

(2013) 04 BOM CK 0185

Bombay High Court (Aurangabad Bench)

Case No: Arbitration Application No. 6 of 2011

M/s. Sanjay B.
Jawlekar

APPELLANT

Vs

General Manager,
South Central Railway
Secunderabad (A.P.)

RESPONDENT

Date of Decision: April 8, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(4)(a), 11(4)(a), 11(5), 11(6)

Citation: (2013) 4 ARBLR 536 : (2013) 4 BomCR 128

Hon'ble Judges: S.S. Shinde, J

Bench: Single Bench

Advocate: G.K. Naik-Thigle, for the Appellant; P.G. Godhamgaonkar, for the Respondent

Final Decision: Allowed

Judgement

S.S. Shinde, J.

This arbitration application is filed with a prayer to appoint Arbitral Tribunal to adjudicate upon the disputes inters the parties to the arbitration application. The case of the applicant, in nutshell, is as follows:-

It is the case of the applicant that the applicant is registered Government Contractor. In pursuance to the notice inviting tender by the respondents, the applicant being successful tenderer and complied with the eligibility criteria in all respects, was allotted to the work of Nanded Extension of PIT Line From 21 to 24 coaches and additional PIT line for 16 coaches length and provision of sick line facility agreement No. 5/Sr. Den/Co-Ord/Ned dated 9.5.2007. The said allotment of the work was in pursuance to the offer submitted by the applicant. It is further case of the applicant that details in nutshell of the afore mentioned work are as follows:-

a. Date of Agreement: 09/07/2007.

b. Agreement No. 5/Sr. DEN/Co-Ord/NED dated 09/05/07.

c. Date of completion without extension: 02/10/2007.

d. Extension granted:

I. 03/10/2007 to 28/02/2008

II. 29/02/2008 to 31/05/2008

III. 31/05/2008 to 31/08/2008

IV. 01/09/2008 to 13/12/2008

V. 01/01/2009 to 15/02/2009

VI. 16/02/2009 to 15/04/2009

e. Date of completion of the work: 15/04/2009

It is further case of the applicant that the work could not be completed within stipulated time, for the reasons solely attributable to respondent. The work was hampered due to various reasons, such as the extensions granted to the F.O.B. work, other obstructions of existing welding room and store room of Mechanical Department for carrying out a drainage work near the pit line, non handing over the site, obstruction of the existing staircase of Foot Over Bridge, no access for executing 55 Mtr. Length of Addl. Pit line, variations during course of execution of work of substantial nature, delayed payments in gross contravention with the contractual covenants.

It is further case of the applicant that without any extension and with pre-requisite condition that both parties to the contract comply with their reciprocal obligation strictly in its order of performance, without any change on the site condition, quantities of work as has been stipulated in the tender, contract work was expected to be completed within 9 calender months.

It is further case of the applicant that though the time limit for completion of contract has been stipulated to be essence of the contract by virtue of various terms in the contract imposing reciprocal obligation, so also making performance of the contractor/plaintiff contingent to the successful compliance in its entirety by defendant; and due to existence of clause of extension of time, this stipulation is rendered nugatory. Thus, period of the tender work can be extended with the approval of the defendant in the event of unforeseen difficulties beyond the control of the contractor and due to site conditions or change in the quantity.

It is the case of the applicant that the applicant has specifically averred in the letters dated 10.11.2009, 17.9.2010 addressed to the respondents to draw his attention to the bona fide, genuine and legal claims and requested for appointment of Arbitrator. It is the case of the applicant that the respondent by adopting hyper

technical approach without considering the genuineness of the claim raised by the applicant, in sheer non application of mind, failed to consider the request for appointment of Arbitrator. It is further case of the applicant that even though the terms and conditions of the contract provide for reference to Arbitrator to the extent of 20% of the total value of the work, applicant expressly reserves his right to approach and take appropriate recourse to available legal proceedings. It is further case of the applicant that, if the respondent gives consent for remaining claim to be raised before the Arbitrator, the applicant has no objection for referring these additional disputes to the Arbitrator.

