

**(2012) 08 DEL CK 0461**  
**In the Delhi High Court**  
**Case No : O.M.P. No. 245 of 2002**

|                                    |    |            |
|------------------------------------|----|------------|
| Gas Authority of India Ltd.        |    | APPELLANT  |
|                                    | Vs |            |
| Sab Industries Limited and Another |    | RESPONDENT |

**Date of Decision :** 23-08-2012

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 34

**Citation :** (2012) 131 DRJ 469

**Hon'ble Judges :** Dr. S. Muralidhar, J

**Bench :** Single Bench

**Advocate :** Ramji Srinivasan, with Mr. Ajit Pudussery, Mr. Dinesh Khurana, with Mr. Vivek Paul Oriel and Ms. Joanne Pudussery, for the Appellant; Nidhesh Gupta with Mr. Tarun Gupta, Ms. Nidhi Gupta, M.K. Ghosh and Mr. Deepak Sabharwal, for the Respondent

**Final Decision :** Allowed

## Judgement

S. Muralidhar, J.—Gas Authority of India Ltd. ("GAIL") has filed this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenging an Award dated 26th April 2002 passed by the sole Arbitrator (Respondent No. 2) in the disputes between the GAIL and Respondent No. 1 SAB Industries Ltd. ("SIL") arising out of a letter of intent ("LoI") dated 23rd December 1996 whereunder SIL was to construct hundred houses for the GAIL at Sector 23, Noida for a total value of Rs. 5,37,83,775. Before the sole Arbitrator appointed by the GAIL, SIL filed twenty-eight items of claims in the sum of Rs. 1,97,52,143.62 together with future interest at 24% per annum compounded quarterly on the amounts claimed under Claim Nos. 1 to 28.

2. In its reply statement filed on 14th August 2001 a preliminary objection was raised by GAIL that since SIL had accepted the payment of the amount under the final bill in absolute satisfaction no further claim was maintainable. Along with the reply statement, GAIL enclosed a copy of the completion certificate, 18th RA bill as finalized and the no demand certificate ("NDC") issued by SIL. In other

words, GAIL's plea was that since there was an "accord and satisfaction" of all the claims of SIL, and payment against the final bill had been accepted by SIL without protest, SIL's claims were not arbitrable.

3. In the impugned Award, the learned Arbitrator dealt with this preliminary submission as under:

c) As regard contention of the Respondents that a "No Claims Certificate" had been issued by the Claimants to the Respondents, the Respondents has shown that said "No Claims Certificate" which is printed document and it was the case of the Claimants that the Claimants was made to sign on the dotted line. This fact has not been disputed by the learned counsel appearing for the Respondents. The Claimants has also relied upon a letter dated 26.6.2000, written by C.P. Kukreja Associates Pvt. Ltd., i.e. the consultant of the Respondents, wherein the consultant of the Respondents has asked the Claimants to "furnish the requisite "No Claims Certificate" in the prescribed proforma as enclosed, which may please be obtained from them before releasing payment of the Contract against their 18th and final bill." Again, at pages 5 and 6 of the documents filed by the Respondents Company, the said Consultant have again reiterated in Point No. IV that "the Contractor in furnishing the "No Claim Certificate" in the proforma enclosed". A perusal of the above makes it clear that the No Claim Certificate which was being sought by the Respondents was in the prescribed proforma, on which the Claimants was required to sign. In addition to the aforesaid, a perusal of the judgments of the Hon"ble Supreme Court of India as mentioned earlier, make it absolutely clear that the issuance of the "No Claims Certificate" only weakens the case of the concerned party; but the entire matter is a subject of arbitration.

4. Mr. Ramji Srinivasan, learned Senior counsel, appearing for GAIL referred to the decisions of the Supreme Court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., and Union of India (UOI) and Others Vs. Master Construction Co., and urged that the mere averment by SIL in its rejoinder for the first time that it had signed the NDC under "coercion and duress" was not sufficient for the learned Arbitrator to conclude that SIL was made to sign on the dotted line. He submitted that the statement in the above extracted paragraph of the Award that the said fact was "not disputed by learned counsel appearing for the Respondent" was incorrect inasmuch as GAIL had categorically stated on affidavit before the learned Arbitrator that the NDC had been issued by SIL not under any "coercion or duress". He referred to the entries in the bank accounts to show that the final payment by GAIL of the amount mentioned in the NDC to SIL was made on 23rd October 2000 contemporaneous with the issuance of the NDC.

5. Mr. Nidhesh Gupta, learned Senior counsel appearing for SIL, first referred to the correspondence between the parties and the minutes of the meetings held at different stages which according to him would go to show that what was admittedly owed to SIL was an amount far greater than what it had been coerced into agreeing to accept in the NDC. Although he did not deny that neither in

SIL's letter dated 15th February 2001 to GAIL nor in the subsequent letter dated 15th March 2001 issuing notice for appointment of an Arbitrator, SIL had not stated anything about it having been coerced into issuing the NDC, he submitted that the statement made by SIL in its rejoinder before the learned Arbitrator together with the numerous documents placed on record which were referred to by the learned Arbitrator, satisfied the requirement of the law as far as the conclusion of the learned Arbitrator was concerned. He also referred to the decisions in National Insurance Company Limited v. Boghara Polyfab Private Limited and Union of India v. Master Construction Company. He referred to the decision of a learned Single Judge of this Court in H.C. Builders Vs. Union of India, and submitted that since the learned Arbitrator has, on the basis of the evidence, arrived at a finding of fact that SIL was forced to sign on the dotted line, the said finding did not call for interference.

6. The question whether the issuance of a NDC precludes a Contractor from making claims in arbitration proceedings has been considered in a large number of cases by the Supreme Court. Relevant to the facts of the present case are the decisions in P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., ; State of Maharashtra v. Nav Bharat Builders and Nathani Steels Ltd. v. Associated Constructions . In each of the above cases, the facts were examined in order to determine whether or not the Contractor's statement concerning final settlement of disputes was voluntary and whether the contract was in fact discharged by "accord and satisfaction". In Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash the Supreme Court held that when a question was raised whether there was discharge of the contract by way of "accord and satisfaction", the Arbitrator had to first determine that question before proceeding further with the arbitration.

7. In Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, , the Contractor had, on the same day that he had signed an NDC written a letter to the Employer stating that it had issued the NDC in view of a threat that unless it was executed the payment would not be released. Interestingly, in the said judgment, the Supreme Court took note of the fact that the letter was filed before the trial court and therefore, it could not be said that the plea of the Contractor that it had issued the said certificate under coercion was an afterthought. The Supreme Court in Boghara Polyfab Private Limited also relied on the categories of cases where the full and final settlement discharge vouchers were insisted and taken (either in a printed format or otherwise) as a condition precedent for the release of admitted dues. It noted that in Nav Bharat Builders, Nathani Steels and P.K. Ramaiah & Co., the Court examined the facts in order to satisfy itself that there was "accord and satisfaction" or complete discharge of the contract and whether there was evidence to substantiate the allegation of "coercion/undue influence". In United India Insurance Vs. Ajmer Singh Cotton and General Mills and Others, , it was held that ".....If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like,

coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief...."

8. Mr. Nidhesh Gupta placed considerable emphasis on the observations in para 49 of the decision in Boghara Polyfab Private Limited. The said para reads thus (SCC @ p. 293-94):

49. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually, that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government Departments, statutory Corporations and government Companies for issue of undated "no due certificates" or "full and final settlements vouchers" acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.

9. It was urged by Mr. Gupta that in the present case the payment of the amount mentioned in the NDC, which was pre-printed and undated, was released to SIL only after it signed the NDC. It was submitted that the observations in para 49 of the decision in Boghara Polyfab Private Limited squarely applied to the facts on hand and, therefore, the learned Arbitrator was justified in coming to the conclusion that SIL having been forced to sign "on the dotted line" would not by virtue of the NDC be precluded from maintaining its claims. Mr. Gupta also buttressed his submissions by referring to illustration (iii) in para 52 of the decision in Boghara Polyfab Private Limited (SCC @ p.295):

52.....(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.

10. The observations in para 49 and the illustration in para 52 (iii) are possible factual situations, which when proved to exist, might lead to the inference that the NDC was obtained from the Contractor under "duress or coercion". However, the mere averment of those facts is insufficient. The facts have to be shown to exist by the party by producing evidence. This is clear from para 50 of the decision in Boghara Polyfab Private Limited (SCC @ p. 294):

50. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by the plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether the plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration.

11. In the present case, the NDC signed by SIL reads as under:

#### No Demand Certificate

Received the sum of Rs.707784=00 (Rupees Seven lac Seven thousand Seven hundred Eighty four only) in full and final settlement of all the payments due to us for Construction of 100 Nos. Residences and Site Development Works for GAIL at Plot No. B-99, Sector-23, Noida, U.P. executed by us under the Contract Agreement between us and GAIL including all amounts payable to us as per the Agreement. We hereby unconditionally and without any reservations whatsoever certify that with this payment, we shall have no claim of any description on any account whatsoever from GAIL against the aforesaid job executed by us. We further declare unequivocally that with this payment we have received all the amounts payable to us and have no dispute of any description whatsoever regarding the amounts worked out as payable to us and the amounts received by us and that we shall be continued to be bound by the terms and conditions of the Agreement as regards the performance of the contract.

for M/S SAB Industries Ltd.

