

(2009) 02 DEL CK 0011

In the Delhi High Court

Case No : Arbitration Application No. 211 of 2008

S.K. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Citation : (2009) 157 DLT 647 : (2009) 3 ILR Delhi 690 : (2010) 8 RCR(Civil) 1404

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Vivekanand, for the Appellant; Geetanjali Mohan and Vaishnavi, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The question whether disputes/claims under an agreement with respect where to a receipt of full and final settlement has been given or a settlement agreement has been signed, are arbitrable or not has been repeatedly vexing the Courts. Two streams of judgments/precedents exist. While one stream takes the view that a claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher has been executed by the claimant, if its validity is disputed by the claimant; the other stream takes the view that upon performance/discharge, the contract stands discharged and nothing remains neither any right to sign performance nor any obligation to perform, resultantly there cannot be any dispute and consequently there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Naturally, the two views are on distinguishable facts of their respective cases.

2. I am, personally, of the view that a party to a contract containing an arbitration agreement, when faced with a situation of being required to sign a full and final discharge or a settlement agreement, howsoever, economically coerced it may be, has two choices. Either the party can at the cost of its economic

detriment and delay in receiving even admitted payments, to not succumb into signing of such discharge or settlement agreement and ought to invoke the arbitration process at that stage itself. In such a situation, the remedy of seeking interim relief/directions from the Court or from the Arbitral Tribunal of payment of admitted amounts is available to such a party. Thus, though there may be delay in receiving the admitted and/or offered amounts but it cannot be said that the party is remediless. Alternatively, such a party can succumb to the coercion, pressure and sign the discharge voucher and/or the settlement agreement. It will then immediately receive the offered/admitted amounts. Naturally when such a party makes further claims, the other will set up a plea of the contract having been discharged and no disputes or arbitration thereof thereunder being possible. It is not as if the claimant party in such a situation is remediless. The claimant party in such a situation has the option of a civil suit available to it. In such civil suit, it will be decided whether the discharge or settlement is legal or not. If not found to be legal and valid, the same court would also adjudicate the remaining claims of such party. The other party in such eventuality would not be entitled to take the plea of the Court being not entitled to adjudicate the claims for the reason of being covered by the arbitration clause inasmuch as such party would have forfeited the rights to take such a plea by contending that the contract stood discharged.

3. In my view, once a discharged voucher or a full and final receipt or a settlement agreement is signed, the same is novation, rescission or alternation of the original contract between the parties (within the meaning of Section 62 of the Contract Act) containing the arbitration agreement. Such new contract unless itself containing an agreement of arbitration, the claim/dispute thereunder that such new contract is vitiated by fraud, undue influence, coercion can only be adjudicated by a civil court and not under the arbitration agreement under the original contract. Adjudication of such issues of fraud, undue influence, coercion in the matter of novation, rescission or alternation of the contract could not be within the ambit of the arbitration agreement in the original agreement. Section 62 of the Contract Act is clear in this regard. Where the parties to a contract agree to submit to a new contract or to rescind it or to alter it, the original contract need not to be performed. Similarly, it is always open to the to the other party, if willing to follow the dispute resolution mechanism of arbitration to always give up the plea of the contract having been so discharged and to agree on the arbitration. The other party in such case would be entitled to contest the claim on the ground that the same was validly settled/discharged and not rely merely on the written agreement of discharge/settlement. However, if it does not choose to do so, it cannot subsequently upon civil court finding the discharge/settlement to be void for the reason of fraud, undue influence or coercion, fall back on the arbitration clause and defeat the claim on that ground.

4. The courts are inundated with applications u/s 11(6) of the Arbitration Act which are being contested on such grounds of full and final settlement/discharge/settlement. As per dicta in S.B.P. and Co. Vs. Patel Engineering Ltd. and

Another, , the Chief Justice and/or his designate, when faced with such a plea has to either a) adjudicate the said plea and i) upon finding the discharge/settlement being under coercion or a result of undue influence, appoint an arbitrator to go into the claims, or ii) upon finding discharge/settlement to be not under coercion, undue influence etc., dismiss/reject the application for appointment of arbitrator OR b) leave the plea to be adjudicated fully and finally by the arbitrators.

I am prima facie of the view that the present case does not fall in the class of cases as P.K. Ramaiah, Nav Bharat Builders, Harivansh Chawla and Nathani Steels Ltd. and rather falls in the class of cases as in Reshmi Constructions. The settlement agreement appears to have been signed under coercion, meaning that the claims shall remain arbitrable under the original agreement.

