of clause 43(2) of the general conditions of contract, the applicants are entitled to claim a reference to the sole arbitrator and it will not preclude the applicants 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 decision 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, 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".

3 (2008) 16 SCC 128

4 (2011) 2 SCC 400

(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 applications are allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge