A M/S. ASSOCIATED CONSTRUCTION

v.

PAWANHANS HELICOPTERS PVT. LTD.

(Civil Appeals Nos. 3376-3377 of 2008)

MAY 7, 2008

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[TARUN CHATTERJEE AND HARJIT SINGH BEDI, JJ.]

Arbitration – Award – Challenge to – Held: The Court does not sit in appeal over an arbitral award – If view taken by C *arbitrator permissible, it cannot be interfered with, on the premise that a different view is also possible – On facts, it cannot be said that the arbitral award was so unconscionable that it required interference by Court.*

Contract – For construction work – Between Appellant D *and Respondent-Government undertaking – Delay in completion of work on account of reasons attributable to Respondent – Respondent demanded "No Dues Certificate" for release of payment – Appellant gave such certificate – Claim towards escalation by Appellant – On facts held: Even* E *assuming that there could be no price escalation during pendency of the contract, such embargo could not be carried beyond that period as time was essence of the contract – Plea raised by Appellant that it issued "No Dues Certificate" under duress not an after thought.*

F **Appellant-contracting firm entered into a contract for construction work with the Respondent, a Government of India undertaking. The construction work was scheduled to be completed in 4 month but the Appellant could not meet the deadline due to the fault of the** G **Respondent. The Respondent demanded a "No Dues Certificate" for release of payment. Appellant gave such certificate allegedly "under duress" as it was in economic distress. There was a disagreement between the parties over the payment of bills. The matter was referred for**

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arbitration. The arbitral award passed was in favour of Appellant. on which the Respondent moved the High Court. The Single Judge too held in favour of Appellant stating that clauses 18 and 34 of the contract, when read together, provided for the payment of escalation charges as the work had not been completed within four months on account of the fault on the part of the Respondent and that the said clauses did not prohibit such payment, more particularly as time was essence of the contract and as the contract was not on a fixed price, the prohibition of escalation was, if at all, to be read during the period of contract only. The Single Judge also repelled the arguments of the Respondent that after having submitted the final bill on 25th October 1991, it was not open to the Appellant to submit a second final bill on 2nd February 1993 by observing that the payment received as a consequence of the bills submitted on 25th October 1991, was "under duress" and it is on that account that the Appellant had given the aforesaid "No Dues Certificate". The Division Bench of the High Court however set aside the order of the Single Judge. Hence the present appeals.

Allowing the appeals, the Court

HELD:1.1. Clause 43 and 43 (1) and (2) of the contract in question when read together clearly visualize escalation of price on account of reasons beyond the control of the contractor and attributable to the other side. Moreover, clause 43 (2) clearly states that the remedy under clause 43(1) would be in addition to such other remedy that may be open to the contractor under the other provisions. Clause 43 should be read in aid of the contractor as it clearly provides for indemnity in case there was a delay in the completion of the work which could be attributable to the Respondent. Further, even assuming for a moment that there could be no price escalation during the period of 4 months i.e. during the pendency of the contract, such embargo would not be carried beyond that period as time was the essence of the

A contract. [Paras 7, 11] [981-C,D, 984-F,G]

1.2. The Court does not sit as one in appeal over the award of the arbitrator and if the view taken by the arbitrator is permissible, no interference is called for on the premise that a different view was also possible. Also, B in commercial transactions, all situations cannot be visualized and the positive and unchallenged finding in the present case is that the delay in the execution of the work was occasioned on account of reasons attributable the to Respondent. It cannot, therefore, be said that the C award of the arbitrator was so unconscionable that it required interference. [Para 7] [981-D,E,F,G]

1.3. It was open to the Appellant-contractor to contend that it was liable to be compensated on account D of the fact that delay had been occasioned on account of reasons attributable to Respondent. [Para 10] [984-E]

MCD v. M/s.Jagan Nath Ashok Kumar & Anr. (1987) 4 SCC 497; *P.M.Paul v. Union of India* (1989) ***Supp 1*** SCC 368 and *K.N.Sathyapalan (D) By Lrs. v. State of Kerala & Anr.* E (2006) 12 SCALE 654- ***referred to.***

