THE HON'BLE SRI JUSTICE UJJAL BHUYAN

ARBITRATION APPLICATION No.22 OF 2019

ORDER:

Heard Mr.Kilashnath PSS, learned counsel for the applicant and Mr.C.V.Rajeeva Reddy, learned counsel for respondent No.1. Also heard Mr.Gadi Praveen Kumar, learned counsel for respondent No.2.

2 This application has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (briefly, 'the 1996 Act', hereinafter) for appointment of arbitrator.

3 Applicant is a company engaged in the business of civil and structural, infrastructural and electrical engineering services.

4 First respondent which is a Government of India enterprise, issued tender notice inviting tenders for the work "construction of laboratory, buildings, animal house, security block including internal roads, compound wall, underground sump, water supply, sanitary, internal electrification and other ancillary works at site 'A' and construction of hostel building, residential blocks, Director's bungalow, internal roads, underground sump, water supply, sanitary, internal

electrification and other ancillary works at site 'B' for the Centre for DNA Fingerprinting and Diagnostics at Uppal X Roads, Hyderabad". Tender submitted by the applicant was accepted by the first respondent on 25.03.2013 for a total contract price of Rs.50,03,16,920-04, with completion period being 24 months.

5 Pursuant thereto, both the parties i.e. applicant and respondent No.1 entered into an agreement on 17.05.2013 at Hyderabad.

6 Though the stipulated date of completion was 24 months, with expiry date being 21.04.2015, there were extensions from time to time for reasons completely beyond applicant's control. According to the applicant, the execution of the work was extended beyond the contract period for a further period of 691 days.

7 Because of such extension and associated escalation of price, applicant issued notice to the first respondent on 23.04.2015 for additional payment. This was followed by letters dated 05.07.2015 and 01.07.2016. However, respondents did not agree with such claim of the applicant.

8 Be that as it may, applicant completed the execution of the work on 31.12.2016 to the full satisfaction of respondent No.1. Last bill was submitted by the applicant on 24.08.2017.

9 When applicant enquired about payment to be made to it, it was informed that unless applicant furnished a *'no claim certificate'* in the prescribed format to the first respondent, it would not receive the remaining payment. However, according to the applicant, submission of *no claim certificate* along with the final bill was not envisaged in the agreement. But, because of the dominant position of the first respondent and also on account of the fact that applicant was in dire need of money, it had submitted a *no claim certificate* on 07.03.2018, which it is stated was under coercion and duress. Two days after the *no claim certificate* was submitted, payment was made to the applicant on 09.03.2018.

10 Applicant thereafter issued letter to the first respondent regarding additional payment which was, however, rejected by respondent No.1 on the ground that applicant had submitted *no claim certificate*. Applicant has stated that all disputes arising out of the contract are governed by Clause 25 of the general conditions of contract. Accordingly, applicant had

submitted its claim to the first respondent, vide letter dated 30.07.2018. The details of claim are mentioned in paragraph No.10 of the affidavit and in annexure IX.

11 Respondent No.1 denied all the claims of the applicant through its letter dated 21.08.2018 since applicant had signed and filed a *no claim certificate*. Being aggrieved by the rejection letter of respondent No.1 dated 21.08.2018, applicant wrote back to the first respondent on 30.08.2018 stating that though the final bill was submitted on 24.08.2017, it was informed that unless a *no claim certificate* was furnished in a prescribed proforma, the final bill would not be paid. Applicant was directed to submit a *no claim certificate* in a proforma handed over, though submission of such a certificate along with the final bill was not envisaged in the agreement. Applicant stated that since it was in dire need of money, it submitted the *no claim certificate* on 07.03.2018 which should be treated as having been given under coercion and under compelling circumstances. Thus, such a certificate obtained on account of undue influence and dominating position, would be invalid. Be that as it may, the claims made by the applicant were rejected by the first respondent vide letter dated 24.10.2018 whereunder it was

again reiterated that applicant had submitted *no claim certificate* but denied that it was obtained under coercion or under undue influence. Since the final bill was settled and the payment was credited into the bank account of the applicant, payment of further amount as per the claims made by the applicant would not arise.

