

(2015) 10 DEL CK 0223
In the Delhi High Court
Case No : FAO (OS) 46/2013

SAB Industries Limited

APPELLANT

Vs

Gas Authority of India Ltd. and Others

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 19, 34
Contract Act, 1872 — Section 73, 74

Citation : (2015) 6 ARBLR 210

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : Nidhesh Gupta, Sr. Advocate, Tarun Gupta and Avijit Mani Tripathi, Advocates, for the Appellant; Ajit Pudussery, Shruti Sarma Hazarika, Advocates, for the Respondent

Final Decision : Partly Allowed

Judgement

S. Ravindra Bhat, J.—In this appeal, the correctness of the learned Single Judge's order and judgment, in OMP 245/2002 preferred by the respondent Gas Authority of India Ltd. ("GAIL") under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") has been questioned. GAIL had challenged an Award dated 26.04.2002 of the Sole Arbitrator in the disputes between it (GAIL) and the first Respondent ("SAB"). These disputes arose out of a letter of intent ("LoI") dated 23.12.1996 by which SAB agreed to construct hundred houses for GAIL at Sector 23, Noida for a total consideration of Rs. 5,37,83,775. The award (of the arbitral tribunal), was set aside by the learned Single Judge in the impugned judgment.

2. SAB claimed amounts under twenty-eight items aggregating Rs. 1,97,52,143.62 with future interest at 24% per annum compounded quarterly on the amounts claimed under Claim Nos. 1 to 28. GAIL's preliminary objection, in its reply was that since SAB had accepted payment of the amounts under the final bill in absolute satisfaction no further claim was maintainable. GAIL relied

upon and enclosed a copy of the completion certificate, 18th (final) bill and the No Demand Certificate ("NDC") issued by SAB. GAIL's plea was of "accord and satisfaction" of all the claims of SAB, which precluded its claims and that those were not arbitrable. The Arbitral Tribunal dealt with this preliminary submission in the following terms:

"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."

3. GAIL argued- in the application under Section 34 before the learned Single Judge that SAB never urged or pleaded coercion in regard to acceptance of amounts given by it and that this was pleaded for the first time in SAB's rejoinder. This was insufficient for the Arbitrator to conclude that SAB was made to sign on the dotted line. GAIL disputed the tribunal's factual assertion regarding admission, stating that it had categorically stated on affidavit in arbitration proceedings that the NDC had been issued by SAB without coercion or duress. GAIL had paid the amount mentioned in the NDC to SAB on 23rd October 2000 contemporaneous with the issuance of the NDC.

4. Before the learned Single Judge, SAB relied on the correspondence between the parties and the minutes of the meetings held at different stages to say that SAB was entitled to an amount far greater than what it had been coerced into agreeing to accept in the NDC. It was also submitted by SAB that its statement in the rejoinder in arbitration proceedings, together with several documents on the record were referred to by the learned Arbitrator, satisfied the requirement of the law as far as the conclusion of the learned Arbitrator was concerned. SAB stated that since the Arbitrator, on the basis of the evidence, found that it (SAB) was forced to sign on the dotted line, the said finding did not call for interference.

5. The learned Single Judge considered the decisions reported as P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., ; State of Maharashtra v. Nav Bharat Builders 1994 Supp (3) SCC 83; Nathani Steels Ltd. v. Associated Constructions 1995 Supp (3) SCC 324 and Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash , (1982) 1 SCC 625 where the Supreme Court considered the issue of "accord and satisfaction". It was held that the Arbitrator had to first determine that question before proceeding further with the arbitration. The impugned judgment also considered Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, , where the contractor had, on the day that he had signed an NDC, written to the Employer, stating that it issued the NDC in view of a threat that unless it was executed the payment would not be released. After considering all the judgments and the circumstances of the case, the learned Single Judge concluded that the award could not be sustained:

"15. 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".

16. 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 non payment 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."

