

(2011) 04 SC CK 0026

In the Supreme Court Of India

Case No : Civil Appeal No. 3541 of 2011 (Arising out of SLP (Civil) No. 8162 of 2007)

Union of India (UOI) and Others

APPELLANT

Vs

Master Construction Co.

RESPONDENT

Date of Decision : 25-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6)

Citation : (2011) AIRSCW 4610 : (2011) AIRSCW 2669 : (2011) 2 ARBLR 105 : (2011) 4 AWC 3629 : (2011) 3 CHN 100 Supp : (2011) 2 CompLJ 520 : (2011) 5 JT 244 : (2011) 5 MhLj 835 : (2011) 3 RCR(Civil) 526 : (2011) 5 SCALE 165 : (2011) 12 SCC 349 : (2011) 5 SCR 853 : (2

Hon'ble Judges : R. M. Lodha, J;Aftab Alam, J

Bench : Division Bench

Advocate : Brijender Chahar, Nishant Patel, C.S. Khan and Shamsuddin Khan, for D.S. Mahra, for the Appellant; Indu Malhotra Jyoti Mendiratta and Prerna Priyadarshini, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—Leave granted.

2. This appeal, by special leave, arises from the order dated December 8, 2006 passed by the Chief Justice of the Punjab and Haryana High Court in the proceedings u/s 11(6) of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act') whereby he held that all disputes between the parties to the contract have to be referred to the arbitration and appointed Mr. M.S. Liberahan, retired Chief Justice of Andhra Pradesh High Court, as sole arbitrator to decide the disputes between the parties.

3. The Respondent -- M/s. Master Construction Company (for short, 'the contractor') -- was awarded a contract (CA No. CEBTZ--14/95-96) on September 17, 1995 by the first Appellant-- Union of India -- for the work, 'provisions of OTM accommodation and certain essential technical buildings' to be erected and

installed at Bhatinda. The first phase of the work was to be completed by July 20, 1996 and the second phase by January 20, 1997.

4. The agreement between the parties made IAFW--2249 an integral part of the contract. Condition 70 thereof provided mode for resolution of disputes and differences between the parties through arbitration.

5. The work is said to have been completed by the contractor, albeit belatedly, on August 31, 1998. The completion certificate was issued on September 9, 1999.

6. The contractor furnished no-claim certificates on April 3, 2000, April 28, 2000 and May 4, 2000 and the final bill was signed on May 4, 2000.

7. The payment of final bill was released to the contractor on June 19, 2000. Thereafter, the bank guarantee amounting to Rs. 21,00,000/- was also released on July 12, 2000. Immediately after release of the bank guarantee, on that very day, i.e. July 12, 2000, the contractor wrote to the Appellants withdrawing 'no-claim certificates'; it also lodged certain claims.

8. The Chief Engineer, Bhatinda Zone, Bhatinda (Appellant No. 3 herein) vide his letter dated July 13, 2000 declined to entertain the claims of the contractor on the ground that the final bill has been accepted by the contractor after furnishing the 'no-claim certificates' and no claim under the contract remained.

9. The contractor vide its letter dated September 10, 2000 requested the Engineer-in-Chief, Army Headquarters, Kashmir House, New Delhi (Appellant No. 2 herein) to refer the disputes between the parties for resolution to the arbitrator. The contractor stated in that letter that if the arbitrator was not appointed within 30 days from the date of request, it may be constrained to seek the remedy as may be available under the law.

10. As no arbitrator was appointed by the Appellants despite the request made in the letter dated September 10, 2000, the contractor made an application u/s 11 of the 1996 Act before the Civil Judge, (Senior Division), Bhatinda on January 10, 2001. The application, after contest, was dismissed by the Civil Judge, Senior Division, Bhatinda on January 6, 2003.

11. Being not satisfied with the order dated January 6, 2003, the contractor challenged that order by filing a writ petition before the High Court of Punjab and Haryana.

12. The Division Bench of the High Court heard the parties and by its order dated May 20, 2004 dismissed the contractor's writ petition.

