

(2012) 09 DEL CK 0087

In the Delhi High Court

Case No : O.M.P. 77 of 2006 and O.M.P. 171 of 2006

Indian Oil Corporation Ltd. and Others

APPELLANT

Vs

M/s. Ponty Malik Construction Co. and Another
 Ponty
Malik Construction Co. and Another Vs Indian Oil Corporation
Ltd. and Others

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16(2), 34, 34(2)(b)(ii)
Contract Act, 1872 — Section 28

Citation : (2012) 193 DLT 535

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

Bench : Single Bench

Advocate : D. Moitra with Ms. Suman Mandal, O.M.P. 77 of 2006, Ms. Sunita Harish and Mr. Girish Kandpal, O.M.P. 171 of 2006, for the Appellant; Sunita Harish and Mr. Girish Kandpal, Advocates, O.M.P. 77 of 2006, Mr. D. Moitra with Ms. Suman Mandal, Advocates, O.M.P. 171 of 2006, for the Respondent

Judgement

Justice S. Muralidhar

1. Aggrieved by the Award dated 19th November 2005 of the sole Arbitrator, Indian Oil Corporation Ltd. ("IOCL") has filed O.M.P. No.77 of 2006 and the Contractor M/s. Ponty Malik Construction Co. ("PMCC") has filed O.M.P. No.171 of 2006, u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act"). IOCL awarded PMCC the work of site grading, construction of roads, SW drains, culverts, ERC's, tank pads and other associated works for Panipat Marketing Terminal of IOCL (Marketing Division). The contract value was Rs.4,99,85,910 and the time for completion was 10 months from 21st October 1994. The Engineer In-charge was Engineers India Ltd. ("EIL") who was the power of attorney holder for IOCL for this purpose. According to IOCL, PMCC failed to execute the work within the stipulated time. IOCL states that only 32% of the total contract value could be completed by PMCC by the stipulated date of completion. The contract had to be ultimately abridged.

2. IOCL states that on 12th December 1997, a final bill was drawn up which was signed by the partner of the PMCC whereby a sum of Rs.9,41,678 was determined as payable to PMCC in full and final settlement of all its claims. Simultaneously, a "No Claim Certificate" ("NCC") was also signed by PMCC. IOCL states that the aforementioned sum was arrived at by deducting liquidated damages ("LD") of Rs.15,68,000 from the sum of Rs.25,48,914 being the balance amount payable for the work done. After deducting income tax and sales tax, a sum of Rs.9,41,678 was found payable. The said amount was paid by a cheque dated 13th December 1997 which was encashed by PMCC.

3. More than six months thereafter on 25th June 1998 PMCC wrote to EIL claiming that IOCL owed it a sum of Rs.2,61,36,315.24. In reply to this letter, EIL on 30th June 1998 wrote to PMCC enclosing a copy of the NCC and stating that as per its record "full and final payments against your final bill including extra claims (Item Nos.3 & 5) and security deposit had been released and accepted by your authorised representative". On 16th December 1998 PMCC wrote to EIL stating that the NCC enclosed with IOCL's letter dated 30th June 1998 "seems to be a fictitious certificate as the signature is not of any authorised person...." and that "This has been intentionally and mischievously done by someone with the motive to harass us".

4. On 20th August 1999, PMCC sent IOCL a reminder stating that if its legitimate dues were not paid, or an Arbitrator was not appointed within 30 days, it would seek appropriate legal address. EIL wrote to PMCC on 5th October 1999 reiterating that all payments due to PMCC had been released and no money was due. EIL expressed surprise that PMCC was challenging the authenticity of the NCC and that its denial of the NCC was not legitimate.

5. PMCC filed Arbitration Application No.264 of 2000 in which an order was passed by this Court on 28th February 2001 appointing the sole Arbitrator. Before the learned Arbitrator an application was filed by IOCL u/s 16(2) of the Act challenging his jurisdiction on the ground that there had been a full and final settlement of all claims of PMCC and therefore there was no arbitrable dispute.

6. By a 187 paragraph order dated 23rd April 2004, the learned Arbitrator rejected the said application holding that he had jurisdiction to decide the dispute between the parties. In doing so, the learned Arbitrator observed that IOCL had waived compliance with the requirement of PMCC having to notify its claim under Clause 6.6.1.0. The learned Arbitrator further observed that the levy of LD by IOCL was in breach of the settlement between the parties whereby PMCC was prepared to limit its claim to Claim Nos.3 & 5 and give up Claim Nos.1, 2, 4 & 6. It was held that since PMCC needed the money urgently, its partner was compelled to sign "whatever paper was put before him". The learned Arbitrator concluded in para 98 of the order dated 23rd April 2004 that the NCC dated 12th December 1997 "is not worth the paper on which it is written". It was further observed that IOCL had been "unfair, unjust and improper" in dealing with PMCC and that the LD could not have been levied.

7. After the parties filed their respective affidavits by way of evidence and the deponents of the affidavits were cross-examined, the learned Arbitrator passed the final impugned Award dated 19th November 2005. The learned Arbitrator came to an opposite conclusion as regards the NCC. He now held that the NCC was signed "by a duly authorized person who accepted the cheque, signed the "no due certificate" and took the cheque with him and put it in the bank account". If indeed there was no settlement by an authorized person as claimed by PMCC "the cheque should have been returned". Further the learned Arbitrator held that he was "unable to accept the argument that the settlement was made by an unauthorized person". The learned Arbitrator also accepted IOCL's arguments that in terms of Clause 6.7.1.0 of the contract there was a complete discharge of the owner's (IOCL's) liability since the payment was made "in full and final settlement of all the dues to the contractor". Again in para 87 of the final Award, the learned Arbitrator concluded: "I am not persuaded that I have power to set aside the settlement on the vague ground of "financial constraint"....I find there was no unfairness, no undue influence and no unconscionable grounds on which the transaction can be set aside".

8. However, the learned Arbitrator held that the deduction of the LD amount of Rs.15,68,000 from the bill amount of Rs.25,48,914 was not justified and was "incompatible and incongruous with the spirit of the amicable settlement which was reached as to extra claims. To deduct LD was a breach of faith". Accordingly, the learned Arbitrator awarded PMCC a sum of Rs.15,68,000 together with simple interest @ 15% per annum from 12th December 1997 till the date of payment and Rs.2 lakhs as costs. IOCL's counter-claim was dismissed.

9. Aggrieved to the extent that PMCC has been held entitled to a sum of Rs.15,68,000 together with simple interest @ 15% p.a., and the rejection of its counter-claim IOCL has filed O.M.P. No.77 of 2006. To the extent its other claims have been rejected, PMCC has filed O.M.P. No.171 of 2006.

10. Mr. D. Moitra, learned counsel for IOCL referred to the decisions of the Supreme Court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., and Union of India v. M/s. Master Construction Co. (2011) 3 R.A.J. 487 (SC) and submitted that once the learned Arbitrator came to the conclusion that the NCC was not given by PMCC under duress or coercion, there was no arbitrable dispute left to be adjudicated. He submitted that the NCC had to be read together with the final bill which was contemporaneously signed by the partner of PMCC on the same day i.e. 12th December 1997. The final bill signed by the partner of PMCC showed the amount payable for the work done as Rs.25,48,914 and the LD amount deducted therefrom as Rs. 15,68,000. The LD amount could not be separated from the amounts indicated in the final bill which showed how the amount of Rs. 9,41,678 which was paid as full and final settlement was arrived at.

11. Mr. Moitra pointed out that for more than twelve months after receiving and encashing the cheque of Rs.9,41,678, PMCC chose to keep quiet. PMCC has also

led no evidence to make its case good to show that the signatures on the NCC and the final bill were fictitious. It is submitted that the learned Arbitrator contradicted himself in holding on the one hand that the NCC was valid and on the other hand holding the deduction of Rs.15,68,000 towards LD to be invalid. He submitted that the impugned Award suffered from a patent illegality and was contrary to the public policy of India, making it liable to be set aside u/s 34(2)(b) (ii) of the Act.

