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HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.35 of 2015

M/s Surendra Singh Kalra, aged 45 years, S/o Shri Balwant Singh Kalra, Railway Contractor, R/o A-507, Harsh Ashiyana, Green Park Colony, Near Maharana Pratap Chowk, Bilaspur, Tahsil and District Bilaspur (C.G.)

---- Applicant

Versus

The General Manager, South East Central Railway, Bilaspur, District Bilaspur (C.G.)

---- Non-applicant

For Applicant:	Mr. Somnath Verma, Advocate.
For Non-applicant:	Mr. Abhishek Sinha and Ms. S. Harshita, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

04/08/2017

1. This is an application filed seeking appointment of arbitrator on the strength of arbitration clause contained in the contract agreement dated 24-4-2008. The applicant entered into contract agreement for construction of major bridge No.12 (7x12.2 m PSC) and bridge No.38 (1x18.3 m PSC) in Pindrai Ghansore section detour alignment in connection with Gondia Jabalpur Gauge conversion Project. The approximate value of contract is ₹ 4,66,76,348/- and the completion period was 18 months from the date of acceptance. The agreement was executed on 1-2-2011. The work was finally measured in presence of the contractor and final bill was submitted by the contractor which was paid on 21-8-2014. Thereafter, the applicant issued notice on 15-4-2015 stating inter alia that there is

price variation for additional work which he has executed and sought appointment of arbitrator on 15-4-2015 which was replied by the Railways stating that clause 43(2) provides for no claim and once no claim certificate is issued by the contractor, he shall be debarred from disputing the correctness of the items covered by no claim certificate. Clause 63 excludes the remedy of arbitration in a case where no claim certificate has been given by the contractor and therefore no arbitrator can be appointed. Thereafter, the applicant has filed this application on 17-8-2015 for appointment of arbitrator to which reply has been filed stating that since no claim certificate has been issued by the contractor and such claims are excepted matters not within the purview of dispute resolution by arbitration, that will debar him from making claim for appointment of arbitrator as such, no arbitral dispute exists between the parties which requires reference of dispute to the Arbitral Tribunal and the application deserves to be rejected.

2. Learned counsel for the applicant submits that no claim was issued by the applicant under duress and coercion and not voluntarily. No claim was issued under compulsion on the pressure exerted by the non-applicant Railways that unless such certificate is issued, final payment would not be disbursed, therefore to meet the financial liability and to overcome the hardship, no claim certificate has been issued and it will not come in the way for appointment of arbitrator and intervention by the court and as such, the application deserves to be allowed.

3. Learned counsel for the non-applicant Railways would submit that there is no arbitral dispute exists in view of no claim certificate signed by the applicant under his own signature willingly and without protest or demur as such, this will be an explicit matter under clause 43 (2) of the contract agreement and arbitration is not the remedy and the matter cannot be referred to arbitration under the Arbitration and Conciliation Act, 1996. Even thereafter, performance guarantee and security deposit were released in favour of the applicant which he did not object and willingly accepted. He placed reliance upon the decisions of the Supreme Court in the matters of National Insurance Company Limited v. Boghara Polyfab Private Limited¹ and New India Assurance Company Limited v. Genus Power Infrastructure Limited².
4. I have heard learned counsel appearing for the parties, considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
5. 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.
6. Law on this point is very much well settled. In Boghara Polyfab Private Limited (supra), the Supreme Court has held that the party

1 (2009) 1 SCC 267

2 (2015) 2 SCC 424

pleading 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 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.”

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 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

3 (2011) 12 SCC 349

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.”

8. 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.”

9. The question for consideration would be whether the applicant has been able to establish the plea of coercion and duress in issuance of No Claim Certificate.
10. The applicant issued no claim certificate under his own letter head and his own signature on 31-5-2012 which states as under: -

Sub: No claim certificate for the work of “Execution of works for construction of major bridge No. 12(7x12.2m PSC) and bridge No.38(1x18.3m PSC in Pindrai-

Ghansore section on detour alignment in connection with Gondia-Jabalpur Gauge conversion project.

Agreement No.: C.A.No.73/Br.No.12 & 38/Pindrai-Ghansore/CEC/SECR/08

X.X.

It is to inform you that I have completed all the works on dt. 29.02.12 satisfactorily. The final measurements are accepted by me & there is no claim from my side against the above quoted agreement. Hence you are requested to kindly release my security deposit at the earliest.

11. Not only this, thereafter, performance guarantee was released in favour of the applicant on 6-5-2014 and security deposit was also released on 9-10-2014 and on that basis, rights and obligations under the contract stand discharged and the contractual obligations came to an end. The application for appointment of arbitrator was filed on 17-8-2015 in which it has been stated in paragraph 2 that certificate was obtained under threat of non-preparation of final bill and non-payment, but it has not been substantiated by filing any material on record.
12. The applicant's conduct in issuing no claim certificate under his own seal and signature on his letter-pad and even after the issuance of no claim certificate, obtaining performance guarantee on 6-5-2014 and release of security deposit on 9-10-2014 would show that the plea of duress taken by the applicant is not sincere and it is only in order to overcome the difficulty in getting such a claim.
13. 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 31-5-2012 or soon after the letter was signed on 31-5-2012. Even after when the notice of this application was served to the non-applicant, no such plea was taken in the application. Such a plea of duress is absolutely lacking in this entire application and material filed by the applicant. Therefore, in my view the issue is not arbitral in view of clause 43 (2) of the general conditions of contract. Thus, I am of the opinion that the satisfaction accorded by the applicant by accepting final bill and issuing no claim, was voluntary and not under duress or coercion. It was full and final satisfaction of claim and therefore no arbitral dispute exists in order to exercise the power under Section 11(6) of the Arbitration and Conciliation Act, 1996 following the principles of law laid down by the Supreme Court in Boghara Polyfab Private Limited (supra), Master Construction Company's case (supra) and Genus Power Infrastructure Limited (supra).

14. Accordingly, the arbitration application for appointment of arbitrator deserves to be is hereby dismissed leaving the parties to bear their own cost(s). However, this will not bar the applicant for resolution/ adjudication of dispute in accordance with law.

Sd/-
(Sanjay K. Agrawal)
Judge