Signature

12. The NDC is undated, but the documents placed on the arbitral record by GAIL substantiate its plea that the payment of the amount mentioned in the NDC was

paid to SIL on or around 23rd October 2000. The signed voucher in that regard is also available on record. As will be noted hereafter, SIL did not deny having received payment after the NDC was signed. Whether the payment was received simultaneously with the NDC or thereafter pales into insignificance when it is seen that SIL made no noise about it till much later when it filed a rejoinder in the arbitral proceedings.

13. It was not as if SIL was taken by surprise on being asked to give the NDC. This was one of the prerequisites for the making of final payment in terms of Clause 94 which reads as under:

#### 94.4 Final payments

Based on the joint final measurement of work performed in accordance with/as per Clause 92, the Contractor shall submit his final bill for the works within 3 months of such final measurements. The bill shall be based only on works as measured and at accepted tender rates including rates for any additional or extra work which might have been sanctioned by the Owner. All deductions due under the Contract shall be incorporated. The final bill shall be accompanied by:

- a) A copy of the Completion Certificate issued by the Engineer-in-Charge and
- b) A "No Claim Certificate" in the prescribed form.

The Engineer-in-Charge shall examine and certify the final bill for payment after satisfying that the works have been satisfactorily completed and that all properties, works and things removed or disturbed/damaged in consequence of the work have been properly replaced and made good and all expenses and demands incurred or made by or on the account of GAIL or in respect of any damage or loss by, from or as a consequence of execution of the works have been satisfied, all materials have been returned and the site cleared. In respect of list of claims given by the Contractor, the Owner shall examine and either accept or repudiate in whole or in part and convey its decision in writing to the Contractor.

14. Unlike the facts in *NTPC Ltd. v. Reshmi Constructions*, where on the very same day the Contractor protested about having been made to give the NDC under "coercion or duress", in the present case SIL registered no such protest immediately after receiving payment. This conduct of SIL is significant for the purposes of assessing the credibility of its plea as to having been made to sign the NDC under "duress or coercion".

15. In its letter dated 15th February 2001 addressed to GAIL regarding "payment of pending items", SIL did not mention of the fact that it had been made to sign the NDC under "coercion or duress". This was followed by the letter dated 15th March 2001 which reads as under:

Dear Sir,

The above work was awarded to us vide your letter dated 23.12.1996 and the

same was completed and handed over on 12.05.1999. During the currency of contract certain disputes has arisen with respect to nonpayment of deviation items resulting into extra work as defined under clause 107.1 of the aforesaid agreement. These items along with our claim and interest payable thereon were consolidated and a notice was sent for payment to the Manager(Civil), GAIL on 15.02.2001 as per copy attached, in terms of Cl. 107 of the contract.

Since the concerned Manager (Civil), has failed to make us the payment as mentioned in the above letter, we hereby invoke the arbitration clause 107 as specified within the aforesaid agreement and request you to send us a panel of arbitrators within 30 days in terms of clause mentioned therein. The relevant text of the arbitration clauses so mentioned herein are enclosed for your perusal and necessary action.

16. Following the appointment of the learned Arbitrator, SIL filed its statement of claims. Again, there was not a whisper therein about SIL having had to sign the NDC under "duress or coercion". It was only in response to GAIL's preliminary objection in its reply statement regarding the NDC that for the first time in its rejoinder filed on 19th September 2001, almost a year after it had received the cheque in full and final payment, SIL came up with the following pleas:

However, the Respondent Company and its authorities went back on the assurances which had been given until then and asked the Claimant Company to accept the final bill prepared by them, wherein a payment of Rs.7,07,784/-plus escalation of Rs.3,00,000/-was being released against the aforesaid heads.

It is submitted that in addition to the aforesaid, a No Claim Certificate in a fixed proforma was also submitted by the Respondent Company to the Claimant Company, wherein the Management of the Claimant Company was required to sign on the dotted line as a precondition to the release of payment. The representative of the claimant company signed the blank No Claim Certificate and the figures filled in therein were not filled in by the representative of the claimant company. It is a well known fact that in industry, cash flow and circulation of money is necessary for businesses to run. The claimant company required funds for running its business and, therefore, under threats of the Respondent company that refusal, to sign on the dotted line and to accept the arbitrary figure fixed by the Respondent company would result in even the payment of Rs. 7,07,784/-plus escalation of Rs. 3,00,000/-being delayed indefinitely, the representative of the claimant company signed the No Claim Certificate. It is submitted that having not being done so, the business of the claimant company would have been severely affected since the shortage of cash would have adversely resulted in ongoing operations being delayed resulting in further consequences which would have had far reaching impact.

