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Mere issuance of 'no claims certificate' does not constitute waiver if coercion and undue influence is well established: DHC refuses to set aside arbitral award

GAIL (India) Limited v. Bansal Infratech Synergies Limited

Case No.	O.M.P. (COMM.) 180/2021
Date	27 July 2021
Court	High Court of Delhi
Coram	Hon'ble Mr. Justice Vibhu Bakhru

1. FACTUAL MATRIX

- 1.1 The present judgment arises out of an application filed under section 34 of the Arbitration and Conciliation Act, 1996 (“**Act**”) seeking setting aside of the arbitral award dated 10 December 2020 (“**Award**”). The Award was rendered in respect of disputes that had arisen between GAIL (India) Limited (“**Applicant/GAIL**”) and Bansal Infratech Synergies (“**Respondent**”) in connection with the contract for ‘Civil and Structural and U/G Piping Works for LLDPE/HDPE’ at GAIL’s Petrochemical Complex - II at Pata, Uttar Pradesh (“**Project**”).
- 1.2 The Respondent’s bid for a contract value of INR 63,68,27,876 was accepted and the same was communicated by a Fax of Acceptance (“**FAO**”) on 8 October 2011. Subsequently, on 3 November 2011, a detailed letter of acceptance (“**DLOA**”) was issued to the Respondent. The works were required to be completed within a period of eighteen months from the date of issuance of the FOA; that is, by 8 April 2013. The time for completing the works was extended and the Respondent finally completed the same on 31 March 2015. Thereafter, on 3 March 2016, the Respondent submitted its Final Bill to Engineers India Limited (“**EIL**”), the Consultant on the Project. Thereafter, the Final Bill was forwarded by EIL to GAIL and payments against the same were made on the recommendations of EIL. The last payment was made to the respondent on 17 October 2017. Prior to receipt of the last payment, Respondent invoked the arbitration clause and issued a notice dated 12 October 2017 claiming the amounts due to it under the contract. GAIL refuted the claim stating that the contract stood discharged by accord and satisfaction in view of the No Claim Certificate (“**NCC**”) issued by the Respondent.
- 1.3 This led to the Respondent filing an application under Section 11(6) of the Act and Justice (Retd.) Badar Durrez Ahmed was appointed as the Sole Arbitrator for adjudicating the dispute (“**Sole Arbitrator**”) on 16 April 2018. The Sole Arbitrator rendered the Award in favour of the Respondent and concluded that the NCC issued by the Respondent was under undue influence, duress and coercion and directed GAIL to pay the outstanding dues.

2. CONTENTIONS OF THE APPLICANT

- 2.1 GAIL contended that, *firstly*, the contract between the parties stood fully discharged by accord and satisfaction as the Respondent furnished the NCC. *Secondly*, GAIL claimed that the Respondent had submitted the Material Reconciliation Statement accepting that 128.846 MTs of structural steel deposited with GAIL, was scrap and Respondent was precluded to raise any claims in view thereof of the NCC. In addition, GAIL contested the claims on merits as well.
- 2.2 *Thirdly*, it was contended that a bald allegation of coercion and undue influence would be insufficient and positive evidence must be led to establish the same, and the Sole Arbitrator erred on this count. Finally, it was contended that the plea of undue

influence and coercion was raised for the first time in the Statement of Claims, and therefore, such a claim could not be accepted on account of delay.

3. CONTENTIONS OF THE RESPONDENT

- 3.1 *Firstly*, the Respondent disputed GAIL's contention and submitted that the contract was not discharged by accord and satisfaction and there was no infirmity in the Award.
- 3.2 *Secondly*, it was contended that the MRS and NCC were invalid and had been obtained by coercion and undue influence, which has been demonstrated and established by leading positive evidence before the Sole Arbitrator, who was considered the same while rendering the Award in its favour.

4. ISSUE

- 4.1 Whether issuance of NCC constitutes a waiver and puts an end to all future claims by the contractor and whether the Award is liable to be set aside?

