NO CLAIM CERTIFICATE – NO BAR FOR MAKING CLAIMS

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When the work stands completed and stage for preparation of final bill reaches, the employer calls upon the contractor to give a no-claim or a no-dues certificate to the effect that he has no claim against the employer, even though there is no provision in the contract casting obligation on the contractor to furnish the same. The contractor, in such a situation, is in a precarious condition. He cannot say no because in that event the huge amount due to him on account of final bill and release of security deposit, would be declined for being released. At the same time he cannot say yes to the proposal of the employer for fear of avenue of arbitration being closed to him.

The issue of no-claim certificate had been considered by the courts, including the apex court, from time to time. Surprisingly, view taken by the courts at one point of time was changed to another view, though the facts were identical. A state of uncertainty as to what should be the law on the point, continued to prevail.

Courts in our country have generally favoured the argument that the agreements entered into between the parties voluntarily have to be given effect to even if such agreements contain patently unfair clauses. This view has been adopted by the courts on the premise that where a party willingly, and of his own accord, agree to a certain stipulation contained in the contract, it has to be honoured. Such an approach was necessitated because of a stipulation in some contracts that the contractor shall submit a no-claim certificate to the employer, before final bill is prepared. The view taken by the courts in such cases was that the parties cannot be released from their bargain, however, improvident it may consider the clause to be.

It is submitted that clauses which on their very face appear to be unreasonable and unfair must not be allowed to be given effect to. Something which is unreasonable and unfair, under one set of circumstances, shall continue to be unreasonable and unfair, under another set of circumstances. Many countries have enacted laws and instituted commissions to enquire into

this aspect of law in order to give due protection to their citizens against contracts and contractual terms which are palpably unconscionable.

The Law Commission of in its 199th Report had observed that there are two forms of unconscionability, i.e. procedural and substantive. It was also observed that where a contract or term is procedurally unfair it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or the circumstances under which the contract has been entered into or terms thereof have been arrived at by the parties. A contract or a term thereof shall be treated as unfair if the contract or term thereof has been arrived at by the parties thereof, are by themselves harsh, oppressive or unconscionable.

A correct view has been taken in Section 2.302 of Uniform Commercial Code wherein it is provided that if the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause, as to avoid any unconscionable result.

It goes without saying that no contractor, of his own free volition, would ever think of a giving a no-claim certificate to the employer, what to speak of tendering one. If he submits one, it can be said to be a case of undue influence/coercion. It may be a case of yielding to circumstances created by the employer. The Supreme Court in *NTPC Ltd. v. Reshmi Constructions* (1) has made the following observations as to the effect of undue pressure:

> "*Neessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain, who is in a stronger position. Although it may not be strictly in place but the court cannot shut its eyes to the ground reality that in a case where a contractor has made a huge investment, he cannot afford to take from the employer the amount due under the bills, for various reasons, which may include discharge of his liability towards banks, financial institutions and other persons. In such a situation, public sector undertaking may have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is

signed. Each case, therefore, is required to be considered on its own facts. A case, where a party has had to succumb to the pressure of the other party to the bargain who is in a stronger position, has to be made out and proved before the arbitrator for obtaining an award."

When a work gets prolonged beyond the stipulated date of completion due to late issue of drawings and decisions, inasmuch as even the extension of time was granted by the employer, without levy of liquidated damages, the insistence of the employer that till such time a no-claim certificate is tendered by the contractor, final bill shall not be paid, will certainly be a case where it could safely be said that the contractor had to succumb to the pressure of the employer.

In one case it was stipulated in the contract that while submitting his final bill, the contractor shall append therewith a list of claims together with a "No-Demand Certificate". Therefore submission of a "No Demand Certificate" was a pre-condition for scrutiny of the bill much before the clamant could know as to which part of his claim was going to be accepted by the employer or what amount would be offered against his claim. In such a case, the "No-Demand Certificate" cannot be construed to mean discharge of the contract by accord and satisfaction, because it is required to be furnished alongwith the claim and even before it is scrutinized by the employer.

It is known to everyone in the engineering industry, being a notorious fact that till such time a 'no-claim certificate' is issued by the contractor, and that too in the format evolved by the employer, payment of the final bill would not be made to the contractor. In such matters, it would be highly unjust and unfair to say that since the contractor has given a 'no-claim certificate', the contract stands discharged by accord and satisfaction.

In some contracts, it is provided that the contractor shall not be entitled to payment of escalation during the period of contract. If, for reasons not attributable to the contractor, the completion of work oversteps the schedule of time, can it be said that the contractor shall not be entitled to payment of escalation in the extended period of contract? In *Associated Construction* v. *Pawanhans Helicopters Pvt. Ltd.,* (2) it was held that even assuming that there could be no price escalation during the original period of contract, such

embargo would not be carried beyond that period when time is the essence of the contract.

In *Union of India v. Onkar Nath Bhalla and Sons*, (3) claims of the contractor, made after submission of no-further claim certificate, were held to be not subject to adjudication by the arbitrator because the contractor had given the said certificate at the time of signing the final bill, without any protest or reservation. The judgment of the Supreme Court was based on the decision of the matter reported as *P.K. Ramaiah & Co. v. NTPC* (4) wherein it was held that where there is full and final satisfaction by a receipt in writing and the amount was received unconditionally, the question of raising further claims did not arise.