It is specific case of the applicant that, the alleged no claim certificate is specifically denied by the applicant. The said no claim certificate cannot, in any manner, prejudice the bonafide claim of the applicant. The said certificate is not signed by the applicant. It is only the signature which was obtained by the respondent, under threats to applicant that all his payment would be withheld if he does not sign on the blank paper provided by respondent. Therefore, according to the applicant, his signature has been obtained under financial duress, with the knowledge that the applicant was in financial crises due to withholding of the payments by respondent. It is further case of the applicant that more than quite often applicant was threatened that a penal action under the contract would be initiated against him, if he does not sign on the no claim certificate. According to the applicant, with such unfair practices applicant was required to sign on blank paper as such. According to the applicant, without prejudice to the contention raised herein above, even if the alleged no claim certificate relied upon by the respondent is perused, it appears that it has been supplied to the applicant as per his demand after the respondent's letter dated 6.7.2010. The said certificate would reveal that it does not provide for restriction for claiming any legitimate claims of the applicant. It does not provide that it is towards full and final satisfaction with complete accord. According to the applicant, said no claim certificate is null, void ab initio and without any legal consequences whatsoever. It is further stated that the applicant has no faith in the respondent and as such about fairness and justness and in these premises, by resorting the provisions of Section 11 of the Arbitration and Conciliation Act 1996, the applicant served notice to respondent in accordance with Section 11 (4) (a) read with Section 11 (5) of Arbitration and Conciliation Act, 1996.

In para 15 of the application, the applicant has stated that, the contract inter se the parties provide for resolution of dispute vide arbitration clause, as mentioned in para 15 of the application. It is the case of the applicant that inspite of notice served upon the respondent, vide notice dated 15.10.2010, the respondent has not taken steps for redressal of claim of the applicant nor any appointment of Arbitrator so contemplated as per the Agreement entered into between the parties have been taken by the respondent. Therefore, the applicant has filed this application for appointment of Arbitrator.

2. SUBMISSIONS OF COUNSEL FOR THE APPLICANT

(a) Learned counsel appearing for the applicant submits that even though the terms and conditions of contract provides for reference to Arbitrator to the extent of 20% of the total value of the work, the applicant reserves his right to take appropriate recourse of availing legal proceedings for remaining claim. It is submitted that the applicant has specifically denied no claim certificate. It is submitted that this alleged, "no claim certificate" cannot, in any manner, prejudice the bonafide claim of the applicant. The said alleged no claim certificate has not signed by the applicant. It is only the signature which were obtained by the Officers of the respondent under threats to the applicant that, his payment will be withheld if he does not sign the blank papers provided by the respondent.

(b) It is submitted that signatures have been obtained under financial duress with a knowledge that the applicant is in financial crises due to withholding of payment by the respondent. It is submitted that the said alleged no claim certificate is neither legal nor binding upon the applicant. It is submitted that the resorting to provisions of section 11 of Arbitration and Conciliation Act 1996, the notice dated 15.11.2010 is served upon the General Manager, South Central Railway, Secunderabad in accordance with Section 11(4) (a) of the Arbitration and Conciliation Act 1996. However, there is no response from the respondent. In the premises, counsel appearing for the applicant submits that the applicant has proposed the names of two retired High Court Judges, as mentioned in para 10 of the application for appointment as impartial Arbitrator.

(c) It is submitted that inspite of repeated requests to the respondent to satisfy the claim raised by the respondent, or in case the respondents have any dispute about the said claim, the matter may be referred to the Arbitral Tribunal, the respondents have not taken steps even after expiry of the period of notice given to them. It is submitted that as stated earlier, no dues certificate would not preclude the applicant from seeking appointment of Arbitrator. Learned counsel appearing for the applicant pressed into service exposition of the Supreme Court in the case of [Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra and Another](#), and submitted that the Supreme Court in the said judgment has considered the provisions of Section 11 subsection (6), 7 and 8 and 2(1) (b) of the said Act and held that existence of valid arbitration agreement in respect of dispute raised, has to be looked into by the Chief Justice/his designate.