13. The contractor challenged the High Court's order by filing a SLP before this Court. This Court disposed of the SLP on January 3, 2006 by directing that the application filed by the contractor u/s 11 of the 1996 Act shall be placed before the Chief Justice of the Punjab and Haryana High Court, for appropriate order thereon. This Court, consequently, set aside the orders of the High Court and the lower court.

14. It was then that the Chief Justice of the Punjab and Haryana High Court decided the application filed by the contractor u/s 11(6) of the 1996 Act and passed the order impugned in the present appeal.

15. Mr. Brijender Chahar, learned senior counsel for the Appellants made two-fold submission: (i) that no arbitrable dispute existed between the parties as full and final payment has been received by the contractor voluntarily after submission of 'no-claim certificates' and the final bill, and (ii) that, in any case, the Chief Justice in exercise of his power u/s 11(6) ought to have given due regard to the arbitration clause and appointed the arbitrator in terms thereof.

16. Ms. Indu Malhotra, learned senior counsel for the contractor, on the other hand, vehemently contended that the whole case of the contractor from the very beginning had been that 'no-claim certificates' were given by the contractor under the financial duress and coercion as the Appellants had arbitrarily withheld the payment. She would submit that the issue whether 'no-claim certificates' were given voluntarily or under financial duress, is an issue which must be decided by the arbitrator alone and it is for this reason that the Chief Justice, in the proceedings u/s 11(6), has referred the disputes between the parties to the arbitrator. In this regard, she heavily relied upon a recent decision of this Court in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., . She also referred to two earlier decisions of this Court, namely, Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, and Ambica Construction v. Union of India (2006) 13 SCC 475.

17. That IAFW--2249 was made an integral part of the contract between the parties and condition 70 thereof provided for mode of resolution of disputes and differences between the parties through arbitration is not in dispute. Condition 70 (arbitration clause) reads as under:

70. Arbitration-All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the works or termination or determination of the contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 52,53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration

proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, *ex parte*, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters, referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitrator shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and binding on both parties to the contract.

If the value of the claims or counter claims in an arbitration referred exceeds Rs. 1 lakh the arbitrator shall give reasons for the award.

18. The controversy presented before us does not concern the existence of arbitration agreement but it relates to whether after furnishing 'no-claim certificates' and the receipt of payment of final bill, as submitted by the contractor, any arbitrable dispute between the parties survived or the contract stood discharged. Before we turn to the factual aspect, it is appropriate to carefully consider the decision of this Court in *Boghara Polyfab Private Limited (2009) 1 SCC 267* at some length as the learned senior counsel for the contractor placed heavy reliance on it.

19. In *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*, this Court surveyed a large number of earlier decisions of this Court, namely, *The Union of India Vs. Kishorilal Gupta and Bros.*, *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, *Damodar Valley Corporation Vs. K.K. Kar*, *Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash Union of India (UOI)* and *Another Vs. L.K. Ahuja and Co.*, *State of Maharashtra v. Nav Bharat Builders P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn.*, *Nathani Steels Ltd. v. Associated Constructions*, *M/s. Indian Drugs and*

Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, United India Insurance Vs. Ajmer Singh Cotton and General Mills and Others, Jayesh Engineering Works v. New India Assurance Co. Ltd., S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, National Insurance Company Ltd. Vs. Nipha Exports Pvt. Ltd., and National Insurance Company Ltd. Vs. Sehtia Shoes, With regard to the jurisdiction of the Chief Justice/his designate in the proceedings u/s 11 of the 1996 Act, this Court culled out the legal position in paragraph 51 (page 294) of the report as follows:

51. The Chief Justice/his designate exercising jurisdiction u/s 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/ undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance.

20. The Bench in Boghara Polyfab Private Limited in paragraphs 42 and 43 (page 291), with reference to the cases cited before it, inter alia, noted that there were two categories of the cited cases; (one) where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, it was held that there could be no reference of any dispute to arbitration and (two) where the court found some substance in the contention of the claimants that 'no dues/claim certificates' or 'full and final settlement discharge vouchers' were insisted and taken (either in printed format or otherwise) as a condition precedent for release of the admitted dues and thereby giving rise to an arbitrable dispute.

