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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 19.05.2017

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Pronounced on: 07.07.2017

+ O.M.P. (COMM) 240/2017

JAYCON INFRASTRUCTURE LIMITED Petitioner
Through Mr. Keshav Dayal, Sr. Advocate
with Ms.Geeta Mehrotra, Adv.
versus
SOMA ENTERPRISE LIMITED Respondent
Through

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. Present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking to challenge the Award dated 31.1.2017 made and published by the learned Arbitrator. The parties entered into an agreement on 12.02.2008. A part of the project work, namely, Earth Works and Structural works to be executed on 66.161 KM of the National Highway No.1 i.e. from KM 146.000 to KM 212.161 was awarded to the petitioner by the respondent vide letter of Award dated 23.2.2009. Two agreements were also signed between the parties dated 4.4.2009 for (i) Earth work and excavation for Highway and structure work of project between Km 146.000 to Km 212.161 for a sum of Rs.71.98 crores and (ii) structure work for the same area. The work was to

be completed within 30 months from the date of signing of the Agreement or from the date of notice of commencement of work, whichever was later.

2. It is the case of the petitioner that there were hindrances on the part of the respondent on account of which execution of the work was delayed. It is stated by the petitioner that the work was closed in July 2011. The petitioner was not satisfied on account of alleged failure of the respondent to finalise the bills and release money and the bank guarantees. The petitioner is stated to have written various communications in this regard. The parties are stated to have entered into a Termination-cum-Settlement Agreement (hereinafter referred to as 'TSA') on 29.6.2012 to bring an end to their disputes. The petitioner, however, submits that the same was got signed by the respondent under coercion and duress.

3. Initially on a petition filed in this court being Arb.Petition No.482/2012 on 11.7.2013 Mr.Justice R.C.Lahoti (Rtd.) was appointed as the Sole Arbitrator to adjudicate the disputes between parties. Later on, learned Arbitrator, namely, Mr.Justice Mukundakam Sharma, (Retd.) was appointed as the Sole Arbitrator. The learned Arbitrator entered into reference and framed the following issues:-

i. Whether the termination cum settlement agreement dated 29.06.2012 was executed by the Claimant due to undue influence and coercion exercised by the Respondent and if so, its effect?

ii. If the aforesaid issue is answered in favour of the Respondent whether the said agreement dated 29.06.2012 constitutes an accord and satisfaction of the main contract and if so, its effect?

iii. Whether the Claimant is entitled to claim and receive any amount as claimed in the Statements of Claim and if so, to what amount?

iv. If the aforesaid issue is answered in favour of the Claimant, whether the Claimant is also entitled to receive any interest on the awarded amount and if so, at what rate and for which period?

COUNTER CLAIM

v. Whether the Respondent is entitled to claim and receive any amount towards counter claims as claimed, and if so, what amount?

vi. Whether the Respondent is answered in favour of the Respondent, whether the Respondent is also entitled to receive any interest on the awarded amount and if so, at what rate and for which period?

vii. Whether the Claimant/Respondent is also entitled to claim the cost of the arbitration?

viii. Relief.”

4. The essential issue which is the fulcrum of the entire dispute is the TSA dated 29.6.2012. As per the petitioner this document was executed under undue influence and coercion and is not binding. As per the respondent this document brings an end to all disputes. The learned Arbitrator noted the submissions of the petitioner that the said document is a result of coercion, undue influence and pressure exerted by the respondent. The Award notes that the following facts were pleaded to press the contention of coercion, undue influence and pressure i.e. (i) TSA was

signed by the petitioner only because Bank Guarantee of Rs.36.79 crores was not returned back to the petitioner.

(ii) The respondents kept threatening invocation of the bank guarantees. They continued to retain a bank guarantee for a sum of Rs.3.10 crores.

(iii) Claims worth as much as Rs.155 crores had to be foregone by executing the TSA which is an instance of undue influence exerted by the respondent on the petitioner. (iv) the respondent having received a substantial sum of Rs.3.44 crores from the insurance company but gave only a sum of Rs.29.86 lacs to the petitioner.