(d) It is submitted that in the facts of the present case, there is agreement between the parties and there is also clause in the said agreement to refer the matter to the Arbitral Tribunal in case of arbitration proceeding. It is submitted that the Supreme Court in the case of Bharat Ashra (supra) in para 12 has stated that the issues which the Chief Justice or his designate is bound to decide; issues which he can also decide, that is, issues which he may choose to decide; and issues which should be left to the Arbitral Tribunal to decide. It is submitted that the issue which the chief

Justice/his designate will have to decide whether the party making application has approached the appropriate High court, whether there is an arbitration agreement and whether the party who has applied u/s 11 of the Act, is a party to such an agreement.

(e) It is submitted that in the present case, the applicant has demonstrated that the applicant has approached the appropriate High Court and further there is arbitration agreement and the applicant herein is party to the agreement. It is submitted that, the said position is not in dispute. It is submitted that the respondent relying upon clause 63 of the general conditions of the agreement and harping upon no claim certificate, however, has stated that the respondent has obtained the said certificate in financial duress with the knowledge that the applicant was in financial crises due to withholding the payment by the respondent.

(f) Learned counsel submits that the Supreme Court in the case of [National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.](#), held that if the issuance of full and final discharge/settlement voucher/no dues certificate and if there is dispute as to whether said voucher/certificate given validly, voluntarily and without duress, whether the contract has been discharged by performance is a mixed question of fact and law and if there is dispute in regard to that question, that is arbitrable.

(g) It is further submitted that in the present case also there is correspondence between the applicant and the respondent, which would clearly shows that the respondent has obtained such no dues certificate under duress from the applicant. Therefore, this Court by expressing prima facie opinion, that such certificate is obtained by the respondent under duress from the applicant, can refer the matter to the Arbitral Tribunal, leaving the question open to the arbitrator to decide whether the obligation under the contract are fully performed and discharged of the contract by performance is acknowledged by the full and final discharge voucher/receipt.

(h) It is submitted that in view of the judgment of the Supreme Court in the case of Bharat Ashra (supra) this court can refer the issue to the Arbitrator that whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights or obligation or by receiving final payment without prejudice. It is submitted that in view of the aforesaid judgment, the issue which can be called as (second category) as per the said judgment, the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are; a) whether the claim is a dead (long barred) claim or a live claim, (b) whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

(i) It is submitted that in third category, the issue as held by the Supreme Court in the case of Bharat Ashra (supra) whether the claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a

departmental authority and excepted or excluded from arbitration). It is submitted that merits or any claim involved in the arbitration could also be decided by the Arbitrator. Therefore, according to the learned counsel appearing for the applicant, since the respondent in spite of notice, has not taken steps to refer the matter to the Arbitral Panel, this Court can appoint Arbitrator u/s 11 of the Arbitration and Conciliation Act. Learned counsel invited my attention to para 10 of the petition and submitted that the applicant has suggested the names of two retired judges of the High court and prayed that, out of them one may be appointed as Arbitrator.

4. SUBMISSIONS OF COUNSEL FOR THE RESPONDENT

(a) Learned counsel appearing for the respondent invited my attention to the affidavit in reply and submitted that, Nanded Division of South Central Railway invited open tender on 7.9.2006 for the work of "Extension of PIT line for 16 coaches" length and provision of Sick Line facility. The applicant herein was one of the bidders in the said tender. It is submitted that the said tender notice stipulates certain regulations, terms and conditions before submitting their bid in the above mentioned work. The contract work was awarded to the applicant vide agreement No. 5 dated 9.5.2007 at value of Rs. 1,75,48,083/- with completion period of nine months and date of completion was supposed to be on 2.10.2007. Learned counsel invited my attention to clause 63 and 64 of the agreement and submitted that provisions of clauses 63 and 64 of the general conditions of contract will be applicable only for settlement of claims/disputes for value less than or equal to 20% of the original value (excluding cost of materials supplied free by railway) of the contract or 20% of the actual value of work done (excluding the value of the work rejected) under the contract, whichever is less.