12. Ms. Sunita Harish, learned counsel appearing for PMCC, referred to the correspondence between the parties preceding the settlement. In particular, she referred to the fact that on 24th April 1995, there was a meeting between the parties during which it was agreed that the work awarded to PMCC would be abridged with no financial implication to the PMCC. This was reiterated in a co-ordination meeting held on 8th May 1995. On 10th June 1995, EIL communicated to PMCC the decision to abridge the site grading work awarded to PMCC. On 7th March 1996, PMCC submitted a final bill for Rs.1,11,51,981.61 towards the work executed after the abridgement. On 26th March 1996, EIL returned the original final bill for correction. On 9th April 1996, PMCC re-submitted the final bill.

13. Ms. Harish stated that on or about 15th July 1996 during discussions, EIL compelled PMCC to withdraw Claim Nos.1, 2, 4 & 6 in lieu of its Claim Nos.3 & 5 being considered. PMCC states that it agreed to this by its letter dated 8th August 1996 to EIL due to the financial constraints it was facing. When no payment was received by 16th August 1996, PMCC sent reminders on 22nd and 29th August 1996. PMCC had submitted a NCC for release of payment. On 30th August 1996, EIL informed PMCC that the release of ad-hoc payments was under active consideration. Thereafter, several reminders were sent to EIL but no money was forthcoming. A reminder was sent by PMCC on 21st November 1997. EIL released part payment of a sum of Rs.50,86,796 in 18 months after 8th August 1996 "after taking alleged "No Claim Certificate" dated 12th December 1997", in three instalments and this led PMCC to send a letter on 25th June 1998 making a claim of Rs.2,61,36,315.24.

14. Ms. Harish further referred to the order dated 23rd April 2004 in which the learned Arbitrator held that PMCC had claimed the NCC to be an invalid document. While she acknowledged that the learned Arbitrator had contradicted himself by holding the very same NCC to be valid in the final Award dated 19th November 2005, Ms. Harish submitted that the deduction of LD in the sum of Rs.15,68,000 by IOCL from the final bill was contrary to the express understanding between the parties. She referred to the internal office notings whereby officials of IOCL had approved the payment of Rs.25,48,914 to PMCC towards Claims 3 and 5. She referred to the cross-examination of IOCL's witness in which it was admitted that no prior notice was issued to PMCC for deduction of the LD amount. She submitted that the impugned Award in that regard did not suffer from any illegality and called for no interference u/s 34 of the Act.

15. The central issue that arises for consideration and for adjudication is whether there was a "full and final settlement" of the claims of PMCC by means of the NCC dated 12th December 1997, the final bill of that date followed by encashment by PMCC of a cheque dated 13th December 1997 issued in its favour by IOCL in the sum of Rs.9,41,678.

16. At the outset it must be noted that the learned Arbitrator has expressed two diametrically opposite views as regards the NCC. In paras 77 and 98 of his order dated 23rd April 2004, while dismissing IOCL's application u/s 16(2) of the Act, the learned Arbitrator held as under:

77. He signed whatever paper was put before him. PSU will not pay until he signs no claim certificate. This is the upperhand of IOCL in the transaction which vitiates it and pricks the conscience. As Gandhi once said "there is a higher court than the court of justice. It is the court of conscience and that court supersedes all other courts". This is why a court of equity is a court of conscience.

....

98. On the question of "No Claim Certificate" my view is that the "No Claim Certificate" dated 12th December 1997 is not worth the paper on which it is written. The reason is that IOCL had no right whatsoever to deduct LD out of the amount due.

17. Further the learned Arbitrator seemed to have accepted the case of PMCC that since IOCL had agreed to settle PMCC's Claims 3 & 5 in lieu of PMCC giving up its other claims, the levy of LD by IOCL was "in teeth of the settlement". It was held:

76. A final settlement must mean that IOCL pays the full amount of claims 3 and 5 without any deduction. The termination of the contract was agreed to be without financial implication on either side. But levying LD is a financial liability for the contractor. He is mulcted in damages for delay in execution of the work. But work had been taken away from him before the expiry of the completion period on the clear understanding that he will not be liable for delay, if any, in the execution of the work. IOCL did not keep faith. They acted against the settlement. Levy of LD is in teeth of the settlement. So glaring is the error that we cannot shut our eyes to the ground reality, as the Supreme Court has said. The contractor was under heavy financial pressure. He was ready to take whatever was given by the owner.