In addition to the aforesaid threat, the claimant company was also coerced into accepting the arbitrary figure mentioned in the No Claim Certificate under the threat that Bank Guarantee for Rs. 53,78,000/-which have been executed by the

claimant company in favour of the Respondent company by way of performance guarantee would be encashed even though the claimant company had fully complied with its part of the contractual obligations and had satisfactorily completed the work. Under the threat of encashment of bank guarantee worth Rs. 53,78,000, which would have irreparably crippled the claimant company, the claimant company had no option but to accept the arbitrary figure given by the Respondent company.

In addition to the aforesaid objections, the exercise of coercion and undue influence by the Respondent company is also apparent from the fact that under Contract Clause No. 94(1), the No Claim Certificate is to be submitted along with the final bill.

In the present matter when the final bill dated February 7, 2000 was submitted by the claimant company, No Claim Certificate was given along with it. The No Claim Certificate was only taken by the Respondent company under coercion in the circumstances mentioned herein which fact completely establishes the manner in which the claimant company was threatened and forced into signing the No Claim Certificate.

17. SIL failed to lead any evidence in support of the above averments. It did not name anyone in GAIL, if at all, who coerced or compelled SIL to give the NDC. There was no evidence before the learned Arbitrator which might have substantiated the above averments in SIL's rejoinder. On the other hand, GAIL filed the affidavit of one Mr. Anoop Gupta on 12th October 2001 in which it was stated as under:

2. The claimant above named has filed a Statement of Claim against GAIL, the Applicant/Respondent. GAIL has already filed a Counter Statement, taking inter alia the preliminary point of maintainability of the said Statement of Claim. In addition, GAIL has filed an application challenging inter alia the maintainability of the said Statement of claim.

3. In both the above mentioned counter statement and application aforesaid, GAIL has relied upon certain documents for substantiating its allegations against the claimant above named, so as to prove that the said Statement of Claim is not tenable and the Arbitration is not maintainable.

4. GAIL has already filed copies of the above mentioned documents, relied upon by it as Annexure to the counter statement. Presently, GAIL is filing photocopies of those documents along with this Affidavit and the documents are listed in a separate sheet annexed hereto and marked "A". These documents, filed for and on behalf of GAIL in the above matter are the official records of GAIL.

18. The documents referred to in the affidavit included the NDC and the entries in the bank statements which substantiated the payment made to SIL of the amount mentioned in the NDC by way of cheque. The evidence of Mr. Anoop Gupta remained unrebutted. The learned Arbitrator in his impugned Award did

not even discuss the said evidence. The finding that SIL had to sign on "the dotted line" was coerced into signing the NDC is not based on any evidence.

19. Mr. Nidhesh Gupta earnestly pleaded that this was a classic case of a party being forced to sign the NDC under "economic duress". He invited the Court to infer from the extracted passage of the impugned Award that it was only after analyzing the entire evidence that the learned Arbitrator concluded that SIL was made to sign on the dotted line. In the first place, that is not how the learned Arbitrator has approached the issue. He refers to no evidence that might have led him to draw that conclusion. Secondly, the learned Arbitrator in fact failed to demand that SIL should prove its allegation of coercion or duress by some credible evidence. Thirdly, the documents on record, placed by way of the unrebutted affidavit of Mr. Anoop Gupta do not support the plea of SIL. Lastly, the scope of the jurisdiction of this Court u/s 34 of the Act is limited. The Court cannot at this stage permit SIL to make good its failure to lead evidence before the learned Arbitrator.

20. An allegation by a party that a certain document was got signed by the opposite party against whom a claim is made through duress or coercion is indeed a serious one. It ought not to be made lightly. The standard of proof that should be demanded by an Arbitrator before whom such allegation is made would be no different from the standard of proof required if such a plea were to be urged in proceedings before a civil court. This is clear from paragraph 50 of the decision in Boghara Polyfab Private Limited. In Union of India v. Master Construction Company, the requirement of the Court having to be satisfied with the plea of "duress and coercion" even at the stage of appointment of an Arbitrator was emphasized. It was observed:

A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate.... if such plea is found to be an afterthought, make-believe or lacking in credibility, the matter must be set at rest then and there.

21. In the present case, the learned Arbitrator committed a patent illegality in not requiring SIL to prove through some credible evidence its allegation. His finding that SIL signed the NDC "on the dotted line" is not the same as the finding that SIL had signed the NDC under "duress or coercion". Even if it were to be assumed to be so, such finding was not based on any evidence. SIL's claims ought not to have been entertained. For the aforementioned reasons, the impugned Award dated 26th April 2002 is set aside. The petition is allowed with costs of Rs. 20,000 which will be paid by SIL to GAIL within a period of four weeks from today.