

**HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

AA no. 20/2013

Date of order: 28.03.2014

Pir Panchal Company Pvt. Ltd. v. Union of India and ors

**Coram:**

**Hon'ble Mr. Justice M. M. Kumar, Chief Justice**

**Appearing counsel:**

For the Petitioner(s) : Mr. Himanshu Beotra, Advocate.

For the Respondent(s) : Mr. P. S. Chandel, CGSC.

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|-----|---|---|-----|
| i)  | Whether to be reported in<br>Press, Journal/Media | : | Yes |
| ii/ | Whether to be reported in<br>Digest/ Journal      | : | Yes |

M. M. Kumar, CJ

1. The petitioner Pir Panchal Company Pvt. Ltd. has approached this Court with a prayer for appointment of an independent arbitrator under Section 11 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997.

2. Few facts may first be set out to put the controversy in its proper perspective. The Deputy Chief Engineer, Construction/Doubling Northern Railways issued NIT dated 28.09.2006 inviting tenders from eligible contractors for construction of Railway level/low level platform at Samba/Ghagwal and loading ramps at Samba block hut at Basantar bridge, staff quarters and duty huts and lifting barrier at level crossing between Jammu Ghagwal and other works

between Vijaypur-Jammu-Ghagwal in connection with Jalandhar-Pathankot-Jammu Tawi doubling (Annexure A). The petitioner was a successful tenderer. Accordingly acceptance letter dated 02.08.2007 allotting the contract to the petitioner at the rate of Rs. 2,20,00,244.67 was issued (Annexure B).

3. The petitioner- company was directed to start the execution of work vide letter 09.08.2007 (Annexure C). During the execution of the work the petitioner-company was directed to do some works in addition to the allotted work, which was duly executed by it. According to the clauses of the contract agreement it was provided that clear sites were available for completion of various structures. A period of four months commencing from 02.08.2007 was fixed. However, the petitioner claims that on account of non-availability of clear sites for execution of work there was delay in the execution which was attributable to the respondents. The time therefore was extended from time to time. It is appropriate to mention that extensions were granted on many occasions and the work was eventually completed in 49 months. It is alleged by the petitioner that the total work on account of non-availability of the site was reduced and in fact it resulted in financial losses to the petitioner-company. Be that as it may, the work was completed on 30.09.2011. In the Final Bill a large number of items of work

executed by the petitioner-company were not accounted for and were found missing. The petitioner agitated and requested for inclusion of the aforesaid items by letter dated 19.04.2012. A sum of Rs. 7,37,36,975/- was claimed by the petitioner-company. It is categorical case of the petitioner-company pleaded in para no. 8 and 9, that there was pressure and undue influence mounted on it to withdraw the claim made vide letter dated 19.04.2012 and the petitioner was forced to agree for release of undisputed amount of Rs. 20.74 lacs along with the amount of performance bank guarantee, security deposit and earnest money amounting to Rs. 25,13,904/-. It is positive case of the petitioner that on account of undue influence, pressure and threats the petitioner was forced to agree to accept the undisputed amount by excluding the value of the additional work executed. The respondents showed their inability to process the final bill in presence of the claim made by the petitioner in its letter dated 19.04.2012 because accepting such a claim by respondents would have made the contract disputed one which would cause disability to process the bill. Such a course was considered contrary to the policy of the respondents. The letter dated 19.04.2012 was consequently withdrawn on 30.04.2012 with the object of securing the payment of undisputed amount. A supplementary agreement

dated 20.07.2012 was also secured from the petitioner-company that it would not ask for reference to arbitration and contract agreement was discharged.

4. In the objections filed by the respondents it has been stated that the petitioner was given extensions for more than ten times for completing the pending work and the last date fixed for completing the work was 30.09.2011. It is conceded that the work was completed by the petitioner and as per the policy of the respondents the final bill was prepared which was processed with no claim receipt from the petitioner. However, on 19.04.2012 claims were made over and above the final bill in the letter sent by the petitioner. The aforesaid letter was withdrawn on 30.04.2012 (Annexure-D) in order to secure the payment. A supplementary agreement was also got executed on 20.07.2012 stipulating that it was agreed and understood between the parties that in consideration of the payment already made under the agreement, the principal agreement would cease to have any effect and shall be non-existent for all purposes. Therefore, it is claimed that no reference to arbitration could be made.