The court also noted that the question as to whether there was coercion and duress was raised for the first time, in reply to GAIL's preliminary objection that the dispute was not arbitrable because of accord and satisfaction. The learned Single Judge then concluded that:

"18. 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:

19. 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.

20. 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 under Section 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.

21. 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 after- thought, make-believe or lacking in credibility, the matter must be set at rest then and there."

22. 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.

23. For the aforementioned reasons, the impugned Award dated 26th April 2002 is set aside"

6. SAB argues, in this appeal, and places reliance on National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., . It is submitted that the Supreme Court held that if it is established that the No Claim Certificate was executed on account of fraud/coercion/undue influence practiced by the other party, then the discharge of contract by such No Claim Certificate is rendered void and cannot be acted upon. SAB, who was hard pressed for funds and was keen to get the amount released, was coerced to sign on dotted lines in a printed form i.e. the alleged No Claim Certificate. The said No Claim Certificate was executed under economic duress on account of coercion employed by the Respondent. Therefore, it could not be considered to be voluntary or as having resulted in the discharge of contract by accord and satisfaction. The issuance of the alleged No Claim Certificate, urged learned senior counsel, did not debar the SAB from getting its claims adjudicated before the Arbitrator.

7. It was argued that the learned Single Judge fell into error in overlooking that the correspondence between the parties and the minutes of meetings held at different stages established that what was admittedly due to SAB from GAIL was an amount far greater than what it had been coerced into accepting in the alleged NDC. That document was a pre-printed and undated document as is clear from the letter-dated 26.06.2000 sent by the Consultant of the Respondent to the Petitioner. Therefore, the fact that the Appellant had to sign on dotted lines and was coerced into signing the No Dues Certificate is substantiated by ample material on record. The present case is clearly a glaring example of "economic duress" exercised by the Respondent on the Appellant. The learned Arbitrator after meticulously and scrupulously examining the entire material on record, rightly concluded that the No Dues Certificate was executed under duress and coercion. The learned Single Judge should not have reversed that finding.

8. It was further submitted that there was neither any patent illegality in the award, nor could it be said to have exceeded the terms of contract, or even gone beyond the agreed terms. Counsel stressed that the view that persuaded the learned Single Judge to set aside the award is too technical and legalistic; though in arbitration proceedings, parties have to set up their pleas clearly, there is no estoppel from claiming amounts due, as long as the plea is set up. The rule which requires parties to set up their pleas is with a view to be clear as to what is sought; in the present case, even though the specific plea with regard to coercion was taken in the rejoinder, the respondent GAIL had clear notice. The parties were in issue on this aspect and the arbitrator adjudicated the matter. The award, therefore, could not be interfered with, on an appreciation of certain

judgments. Counsel also submitted that the learned Single Judge fell into error in holding that there was no material to support the award on the merits of the amounts granted.

9. Counsel for GAIL urged that this Court should not interfere with the findings and judgment of the learned Single Judge. It was argued in this context, that the No Claim Certificate constituted a complete waiver of any and every liability. There did not exist any dispute and the agreement stood exhausted and terminated. The arbitration clause being part of the agreement also stood terminated. At the time when the matter was referred to arbitration there did not exist any arbitration agreement or dispute under the agreement. It was submitted that parties jointly conducted the measurements and the final bill submitted by SAB was accepted by both the parties. The payment was received by SAB on the final bill without demur and reflected the complete satisfaction and was in full and final settlement of any and every liability. Learned counsel for GAIL, Mr. Ajit Pudussery, also relied upon the decisions in *Union of India (UOI) and Others Vs. Master Construction Co.*, and *New India Assurance Company Ltd. Vs. Genus Power Infrastructure Ltd.*, to say that the circumstances under which coercion or threat is held out too should be spelt out clearly to avoid the consequence of a no claims certificate - set up by an employer as a plea barring the claimant's demands for amounts that are unpaid or withheld.