5. The Award notes the legal position relying upon a catena of judgments including the judgment of the Supreme Court in ***Union of India vs. Master Construction Company, (2011) 12 SCC 349*** and ***National Insurance Company vs. M/s. Boghara Polyfab Pvt.Ltd., (2009) 1 SCC 267***. The learned Arbitrator recorded a finding that execution of the TSA is not in dispute. The petitioner has failed to prove that the TSA was obtained by fraud, coercion, duress and undue influence. It was concluded that both the parties with their eyes open and after detailed dialogue and discussion had executed the TSA. There were long discussions between the parties spanning over months. After detailed discussion and suggestions finally TSA was drawn and executed. Further, the Award notes various acts which have been undertaken by the parties to give effect to the TSA which were done after execution of the TSA. These include return of Bank Guarantee totalling Rs.29.6 crores which was returned to the petitioner by the respondent. The respondent having agreed to pay a sum of Rs.5.86 crores to the petitioner. Various such other steps have been noted in the Award. The Award also notes that it was the petitioner who initiated the process of

amicable settlement. The Award concludes that the facts demonstrate elements of mutuality and free consent in the settlement process.

5. The Award further records on issue No.2 that in view of the TSA the same constitutes accord and satisfaction of all the disputes between the parties. The Award despite having held against the petitioner on the legality and validity of TSA has gone into details of the various claims raised by the petitioner. The Award deals with various claims raised by the petitioner and has rejected the same on facts.

Regarding the counter-claim as no liability has been fixed on the respondent the learned Arbitrator noted the submissions of the respondents that there was complete accord and satisfaction in the present case due to execution of the TSA. The Award also notes the statement of learned counsel for the respondent that in case the arbitral tribunal concludes that there was a complete accord and satisfaction in the matter due to execution of the TSA which agreement binds the parties, then the respondent does not press the counter-claim. Accordingly, the counter-claim filed by the respondents was not dealt with.

6. I have heard learned senior counsel for the petitioner. He has attacked the findings of the learned Arbitrator on the TSA and has submitted as follows:-

(i) He submits that in the draft TSA that was agreed upon, certain lines which were never agreed upon have been added to the TSA. Reliance is placed on a draft TSA specially paragraphs VII, VIII and IX to submit that these changes have been incorporated in the final TSA which were not there in the draft.

(ii) It is urged that the respondent had in possession bank guarantees of the petitioner which they repeatedly kept threatening to encash. Hence, there was undue pressure on the petitioner.

(iii) Reliance is placed on the affidavit by way of evidence of the Managing Director of the petitioner Shri Jitender Mittal where he has repeated the various so called instances of undue influence and coercion. It is urged that there is no valid cross-examination of the said witness by the respondents.

(iv) It is further urged that the petitioner has to recover some amount from the respondent on account of insurance claims. It is stated that without any basis the reference to the insurance amount has also been added in the TSA.

7. In my opinion, there is no merit in the submissions of the learned senior counsel for the petitioner. The learned Arbitrator has recorded a finding of fact that the TSA is not vitiated on account of fraud, misrepresentation etc. Detailed reasons have been recorded in this regard. The learned Arbitrator has after having noted the submission of the petitioner recorded a finding of fact that before the TSA a draft TSA was circulated. There were long discussions between the parties and after detailed discussions, suggestions and corrections the final TSA was drawn and executed. The said execution of the TSA and the facts on record demonstrate elements of mutuality and free consent in the settlement process while closing the terms of the TSA. After execution of the TSA, the petitioner never raised any grouse regarding the TSA having been executed under the coercion, undue influence or pressure.

8. The Award further notes that parties have taken consequential actions pursuant to the terms and conditions of the TSA. The Award records the following consequential steps taken by the parties:-

I. Various Bank Guarantees totalling over Rs. 29.6 crores that had been submitted by the Claimant to secure the performance and unrecovered amount of mobilization, machineries etc. as on the date of execution of the TSA were returned by the Respondent.

II. In consideration of all the claims of the Claimant including those under the letter dated 25.06.2011, the Respondent had agreed to pay a sum of Rs. 5.86 crores to the Claimant.

III. In order to amicably close the contracts, the Respondent agreed to pay for certain claims raised by the Claimant, such as payment for transportation of WMM and GSB, claim towards extra MDD, payment for extra reinforcement used in the crash barrier etc.