Merely because a contractor had given a 'no-claim certificate' that he would not make any claim after the final bill is paid, led the courts to hold that since the parties had arrived at a settlement, nothing survives thereafter for adjudication. The courts did not go into the reasons under which the contractor had to give a no-claim certificate. In *Nithani Steel Ltd. v. Associated Constructions*, (5) it was held that once the parties have arrived at a settlement in respect of any dispute and that dispute is amicably settled by way of a final settlement between the parties, it cannot lie in the mouth of one party to spurn it on the ground that it was a mistake and that if such a dispute on which there had been a settlement is referred to arbitration the sanctity of the contract would be lost.

It cannot be said in abstract that there can be no voluntary settlement of disputes for which the employer is asking for a 'no-claim certificate'. In a case Railways made an offer to the contractor laying down that if the offer was not acceptable the cheque should be returned forthwith failing which it would be deemed that the contractor has accepted the offer in full and final settlement of its claims. It was also stated that the retention of the cheque and/or encashment thereof will automatically amount to satisfaction in full and final settlement of the claim. Thus, if the contractor accepts the cheque and encashes the same without anything more, it would amount to acceptance of the offer. It is significant that protest and non-acceptance, if any, must be conveyed before the cheques are encashed. An offeree cannot be permitted to change his mind after the unequivocal acceptance of the offer. (6) The decision in this matter was based on the principles enshrined in section 8 of the

Contract Act, 1872 which states: "**Acceptance by performing conditions or receiving consideration. –** Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

An offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The Courts must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the "offeree" was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. (7)

Though acceptance has to be notified to the offeror, he is free to dispense with it since that notification is for his benefit. From the encashment of a cheque without first informing disagreement with the condition that the cheque is in full and final settlement the employer must be assumed, in terms of section 8 of the Contract Act, to have fully accepted the proposal to settle the claim fully and finally with a lesser amount. (8)

If a person sends a sum of money on the condition that it is to be taken, if at all, in satisfaction of a larger sum, and if the money is kept it is a question of fact as to the terms upon which it is kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If the accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. (9)

When a 'no-claim certificate' is given by the contractor without any undue influence whatsoever, then such a certificate is binding and any plea raised at a later point of time for retracting from its position cannot be permitted. But if the circumstances of the case are such which go to show that no prudent person would ever think of giving such a certificate voluntarily, then it will not be acted upon. For example, if a contractor applies for extension of time for reasons attributable to the employer, in order to achieve completion of works, then a 'no-claim certificate' to the effect that he will not make any claim

on account of prolongation of contract, would be of no avail. Anybody and everybody will subscribe to the view that the 'no-claim certificate' given, in such circumstances, will not and cannot be of the free-will of the contractor.

Simply because the contractor has given a no-claim certificate would not mean that he would not be entitled to claim damages. The plea of the employer that extension of time had been given to the recorded date of completion without levy of liquidated damages, the consideration of 'No-claim Certificate' was held to be not tenable because the grant of extension of time and non-levy of liquidated damages clearly showed that the contractor was not responsible for the delay and hence, the 'No-claim Certificate' had no effect. (10)

Where the contractor claimed the amount due to him by way of final bill and it was paid by the employer after obtaining receipt of full and final settlement but prior thereto the contractor had registered his protest, it was held that in such like cases it could be said that the contractor had not waived his right under the contract and was thus entitled to make a claim for adjudication of his claims through arbitration. (11)

When, after the payment of the final fill, a contractor makes a claim, the employer generally resists the claim on the plea that the contract stood discharged after the contractor accepted the payment in full and final satisfaction in the form of final bill. The Supreme Court in *Jayesh Engineering Works v. New India Assurance Co. Ltd.* (12) has taken the view that questions whether the contract has been fully worked out and whether payment has been made in full and final satisfaction or any amount remains to be paid, are to be considered by the arbitrator when there is a dispute on such questions.

In *Halsbury's Laws of England,* (13) it is stated:

"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate expresses two propositions:

(1) That the person in question, having a choice between the courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

Over the years, conflicting judgments have been reported from various courts on the issue of 'no-claim certificates'. Different views were expressed in some cases by High Courts, one opposed to the other. Recently, in *R.L. Kalathia and Co. v. State of Gujarat,* (14) has set the controversy at rest and has laid down the following principles regarding "no-dues certificate":

"(i) Merely because the contractor has given a "no-dues certificate", if there is an acceptable claim, the Court cannot reject the same on the ground of "no-dues certificate"

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause would not be an absolute bar to a contractor from raising claims which are genuine at a later date even after submission of such a "no-claim certificate".

(iii) Even after execution of full and final discharge voucher / receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not debarred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing a "no-dues certificate".

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1. (2004)2 SCC 663: AOR 2004 SC 1330
2. AIR 2008 SC 2911
3. (2009)7 SCC 350
4. 1994 Supp.(3) SCC 126
5. 1995 Supp. (3) SCC 324

6. Bhagwati Prasad Pawan Kumar v. Union of India, (2006)5 SCC 311: AIR 2006 SC 2331: 2006(3) RAJ 161: (2006)6 Mah LJ 6
7. Ibid
8. Union of India v. Rameshwarlall Bhagchand, AIR 1973 Gau 111
9. Day v. McLea, (1889)22 QBD 610: 58 LJ QB 293: 60 LT 947 (CA)
10. Sanyukit Nirmata v. Union of India, 2004(1) RAJ 632 (Del)
11. DDA v. Saraswati Construction Co., 2004(3) Arb LR 276 (Del) (DB)
12. (2000)10 SCC 178
13. 4th Ed., Vol. 17, para 957, p. 844
14. (2011)2 SCC 400