.....

80. The contractor was in desperate need for money. He asked for Rs.30 lacs adhoc under the settlement immediately on his signing the No Claim Certificate as interim payment. In fact he had done all that was required of him under the settlement. He had given up all claims except claims 3 and 5. IOCL agreed to pay claims 3 and 5. No Claim Certificate was got signed on 12th December 1997 from the contractor. Payment was made after 18 months of the settlement.

Settlement is dated 5th July 1995. Payment of Rs.9 lacs and odd was made on 13th December 1997. Such delay for a man passing through financial crisis was too much. To crown all IOCL officers crossed out in red ink Rs.15 lacs and odd out of Rs.25 lacs final bill with one stroke of pen leaving a mere Rs.9 lacs and odd. This is what happened to the contractor who was in dire need of money. He took whatever were given to him. He signed whatever papers IOCL wanted him to sign. In fact the contractor signed his own death warrant on which IOCL is now building the defence.

18. However, in the impugned final Award the learned Arbitrator took an opposite view as regards the NCC. This may have been on account of what transpired during the arbitral proceedings. Mr. Abdul Malik, the partner of PMCC, who signed both the final bill and the NCC in his cross-examination on 25th February 2005 in the arbitration proceedings gave the following answers:

I received the cheque by post of the amount of Rs.9,41,678. My man did not go to receive the cheque. I received it by post.

Security deposit was released to me. Orally the date I don't remember. I don't remember whether my man came to take the security deposit from the Corporation.

I don't remember what were details of the payment of Rs.9,41,678 of which I received the cheque. I got the cheque encashed.

I am filing today copy of the final bill proforma submitted to the Corporation for approx. amount of Rs.45,77,767 as well as the net amount of Rs.35,90,380. This was received by the respondent on 22nd June 1996.

I do not remember the amount for the work I did.

Neither I nor my representative signed in my claim certificate.

I did sign a no claim certificate but I do not remember the date.

When I asked for payment the respondent informed me that Rs.15,68,000 has been deducted on account of liquidated damages. Written communication was given but I do not know the date when it was given to me. There is a writing which is already on record.

When no claim certificate was shown to me I found that it was not signed by any man authorized by me during the arbitration proceedings.

Letter dated 25th June 1998 (DD) was written by me. I received the reply vide letter dated 30th June 1998 (EE).

I wrote letter dated 20th August 1999 (HH). I got the reply dated 5th October 1999.

I did not mention about duress earlier than in the legal notice which was issued. Then said I do not remember. I did not receive no claim certificate dated 12th

December 1997 from the Respondent.

19. In the final Award dated 19th November 2005, the learned Arbitrator rejected the case of PMCC "that the settlement was signed by an unauthorized person and secondly that it is not in conformity with clause 6.7.1.0 of the contract." The learned Arbitrator held in paras 35 and 36 of the final Award as under:

35. As regards the objection that the settlement was signed by an unauthorized person it is enough to say that the onus lies on the contractor to show that the person signing the settlement was not duly authorized and that he was not the duly authorized representative of the contractor. The very fact that the cheque of Rs.9,41,678 was accepted by the contractor and the money having gone into the coffers of the contractor it is too late in the day to repudiate the settlement on the spacious ground that it was not entered into by an authorized person. The seal of the contractor has been put on the "no claim certificate" and the partner is also mentioned in the seal. All this shows that the settlement was made by a duly authorized person who accepted the cheque, signed the "no due certificate" and took the cheque with him and put it in the bank account. The money of the cheque was realized. After an year or so of the settlement the question of lack of authority of the person signing the settlement was raised. If there was no settlement by an authorized person the cheque should have been returned. It was not done. I, therefore, am unable to accept the argument that the settlement was made by an unauthorized person.

36. As regards the second ground of attack clause 6.7.1.0 deals with the discharge of owner's liability. The clause says "upon condition that the said payment is being made in full and final settlement of all dues to the contractor" the owner's liability will stand discharged. This is exactly what happened in this case. Full and final payment was made. "No dues certificate" was issued. Cheque for the balance due to the contractor was given and accepted.