2.1. The desperate tone of the Appellant-contractor is supported by the letter of 10th January 1991 in which it was noted that though repeated requests had been made for the payment atleast against the bills certified by the F Architect, a huge amount had been blocked arbitrarily over a long period of time and a request was made for its release. The letter dated 21st November 1991 is again a reminder to the Respondent asking for payment and that in case there was a dispute, the matter be referred to the G arbitrator and submitting that payment should be made atleast with respect to those dues which had been certified by the Architect. The letter dated 9th December 1991 from Respondent to the contractor shows that payment could be considered provided the contractor H submitted a "No Claim Certificate". It appears that such

certificate was indeed issued but with no result on which the contractor in his letter dated 26th December 1991 in reply to the letter dated 9th December 1991, once again submitted that the payments be released in so far as they had been certified by the Architects/Consultants and if there was a dispute regarding the other payments, they should be referred to an arbitrator. When no action was taken, another letter dated 5th May 1992 was addressed to Respondent by the contractor stating that as they were facing economic duress on account of the payment being held back, and as a "No Claim Certificate" had been issued, the payment be defrayed as promised or else they might have to refer the matter to the arbitrator. [Paras 12, 15] [985-E,H, 986-A,F,G]

2.2. It appears however that no steps were taken on which the contractor addressed a letter dated 2nd February 1993 for payment of dues and again stated that if the payment was not made, the dispute should be referred to the arbitrator. In response to this letter, Respondent in its letter dated 9th February 1993 replied that the matter was under scrutiny and it would take about 2 months for verification and that the contractor would be informed in due course. As no reply was received, a letter dated 21st May 1993 was addressed by the contractor relating to the undertaking that the enquiry would be completed within 2 months but complaining that nothing had been done and on the contrary on 8th June 1993 the claim for any payment was rejected by Respondent observing that as a "No Dues Certificate" had been submitted by the contractor, the question of any balance payment being due did not arise. It is at this stage that the contractor had invoked the clause for arbitration. The correspondence shows that the contractor was compelled to issue a "No Dues Certificate" and in this view of the matter, it could not be said that the contractor was bound by what he had written. It is also clear that there is

voluminous correspondence over a span of almost 2 years between the submission of the first final bill on 3rd June 1991 and the second final bill dated 2nd February 1993 and as such the claim towards escalation or the plea of the submission of a "No Dues Certificate" under duress being an after thought is not acceptable. [Para 16] [987-B-G]

M/s. Ambica Construction v. Union of India **(2006) 12 SCALE 149 – referred to.**

3. In the facts and circumstances of the case, in that Respondent has taken advantage of a beleaguered contractor, and has behaved in a most unbecoming manner in pushing it ever deeper into the chasm, the Appellant-contractor will have its costs which are computed at Rs.10,000/- [Para 17] [988-F,G]

CIVIL APPELLATE JURISDCTION : Civil Appeal Nos. 3376-3377 of 2008

From the Judgment & Order dated 7.6.2007 of the High Court of Bombay in Appeal No. 840/1999 in Arbitration Petition No. 106 of 1997 and Appeal No. 1455/1999 in Arbitration Petition No. 108 of 1997

Shyam Divan, Ajay Kumar, Richa Srivastava and Indu Sharma for the Appellant.

Raju Ramachandran, J. Buther, Amit Kumar, Geeta Kalra and Susmita Lal for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. Leave granted.