IV. The Respondent paid extra amounts to the Claimant for rework done against flood losses. This was beyond what was contained in the contractual arrangement and those provided in BOQ attached to the Work Contracts. It did not recover the amounts towards material as per Schedule- B of Structure Contract for material recovery.

V. An amount of Rs. 11.96 crores was found to be due against the Claimant and payable to the Respondent under the head of unrecovered mobilization and machinery advance. It was agreed to by the Claimant to pay the same within 30 days from the execution date of the TSA. As per Clause 8 of the TSA, the Claimant submitted fresh Bank Guarantees of Rs. 11.96 crores to the Respondent to secure the said amount.

VI. The Respondent waived off the liability under the defect liability period provided that the Claimant made the payment of a recoverable amount of Rs. 11.96 crores.

VII. The Respondent did not levy liquidated damages and other Compensations under the works contracts.

VIII. It was agreed by the Respondent to forego all available rights and remedies against the Claimant under the works contracts including the right to get the remaining/defective works executed at Claimant's risk and cost.

IX. An indemnity Bond was also submitted by the Claimant to indemnify the Respondent and its employers for any liability towards violation of labour laws, rules and regulations in accordance with the TSA provisions.”

9. The learned Arbitrator also records that immediately after the execution of the TSA, the petitioner never protested about any coercion, undue influence or pressure. It is only when all the acts that were required to be performed by the respondent were discharged; the pretence of coercion, undue influence and pressure was raised for the first time on 31.7.2012.

10. Reference may be had to the judgment of the Supreme Court in *National Insurance Company Ltd. vs. M/s.Boghara Polyfab Pvt.Ltd., (supra)*. In that case it was the contention of the respondents therein that the appellants had forced them to accept a lower settlement and that the respondent had no alternative but to yield to the coercion and pressure applied by the appellant and sign the discharge voucher. In that case the court held as follows:-

“19. 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. 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.

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25. In several insurance claim cases arising under Consumer Protection Act, 1986, this Court has held that if a complainant/claimant satisfies the consumer forum that discharge vouchers were obtained by fraud, coercion, undue influence etc., they should be ignored, but if they were found to be voluntary, the claimant will be bound by it resulting in rejection of complaint. In *United India Insurance Co. Ltd., v. Ajmer Singh*

Cotton & General Mills MANU/SC/0463/1999 :
AIR1999SC3027 , this Court held:

The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief.

In the instant cases the discharge vouchers were admittedly executed voluntarily and the complainants had not alleged their execution under fraud, undue influence, misrepresentation or the like. In the absence of pleadings and evidence the State Commission was justified in dismissing their complaints.....”

11. It is manifest that the petitioner had to prove that the TSA was executed due to fraudulent acts of the respondent or on exercise of undue influence or on misrepresentation, if any. However, the learned Arbitrator has come to a finding of facts to the contrary. The learned Arbitrator records a finding of fact that the petitioner has failed to prove that the TSA was occasioned by fraud, coercion, duress or undue influence. This conclusion is based on the facts and circumstances as noted prior to execution of the TSA and thereafter.

12. The settled legal position is that a finding of fact recorded by an Arbitrator would normally not be interfered with by the court while considering a petition under section 34 of the Act. Reference may be had to the judgment of the Supreme Court in *Swan Gold Mining Limited vs. Hindustan Copper Limited*, (2015) 5 SCC 739 where the Supreme Court held as follows:-

“12.It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.”

13. To the above effect is also the judgment of the Supreme Court in the case of *Chebrolu Enterprises vs. Andhra Pradesh Backward Class Cooperative Finance Corporation Ltd.*, 2015 SCC Online SC 1065.

14. There are no reasons as to why the court should interfere in the findings of facts rendered by the learned Arbitrator on the validity and effect of TSA.

15. It may be noted that no submissions have been made regarding the other claims. Needless to add that once the TSA is held to be legal and valid all other claims that were filed by the parties before the learned Arbitrator cease to be valid inasmuch as the said TSA deals with all the rights and liabilities of the parties. It is not the case of the petitioner that the terms and conditions of the TSA have not been fulfilled by the respondent.

16. There is no merit in the present petition. Same is dismissed.

(JAYANT NATH)
JUDGE

July 07, 2017/n