(b) It is submitted that if claim is more than 20%, the contractor will not be entitled to seek such dispute/claim for reference to arbitration and the provisions of clauses 63 and 64 of the general conditions of contract will not be applicable for referring the dispute to be settled through arbitration. It is submitted that the special condition prevailed over existing clauses 63 and 64 of general conditions of contract. It is submitted that the date of completion of work was 2.10.2007, which was extended by spells upto 15.4.2009 without imposing any penalty as per the clause 17A of General conditions of contract. The progress of the work was slow because of site condition, prevailing around the awarded work to the applicant even before bidding for the tender. It is submitted that in view of the ratio laid down by the Supreme Court in the case of Northern Railway, the applicant cannot set out the claim beyond ambit and scope of the contract.

(c) It is submitted that in the opinion of the Engineer, the progress of the work has any time been delayed by the other contractor employed by the Railways under Sub clause (4) of clause-20 of G.C.C. the extension of time shall be considered and shall be granted having regard to the nature of period of delay and the type and the quantum of work attended thereby. It is also stipulated that in the event of such

grant of extension, no compensation shall be payable for the works so carried forward to the extended period of time, the same rate terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.

(d) It is submitted that all the contractual payments, for the work done as per agreement, were made to the contractor. Final bill and security deposits were also released after obtaining no claim certificate from the applicant, as per clause 43(2) of G.C.C., which reads as under.

The contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall be railway entertain or consider any such claim, if made by contractor, after he shall have signed a "No claim Certificate" in favour of the railway in such form as shall be required by the railway after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by "No Claim" certificate of demanding a clearance to arbitration in respect thereof.

Therefore, it is submitted that the "No claim certificate" was given by the applicant without any protest and without putting any pre-condition, therefore, the allegation of the applicant that "no claim certificate" was obtained from him by railways under threat is absolutely incorrect, and is an exception attempted by the applicant for otherwise benefits which he is not entitled to.

(e) It is submitted that the applicant herein made representation dated 10.11.2009 to the General Manager, South Central Railway demanding for appointment of Arbitrator to adjudicate the claim amount of Rs. 35,01,000/-. Learned counsel invited my attention to the details of claim by the applicant, which are stated in para 8 of the affidavit in reply. It is submitted that the request for appointment of Arbitrator was rejected by the Railway vide letter dated 6.7.2010, in view of the reasons that, the applicant has submitted an "Unconditional" no claim certificate before payment of final bill and release of security deposit and it is an excepted matter in terms of clause 63 of G.C.C. excepted matters under clause 63 of G.C.C. are excluded from the purview of Arbitration and hence, the application of the applicant, seeking appointment of Arbitrator deserves to be rejected.

(f) It is submitted that reliance placed by the applicant in case of Ambika Constructions vs. Union of India is unfounded, in the present context having distinct fact. It is submitted that ratio laid down in the said judgment cannot be made applicable in the present case. According to learned counsel for the respondent, distinction between the present case and in the case of Ambika Constructions is that, the applicant has furnished an unconditional no claim certificate after the work was fully completed and works finally measured up without any protest and without any threat from the respondent.

(g) Learned counsel further submitted that Arbitrator does not get jurisdiction to adjudicate the issue once no claim certificate as per clause 43 sub clause (2) of G.C.C. is invoked and if the matter is covered by excepted in terms of clause 63. Learned counsel invited my attention to clause 63 of G.C.C. It is submitted that the applicant has signed and submitted no claim certificate with eyes wide opened and without any compulsion. Therefore, the applicant is precluded from raising any dispute, claims to be referred to the arbitration. It is submitted that the application of the applicant that no claim certificate is obtained by Railway under pressure is totally baseless and unfounded. It is submitted that the applicant-contractor was allowed to complete the work by giving reasonable extension of time without levying any penalty, as provided by clause 17(A) of G.C.C. of completion of work done as per the agreement, final bill and recurring deposit were also released after the applicant submitted "no claim certificate". Therefore, learned counsel appearing for the respondent relying upon the affidavit in reply, contentions in the agreement, judgments cited across the bar would submit that the application is devoid of merits and the same may be rejected.