Analysis and Conclusions

10. As noticed earlier, the arbitral tribunal dealt with the precise effect of the "No Claims Certificate" in Para 6 (b) of the award. The Tribunal took into consideration several judgments of the Supreme Court, which had ruled that such certificate might weaken the claim of the party seeking the amounts ostensibly finally settled, but does not preclude them altogether.

11. In the present case, the LoI had required SAB to complete the construction within a specified time period, i.e 20 months ending on 06.09.1998. Admittedly, the contract period was extended; GAIL completed the works on 12.05.1999 after valid extension of time and without levy of damages. A completion certificate was issued; the defect liability period ended on 13.04.2000. SAB relied on the circumstance that all its claims under various heads were verified by the consultant and accepted by GAIL; nevertheless, it was not paid the full amount. GAIL insisted that its proforma NDC should be furnished, as a precondition to payments; constrained by circumstances, SAB complied. However, it claimed all the amounts due to it, including those withheld in arbitration. These were spelt out with particularity in the rejoinder. GAIL counters this argument, contending that at no time, within reasonable time of writing the NDC, or till arbitration was demanded, did SAB ever contend or whisper that it was the victim of coercion or economic coercion. The fact that it woke up highly belatedly and urged this in rejoinder did not allow it to better a claim which never made explicit the question of coercion, or state it. Therefore, there was no arbitrable claim, which could have been validly gone into.

12. This Court notices that the arbitrator in this case, dealt with the issue of coercion in the light of the stand of the parties. This included his analysis of the contentions made and the pleadings (including the rejoinder). The arbitrator took note of some previous decisions of the Supreme Court to say that when a No Dues Certificate is set up as a bar to a claim, it is not a decisive refutation of the claimant's plea; rather, it might "weaken" its case. Having so held, the arbitrator went on to analyze the details of the amounts due and awarded amounts in favour of SAB.

13. There are observations, in Master Constructions (supra) and Genus Power Infrastructure (supra) which support GAIL. This Court notices, however, that in those cases, the Court was dealing with the situation where the question was whether a reference could be made at all under Section 11 (6) of the Act where one party sets up a plea of accord and satisfaction. In Master Construction (supra) the Court considered its previous holding in Boghara Polyfab (P) Ltd. (supra) which had surveyed a large number of previous judgments and concluded that where, in proceedings under Section 11 (6) , in answer to a plea of accord, a party alleges coercion or fraud which may render the "no dues" or discharge of liability document void, an arbitrable dispute can exist. The Supreme Court then held that there can be no absolute rule on that (i.e wherever a party alleges coercion or fraud in regard to a discharge document set up against it, by the other party to avoid liability) and that the Court "must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. 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 a necessity to refer the dispute for arbitration at all." The Court, in Genus Power Infrastructure (supra) was guided by the decision in Master Construction (supra) and held on the facts of that case, that a "bald plea of fraud, coercion, duress or undue influence is not enough".

14. Before proceeding with the facts of this case, it would be useful to recollect that in arbitration proceedings, the rigid rules of pleadings cannot be over-emphasized. Indeed, even provisions of the Code of Civil Procedure are inapplicable (Section 19). However, it is accepted that principles of pleadings are to be broadly followed. The mere fact that SAB did not specifically urge that it was a victim of coercion, or the nature of coercion it was subjected to, in its statement of claim, is not determinative of the issue. Even in proceedings before the Court, departures from the strict rule of pleadings are recognized. For instance, in Kalyan Singh Chouhan Vs. C.P. Joshi, , it was held that:

"23. There may be an exceptional case wherein the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated.

