

HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Application No.45 of 2014**

M/s Kamy India Through its Proprietor Kamlesh J Tejawani, R/o 1st Floor, 66, Sushma Building, Jaripatka, Post & P.S. Jaripatka, Nagpur-14 (M.S.)

---- Petitioner

Versus

General Manager, South East Central Railway, 5th Floor, C-Block, Bilaspur (CG)

---- Respondent

For Petitioner	:	Mr.Prafull Bharat and Mr.Harshal Chouhan, Advocate
For Respondent	:	Mr.H.S. Ahluwalia, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

26/06/2018

1. This is an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as 'Act of 1996').
2. The agreement was entered into between the petitioner and the respondent under agreement No.50/CEE/CON/SECR/BSP/2008 on 19.3.2009 and approximate value of the contract was ₹ 67,80,406/-. Ultimately, work was awarded to the petitioner on 27.11.2008. During the course of execution of work, dispute arose between the parties and contract in question was terminated on 6.3.2013 by the respondent-Railway. Thereafter, the petitioner made an application for appointment of arbitrator to settle the dispute on 3.6.2014,

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which was reiterated on 13.8.2014. It is the case of the petitioner that on 17.6.2014 the respondent intimated the petitioner that the matter has been referred to the Railway Administration and their views will be informed to him. Thereafter, on 19.8.2014 the petitioner was informed that he has signed 'No Claim Certificate' in favour of the respondent, therefore, he is debarred from disputing the correctness of the items covered by the said certificate and cannot claim arbitration and denied appointment of arbitrator. Thereafter, this application under Section 11(6) of the Act of 1996 has been filed by the petitioner herein.

- 3.** Reply to the application has been filed by the respondent-Railway opposing the said application reiterating its defence that the petitioner's application for appointment of arbitrator was rejected on the ground that final bill was passed on 26.5.2014 and 'No Claim Certificate' was submitted by the petitioner without protest, therefore, after acceptance of 'No Claim Certificate' and acceptance of final bill and signing of 'No Claim Certificate', the petitioner is not entitled to claim appointment of arbitrator particularly in view of clause 43. (2) of the general conditions of contract applicable to the parties.
- 4.** Mr.Prafull Bharat, learned counsel for the petitioner, would submit that after signing 'No Claim Certificate' petitioner is not debarred to make an application for appointment of arbitrator as clause 43.(2) of the general conditions of the

contract itself provides that the contractor shall not be entitled to make any claim unless he signs 'No Claim' certificate in favour of the Railway and and he has accordingly signed 'No Claim' certificate on 20.5.2014 and thereafter all bills of the petitioner have already been cleared. He would further submit that there is an agreement between the parties and agreement contains arbitration clause and dispute has arisen between the parties, therefore, the arbitrator be appointed in view of the provisions contained in Section 11(6) of the Act of 1996 to resolve the dispute arisen between the parties.

5. On the other hand, learned counsel for the respondent would submit that there is no arbitral dispute exists as 'No Claim Certificate' was given by the petitioner willingly and without protest or demur either before or after signing of 'No Claim Certificate', therefore, the contract stood discharged. There were no averment in the application filed under Section 11(6) of the Act of 1996 alleging that 'No Claim Certificate' was signed by the petitioner under fraud or coercion or financial duress. Therefore, the application for appointment of arbitrator deserves to be rejected.
6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the record with utmost circumspection.
7. In order to resolve the dispute between the parties, it would

be appropriate to notice clause 43.(2) of the general conditions of the contract which reads as under:-

“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.** Applicability of clause 43.(2) of the general conditions of contract is not in dispute. General conditions of contract itself provides for signing of 'No Claim Certificate' by contractor/applicant. 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.

9. 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 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

¹ (2006) 13 SCC 475

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.”

10. 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 applicants are entitled to claim a reference to the arbitral tribunal and it will not preclude the applicants to claim for reference to the arbitral tribunal.

11. 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.**

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

Pawanhans Helicopters Limited³.

12. 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".

(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".”

13. As a fallout and consequence of aforesaid discussion, in exercise of power under Section 11(6) of the Act of 1996, I hereby appoint Hon'ble Mr. Justice V.K. Shrivastava, former Judge of Chhattisgarh High Court, Ware House Road, Bilaspur, District Bilaspur (CG) to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr.

³ (2008) 16 SCC 128

⁴ (2011) 2 SCC 400

Justice V.K.Shrivastava who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act and will adjudicate the dispute expeditiously.

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

Sd/-

(Sanjay K. Agrawal)

Judge

B/-