2. The respondent, Pawanhans Helicopters Pvt. Ltd. (hereinafter called "Pawanhans") a Government of India undertaking, floated two tenders for allocation of work for construction of a compound wall and a bridge over a nala. Pursuant to the aforesaid information, several tenders were

received and the tenders of the appellant (hereinafter called the "contractor") were ultimately accepted. Pursuant to the aforesaid, two formal agreements providing for the terms and conditions of the contract in the shape of general conditions of the contract and special conditions of the contract governing the execution of work were duly signed on 12th October 1999. As per the contract the work was required to be completed within four months. It appears that on account of some delay which was attributable to Pawanhans, the work did not proceed as per schedule and the contractor accordingly informed Pawanhans by letters dated 15th February 1990, 23rd February 1990, 24th March 1990, 26th June 1990 and 6th July 1990 that the work was getting delayed as the requisite facilities for its completion had not been provided and highlighting several factors attributable to it had supervened which had led to the delay. The contractor also in the meanwhile vide letters dated 27th July 1990 and 6th August 1990 requested the respondent to release the outstanding bills against the work already completed and also requested for the "Virtual Completion Certificate" vide letter dated 25th August 1990. As some work on the compound wall still remained to be completed, the contractor agreed to take up this assignment subject to waiver of the discount of 8.2% which was to be given to Pawanhans till then and the completed works were duly handed over to Pawanhans on the 12th November 1990. The contractor had also submitted a bill dated 23rd June 1991 and it was conveyed to Pawanhans that it expected compensation on account of the variation in the terms of the contract. Pawanhans thereupon advised the contractor to submit a final bill which too was submitted. The bill was verified by Pawanhans and referred to the contractor yet again with objections. The contractor vide letter dated 21st November 1991 disputed the verification as being without any foundation and also reserved its right to seek arbitration. After a protracted correspondence, Pawanhans vide letter of 9th December 1991 advised the contractor to submit a "No Claim Certificate" as a pre-condition for the release of the balance payment. The contractor wrote to Pawanhans that it was in dire need of

A B C D E F G H

A finances and was being subjected to duress but nevertheless submitted a "No Dues Certificate" dated 17th February 1992 once again specifically highlighting that the same was being issued under duress. It appears that despite the issuance of the aforesaid certificate, Pawanhans still did not release the B payment on which the contractor wrote another letter dated 5th May 1992 and several letters thereafter but again to no effect, and on the contrary received a letter dated 8th June 1992 from Pawanhans asking for a "No Dues Certificate" as per the enclosed specimen without attaching any condition to the same. C The contractor, now in a desperate situation, submitted yet another "No Claim Certificate" dated 18th June 1992 as per directions. After receiving the aforesaid document, Pawanhans in its letter dated 9th February 1993 informed the contractor that a period of two months would be required for the scrutiny of its D bills and vide letter dated 21st May 1993 also intimated that the bills had been submitted for verification by the Architect/Engineer as per the terms of the contract and that in case it was willing to defray the payment, the matter could be referred to arbitration. The contractor finally received a communication dated 8th June 1993 pointing out that as all payments due under the contract E had been made and as a "No Dues Certificate" had been furnished, no further amount was due. The contractor accordingly served a notice dated 28th June 1993 on Pawanhans invoking the clause relating to arbitration. The matter was referred to arbitration by two registered Architects as per the clause. The F contractor submitted its statement of claim for the outstanding amount plus compensation and damages on 6th August 1994. The arbitrators passed two awards on 31st December 1996, one with respect to the contract for the compound wall and the second for the construction of the bridge awarding certain G amounts to the contractor. Aggrieved by the awards, Pawanhans filed two separate petitions under sections 30 and 33 of the Arbitration Act, 1940 before the Bombay High Court for a direction that the awards be set aside.

H The learned Single Judge in his judgment and order dated

9th December 1998 held that clauses 18 and 34 of the contract when read together, provided for the payment of escalation charges as the work had not been completed within four months on account of the fault on the part of the respondent and that the said clauses did not prohibit such a payment, more particularly as time was the essence of the contract and as the contract was not on a fixed price, the prohibition of escalation was if at all to be read during the period of contract only. The learned Single Judge also repelled the arguments of the respondent that after having submitted the final bill on 25th October 1991, it was not open to the appellant herein to submit a second final bill on 2nd February 1993 by observing that the payment received on the 4th July 1993 as a consequence of the bills submitted on 25th October 1991, was under duress and it is on that account that the appellant had given the aforesaid certificate. Some objections raised by the respondent herein were however accepted by the learned Single Judge and the award was accordingly modified and it is the admitted case that the aforesaid modification has been accepted and was not challenged before the Division Bench by the contractor.