5. I have heard the learned counsel for the parties and have perused the record.

6. Mr. Himanshu Beotra, learned counsel for the petitioner has argued that in cases where undue influence, coercion and threats are used for withdrawing the claims made by a contractor then the contract will not be deemed to be satisfied and the legal remedy of reference to arbitration would not stand foreclosed. According to the learned counsel the claim was made in the letter dated 19.04.2012 after the final bill was prepared. However, under duress and coercion the petitioner has to issue the no claim certificate on 27.04.2012, certifying that there was no claim outstanding and also withdrew the claims made in the letter dated 19.04.2012 by signing another letter dated 30.04.2012 (Annexure E,F and G). The attention of the Court has been drawn to the averments made in para 8 where it has been admitted in terms that the petitioner was conveyed verbally that the policy of the respondents did not authorize them to process the bill and this concern was conveyed verbally. Accordingly the petitioner withdrew its earlier letter dated 19.04.2012 by sending the letter on 30.04.2012. Learned counsel has further drawn my attention to the copy of the supplementary agreement dated 20.07.2012 which stand on the same footing. According to the learned counsel in such like situations reference to arbitration would not be barred as the contract cannot be deemed to have been

discharged satisfying various terms of the contract including the arbitration clause. In that regard reliance has been placed on the observations made by Hon'ble the Supreme Court in the case of **National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009)1 SCC 267.**

7. Mr. P. S.Chandel, learned counsel for the respondents, however, has vehemently argued that a choice was offered to the petitioner either to avail the remedy of arbitration without settling the final bill or to accept the final bill settling the whole dispute. According to Mr. Chandel the petitioner preferred the latter course and settled the final bill by withdrawing the claim made on 19.04.2012 by writing a separate letter dated 30.04.2012. Learned counsel has also drawn my attention to various stipulations of the supplementary agreement to argue that it is not possible for the petitioner to wriggle out of the covenant which have been duly signed by the proprietor of the petitioner-company. In support of his submissions Mr. Chandel has placed reliance on the judgment of Hon'ble the Supreme Court rendered in the case of **Union of India and ors v. Master Construction Company, (2011) 12 SCC 349.**

8. Having heard the learned counsel for the parties and perusing the record with their able assistance, the question which arises for determination is that, 'Whether there is a

reasonable doubt created in the mind of the Court with regard to exercise of undue influence or coercion for withdrawal of the claim made in the letter dated 19.04.2012 by writing a letter dated 30.04.2012 and/or by executing a supplementary agreement dated 20.07.2012'. In order to search a definite conclusion it would first be necessary to set out the pleadings of the parties in justa position by referring to claims made in paras 8, 9 and 10:-

8. That after the completion of work on 30.9.2011, to the entire satisfaction of the respondents, the **petitioner company was surprised and astonished to see that much of the claims of the petitioner company were not incorporated in the final bill, to which the petitioner company strongly agitated vide letter no PPCL/NR2012-13/08 dated 19.04.2012 and an amount of Rs.7,37,36,975/- was claimed by the petitioner.**

Despite the fact that the petitioner had completed the work on 30.09.2011 and the respondents were under an obligation to immediately release the amount of petitioner company and also to release the performance bank guarantee, security deposit and earnest money, total amounting to Rs.25,13,904/-, **but to the contrary the respondents started threatening the petitioner company to withdraw its letter no PPCL/NR2012-13/08 dated 19.04.2012, failing which they audaciously told the petitioner company that they would not release the undisputed and agreed amount of Rs.20.74 Lacs as recorded by Inspector of works and also the amount of performance bank guarantee,**

8. That the contents of para 8 of the petition are incorrect on the ground that the execution of work after grant of extensions more than ten times after completing the work the final bill was prepared accordingly and **as per the extent rule/policy as final bill has to be processed with no claim certificate issued by the contractor which was issued by the petitioner firm on 27.4.2012. It is not out of place to mention here that the answering respondents could not process is final bill in the presence of petitioner claim as submitted by his earlier letter dated: 19.4.2012 because admitting such claim by the respondent even for consideration makes the contract disputed one and therefore does not authorize the respondent to process the bill for which the petitioner was conveyed this concern verbally for which the petitioner vide letter dated: 30.4.2012 withdrew his earlier letter dated: 19.4.2012 in his good wisdom in order to get his final bill which was duly accepted by the petitioner for his final measurement. The petitioner firm also signed the supplementary agreement which itself indicates that the petitioner cannot go for asking the arbitration clause the**