20. The learned Arbitrator in para 87 of the final Award rejected the contention of PMCC that the NCC was signed due to financial constraint:

87. Now this settlement is sought to be set aside and repudiated mainly on the ground that it was made under "financial constraint". It was argued that this was an agreement between the powerful and the powerless, the weak and the strong, as the contractor was in deep debt to the bank and interest was mounting. It was said that the employer delayed payment of the final bill and other amounts due to him and caused serious financial loss. The plea of hardship and "financial constraint" is a vague and a wandering plea with uncertain frontiers. This uncertainty is more glaring when on the ground of inequality of bargaining power the court is asked to set aside a transaction. The domination of the strong over the weak has been pleaded unsuccessfully in a large number of cases. So far such a jurisdiction is not part of the law of India. I am not persuaded that I have power to set aside the settlement on the vague ground of "financial constraint".

This vagueness of the plea is clear when it is a case not of money lender Bank and a debtor as was the case in *Lloyds Bank vs. Bundy* (1975) QB 326 in England but a case of a building contractor and a Govt. organization such as IOCL. I find there was no unfairness, no undue influence and no unconscionable grounds on which the transaction can be set aside.

21. There can be no doubt that as regards the central issue in the case, viz., the validity of the NCC, the learned Arbitrator in the final Award dated 19th November 2005 contradicted his earlier finding in the order/interim Award dated 23rd April 2004. The learned Arbitrator compounded this contradiction by observing in para 2 of the final Award that the order dated 23rd April 2004 should be read as part of the final Award. The above contradiction is not capable of being reconciled. It may be partly explained by the following observation in para 68 of the order dated 23rd April 2004:

68. Contractor's counsel described the "no claim certificate" as an act of fraud. Whether this is justified will have to be seen. These questions were raised in the course of arguments and are stated not to answer them here and now finally but to delineate the parameters of enquiry and to outline the contours of the controversy between the parties. After evidence and arguments I will decide them. But for deciding them I must have jurisdiction. I think I have. To say that the arbitrator has no jurisdiction in a case of this type is to shut one's eyes to injustice and oppression. The arbitrator retains jurisdiction to determine whether or not the claim is indeed out of time on the ground that it was not notified within 10 days.

22. It is therefore possible to conclude that the observations of the learned Arbitrator on the issue of the validity of the NCC in his order dated 23rd April 2004 were tentative pending "evidence and arguments" and made only in the context of his having jurisdiction to adjudicate the disputes referred to him. The conclusions in the final Award as regards the NCC should be taken to be the learned Arbitrator's final view based on the evidence placed before him. The only issue on which there was no apparent contradiction in the order dated 23rd April 2004 and the impugned final Award was regarding the validity of the action of IOCL in deducting LD from the amount payable for the work done as shown in the final bill.

23. The Court has examined the entire arbitral record only to ascertain whether the conclusion of the learned Arbitrator in the final Award as regards the validity of the NCC is supported by the evidence. The NCC reads as under:

Dated: 12.12.97

No Claim Certificate

Name of the work:

Site grading, Construction of roads SW Drains, Culverts, ERC, Tank Pad and Other Associated works Marketing Terminal Project.

Name of contractor:

M/s Ponty Malik Construction Co. New Delhi.

Date of start:

21.10.1994.

Scheduled date of Completion:

20.08.1995.

We do hereby certify that we do not have any Claim of what so ever nature and we have received all the payments under the above said Contract.

For Ponty Malik Construction Co.

(Signed by the Partner with the seal of the Company)

24. The above document was drawn up contemporaneously with the final bill which is also dated 12th December 1997. Both the NCC and the final bill bear the signature of the same person described as the partner of PMCC. The final bill shows the deduction of LD from the amount of Rs.25,48,914. It reads as under:

Final Bill

1. Name of the work

Site grading works, Road, S.W. drains, Tank pad.

2. Name of the Contractor

M/s. PontyMalik Const. Co.

3. No./LoI Ref. No.

Tender

Rsg/03

21.10.94.

No. 3412/T-173 (93-94)

Fax No. 6828606 Dt.