12 At that stage, applicant, vide letter dated 31.10.2018, requested the first respondent for appointment of an arbitrator and to refer the claim of the applicant to the arbitrator for adjudication. However, the said request was turned down by the first respondent vide letter dated 10.12.2018 reiterating that such additional claims of the applicant are untenable and that applicant is not entitled to such payment since it has signed and submitted *no claim certificate*.

13 Aggrieved, the present arbitration application has been filed.

14 First respondent has filed counter affidavit. Stand taken in the counter affidavit is that the arbitration application filed by the applicant is not maintainable and is liable to be dismissed on the ground that applicant has

submitted *no claim certificate* to the first respondent on 07.03.2018. Applicant had stated that it had accepted the bill in full and final settlement, further accepting the measurements in the final bill towards full and final settlement. In view of the *no claim certificate* submitted by the applicant, the claims/disputes raised by the applicant are not at all maintainable. The *no claim certificate* was given by the applicant as per Clause 25 (5) of the general conditions of contract. Thereafter statements have been made on merit.

15 Counter affidavit has also been filed by respondent No.2. It is submitted that it was the responsibility of the applicant to have completed the work within the stipulated period and then claim final payment. Upon lapse of the original agreement, no other supplementary agreement was executed between the applicant and the first respondent for the extended period. Asserting that the application filed by the applicant is a frivolous one, second respondent seeks dismissal of the application.

16 Applicant has filed reply affidavit reiterating the averments and contentions advanced in the arbitration application. Applicant has asserted that signing and

submission of the *no claim certificate* would not bar the applicant from raising genuine claims.

17 Learned counsel for the applicant has referred to the agreement dated 17.05.2013 entered into between the applicant and the first respondent, particularly to Clause 25 thereof which deals with settlement of disputes and arbitration. He has also referred to the claim made by the applicant (page No.550 of the paper book). He thereafter submits that rejection of the claim of the applicant by the first respondent vide letter dated 21.08.2018 on the ground that applicant had submitted *no claim certificate* dated 07.03.2018 along with final bill whereafter the final payment was released to the applicant on 09.03.2018 is not at all justified. Referring to Clause 25 (5) of the general conditions of contract, which says that applicant would not be entitled to lodge any claim whatsoever under the contract by virtue of the contract or arising out of the contract, he submits that had the applicant not submitted the *no claim certificate*, first respondent being in a dominant and dominating position, would not have cleared the final bill. He, therefore, submits that there is a valid arbitration clause governing the parties and a referable dispute between the parties. In such circumstances, this

Court may appoint an arbitrator in terms of Clause 25 of the general conditions of contract and refer the dispute to arbitration to be conducted by the learned arbitrator. In support of his contentions, learned counsel for the applicant has placed reliance on a number of decisions.

18 On the other hand, Mr.Rajeeva Reddy, learned counsel for the first respondent submits at the outset that the allegation of coercion or duress made against the first respondent is not at all correct. Referring to the additional claims made by the applicant on 30.07.2018 he submits that nowhere it was stated that the *no claim certificate* was issued under compulsion or duress. Adverting to Sub-Clause (5) of Clause 25 of the general conditions of contract, he submits that it is clearly stated therein that the contractor would not be entitled to make any claim whatsoever against the employer nor shall the employer entertain or consider any such claim if made by the contractor after the contractor had signed and furnished a *no claim certificate* in favour of the employer as in the present case. Contractor would be debarred from disputing the correctness of any item covered by the *no claim certificate* or demanding a reference to arbitration in respect thereof. Even in the arbitration

application, a bald statement has been made that *no claim certificate* was submitted by the applicant under undue influence and duress. In such circumstances, he seeks dismissal of the arbitration application.