<p>security deposit and earnest money, total amounting to Rs.25,13,904/-. It is submitted that the petitioner number of times approached the respondent no. 4 and requested him to at least release his agreed amount, performance bank guarantee, security deposit and earnest money but the respondents clearly refused to accept the request of the petitioner.</p>	<p><b><u>relevant provision laid down in the supplementary agreement is reflected as below:</u></b></p> <p>“It is further agreed and understood by and between the parties that in consideration of the payment already made, under the agreement, the said principal agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes.” Accordingly the petitioner vide letter dated: 2.1.2013 being a signatory to the supplementary agreement executed on dated: 20.7.2012 was informed that the principal agreement having the arbitration clause shall cease to exist and deemed to be non-existence. Hence alleging that the petitioner was forced to withdraw his previous letter dated: 19.4.2012 is baseless because the petitioner had the choice at the time of executing supplementary agreement whether to go for arbitration to adjudicate upon pending final bills or to take his final payments without invoking arbitration clause but on the other hand the petitioner who has come with unclean hands by way of filing the above title petition wants to take undue advantage by taking final bill in the first instance by issuing no claim certificate and subsequently claiming other claims by invoking Arbitration Clause which is not permissible under the provisions of law hence the contents stated in para are denied.</p>
<p>9. That since the petitioner company was already going through huge financial crunches and to add insult to the injury, the respondents illegally and without any justification withheld the hard earned money of the petitioner company and consistently threatened the petitioner company that in case the petitioner would not withdraw the letter no PPCL/NR2012-13/08 dated 19.04.2012 and sign the no objection</p>	<p>9. That in reply to para 9 of the petition it is submitted that a detail submissions stands already submitted in supra paras <b><u>that after signing the supplementary agreement dated: 20.7.2012 and subsequently withdrawing the earlier letter dated 19.4.2012 makes evident clear that the petitioner cannot go for asking the arbitration clause on the ground that principal agreement having the arbitration clause shall be ceased to be non</u></b></p>



<p>certificate/Supplementary agreement for an amount of Rs.20.86 Lacs in total, unequivocally and without conditions, no payment would be released, as such the petitioner company under duress and forced circumstances, withdrew the aforesaid letter no.PPCL/NR2012-13/08 dated 19.04.2012 and signed the No objection certificate/Supplementary agreement for an amount of Rs.20.86 Lacs in total.</p>	<p><u>existent, for which stating in para that the petitioner was forced to withdraw the earlier letter by the answering respondents does not arise on the ground that the petitioner was afforded choice at the time of executing the supplementary agreement either to go for arbitration for pending final bills or to take his final payments hence the contents which are incorrect are denied.</u></p>
<p>10. That the consent which was obtained by the petitioner was not a free consent as required under law and was obtained by the respondents by exercising undue influence, pressure &amp; coercion, in as such as, the respondents not only withheld the payments of the petitioner company but also forced the petitioner to withdraw letter no PPCL.NR2012-13/08 dated 19.04.2012. It is submitted that the petitioner was undergoing financial crises and the respondent were having edge over the petitioner as such the petitioner under the compelled circumstances signed the NOC/ Supplementary affidavit as mentioned above and an amount of Rs.20.86 Lacs was released in his favour.</p>	<p>10. That in reply to para 10 of the petition so far stating that the consent obtained by the petitioner was while exercising undue influence, under presser and with coercion by the answering respondents for withdrawal of letter dated 19.4.2012 is a vague statement in this regard a detail submission stands already submitted in preceding para however once again it is submitted that the petitioner who has approached the Hon'ble Court with unclean hands by signing no claim certificate/supplementary agreement as well as withdrawing <u>letter in C/W the claims he first got the final payment and other dues released in his favour and thereafter he processed for submitting his claim which is not only illegal, unfair but also reflects the malafide intention of the petitioner firm for which no relief as claimed can be granted in favour of the petitioner nor a petition preferred for invoking arbitration clause is maintainable hence the contents which are incorrect are denied.</u></p>

9. A perusal of the pleadings would show that the petitioner agitated its claims in the letter dated 19.04.2012, claiming a sum of Rs. 7,37,36,975/-. The basic reason was that many of

the claims made by the petitioner were not included in the final bill after completion of the work on 30.09.2011. There is specific averment that the respondents were under obligation to release the bill of the petitioner-company along with the performance bank guarantee, security deposit and earnest money amounting to Rs. 2,51,3904/-. On the contrary, the respondents started threatening the petitioner-company to withdraw its letter dated 19.04.2012 failing which the respondents were not to release the undisputed and agreeable amount of Rs. 20.74 lacs along with the performance bank guarantee, security deposit and earnest money. The petitioner-company, under duress and forced circumstances withdrew the aforesaid letter dated 19.04.2012 and signed the No Objection Certificate along with the supplementary agreement. The aforesaid averments made by the petitioner-company have been admitted as is evident from the underlining portion, inasmuch as the respondents expressed their inability to process the bill in the face of the claim made in the letter dated 19.04.2012. The respondents also conveyed this concern verbally to the petitioner and on 30.04.2012 the petitioner-company withdrew its letter dated 19.04.2012 and then the final bill was accepted by it. Thereafter even a supplementary agreement was executed by the petitioner on 20.07.2012 in order to secure payment . It is thus