4. Date of starting the work

08.11.1994

5. Date of completion

6. Extension If any

7. Value of the work

Rs. 4,99,85,910

(X) Work done (measured) As per the Bill enclosed

Total Amount Rs. 1,52,41,570.97

This Bill Amount Rs. 25,48,914.10

(Y) Recoveries

As per note dt. 12/12/--attached

i) Secured Advance

:LD

15,68,000

ii) Other Advance if any

:

iii) Security Deposit @ 10%

:

iv) Other Recoveries

:

a) Electricity

:

b) Water

:

c) Income Tax @ 2%

:

19,618

d) Sale Tax @ 2%

:

19,618

Total Net After Recoveries

:

9,41,678

(Z) Other payments recommended

i) Secured Advances

ii) Advances if any

iii) As directed by Clients

Net Payment

(X-Y+Z)

Signature of Contractor

Sign. of Engr. in-charge

Sign. of Const. Supdt.

25. The final bill refers to an attached note, copy of which has been shown to the Court. The note shows how the amount of Rs.25,48,914 towards Claims 3 and 5 was calculated. The note contains the following remark:

As per above calculation Rs.25,48,914.10 is due to Contractor against Claim No. 03 & 05 & Rebate Item, which may be paid to Contractor after affecting applicable recovery.

Immediately below the above remark is the following remark:

Payment may be released, after adjusting LD, as advised by management.

26. It is seen that Claims 3 & 5 were processed for payment and in terms of the above note the LD amount was deducted. The learned Arbitrator observes that the deduction of the LD was indicated in a different ink (red). If it was the case of PMCC that when its partner signed the final bill, it did not indicate any deduction on account of LD, then there should have been evidence led to that effect. There was none. In fact, the calculation of the sum of Rs.9,41,678 as shown in the final bill, and for which amount a cheque was issued in favour of PMCC, was after deducting the LD of Rs.15,68,000, and two amounts of Rs.19,618 each towards income tax and sales tax from the sum of Rs.25,48,914. PMCC, therefore, could not prove that it was unaware of the deduction of Rs.15,68,000 as LD from the final bill.

27. On 13th December 1997, a cheque for Rs.9,41,678 was prepared. PMCC knew when it received the said cheque that the payment under Claims 3 & 5 had been processed for Rs.25,48,914 minus the LD and tax amounts. If indeed it was not aware of the said deduction of LD at that stage, it would naturally have raised a question forthwith why it was being paid only Rs.9,41,678 as against Rs.25,48,914. It raised no such question for almost a year thereafter. On the other hand, PMCC encashed the cheque dated 13th December 1997 for Rs.9,41,678 without protest.

28. At one stage of the hearing it was sought to be suggested by Ms. Harish that the partners of PMCC were in judicial custody and were, therefore, unable to follow up the matter with IOCL. However, subsequently it was clarified by Ms. Harish that at the time of the cheque dated 13th December 1997 received and encashed none of the partners of PMCC were in judicial custody. Even assuming that on the date when they received the cheque, they were under financial

constraints, once the cheque was encashed it was but natural that PMCC would have immediately protested to IOCL about being paid an amount far less than what was agreed to between the parties. It however waited till December 1998 to raise a protest. This conduct puts paid to PMCC's case that it was not aware of the deduction of the LD of Rs.15,68,000 or that it signed the NCC and final bill under duress or coercion.

29. The learned Arbitrator's conclusion as regards the NCC in the impugned final Award is perfectly consistent with the evidence. It is also consistent with the law explained in para 50 of the decision in National Insurance Company Limited v. Boghara Polyfab Private Limited in the following words:

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 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.

30. In Union of India v. M/s. Master Construction Co., the Supreme Court reiterated as under:

Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all. It cannot be overlooked that the cost of arbitration is quite huge - most of the time, it runs in six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion duress or undue influence has been taken by the claimant. 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 the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.

