

# Calcutta High Court

HON'BLE JUDGE(S): PRAKASH SHRIVASTAVA, C.J.

**MIS. HINDUSTHAN BUILDERS V. IRCON INTERNATIONAL LIMITED.**

A. P. No. 374 of 2020,, decided on 28/01/2022

**Arbitration and Conciliation Act (26 of 1996), S.11(6)-Appointment of arbitrator - Dispute arising out of works contract - As per contractor, work was delayed due to default on part of employer and therefore, payment was also delayed - Further plea of contractor that No Claim Certificate was submitted under economic duress - Final bill made to contractor duly accepted by him - There is no material placed on record to show that final bill was accepted under protest - Even after submitting No Claim Certificate and accepting final bill payment, contractor remained silent for six months before raising plea that said certificate issued under duress - Therefore, arbitrator cannot be appointed.**

**2011 AIR SCW 2669, Relied on.**

(Para 7, 11)

**Case Referred :**

**Chronological Paras**

AIR 2019 SC 3137

Para No.( 8, 10)

AIR 2011 SC 754: 2011

Para No.( 10)

AIR sew 703

Para No.( 10)

2011 AIR SCW 2669

(Rel.on)

## **Name of Advocates**

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Sauvik Nandy, S. Saha for Petitioner; Raghunath Ghose, Ms. Sevanti Roy for Respondent.

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- 1. ORDER** :-This application under Section 11(6) of the Arbitration and Conciliation Act has been filed by the applicant for appointment of arbitrator to resolve the dispute between the parties.
2. The case of the applicant is that in response to the e-tender, applicant had given the offer and letter of acceptance dated 29.01.2016 was issued to the applicant by the respondent for construction of 750m approx. concrete road as per technical and MORTH Specifications. The formal agreement was executed on 14.03.2016. The work was to be completed within 9 months, but there was some delay in completion. The extension of time was granted by the respondent by their letter dated 05.06.2017. Ultimately, the work was completed on 15.12.2017. The allegation of the applicant is that the work was delayed due to the default on the part of the respondent. According to the applicant the payment was also delayed and was made only after 05.03.2019 that too on submission of No Claim Certificate which was submitted under economic duress. Applicant had issued the letter dated 02.09.2019 for appointment of arbitrator. Applicant thereafter had sent the notice for conciliation dated 19.06.2020 which was replied by the respondent stating that the full payment was made in March, 2019 and No Claim Certificate was submitted by the applicant in January, 2019, hence, the contract was discharged, therefore, the prayer for conciliation could not be accepted. The applicant thereafter had sent the communication dated 01.10.2020 for appointment of arbitrator which was replied by the respondent on 27.10.2020 taking the stand that after acceptance of the final bill of payment on 05.03.2019 and on submission of No Claim Certificate the contract stood discharged, therefore, the applicant could not invoke the mutual settlement, conciliation or arbitration clause.

3. **The** submission of the learned Counsel for the applicant is that the No Claim Certificate was issued by the applicant under economic duress as the payment was delayed by the respondent, therefore, on the basis of such No Claim Certificate, the remedy of arbitration cannot be denied.

4. Submission of the learned Counsel for the respondent is that the applicant had submitted No Claim Certificate voluntarily and there is no material on record to show that it was submitted in duress, hence he cannot invoke the arbitration clause after receiving full payment.

5. **Having** heard the learned Counsel for the parties and on the perusal of the record, it is noticed that the arbitration agreement is undisputed which provides for the following conciliation/arbitration clause:

"45.2 Conciliation/Arbitration

45.2.1 It is a term of this contract that Conciliation/ Arbitration of disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes within 120 days of submission of monthly statement of such claim, through mutual settlement.

45.2.2 In the event of failure to resolve and dispute or differences between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Employer of any certificate to which the Contractor may claim to be entitled to, through mutual settlement, the Contractor may refer such matters to the Chairman and Managing Director in writing within 60 days from the date of failure of amicable settlement of such disputes or differences for settlement through Conciliation.

45.2.3 If the effort to resolve all or any of the disputes through Conciliation fails, the Contractor may refer to the Chairman and Managing Director of the Employer for settlement of such disputes or differences through arbitration. No disputes or differences shall be referred to arbitration after expiry of 60 days from the date of notification of the failure of Conciliation."