4. I have given careful consideration to the submissions of learned counsel appearing for the parties. With the able assistance of counsel for the parties, perused the entire material placed on record, including the general condition of contract and also other documents placed on record, judgment of this court and the Supreme Court cited across the bar. At the outset, it would be apposite to refer para 22 from the judgment of National Insurance Company Limited (supra) in which the Supreme Court has stated the duty of the Chief Justice or his designate whether the intervention of the court is sought for appointment of Arbitral Tribunal u/s 11 of the Arbitration and Conciliation act 1996. Para 22 of the said judgment, reads thus:-

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal u/s 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application u/s 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1) The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied u/s 11 of the Act, is a party to such an agreement.

22.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

5. Upon careful perusal of para 22.1, reproduced herein above from the judgment of the Supreme Court in the case of National Insurance Company Ltd., the Chief Justice or his designate will have to decide whether the party making an application has approached the appropriate High Court. In the present case, the applicant is ordinary resident of Nanded city, which is within the jurisdiction of this Court. Therefore, the applicant has approached the appropriate High Court. There is arbitration agreement between the applicant and the respondent. The applicant did send notice to the respondent for appointment of the Arbitrator invoking the relevant clause of the agreement which provides for referring the matter to the Arbitrator in case of dispute between the parties. However, the respondent refused to appoint the Arbitrator on the ground that the applicant has finally settled the matter and issued "no claim certificate" and matter is covered under excepted matter and therefore, in view of clause 63 of the G.C.C. the matter cannot be referred to the Arbitrator. Therefore, the applicant herein has filed application u/s 11 of the said Act. The applicant is party to the agreement with the respondent. Therefore, in the facts of the present case, the applicant has approached the appropriate High Court, there is arbitration agreement between the parties and the applicant is party to the agreement has applied u/s 11 of the said Act for appointment of the Arbitrator. There is no dispute about territorial jurisdiction of this Court or agreement entered into between the parties.

6. The relevant clauses from general condition of contract are 63 and 64. There is modification of clause 63 and 64 of general conditions of contract, which read thus:-

1. The provision of clause 63 and 64 of the General conditions of Contract will be applicable only for settlement of claims/disputed for valuables less than or equal to 20% of the original value (excluding cost of materials supplied free by Railway) of the contract or 20% of the actual work done (excluding the value of the work rejected) under the contract, whichever is less. When claims/disputes are of value more than 20% of the value of the original contract or 20% of the value of the actual value of the work done under the contract, which ever is less, the contractor will not be

entitled to seek such disputes/claims for reference to arbitration and the provisions of clause no. 63 & 64 of the General conditions of such contract will not be applicable for referring the disputes to be settled through arbitration.

2. The contractor shall furnish his monthly statement of claims as per claims as per clause 43(1) of General Conditions of Contract. But, the contractor should seek reference to arbitration to settle the disputes only once, subject to the conditions as per para No. 1.

3. The special conditions shall prevail over the existing Clauses 63 & 64 of General Conditions of Contract.

7. In the light of the modification to above referred clause 63 and 64 of the G.C.C. the applicant herein has restricted his claim for value less than or equal to 20% of the original value of the contract or 20% of the value of the work done as stated in the modification of clause 63 and 64 of G.C.C. There are averments in the application to that effect in para 8 and also the notices issued to the applicant by the respondent clearly mention that the applicant has restricted his claim to the extent of 20% reserving his right to seek appropriate remedy before the appropriate forum for the rest of the claim. The contention of the respondent is that in view of clause 2 of clause 43 of G.C.C., the applicant/contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising of the contract since he has signed a no claim certificate. The contention of the respondent is that in view of the provisions of clause 63 of G.C.C. also the applicant is barred from praying for referring the matter to the Arbitrator since the case falls under excepted category. In this respect, it would be apposite to refer to para 52 from the judgment of the Supreme Court in the case of National Insurance Company Limited, which reads thus:-

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:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the Conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration

thereafter.