19 In his reply submissions, learned counsel for the applicant submits that the relationship between the contractor and the employer is very skewed. The employer is in a dominant position. Unless and until the applicant submitted the *no claim certificate,* respondent No.1 would not have settled the final bill dated 24.08.2017. The *no claim certificate* was submitted before the payments were made. This the applicant had clearly stated in his letter dated 30.08.2018 addressed to the first respondent. He therefore submits that present is a fit case where an arbitrator may be appointed and the dispute between the parties may be referred to arbitration.

20 Submissions made by learned counsel for the parties have received the due consideration of the Court.

21 At the outset, the decisions cited at the bar may be adverted to and analysed.

22 A Constitution Bench of the Supreme Court in **Bishundeo Narain Vs. Seogeni Rai**[1], while dealing with a bill arising out of a suit for a declaration that the compromise decree made in a previous suit for partition would not bind the parties, dealt with the question of undue influence and coercion. It was observed that those were not separately pleaded, further observing that no proper particulars were furnished stating that if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid.

23 Supreme Court in **Union of India Vs. Master Construction Company**[2] was examining a decision of the High Court under Section 11 (6) of the 1996 Act holding that all disputes between the parties to the contract had to be referred to arbitration; whereafter learned arbitrator was appointed, dealt with the issue regarding furnishing of *no claim certificate*. The question before the Supreme Court was after furnishing *no claim certificate* and after receipt of payment of final bill as submitted by the contractor whether

[1] AIR 1951 SC 280
[2] (2011) 12 SCC 349

any arbitrable dispute between the parties survived or the contract stood discharged. After referring to its various decisions, Supreme Court opined that there is no rule of the absolute kind. In a case where the claimant contends that 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 or 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. Thereafter Supreme Court observed as under:

> **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.

24 Again in the case of **United India Insurance Company Limited Vs. Antique Art Exports Private Limited**[3]**,** Supreme Court referred to the decision in **Master Construction Company** (2 supra) but held that a mere plea of fraud, coercion or undue influence in itself is not enough. The party who alleges so is under obligation to *prima facie* establish the same by placing satisfactory material on record before the Chief Justice or his designate. In the facts of that case it was held that no dispute subsisted after the discharge voucher being signed by respondent without any demur or protest. Belatedly a claim was raised that the discharge voucher was signed under undue influence and coercion with no supportive *prima facie* evidence being placed on record. Supreme Court, therefore, concluded that it must necessarily 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.

25 A Single Judge of this Court in **A.Raghunandan Raj Vs. Fortune Monarch Associates**[4] in an application under Section 11 (6) of the 1996 Act for appointment of arbitrator held that when fraud, undue influence and coercion is

[3] (2019) 5 SCC 362
[4] 2020 (6) ALT 333 (TS)

pleaded, full proof must be set forth in the pleadings and the case can only be decided based on the same. A bald plea of undue influence is not sufficient. Without establishing a *prima facie* case of undue influence by not placing any materials on record, an applicant would not be entitled to reference of a matter to arbitration.

26 In **Bharat Sanchar Nigam Limited Vs. M/s. Nortel Networks India Pvt. Limited**[5]**,** Supreme Court referred to the decision in **Master Construction Company** (2 supra) where it was held that a bald plea of fraud, coercion, duress or undue influence was not sufficient unless the party who sets up such a plea was able to *prima facie* establish it by placing materials on record. In that context it was held that if the dispute *prima facie* appears to be lacking in credibility, the matter would not be referred to arbitration. Thereafter, Supreme Court considered the effect and impact of the Arbitration and Conciliation (Amendment) Act, 2015, which came into force with effect from 23.10.2015. As per Sub-Section (6A) of Section 11 inserted by way of the aforesaid amendment, the Supreme Court or the High Court, as the case may be, while considering any application under Sub-

[5] Civil Appeal Nos.843-844 of 2021

Section (4) or Sub-Section (5) or Sub-Section (6) shall notwithstanding any judgment, decree or order of any Court confine to the examination of the existence of an arbitration agreement. Thus the effect of the amendment is that if the existence of the arbitration agreement is not in dispute, all other issues should be left for the arbitral tribunal to decide. It has been held as follows:

> "The effect of the amendment was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for the arbitral tribunal to decide. This was in reinforcement of the doctrine of *kompetenz-kompetenz,* which empowers the tribunal to rule on its own jurisdiction, including any objections with respect to the validity of the arbitration agreement; and thereby minimize judicial intervention at the pre-reference stage."