19. I, however, at this stage do not deem it appropriate to return a positive finding on this aspect. In my view a positive binding finding on the averments of coercion, undue influence, etc. in the face of a written document ought not to be returned without examination of witnesses. Though it is permissible to examine witnesses while adjudicating an application u/s 11(6) of the Act but in my view if the said exercise is undertaken here, the same will lead to further delays. The parties having agreed to arbitration, it is apposite that the said claims/disputes are also adjudicated by the arbitrator only. Another single judge of this Court recently in Hero Exports v. Tiffins Barytes A.A No. 121/2008 decided on 2nd September, 2008 left the questions of coercion and extortion to be decided by arbitrator.

5. The adjudication u/s 11(6) of the Act of such a plea is likely to entail cross-examination of witness, thereby delaying the possible arbitration proceeding. The courts thus have a tendency to leave such questions to be decided in arbitration. The approach suggested by me hereinabove, would obviate such delays/situations inasmuch as the parties would have clarity that if they are signing or insisting upon signing of such a discharge/settlement for immediate benefits, they would subsequently not have the agreed remedy of arbitration and will be open to the jurisdiction of the civil courts. If such interpretation is followed, it will lead to clarity, and prevent the parties from being subjected to arbitration after obtaining documents of discharge/settlement. In such a situation, the law as developed on Section 34 of the 1940 Act is applicable. It was held in Narsingh Prasad Boobna and Others Vs. Dhanraj Mills, that where an agreement is impeached on the grounds of fraud and as to the factum or validity of contract, such a dispute does not fall under the arbitration clause and should be decided by the court. So where allegations of fraud and coercion in the matter of execution of discharge/settlement agreement is averred, the same cannot possibly be within the ambit of arbitration clause in the agreement which was admittedly discharged/settled even if by fraud, misrepresentation or coercion. Even otherwise it is settled position that the party against whom averment of fraud/coercion is made has a right of having the same adjudicated by court. See

6. My view aforesaid is but a suggestion; otherwise, the recent dicta of the Apex Court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., after noticing the two streams of judgments aforesaid and after discussing most of them, succinctly set out the law in para 19 of the judgment as under:

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 Page 4071 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.

7. Having summarized the law as aforesaid, the Apex Court noticed P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., , State of Maharashtra. Nav Bharat Builders and Nathani Steels Ltd. v. Associated Constructions in each of which cases the Court held the claims to be not arbitrable. It was found that in P.K. Ramaiah (supra) there was an unconditional acknowledgment and acceptance and the same was sought to be challenged and reference to arbitration sought after several years. In Nav Bharat Builders (supra), it was found that upon claims being raised a Committee had been constituted to examine the same and the Committee had suggested

acceptance of the claim subject to certain terms; the contractor had agreed to accept the terms as worked out by the Committee and thereafter accepted the monies and agreed to withdraw the application filed u/s 20 of the 1940 Act. It was in these circumstances that a subsequent contention that the letter was obtained by coercion was negated. In *Nathani Steels (supra)*, the settlement deed referred to prior discussion between the parties and recorded the amicable settlement in the presence of architect; in these circumstances, the contention of the contractor that the settlement was liable to be set aside was not accepted. It will therefore be seen that it was owing to the aforesaid fact that the request for arbitration under the original agreement was negated. It was further held that the observations in *Nathani Steels* that "unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was mistake and proceed to invoke the arbitration clause" was in reference to the plea of mistake and not with reference to allegations of fraud, undue influence or coercion.

8. The Apex Court in *Boghara Polyfab Pvt. Ltd (supra)* also noticed the other stream of judgments in *Damodar Valley Corporation Vs. K.K. Kar*, , in *Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash*, , in *Union of India (UOI) and Another Vs. L.K. Ahuja and Co.*, , in *Jayesh Engineering Works v. New India Assurance Co. Ltd.*, , in *Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors*, and in *Ambica Construction Vs. Union of India (UOI)*, . In *Damodar Valley Corporation (supra)* a full and final receipt was asked for but was not submitted and thus it was held that the claims remained arbitrable. In *Bharat Heavy Electricals Ltd. (supra)*, the question of full and final settlement was left for adjudication to the arbitrator. In *L.K. Ahuja and Co.*, the court did not find any full and final discharge or accord or satisfaction. In *Jayesh Engineering Works*, again the matter was left to be decided by the arbitrator. In *Reshmi Constructions*, the contractor had on the same date as signing the full and final settlement sent a letter to the effect that the same was signed under threat and coercion; because of such conduct, it was held that the arbitration under the original agreement was not barred. *Ambica Constructions* merely followed *Reshmi Constructions*.