evident that the petitioner dropped his claim in order to avoid starvation of funds and to avoid bringing its business at a standstill. The financial condition of the petitioner-company was weak and they wanted to secure the liquid cash to the extent it was possible at that stage. The respondents claim that the petitioner was given choice. Such a choice for the petitioner would be a choice of a lamb before a lion and cannot be regarded as a real choice. Therefore, it is not possible to reach a conclusion that the petitioner-company out of its free will and volition had withdrawn the claim made in the letter dated 19.04.2012. It is in the aforesaid facts and circumstances that Hon'ble the Supreme Court in paras 50 and 51 of the judgment rendered in the case of Boghara Polyfab (P) Ltd's case (supra) observed as under:-

“50. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration.

51. The Chief Justice/his designate exercising jurisdiction under section 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.

52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject are:

(i) .....

(ii) .....

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

.....” (Emphasis added)

10. A perusal of the aforesaid paras along with illustration (iii) would make it patent that if the payment is released on the

conditions that the contractor was to give the discharge vouchers in a prescribed format, acknowledging receipt of money in full and final settlement of the contract then it could not be regarded that the settlement was arrived at on account of free will and volition. Illustration (iii) would clearly cover the facts of the present case because the petitioner-company has raised its claims which were not included in the final bill by writing a letter dated 19.04.2012 which it was forced to withdraw on 30.04.2012. It was then forced to execute a supplementary agreement on 20.07.2012. Illustration (iii) further clarifies that withdrawal of the claim does not need to be in writing and it can also be oral. The fact that respondents have conveyed to the petitioner-company orally that the final bill cannot be processed unless the claims made in the letter dated 19.04.2012 are withdrawn. It speaks volumes about the duress exercised by the respondents on the petitioner to secure the no objection certificate and no claim voucher as also the supplementary agreement. In such a situation the arbitration clause would not stand replaced or discharged. Therefore, the petition deserves to succeed.

11. The judgment of Hon'ble the Supreme Court in Master Construction Company's case (supra) on which reliance has been placed by Mr. Chandel would not be attracted to the facts

and circumstances of this case because in that case a bald plea of fraud, coercion, duress or undue influence was raised without substantiating the same. The aforesaid position emerges from perusal of paras 24, 25, 27, 28, 29 and 30, which are set out below *in extenso*:-

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 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 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.

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

21. 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.”

22. The above certificates leave no manner of doubt that upon receipt of the payment, there has been full and final settlement 14 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.

23. 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. 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.”

12. A perusal of the aforesaid paras would show that Hon'ble the Supreme Court has taken notice of the judgment in Boghara Polyfab (P) Ltd's case (supra) and concluded that there was only a bald allegation as no facts showing duress or withdrawal of the claims were pleaded. In the present case, on the contrary, the petitioner has raised the claims in the letter dated 19.04.2012. The policy of the respondents showing their inability to process the final bill in the face of claims over and above the final bill amply show the duress and coercion exercised by the respondents. The respondents went to the extent of verbally telling the petitioner that until and unless it withdraws the claims made in the letter dated 19.04.2012, they would not be able to process the bill as is evident from the admission made by the respondents in para 8 of the objections. The supplementary agreement would also stand on the same footing. Therefore, it cannot be concluded that on facts and principles the present case can be treated on the same page as was the position in Master Construction Company's (supra). There are clearly distinguishable factors which persuade the Court to apply the principle laid down in Boghara Polyfab (P) Ltd's case (supra).

13. As a sequel to the above discussion this petition succeeds. The dispute between the parties is referred to an



independent arbitrator. The arbitrator must first decide as to whether the no claim certificate was issued under duress and coercion, withdrawing the claim made in letter dated 19.04.2012 or any other document and whether exclusion of the agreement dated 20.07.2012 was the result of free will and volition without duress and coercion. Accordingly, Hon'ble Mr. Justice B. L. Bhat, a former Judge of this High Court is appointed as arbitrator. Registrar Judicial shall send intimation to the arbitrator with a copy of this order.

**(M. M. Kumar)**  
**Chief Justice**

**Jammu,**  
**28.03.2014**  
Anil Raina, Secy.