26.1 Supreme Court referred to and extracted its earlier decisions and held that post the 2015 amendment, all that the Courts are required to examine is whether an arbitration agreement is in existence or not - nothing more, nothing less. It has been held as follows:

> **31.** Sub-section (6-A) came up for consideration in *Duro Felguera, S.A.* v. *Gangavaram Port Ltd.* (2017) 9 SCC 729, wherein this Court held that the legislative policy was to minimise judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 Amendment, all that the courts are required to examine is whether an arbitration agreement is in existence — nothing more, nothing less.
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> "*48.* Section 11(6-A) added by the 2015 Amendment, reads as follows:
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> '11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, *notwithstanding any*

> *judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.'*
>
> (emphasis supplied)
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> From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.
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> *59.* The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

26.2 Finally, Supreme Court concluded as under:

> **34.** In view of the legislative mandate contained in the amended Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimize judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties.

27 Having surveyed the legal provision, Court may now advert to the agreement dated 17.05.2013 entered into between the applicant and the first respondent. Clause 25

thereof deals with settlement of disputes and arbitration. Relevant portion of Clause 25 of the general conditions of contract reads as under:

CLAUSE 25:

Settlement of Disputes & Arbitration:

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment shall be dealt with as mentioned hereinafter:

1) If the contractor considers any work demanded of him to be outside the requirements of the Contract, or disputes any drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Engineer-in-Charge in writing for written instruction or decision. Thereupon, the Engineer-in-Charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter

   If the Engineer-in-Charge fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may, within 15 days of the receipt of the Engineer-in-Charge decision, appeal to the Appellate Authority specified in Schedule "F" who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal. If the Contractor is dissatisfied with this decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Appointing Authority specified in Schedule 'F' for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

2) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or

> difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Appointing Authority. The selection of Arbitrator by the Appointing Authority will be governed by the fact whether the dispute is (i) between two Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government Department or (iii) Otherwise.
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> In case the dispute does not fall under item (i) or (ii) of this Para the Appointing Authority, shall appoint the sole arbitrator. Within 30 days of receipt of notice from the Contractor to refer the dispute for Arbitration, the Appointing Authority stipulated in Schedule F shall send to the Contractor a list of three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the Contract. The Contractor shall, within 15 days of receipt of this list select and communicate to the Appointing Authority, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. If the Contractor fails to communicate his selection of name within the stipulated period, the Appointing Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator."

28 Reference may also be made to Sub-Clause (5) of Clause 25, which deals with *no claim certificate*. Sub-Clause (5) of Clause 25 is extracted hereunder:

> "5) Signing of 'No Claim" certificate
>
> The Contractor shall not be entitled to make any claim whatsoever against the Employer under or by virtue of or arising out of the Contract, nor shall the Employer entertain or consider any such claim if made by the Contractor after he shall have signed a 'No Claim Certificate' in favour of the Employer in such form as stipulated by the Employer, after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of any item covered by the 'No Claim Certificate' or demanding a reference to arbitration in respect thereof."

29 Applicant in its letter dated 30.08.2018 had stated that the final bill was submitted on 24.08.2017. When it came to know that the final bill would not be paid unless and until a *no claim certificate* was submitted and as the applicant was in dire need of money, it submitted the *no claim certificate* on

07.03.2018. In the aforesaid context applicant contended that submission of such *no claim certificate* would have to be construed as to have been given under coercion and compelling circumstances.