(vide: Nagubai Ammal and Others Vs. B. Shama Rao and Others, ; Nedunuri Kameswaramma Vs. Sampati Subba Rao, ; Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, ; Kali Prasad Agarwalla (dead) by L.Rs. & Ors. v. M/s. Bharat Coking Coal Ltd. & Ors AIR 1989 SC 1530 ; Sayeda Akhtar Vs. Abdul Ahad, and Bhuwan Singh Vs. Oriental Insurance Company Ltd. and Another,) "

15. In the present case- unlike in Master Construction (supra) and Genus Power Infrastructure (supra) the dispute was not at the stage of referring the matter to arbitration; instead it was at the stage of objections to the award. Having overruled GAIL's plea with respect to non-arbitrability, the Tribunal proceeded to consider the claims on the merits and rendered its findings. These materials were in the form of running bills, joint surveys and minutes of meetings, recommendations/verifications of the consultants, etc. After taking note of all these facts, the Tribunal awarded some amounts to SAB. This distinction, to the Court's mind, makes all the difference. The learned Single Judge, in this case, did not examine the correctness of those findings from the lens of "patent illegality" or the other relevant factors which would render an arbitral award invalid or unenforceable in terms of the settled law (Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,). The court highlighted that:

"Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void." (paragraph 30)

16. In Oil and Natural Gas Commission (supra), the Supreme Court set aside the arbitral award on the ground that the tribunal had failed to consider Sections 73 and 74 of the Contract Act, and relevant precedents, in awarding damages. What is "patent illegality" has been clarified in subsequent cases. Several later judgments have highlighted that Section 34 permits an extremely narrow window for the court to set aside the arbitral tribunal's award. Firstly, the court does not act as if it were an appellate court, re- visiting the evidence and undertaking an extensive factual review of the merits of the dispute with the mandate to cure or correct the errors (Ref Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission of India, and Kwaliti Manufacturing Corporation Vs. Central Warehousing Corporation,). The Court can set aside an award if it finds that the tribunal has made an error on the face of the contract, or provided a "patently illegal" interpretation of the law. Equally, if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction (Ref MSK Projects (I) (JV) Ltd. (supra); G. Ramachandra Reddy and Co. Vs. Union of India (UOI) and Another, ; McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, and Renusagar Power Co. Ltd. Vs. General Electric Company and Another, . In Mc Dermott International (supra), the Supreme Court clarified the Court's inherent limitation by reason of Section 34 in such matters:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission*, and *D.D. Sharma Vs. Union of India (UOI)*,).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

17. Secondly, unless the Tribunal commits a patent error of law in adjudicating upon a question submitted to it, the Court will not intervene *J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another*, . The expression "patently" illegal was explained as an error "which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice."

18. The impugned judgment in this case went by a bare reading of the pleadings and the judgments of the Supreme Court to conclude that SAB was precluded from claiming the amounts in the light of the NDC. As is evident from the above discussion, the judgments of the Supreme Court were rendered in the context of fact situations where demands for arbitration were in issue; here, however, there was a reference. The merits of both questions - arbitrability (whether SAB's claim was not maintainable because of accord and satisfaction on account of NDC) as well as the merits of the award had to be considered. However, the Single Judge - in a linear manner, if one may so describe it- held that since the dispute could not be arbitrable, the award was patently illegal. This Court holds that once the arbitrator considered GAIL's plea and overruled it, that fell within his jurisdiction. Unlike at the stage of making a reference, the parties had proceeded further. We note that the final bill was paid in October, 1999 and the statement of claim in arbitration was made in 2001- clearly within the period of limitation. Consequently, the mere fact that the NDC had not been protested contemporaneously, or that there was no specific plea about coercion in the statement of claim, did not result in waiver. The arbitrator accepted SAB's plea that without signing the dotted line, it could not have secured the amounts released to it; that was a finding of fact. Such finding could not be said to be patently illegal. This Court notices, however, that the merits of each of the claims made in the award, had not been gone into by the learned single judge, who rested his decision on the narrow ground of non-arbitrability due to accord and

satisfaction.

19. In view of the foregoing findings, the impugned judgment is hereby set aside. The Section 34 application preferred by GAIL shall be considered on its merits, by the learned Single Judge. Parties are directed to be present for further directions before the learned Single Judge, who shall now set down the matter for hearing and disposal in accordance with law on 18.10.2015. The appeal is allowed to the above extent, without any order on costs.