31. Going by the ratio of the aforementioned decisions, it is clear that in the instant case, PMCC was unable to establish before the learned Arbitrator that the NCC was issued by it under duress or coercion. The NCC had to be read along

with the final bill that was prepared contemporaneously and the fact that on 13th December 1997 itself the cheque for the amount shown in the final bill was in fact prepared and issued in favour of PMCC. This has to be further seen along with the fact that PMCC deposited the cheque in its account and encashed the said cheque and then raised no protest till 16th December 1998. The letter dated 25th June 1998 from PMCC to IOCL made no whisper about the signatures of the partner of PMCC either on the NCC or on the final bill being taken under duress or coercion. This was sought to be explained by Ms. Harish by stating that at that stage PMCC did not have a copy of either the final bill or the NCC and that a copy of the NCC was furnished by the IOCL only on 30th June 1998. Even assuming this to be correct, after receiving the copy of the NCC on 30th June 1998 from the IOCL, PMCC waited till 16th December 1998, and raised for the first time the issue of NCC being a fictitious certificate. This explanation of PMCC is, therefore, unconvincing and in any event was not urged before the learned Arbitrator.

32. The conclusion of the learned Arbitrator, after evaluating the evidence placed on record, that the NCC was validly issued by PMCC is correct and calls for no interference.

33. Once the learned Arbitrator came to the conclusion that the NCC was validly issued, there was no question of re-opening the full and final settlement recorded therein. Although the NCC itself did not specify the amount, the final bill was a document of the same date signed by PMCC and it clearly indicated the amount for which a cheque dated 13th December 1997 was made. The deduction of LD of Rs.15,68,000 was an integral part of the final bill and could not be separated from it.

34. The further obvious error was that once the learned Arbitrator accepted the legal position emanating from Clause 6.7.1.0 that the payment of the settlement amount constituted full discharge of the liability of the owner i.e. IOCL, there was no question of re-opening the final settlement by going into the question of validity of the deduction of the LD amount. Clause 6.7.1.0 reads as under:

6.7.1.0 The acceptance by the Contractor of any amount paid by the Owner to the Contractor in respect of the final dues of the Contractor determined in accordance with the provisions of Clause 6.3.1.0 hereof upon condition that the said payment is being made in full and final settlement of all said dues to the Contractor shall, without prejudice to the claim of the Contractor included in the Final Bill in accordance with the provisions under Clause 6.6.0.0 hereof and associated provisions thereunder, be deemed to be in full and final satisfaction of all such dues to the Contractor notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the Contractor relative to the acceptance of such payment, with the intent that upon acceptance by the Contractor of any payment made as aforesaid, the Contract (including the arbitration clause) shall, subject to the provisions of Clause 6.8.2.0 hereof, stand discharged and extinguished except in respect of the notified claims of the Contractor included in the Final Bill and except in respect of the Contractor's

entitlement to receive the unadjusted portion of the Security Deposit in accordance with the provisions of Clause 6.8.2.0 hereof on successful completion of the defect liability period.

35. In the contract involving the IOCL there is a requirement under Clause 6.6.1.0 that the Contractor should notify the IOCL about any payment that is due to him. The validity of this clause had been upheld by this Court in *Uttam Singh Duggal & Co. (P) Ltd. v. Indian Oil Corporation Ltd.* ILR (1985) II Del 131 which decision was followed in *Indian Oil Corporation Ltd. v. Era Construction (India) Ltd.* 2012 (4) R.A.J. 573 (Del). The learned Arbitrator need not have gone to the question whether the said clause was void in terms of Section 28 of the Indian Contract Act, 1872. It was sufficient for the purpose of the present case to uphold that the full and final settlement reached between the parties constituted complete discharge of the liabilities of IOCL under Clause 6.7.1.0 of the contract.

36. Consequently, the conclusion of the learned Arbitrator that the deduction of the LD of Rs.15,68,000 by the IOCL as shown in the final bill was invalid and that PMCC was entitled to the said sum together with interest @ 15% per annum suffers from patent illegality and is liable to be set aside as being opposed to the public policy of India in terms of the decision of the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, . As regards the counter-claim of IOCL, it was rightly rejected by the learned Arbitrator.

37. Consequently, to the extent that the impugned Award holds that PMCC is entitled to Rs.15,68,000 together with interest @ 15% per annum, it is set aside. Both the petitions are disposed of in the above terms, but in the circumstances, with no order as to costs.