30 At this stage the *no claim certificate* submitted by the applicant on 07.03.2018 may be adverted to. It reads as under:

NO CLAIM CERTIFICATE

> We herewith certify that M/s. BPR Infrastructure Limited, Plot No.8, 9, 10, 11 Silicon Valley Layout, Flat Nos.103 & 104, Fortune Chambers, Madhapur, Hyderabad – 500081, Phone: 040-40211441 do not have any claim whatever on RITES Ltd with regard to the 'Construction of Sump, Water Supply, Sanitary, Internal Electrification and other Ancillary works At Site 'A' and Construction of Hostel Building, Residential Blocks, Director's Bungalow, Internal Roads, Underground Sump, Water Supply, Sanitary, Internal Electrification and Other Ancillary works at Site 'B' for CDFD Works at Uppal X Roads, Hyderabad, Andhra Pradesh" of M/s. The Centre for DNA Fingerprinting and Diagnostics (CDFD) vide LOA No: RITES/SC/CDFD/LAB/2012-13/01/669 Dated 25.03.2013 and we accept the bill in full and final settlement. We accepted the measurements in the final bill towards full and final settlement.
>
> We hereby certify that we are submitting herewith our unconditional unequivocal no claim certificate in respect of the Construction Of Laboratory Building, Animal House, Security Block including Internal Roads, Underground Sump, Water Supply, Sanitary, Internal Electrification and other Ancillary works at site 'A' and Hostel Building, Residential Blocks, Director's Bungalow, Internal Roads, Underground Sump, Water Supply, Sanitary, Internal Electrification and other ancillary works at site 'B' for CDFD Works at Uppal X-Roads, Hyderabad, Andhra Pradesh.

31 From a perusal of the above, it is seen that applicant had accepted the bill including the measurements as full and final settlement even before the bill was settled. Thereafter,

the applicant certified (as per the proforma) that it was submitting unconditionally and unequivocally the *no claim certificate* in respect of the contract work.

32 *Prima facie* both the parties to the agreement do not stand on the same footing. Bargaining power of the employer i.e. first respondent is certainly much more because of its commanding and controlling position. But this is an aspect i.e. whether the *no claim certificate* would foreclose raising of further claim by the applicant leading to discharge of contract or whether the same can be construed to have been signed and submitted because of the compelling circumstances virtually putting the applicant under compulsion / duress is an issue which can certainly be gone into by the learned arbitrator.

33 Be that as it may, after the legal position has been clarified by the Supreme Court in **Bharat Sanchar Nigam Limited** (5 supra) this is an aspect which can certainly be gone into by the learned arbitrator.

34 Admittedly, there is a valid arbitration clause and claim made by the applicant is not a deadwood. That being the position and upon thorough consideration of all aspects of the

matter, Court is of the view that the dispute raised by the applicant requires to be referred to arbitration to be conducted by a sole arbitrator, keeping all contentions open, including the effect of the *no claim certificate* signed and submitted by the applicant.

35 Accordingly and in the light of the discussions made above, Sri Justice L.Narasimha Reddy, Chief Justice (retired), High Court for the State of Bihar at Patna, bearing D.No.2-2-25/3/3, Durgabai Deshmukh Colony, Near O.U.Campus, Baghamberpet, Hyderabad – 13, Mobile No.9440621406, is appointed as the sole arbitrator to arbitrate on the dispute raised by the applicant. Both the parties are hereby directed to appear before the learned arbitrator on 11.07.2022 at 11.00 AM whereafter the learned arbitrator shall proceed with the matter in accordance with law.

36 Let a copy of this order be forwarded by the Registry to both the parties and also to the learned arbitrator for doing the needful.

37 This disposes of the arbitration application.

JUSTICE UJJAL BHUYAN

Date: 08.06.2022
L.R.Copy be marked B/o Kvsn