9. The Apex Court thus in *Boghara Polyfab Pvt. Ltd.* concluded that dependent upon the facts of each case and conduct of the parties, it has to be determined whether the full and final settlement discharges the arbitration agreement in the original contract or not. The Apex Court further noticed that all the aforesaid cases were under the 1940 Act and the perspective of the new Act was different from the old act.

10. u/s 16 of the new Act, the Arbitral Tribunal is competent to rule on its own jurisdiction. The Apex Court further noticed that in *United India Insurance Vs. Ajmer Singh Cotton and General Mills and Others*, , consumer complaints were held maintainable even after signing of the discharge voucher. The practice of obtaining undated receipts in advance by the government departments and

corporate sector was also noticed. The Apex Court finally in para 28 set out illustrations (though not exhaustive) as to when in spite of discharge of contract the claims would be arbitrable and when they would be not.

11. Before proceeding to the facts of the present case, I may also notice the recent judgment of the Division Bench of this Court in *Meharban Vs. Union of India (UOI) and Others*, ; in that case a plea for arbitration was negated after full and final settlement. I may further notice that in that case there was no case of any coercion, undue influence, etc.

12. The petitioner in the present case was awarded works contract on 13th September, 2002, the scheduled date of completion whereof was 12th December, 2003. The petitioner contended that for reasons attributable to the respondent Railways, the work could not be completed in time and for this reason the time for completion was extended from time to time without any penalty till 31st March, 2006 by which date the works were completed. Attention was drawn to letter dated 28th May, 2004 of the petitioner to the respondent Railways whereunder the respondent Railways were notified of all the additional claims of the petitioner for the reason of delays attributable to the respondent. It was pleaded that the defect liability period of six months also expired satisfactorily without any complaint, by 30th September, 2006 whereafter the petitioner requested the respondent to release the security deposit with full and final payments; that the respondent ultimately prepared a final bill and called the petitioner for signing the same; however, the bills proposed did not include all the payments to which the claimant was entitled and even the escalation already paid was proposed to be withheld/recovered in the final bill. It is averred that the petitioner thus signed the proposed final bill under protest. Significantly, this fact was admitted by the counsel for the respondent during the hearing.

13. It is further averred that since applicant signed the final bill under protest, the respondent wanted the applicant to sign blank formats and bill forms as condition precedent for processing of the release of the bank guarantees of Rs. 15 lacs and cash security deposit as well as the payments under the proposed final bill to the tune of about Rs. 12 lacs. The petitioner claims that he refused to do so leading the respondents into invoking the bank guarantees even though there were no claims of the respondents against the petitioner and defect liability period was also over. The petitioner has averred that faced with the threat of payments under the bank guarantees being made, the petitioner had no option but to sign the blank formats and bill formats. The petitioner has specifically averred that had he at that time taken recourse to arbitration and other proceedings, the payment under the bank guarantees would have been made and he would have been deprived of the sum of Rs. 12 lacs also being offered by the respondents against the final bill. The petitioner thus admits to have signed the blank cyclostyled formats and bill formats and whereafter the respondents withdrew the invocation of encashment of bank guarantees and released the bank guarantees in favour of the petitioner and also made payments of Rs. 12

lacs towards final bill in May, 2006.

14. The petitioner thereafter vide letter dated 27th June 2007 invoked the arbitration clause for its claims against the respondents. The respondents after several reminders ultimately vide letter dated 24th December, 2007 refused appointment of arbitrator for the reason of the petitioner having signed a supplementary agreement. The petitioner thereafter filed the present petition.

15. The respondents file a counter affidavit to the petition, generally denying each and every averment in the petition and further stating that the petition did not require reply on merits. It was pleaded that the parties had entered into a supplementary agreement dated 7th April, 2007 which stipulated that in consideration of the sums already paid by the respondents to the petitioner against all outstanding dues and claims for all works done, the principle agreement stood discharged in toto including the arbitration clause. It was thus pleaded that the petitioner was not entitled to invoke the arbitration clause. Reliance in this regard was placed on judgment dated 7th December, 1984 of this Court in Sarvesh Chopra v. UOI.