(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.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The "accord" is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.

8. Upon careful perusal of correspondence dated 29.8.2008, 10.11.2009 and 15.11.2010 made by the applicant herein to the General Manager, South Central Railway, Secunderabad (A.P.) i.e. the respondent herein, the applicant herein has stated that the alleged "no claim certificate" is specifically denied by the applicant. No claim certificate has not signed by the applicant. It is only the signatures which were obtained by the Officers of the respondent under the threats to the applicant that all his payment would be withhold if he does not sign on the blank papers provided by the respondent's Office. It is stated that signatures have been obtained under financial duress with a knowledge that the applicant is in financial crises due

to withholding of payment by the office of the respondent. It is further stated that more than quite often the applicant applicant was threatened action under the contract would be initiated against him if he does not sign on "no claim certificate". It is further stated in the correspondence by the applicant to the respondent that, the work could not be completed for the reasons solely attributed to the respondent. The work was hampered due to various reasons, such as extension granted to the F.O.B. work, other obstructions of existing welding room and store room of Mechanical Department for carrying out a drainage work near the pit line, non handing over of the site, obstruction of the existing staircase of Foot Over Bridge, no access for executing 55 Mtrs. Length of Addl. Pit line, variations during course of execution of work of substantial nature, delayed payments in gross contravention with the contractual covenants.

9. Therefore, upon careful perusal of averments in the application and the contents of the notice/letter/correspondence by the applicant to the respondent, prima facie, it appears to this Court that "no claim certificate" issued by the applicant appears to be under financial duress. Therefore, in view of the para 22.2 from the judgment of the Supreme Court in the case of National Insurance Company Limited, (supra), that issue (a) Whether the claim is a dead (long barred) claim or a live claim, (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal). Since I have expressed prima facie opinion herein above, that no claim certificate issued by the applicant appears to be under financial duress and therefore, the said issue that is stated in clause B of para 22.2 can be left open for the final decision of the Arbitral Tribunal.

10. Upon careful perusal of para 52 of the judgment of the Supreme Court in the case of National Insurance Company Ltd. (supra), the case in hand will fall under clause III of the said paragraphs. Therefore, the contention of the counsel appearing for the respondents that the case of the applicant would fall in clause II of para 52 from the said judgment, cannot be accepted. Upon careful reading of the averments in the application and contents of the notice/letter/correspondence by the applicant with the respondent, it prima facie appears that said no claim certificate is under financial duress on account of condition of the employer that unless such certificate is issued by the applicant/contractor, he is not entitled to get the payment.

11. The other contention raised by the respondents which leads to disputed questions like whether the claim made falls within arbitration clause or not, can be taken care of by the Arbitrator. As stated by the Supreme Court in para 22.3 of the judgment in the case of National Insurance Company (supra). The issue (third category) as stated in paragraph which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal.

12. When the facts of the case in hand are examined in the background of law as laid down by Apex Court in the case of National Insurance Company Ltd. (supra), it cannot be said that the applicant has no prima facie case to seek a reference. The other details to which advocate Shri Godhamgaonkar wants to invite attention are disputed questions of facts and law, which can be looked into by Arbitrator. Hence, those facts and contentions or accompanying documents or evidence are kept open and it is for the Arbitrator to look into said details. The Arbitrator will also look into whether the parties have concluded the contract/transaction by recording satisfaction of their mutual right or obligation or by receiving final payment without objection or whether the claim is a dead (long barred) claim or a live claim. The issue (third category) whether the claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration) and merits of any claim involved in the arbitration will be looked into by the Arbitrator. In the light of the discussion made herein above and in the facts situation of the present case, application u/s 11(6) is allowed. Hon"ble Shri Justice S.C. Malte (Retired) is appointed as Arbitrator. Proceeding charges of Rs. 5000/- be deposited within two weeks. Application is accordingly allowed and disposed of.