2. Two appeals were thereafter filed by Pawanhans before the Division Bench of the Bombay High Court. The Division Bench vide its order dated 7th June 2007 allowed the appeals and set aside the order dated 9th December 1998 of the learned Single Judge as also the two awards dated 31st December 1996 by highlighting as a preface that it could not be disputed that the scope for interference by the court under section 30 or 33 of the Arbitration Act was limited as the court could not sit as a court of appeal on the decisions arrived at by the arbitrator. The Court then applied the aforesaid principle to the facts of the case and relied on clauses 18 and 34 *ibid* observed that a plain reading of the said clauses did not visualize any claim for escalation or reduction towards the cost of the work and again reiterated that clause 34 of the agreement prohibited the contractor from claiming any extra amount on account of fluctuation of price. The Court further observed, somewhat in contradiction, that a

A remedy towards the escalation of price had been provided by clause 43 of the contract and clause 43-1(E) specifically provided, the procedure whereby such a claim could be made and as the procedure prescribed by the clause had not been adopted, it was not open to the contractor to contend before the B arbitrator that it was entitled to some payments on account of price escalation. The Court finally concluded that:

> "Once it is clear that the respondents are not entitled to claim escalation charges and the entire dispute, which is the subject matter of the appeals being related to the C escalation charges, the impugned orders, to the extent they confirm the award in relation to the escalation charges, are liable to be set aside and the petitions filed by the appellants challenging the awards in relation to the grant of the escalation charges are liable to be allowed to D that extent. Consequently, the claims for interest on the amount of damages awarded towards the escalation are also liable to be set aside."

3. The Division Bench then examined the issues raised E by the contractor as to whether that "No Due Certificate" had been given under duress and held that there was no evidence to show that the said certificate had been given under duress or coercion and as the certificate itself provided a clearance of no dues, the contractor could not now turn and say that any further payment was still due on account of the second final bill. The F Division Bench accordingly allowed the appeal. The matter is before us in these circumstances.

4. Mr. Shyam Divan, the learned senior counsel for the contractor, has raised several arguments before us during the G course of the hearing. He has first pointed out that the awards rendered by the arbitrator were non-speaking and in this view of the matter, the scope for judicial interference was extremely limited and interference with the findings of the Arbitrators was, therefore not called for. He has also pleaded that clauses 18 and 34, as per their plain interpretation themselves visualized a H

claim for escalation where the delay had been caused by the opposite party and that in any case, the bar on the escalation, if at all, could be restricted only for the period of contract i.e. four months and not thereafter. He has also submitted that clause 43-1(C) on which reliance had been placed by the Division Bench for non-suiting the contractor, was misplaced as this clause too did not specifically or even by implication whittle down the effects of clauses 18 and 34. It has also been argued that the finding of the Division Bench that there was no duress on the contractor relating to the issuance of the "No Claim Certificates" was incorrect in the light of the voluminous evidence to the contrary on record.

5. Mr. Raju Ramachandran, the learned senior counsel appearing for Pawanhans has fairly and at the very outset pointed out that the award in question was non-speaking and as such the scope for interference by the court was limited. He has further contended that it would perhaps be difficult to read into the clauses a complete bar towards escalation, as a court would be reluctant to visualize such a bar in the light of some unforeseen situations that might arise in the execution of a work and the gates, thus, could not for ever be closed, but has submitted that clause 43 provided for such an opening and as this procedure had not been adopted by the contractor, the claim under clauses 18 and 34 was not maintainable. He has also submitted that the "No Dues Certificate" having once being given by the contractor, it was not open to it to make a volte-face and to challenge the said certificate on the ground that it had been given under duress and the finding of the Division Bench on this point was, therefore, correct.

6. We have heard the learned counsel for the parties and gone through the record. As would be apparent, the matter would rest on an interpretation of clauses 34, 43 (1) and (2) of the General Conditions of the Contract and clause 18 of the Special Conditions of the Contract. We reproduce herein below the clauses abovementioned:

A "34. The contractor shall not claim any extras for fluctuation of price and the contract price shall not be subject to any rise or fall of prices.