16. The petitioner has along with the petition filed copy of letter dated 12th April, 2007 of the respondent Railways releasing the bank guarantees and withdrawing the earlier letters dated 19th January, 2007 and 20th March, 2007 for encashment of bank guarantees and requesting the bank to release the bank guarantees in favour of the petitioner. The petitioner has also filed photo copies of the cheques dated 31st March, 2007 for Rs. 10,23,860/- and dated 11th April, 2007 of Rs. 51,122/- in favour of the petitioner.

17. The photocopy of the settlement agreement has been filed by the respondents along with their counter affidavit. The same is in cyclostyle form with blanks filled in hand. The date thereof has been filled up in hand as 7th April, 2007. The petitioner does not dispute his signatures on the same on both the pages thereof. The signatures on both the pages bear the date 31st March, 2007 underneath. The signatures on behalf of the respondents are of 4th April, 2007 and the witness on behalf of the respondents has signed on 7th May, 2007. Though the names of the witnesses on behalf of the petitioner are not decipherable but they appear to be officials of the respondent only.

18. It is in the aforesaid state of facts, that the law as summarized in Boghara Polyfab Pvt. Ltd. has to be applied. For the following reasons:

a. The signatures of the petitioner bearing the date 31st March , 2007 and the settlement agreement bearing the date 7th April, 2007 and which shows the same to be signed in advance, as pleaded by petitioner.

b. The payments under the final bill having been released to the petitioner on 31st March, 2007 vide cheques aforesaid and which falsify the statement in settlement agreement of all payments having been made prior thereto.

c. The witnesses to the settlement agreement being officials of the respondent

only and which again show lack of mutuality, discussion prior to signing thereof.

d. The settlement agreement records payments having being made which admittedly were made thereafter.

e. The factum of invocation of bank guarantees and withdrawal of the said invocation after the signing of the settlement agreement by the respondents.

f. No reason having been given as to why the bank guarantees were invoked and which invocation was subsequently withdrawn and which show coercion exercised by the respondent Railways.

g. The detail pleas of the petitioner of circumstances leading him to sign the settlement agreement in blank having not been controverted;

20. The next question to be considered is of the relief to be granted. I have recently had occasion to consider Clause 64 of the Railways Contract as in the present case in *S.B. Construction v. General Manager, Northern Railway and Anr.* AA 467/2007 decided on 27th January, 2009. The agreed procedure for arbitration where claims are in excess of Rs. 10 lacs, as they are in the present case is of the respondent Railways sending a panel of not more than three gazetted railway officers to the petitioner and the petitioner suggesting up to two names out of the said panel for appointment as his nominees. The General Manager is to appoint one at least out of them as the Contractor's nominee and to appoint the balance number of arbitrators either from the panel or from outside the panel and also indicating the presiding arbitrator.

21. The respondent having failed to act as required under the procedure, has forfeited the right to do so as laid down in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*, . However, even though the respondent has failed to act but considering the arbitration agreement between the parties, the petitioner is not entitled to appointment of an independent arbitrator. The Apex court in *Northern Railway Administration, Ministry of Railways; New Delhi v. Patel Engineering Company Ltd.* has held that the Court as the nominee of the Chief Justice, u/s 11(8) of the Act is to give due regard to any qualification required of the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

22. The parties had agreed to a qualification of the arbitral tribunal. It was agreed that the arbitral tribunal shall comprise of gazetted railways officers not below JA grade and of whom at least one shall be from the accounts department. Harmonizing the law laid down in *Datar Switchgears* with *Northern Railway Administration*, in my view, even upon the failure of the respondent as aforesaid, the arbitrators having the agreed qualification only can be appointed by this Court. The only effect of the respondent Railways having forfeited the right to appoint two out of the three arbitrators would be that instead of the respondent Railways being entitled to nominate two out of the three arbitrators, it is the petitioner who would be entitled to nominate all the three arbitrators and to also

designate one as the presiding arbitrator, however all having the qualification agreed.

23. Accordingly, it is directed that upon the petitioner intimating to the respondent Railways three arbitrators having the qualifications as agreed under Clause 64, the respondent Railways shall constitute the Arbitral Tribunal which shall go into claims and counter claims, if any, of the parties in accordance with law.

24. With these directions, the petition is allowed leaving the parties to bear their own costs.