21. In Boghara Polyfab Private Limited¹, the consequences of discharge of the contract were also considered. In para 25 (page 284), it was explained that when a contract has been fully performed, then there is a discharge of the contract by performance and the contract comes to an end and in regard to such a discharged contract, nothing remains and there cannot be any dispute and, consequently, there cannot be reference to arbitration of any dispute arising from a discharged contract. It was held that the question 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, such question is arbitrable. The Court, however, noted an exception to this proposition. The exception noticed is that where both the 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. Yet another exception noted therein is with regard to those cases where one of the parties to the contract issues a full and final discharge voucher (or no-dues 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. It was observed that issuance of full and final discharge voucher or no-dues certificate of that kind amounts to discharge of the contract by acceptance or performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.

22. In paragraph 26 (pages 284-285), this Court in *Boghara Polyfab Private Limited* held that if a party which has executed the discharge agreement or discharge voucher, alleges that the execution of such document was on account of fraud/coercion/undue influence practiced by the other party, and if that party establishes the same, then such discharge voucher or agreement is rendered void and cannot be acted upon and consequently, any dispute raised by such party would be arbitrable.

23. In paragraph 24 (page 284) in *Boghara Polyfab Private Limited*, this Court held 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. The Court stated that such dispute will have to be decided by the Chief Justice/his designate in the proceedings u/s 11 of the 1996 Act or by the Arbitral Tribunal.

24. 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. 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.

25. In light of the above legal position, we now turn to the facts of the present case.

26. At the time of receiving payment on account of final bill, the contractor executed the certificate in the following terms:

(a) I/we hereby certify that I/we have performed the work under the condition of the contract agreement No. CEBTZ-14/95-96, for which payment is claimed and that I/we have no further claims under CA No. CEBTZ-14/95-96.

(b) Received rupees two lakhs fifteen thousand one hundred seventy eight only. This payment is in full and final settlement of all money dues under CA No. CEBTZ-14/95-96 and I have no further claims in respect of the CA No. CEBTZ-14/95-96.

(emphasis supplied by us)

27. The contractor also appended the following certificate:

It is certified that I have prepared this final bill for claiming entire payment due to me from this contract agreement. The final bill includes all claims raised by me from time to time irrespective of the fact whether they are admitted/accepted by the department or not. I now categorically certify that I have no more claim in respect of this contract beyond those already included in this final bill by me and the amount so claimed by me shall be in full and final satisfaction of all my claims under this contract agreement. I shall however, receive my right to raise claim to the extent disallowed to me from this final bill.

28. 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 June 19, 2000 is not in dispute. After receipt of the payment on June 19, 2000, no grievance was raised or lodged by the contractor immediately. The concerned authority, thereafter, released the bank guarantee in the sum of Rs. 21,00,000/- on July 12, 2000. It was then that on that day itself, the contractor lodged further claims.

29. The present, in our opinion, appears to be a case falling in the category of exception noted in the case of Boghara Polyfab Private Limited (Para 25, page 284). As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute.

30. The conduct of the contractor clearly shows that 'no claim certificates' were given by it voluntarily; the contractor accepted the amount voluntarily and the contract was discharged voluntarily.

31. We are, thus, unable to sustain the order of the Chief Justice in the proceedings u/s 11(6) of the 1996 Act. In view of our finding above, it is not necessary to consider the alternative submission made by the senior counsel for the Appellants that the Chief Justice in exercise of his power u/s 11(6) ought to have appointed the arbitrator in terms of the arbitration clause and the appointment of Mr. M.S. Liberahan, retired Chief Justice of Andhra Pradesh High Court, was not in accord with the arbitration agreement.

32. The appeal is, accordingly, allowed. The impugned order dated December 8, 2006 passed by the Chief Justice of the High Court of Punjab and Haryana is set aside. The parties shall bear their own costs.