43 (1) E. Architect's instructions issued in regard to the postponement of any work to be executed under the
B provisions of this contract; and if the written application is made within a reasonable time of it becoming apparent that the progress of the work or of any part thereof has been affected as aforesaid:

C Then the Architect shall ascertain the amount of such loss and/or expense Any amount from time to time so ascertained shall be added to the amount which would otherwise be stated as due in such certificate.

43 (2) The provisions of this condemn are without prejudice
D to any other rights and remedies which the contractor may possess.

18. It is specifically pointed out that the contractor shall not be entitled to any compensation whatsoever on account of:
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1. Any delay in supply of any material.

2. Any increase in costs of any material.

3. Any subsequent increase in cost of any material due
F to increase in other charges like Railway, Steamer, freights or taxes and duties.

4. Any increase in labour costs."

7. We have examined the arguments raised by the learned
G counsel in the light of the aforesaid and other provisions. It is the admitted position that as per clause 38, the date of the commencement of the contract was 1st November. 1989 and the date stipulated for the completion of the work was 28th February 1990. It is also clear from sub-clause (7) of clause 1
H of the General Conditions that time would be the essence of the

contract. We also see from clause 43 aforequoted that this clause has within itself the clear indication that the embargo placed by clauses 18 and 34 was not sacrosanct as has been found by the Division Bench as there could be a situation where the contractor had suffered loss for whatever reasons which was required to be reimbursed as per procedure prescribed in clause 43. Clause 43 (2) also specifically provided that clause 43 was without prejudice to any other rights and remedies that the contractor might possess. We find from a reading of the judgment of the Division Bench that the contractor has been non-suited on the plea that it had failed to proceed under clause 43. On the contrary we believe that Clause 43 is a clause which should be read in aid of the contractor as it clearly provides for indemnity in case there was a delay in the completion of the work which could be attributable to Pawanhans. We are, further, of the opinion that even assuming for a moment that there could be no price escalation during the period of 4 months i.e. during the pendency of the contract, such embargo would not be carried beyond that period as time was the essence of the contract. The learned Division Bench has relied upon a large number of judgments in support of its decision that in case of a clause barring the escalation in the price, it was not open to the contractor to claim any amount under that head. A perusal of the aforesaid judgments, however, do not show any provision in terms of clause 43, and that in any case, these judgments pertain to a claim of price escalation during the period of contract. It must also be borne in mind that a court does not sit as one in appeal over the award of the arbitrator and if the view taken by the arbitrator is permissible, no interference is called for on the premise that a different view was also possible. We also feel that in commercial transactions all situations cannot be visualized and the positive and unchallenged finding in the present case is that the delay in the execution of the work was occasioned on account of reasons attributable to Pawanhans. It cannot, therefore, be said that the award of the arbitrator was so unconscionable that it required interference. In *MCD vs. M/s.Jagan Nath Ashok Kumar & Anr.* (1987) 4 SCC 497, it was

A observed thus:

> "In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factors to be taken into consideration. The award cannot be said to be vitiated by
B non-reception of material or non-consideration of the relevant aspects of the matter. Appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have selected their own forum and the deciding forum must be conceded
C the power of appraisement of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of
D being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator." and further
E concluded:
>
> "After all an arbitrator as a judge in the words of Benjamin N. Cardozo, has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in
F the social life".

8. *P.M.Paul vs. Union of India* (1989) Supp 1 SCC 368 is a case which is almost identical on facts. In this matter the work could not be completed during the period of the contract and
G the contractor was accordingly granted extension of time to complete the same. By an order of this Court, the dispute was referred to an Arbitrator on the reference as to who was responsible for the delay in the completion of the work, what were to be the repercussions of the delay and how to apportion
H the responsibility and the consequences. The arbitrator made

an award in favour of the contractor which was duly challenged by the Union of India with the matter finally reaching this Court at the instance of the contractor and this is what the Court had to say.

