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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 649/2017 & IA No. 15001/2017**

PUNJLLOYD LTD.

..... Petitioner

Through: Ms J.P. Sengh, Senior Advocate
with Mr Yamian Kumar, Mr Shashank Bhan
Sali, Ms Manisha Mehta, Ms Vaishali
Tanwar, Ms Mrigna Shekhar, Advocates.
versus

INDIAN OIL CORPORATION LTD.Respondent

Through: Mr Abhinav Vasisht, Senior
Advocate with Mr Ammit Mgharia,
Ms Tannishtha Singh, Ms Ayushi Gupta,
Ms Rishita Mall, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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04.04.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in connection with the 'Contract Agreement' dated 23.06.2008 (hereafter 'the Agreement'). The Agreement includes an arbitration clause. Clause 9.1.0.0 of the General Conditions of Contract in the Agreement is relevant and is set out below:-

“9.1.0.0 “Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.1.1.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.2.0.0 in respect thereof, and any dispute arising out of any amount claimed by the OWNER against the CONTRACTOR shall be referred to the arbitration by an Arbitral Tribunal comprised of 3 (three) arbitrators selected in accordance with the provisions of the Arbitration & Conciliation Act, 1996. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counterclaim(s). The CONTRACTOR shall not however, be entitled to raise as a set off, defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR’S Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.”

2. Mr Vasisht, learned Senior Counsel appearing for the respondent contended that the final bill did not refer to any Notified Claims, therefore, the petitioner could not refer to any dispute to arbitration. He further submitted that the petitioner had accepted the final bill without any protest or demur in full and final settlement of the claims.

3. He drew the attention of this Court to the Service Entry Sheet of the Memorandum of Payment signed by the parties on 10.03.2014, which, *inter alia*, contained a noting that reads as under:-

“As per clause no. 4.4.0.0 of GCC and Sl. No. 6 of Commercial Ammendment-2, Price adjustment for slippage in completion is applicable to the vendor. ‘F’ is requested to recover full LD as per contract if not recover earlier.”

4. He submitted that in terms of Clause 6.7.1.0 of the Agreement, acceptance of any amount paid by the respondent to the petitioner in respect of the final bill would be deemed to be in full and final satisfaction of all such dues. He contended that since there were no Notified Claim and the petitioner had accepted the payment made by the respondent in full and final settlement of the work done, the Agreement stood discharged and the arbitration agreement did not survive.

5. Mr Sengh, learned Senior Counsel appearing for the petitioner countered the aforesaid submissions. He did not dispute that the petitioner had accepted the final bill without any protest or objections; he, however, contended that the petitioner was assured that its request with regard to levy of liquidated damages would be relooked by a Committee appointed by the respondent. He submitted that whilst, the petitioner accepted the final bill, the disputes relating to the recovery made on account of delay in the works continued to be a contested issue.

6. I have heard the learned counsel for the parties.

7. At the outset, it is necessary to refer to Clause 6.7.1.0 of the Agreement, which reads as under:-

“6.7.1.0 The acceptance by the CONTRACTOR of any amount paid by the OWNER to CONTRACTOR in respect of the Final Bill of the CONTRACTOR in settlement of all said dues to the CONTRACTOR under the Final Bill shall, without prejudice to the claims of the CONTRACTOR included in the Final Bill in accordance with the provisions of clause 6.6.3.0 hereof, be deemed to be in full and final satisfaction of all such dues to the CONTRACTOR notwithstanding any qualifying remarks, protest or conditions imposed or purported to be imposed by the CONTRACTOR relative to the acceptance of such payment, with the intent that upon acceptance by the CONTRACTOR of any payment made as aforesaid, the contract (including the arbitration clause) shall stand discharged and extinguished insofar as relates to and/or concerns the entitlements of the CONTRACTOR under the Contract except for the CONTRACTOR’s right, if any, to receive payment in respect of his notified claims included in his Final Bill and the right to receive payment of the unadjusted balance of the Security Deposit in accordance with the provisions of Clause 6.8.3.0 hereof on

successful completion of the defect liability period. But nothing herein stated shall affect the CONTRACTOR's undercharged liabilities and obligations under the Contract.”

8. There is no dispute that the petitioner had accepted the final bill without any reservations and there were no Notified Claims in respect of which the petitioner had reserved its right to initiate any further proceedings.

9. It is also relevant to note that there are no averments in the petition, which indicates that the petitioner's acceptance of the final bill was without free consent. The averments are to the effect that whilst, the petitioner accepted the final bill, it continued to request for reconsideration of the amount withheld on account of delay.

10. It is also relevant to state that Mr Sengh did not dispute that the acceptance of the final bill in terms of Clause 6.7.1.0 of the Agreement amounts to accepting the payment in “full and final satisfaction” of the dues.

11. In view of the admitted position that the petitioner had signed the final bill and accepted the payments in full and final satisfaction of all its dues without any coercion or undue influence, the only conclusion that can be drawn is that there was full accord and satisfaction resulting in discharge of the Agreement.

12. In *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.*: (2015) 2 SCC 424, the Supreme Court had

declined to appoint an arbitrator in the case where the petitioner had issued a certificate confirming that it had received payments in full and final settlement of all dues. Although, in that case, the petitioner had also sought to urge that the said certificate was not issued by free consent, the Supreme Court had rejected the same 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 31-3-2011 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.”

13. In *Union of India and Others v. Master Construction Co.:* (2011) 12 SCC 349, the Supreme Court had 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 a 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 into 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 a 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 afterthought, make-believe or lacking in credibility, the matter must be set at rest then and there.”

14. The aforesaid decisions were also followed by the Supreme Court in a later decision in *M/s ONGC Mangalore Petrochemicals Ltd. v. M/s ANS Constructions Ltd. & Anr.*: Civil Appeal No.

1659/2018, decided on 07.02.2018 wherein the Court had observed as under:-

“19) When we refer to discharge of a contract by an agreement signed by both the 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 which 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 practised 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. But in case the party is not able to establish such a claim or appears to be lacking in credibility, then it is not open to the courts to refer the dispute to arbitration at all.”

15. As stated above, in the present case, there is no averment that the petitioner had signed the final bill and accepted the withholding of payment on account of delay in work under any coercion or undue influence. Indisputably, the petitioner had signed the final bill with free consent and thus, it is not open for the petitioner to now set up a claim contrary to the discharge signed by the petitioner in terms of the Agreement.

16. In view of the above, the present petition is dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 04, 2018
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