6. **The** record further reflects that in January, 2019 the applicant had

undisputedly submitted the No Claim Certificate stating as under:

"1. I/We, engaged in carrying on business under the name and style "M/s. HINDUSTHAN BUILDERS" certify and confirm in full belief and knowledge that we have worked for M/s Ircon International Limited under the contractual obligations under contract agreement/Letter Acceptance bearing No. IRCON/2053/SHM/CON.ROAD/HB/AGMT/2, Dated 14.03.2016 and Agreement dated. NIL. After completion of the above stated works, we have reconciled all account statement jointly with *Mis.* Ircon International Limited, and we have scrutinized all our payments with respect to actual quantity of works executed and payments thereof in accordance with contract provisions including all claims, contentions, disputes, issue whatsoever in respect of this contract jointly with Ircon International Limited and we declare that the measurement and the payments thereof are in complete satisfaction and shall be extinguished in full on payment as stated in the following paragraph.

2. I/we confirm that I/We entitled to 53,45,578.37 (Rupees fifty three lacs forty five thousand five hundred seventy eight and thirty seven paisa only), in full and final settlement of all my Bills, claims, issues, disputes if any and contentions from M/s. Ircon International Limited. I also confirm and declare that with the receipt of aforesaid amount/costs, my/our all claims, disputes, differences if any, between my above said Contract and M/s Ircon International Limited, under and with reference to above said Agreement / Letter of Acceptance No. IRCON/ 2053/ SHM/ CON.ROAD/HB/AGMT/2, Dated 14.03.2016 shall stand full and finally settled and extinguished."

7. **It** is also not in dispute that thereafter final payment was made to the applicant on 05.03.2019 which was duly accepted by him. There is no material placed on record by the applicant to show that the final bill was accepted under protest. Even after submitting the No Claim Certificate and accepting the final bill payment on 05.03.2019, the applicant remained silent for about 6 months when on 02.09.2019 it had issued the notice raising the plea that No Due Certificate was obtained under duress and making a prayer for arbitration. No prima facie material is placed on record indicating that the No Claim Certificate was obtained from the applicant on dotted line or under any

coercion. Clause 44.2 of the contract in clear terms provides that: "44.2 Signing of "No Claim" Certificate: The Contractor shall not be entitled to make any claim whatsoever against IRCON under or by virtue of or arising out of this contract, nor shall IRCON entertain or consider any such claim, if made by the Contractor, after he shall have signed a "No Claim" Certificate in favour of IRCON in such form as shall be required by IRCON after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of the items covered by "No Claims" certificate or demanding a clearance for arbitration in respect thereof."

8. Considering the similar issue in the matter of United India Insurance Co. Ltd. v. Antique Art Exports Pvt. Ltd. reported in (2019) 5 SCC 362 : **(AIR 2019 SC 3137)** in a case where 11 weeks after issuance of the discharge voucher, for the first time a plea was raised that the discharge voucher was signed under undue influence and coercion and no prima facie evidence was filed in support thereof, it has been held that claim was settled with accord and satisfaction leaving no arbitral dispute subsisting under agreement to be referred to arbitrator for adjudication. In that case the decision of the High Court to appoint the arbitrator in spite of the signing of the discharge voucher has been set aside by holding that:

"21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the Respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27 July, 2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the Arbitrator for adjudication."

9. It is also settled that each case in which such a plea is raised is required to be decided on its own facts and that mere allegation that the discharge voucher or No Claim Certificate was obtained by fraud coercion or undue influence is not sufficient to accept the plea for appointment of arbitrator, but the party seeking appointment of arbitrator is required to produce prima facie

evidence to substantiate plea of fraud coercion or undue influence. In the present case no such prima facie evidence has been produced.

**10. Leamed** Counsel for the applicant has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of R.L. Kalathia and Co. vs. State of Gujarat reported in (2011) 2 SCC 400 : **(AIR 2011 SC 754)** but that is a judgment by Hon'ble Single Judge of the Supreme Court whereas the judgment in the case of Antique Art Exports Pvt. Ltd. (supra) is a judgment by two Hon'ble Judges of the Hon'ble Supreme Court. Moreover, the view taken in the case of Antique Art Exports Pvt. Ltd. (supra) is also supported by the earlier judgment in the matter of Union of India and Ors. v. Master Construction Co., (2011) 12 SCC 349 : **(2011 AIR sew 2669)**.

11. In view of the above legal and factual position, I am of the opinion that after submission of No Claim Certificate and receipt of full and final payment without any protest and keeping silent for about 6 months, in the facts of the present case, the applicant is not entitled to dispute the No Claim Certificate at this stage and invoke the arbitration clause. Hence, the A.P. is accordingly dismissed.

**Petition Dismissed**