> "It was submitted that if the contract work was not completed within the stipulated time which it appears was not done then the contractor has got a right to ask for extension of time, and he could claim difference in price. This is precisely what he has done and has obtained a portion of the claim in the award. It was submitted on behalf of the Union of India that failure to complete the contract was not the case. Hence, there was no substance in the objections raised. Furthermore, in the objections raised, it must be within the time provided for the application under Section 30 i.e., 30 days during which the objection was not specifically taken, we are of the opinion that there is no substance in this objection sought to be raised in opposition to the award. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and has awarded as he did."

9. A similar view has been taken by this Court in *K.N.Sathyapalan (D) By Lrs. vs. State of Kerala & Anr.* (2006) 12 SCALE 654. It has been held as under:

> "We have intentionally set out the background in which the Arbitrator made his award in order to examine the genuineness and/or validity of the appellant's claim under those heads which had been allowed by the Arbitrator. It is quite apparent that the appellant was prevented by unforeseen circumstances from completing the work within the stipulated period of eleven month and that such delay

A could have been prevented had the State Government stepped in to maintain the law and order problem which had been created at the work site. It is also clear that the rubble and metal, which would have been available at the departmental quarry at Mannady, had to be obtained from
B quarries which were situated at double the distance, and even more, resulting in doubling of the transportation charges. Even the space for dumping of excess earth was not provided by the respondents which compelled the appellant to dump the excess earth at a place which
C was for away from the work site entailing extra costs for the same.

In the aforesaid circumstances, the Arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was
D referable to the execution of the work during the extended period, In our judgment, the view taken by the High Court was on a rigid interpretation of the terms of contract and the Supplemental Agreement executed between the parties, which was not warranted by the turn of events."

E 10. We are, therefore, of the opinion in the light of the aforesaid judgments, that it was open to the contractor to contend that it was liable to be compensated on account of the fact that delay had been occasioned on account of reasons attributable to Pawanhans. It is significant that the Division
F Bench of the High Court has been silent on this aspect of the matter and has not referred to the finding of the learned Single Judge with regard to the responsibility for the delay.

11. We are further of the opinion that clause 43 and 43 (1)
G and (2) when read together clearly visualize escalation of price on account of reasons beyond the control of the contractor and attributable to the other side. Moreover clause 43 (2) clearly states that the remedy under clause 43(1) would be in addition to such other remedy that may be open to the contractor under
H the other provisions.

12. We have also gone through the record with respect to the finding of the Division Bench that there was no duress or coercion on the contractor which had compelled it to give a "No Dues Certificate". Mr. Raju Ramachandran has, however, submitted that the story about duress was an after thought in the background that the first final bill had been submitted by the contractor on the 3rd June 1991 and the second final bill on 2nd February 1993 i.e. almost 2 years later and that in any case, a second final bill was not visualized under the contract. He has submitted that the observation of the arbitrator that submission of the second final bill was sanctioned as a trade practice was without any basis. We have gone through the record in the light of the submissions of the learned counsel. We first refer to the letter of the contractor of 11th July 1990 to which reference has been made by the Division Bench requesting Pawanhans to ensure a regular power supply. The letter of 27th July 1990 by the contractor refers to the statement of accounts submitted by it and requests for payment as per the accounts which had been cleared by the Architect. It is to be noted that these letters are on the record and were written by the contractor at the time when the work was in the process of completion. The desperate tone of the contractor is however supported by the letter of 10th January 1991 in which it was noted that though repeated requests had been made for the payment atleast against the bills certified by the Architect, a huge amount had been blocked arbitrarily over a long period of time and a request was made for its release. The letter dated 21st November 1991 is again a reminder to Pawanhans asking for payment and that in case there was a dispute, the matter be referred to the arbitrator and submitting that payment should be made atleast with respect to those dues which had been certified by the Architect. The letter dated 9th December 1991 from Pawanhans to the contractor shows that payment could be considered provided the contractor submitted a "No Claim Certificate". It appears that such certificate was indeed issued but with no result on which the contractor in his letter dated 26th December 1991 in reply to the letter dated 9th December 1991, once again submitted that the

A payments be released in so far as they had been certified by the Architects/Consultants and if there was a dispute regarding the other payments, they should be referred to an arbitrator and in desperation further adds:

> B "However, if you want to hold us to economic duress by not paying what you wish to pay, without "No Claim Certificate", we shall treat it as "Duress" and issue you such a certificate much against our willingness as we cannot afford to liquidate our dues by such a certificate.