5. JUDGMENT

- 5.1 The Hon'ble High Court traversed the Award considering the grounds for setting aside enumerated under Section 34 of the Act and found no infirmity with the findings of the Sole Arbitrator. The Court stated that it warrants no reason to re-appreciate or re-evaluate the evidence and examine the Award on merits under Section 34 of the Act. The Court reaffirmed the following observations of the Sole Arbitrator –
- 5.2 The contention of the Applicant that the allegation of coercion was a bald allegation without any substance, was unmerited. The Court observed that there was ample material on record to support the Respondent's contention that it was compelled to issue the NCC and MRS under economic duress and coercion. The Arbitral Tribunal had examined and evaluated the same and the findings rendered in the Award cannot be stated to be perverse or patently illegal.
- 5.3 The Sole Arbitrator correctly referred to the decisions of the Supreme Court in *Master Construction*¹, *Boghara Polyfab*² and *Dicitex Furnishing*³ which clearly state that the issuance of a 'No Claim Certificate' does not, by itself, extinguish the rights and claims of the party issuing such a certificate. If the party can establish duress or coercion, then the 'No Claim Certificate' issued by it would be void and its claims must be judged on merits.
- 5.4 Further, GAIL could not rely on the NCC to constitute a waiver on the part of the Respondent as it had not complied with the conditions stated therein. The Respondent had issued the NCC, *inter alia*, stating that with the receipt of the money it would have no further claims against GAIL. However, GAIL had not fulfilled the payment condition. The Sole Arbitrator found that the amount released by GAIL fell

¹ *Union of Indian v. Master Construction Co.*, (2011) 12 SCC 349 ("Master Construction").

² *National Insurance Company v. Boghara Polyfab Private Limited*, (2009) 1 SCC 267 ("Boghara Polyfab").

³ *Oriental Insurance Co. Ltd. v. Dicitex Furnishing Limited*, 2019 SCC OnLine SC 1458 ("Dicitex Furnishing").

short by INR 62,49,387 and in terms of the NCC, the claims, dues, disputes, and differences between the parties would be fully and finally settled on receipt of the full amount. As such, even *de hors* the question of coercion and/or duress, the NCC could not constitute a waiver on the part of the Respondent.

5.5 The contention that the plea of coercion had been raised at a belated stage was also unmerited. The Court opined that it was the Respondent's case that it was compelled to issue the NCC and MRS to secure payments that were admittedly due to it; and the question of delay in making such allegation must be considered not from the date when the Final Bill was submitted but when the admitted payments were received.

5.6 The Court further observed that it was true that the language of the NCC was as dictated by EIL/GAIL. It was a one-sided letter and effectively deprived the Respondent from raising any future claims. There was also material on record to establish that the Respondent was facing a liquidity crunch and it had placed on record several letters seeking release of funds on that ground.

6. CONCLUSION

6.1 The Hon'ble Delhi High Court dismissed the Application as GAIL failed to establish any grounds for setting aside the Award under Section 34 of the Act. It was also noted that similar disputes had arisen between the parties and similar issues were also raised in respect of another contract that was awarded to the Respondent. The resultant award was impugned by GAIL in OMP (Comm) 177/2021, wherein the contentions advanced on behalf of GAIL were considered and rejected by this Court by a judgment dated 6 July 2021.

7. PSL OPINION

7.1 judgment signifies vital aspects of standard of proof required for establishing economic coercion and undue influence in construction disputes if the contractor is made to sign a no claim certificate as a pre-cursor to receipt of contractual payments due to it. This practice is rampant in infrastructure contracts executed with many PSUs and claims raised subsequently are hotly contested by taking a plea of waiver. It will serve such parties well to clearly document the facts and circumstances under which the NCC was issued along with any correspondence with the counter party highlighting the financial hardship due to non-payment of contractual bills. At the same time, a bald assertion of coercion or duress without any material to back such a plea would not entitle the party who gave the 'No Claim Certificate' to renege from it.

7.2 The judgment also reaffirms the settled position of law that the arbitrator is the final arbiter of facts, and the Court would not supplant its opinion by re-appreciating or re-evaluating the facts and merits of the Award if perversity or patent illegality is not writ large.