C Please do not hold us to a ransom and arrange to pay. In case you would still like to insist, let us know, so that we could issue you such a certificate under duress as we have serious financial problems."

14. It appears that despite the pleading tone of the D aforesaid letter no payment was made on which the contractor wrote yet another letter dated 17th February 1992 in which it was submitted as under:

> E "Inspite of our claim statements, you have insisted on "No Claim Certificate", we hereby give you this certificate that we have "No Claims" and hence you pay us what you might have worked out as our "Final Dues".
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> In case, you have a particular draft in which a "No Claim" Certificate need be issued to receive our dues of our bill, F please let us have the deft, or else this letter may be treated as the certificate of "No Claim" from our side."

15. When no action was taken, another letter dated 5th May 1992 was addressed to Pawanhans by the contractor stating that as they were facing economic duress on account of G the payment being held back, and as a "No Claim Certificate" had been issued, the payment be defrayed as promised or else they might have to refer the matter to the arbitrator. The letter dated 8th June 1992 is again tell-tale and we reproduce the contents hereunder:

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"Kindly let us know what is it that we have to do to get money which you say is payable but only on your extracting "No Claim" certificate under duress. Please take note if you fail to pay us our dues, we shall be constrained to take you to court for which you will blame yourself if it inconvenience is caused. It is a clear 15 days notice please."

16. It appears however that no steps were taken on which the contractor addressed a letter dated 2nd February 1993 for payment of dues and again stated that if the payment was not made, the dispute should be referred to the arbitrator. In response to this letter, Pawanhans in its letter dated 9th February 1993 replied that the matter was under scrutiny and it would take about 2 months for verification and that the contractor would be informed in due course. As no reply was received, a letter dated 21st May 1993 was addressed by the contractor relating to the undertaking that the enquiry would be completed within 2 months but complaining that nothing had been done and on the contrary on 8th June 1993 the claim for any payment was rejected by Pawanhans observing that as a "No Dues Certificate" had been submitted by the contractor, the question of any balance payment being due did not arise. It is at this stage that the contractor had invoked the clause for arbitration. We have reproduced the correspondence in extenso to show that the contractor was compelled to issue a "No Dues Certificate" and in this view of the matter, it could not be said that the contractor was bound by what he had written. It is also clear that there is voluminous correspondence over a span of almost 2 years between the submission of the first final bill on 3rd June 1991 and the second final bill dated 2nd February 1993 and as such the claim towards escalation or the plea of the submission of a "No Dues Certificate" under duress being an after thought is not acceptable. In *M/s. Ambica Construction vs. Union of India* (2006) 12 SCALE 149 it was observed as under:

"A glance at the said clause will immediately indicate that a No Claim Certificate is required to be submitted by a

A contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a No Objection Certificate had been issued by
B the appellant. On the other hand, even the first Arbitrator, who had been appointed, had come to a finding that No Claim Certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such No
C Claim Certificate had not been submitted under coercion and duress.

From the submissions made on behalf of the respective parties, and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge
D certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in the case
E of Reshmi Constructions's (supra), it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such No Claim Certificate."

17. We are therefore of the opinion that the judgment of
F the Division Bench is erroneous and we accordingly set it aside. The judgment of the learned Single Judge is accordingly restored. In the facts and circumstances of the case, in that Pawanhans has taken advantage of a beleaguered contractor, and has behaved in a most unbecoming manner in pushing it
G ever deeper into the chasm, the contractor will have its costs which are computed at Rs.10,000/-. The appeals are accordingly allowed.

B.B.B. Appeals allowed.

H