

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 18.10.2010**

% **O.M.P. No.149/2004**

GAS AUTHORITY OF INDIA LTD. Petitioner
Through: Mr. Rajiv Bansal & Mr. Amandeep,
Advocates

versus

M/S BANSAL CONTRACTORS (INDIA) LTD. Respondent
Through: Mr. R.D. Shah & Mr. Anil Aggarwal,
Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | : | No |
| 2. To be referred to Reporter or not? | : | Yes |
| 3. Whether the judgment should be reported in the Digest? | : | Yes |

VIPIN SANGHI, J. (Oral)

1. This petition has been preferred under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) to challenge the award dated 11.08.2003 passed by Sh. Harish Chandra, sole arbitrator, whereby various claims of the respondent/contractor have been dealt with by the learned arbitrator.

2. The primary objection raised by learned counsel for the respondent at the time of making his submissions is that the arbitral tribunal has committed a patent illegality in not accepting the

submission of the petitioner/objector that there was accord and satisfaction and consequent discharge of the contract, inasmuch, as the respondent had given a no dues certificate dated 19.09.1999 (which has been noted by the arbitral tribunal at various places as 14.09.1998 in the impugned award), and the respondent had failed to even plead, much less prove that the said no dues certificate had been issued under coercion or undue influence.

3. The submission of Mr. Bansal is that the payment of the final bill had been made to the respondent contractor on 14.09.1999. The said no dues certificate had been issued five days later i.e. on 19.09.1999. The petitioner, on 27.10.1999, issued a communication merely stating that the petitioner had made some deductions incorrectly. Even at that stage the respondent/contractor had not taken the stand that the no dues certificate was issued under coercion or undue influence. He submits that the tribunal while dealing with the issue has completely omitted the notice the fact that coercion or undue influence were never pleaded by the respondent/contractor, neither contemporaneously on 27.10.1999, nor before the tribunal.

4. Mr. Bansal further submits that the petitioner had moved an application at the initial stage of the arbitration i.e. on 30.03.2001 requiring the tribunal to decide the issue of maintainability of the claims of the respondent/contractor as a primary issue as, according to the petitioner, the respondent/contractor had issued a no dues certificate. However, the arbitral tribunal did not decide the said issue

as a primary issue and kept the same pending for determination only after hearing the arguments of all the claims raised by the respondent/contractor.

5. I have gone through the arbitral award on the aforesaid aspect. The aforesaid submission of learned counsel for the petitioner is founded on the premise that a no dues certificate can be assailed by the author of such a certificate only if the author/contractor is able to establish the existence of coercion or undue influence. However, a perusal of the impugned award shows that there are various other factors which have weighed with the arbitral tribunal in rejecting the reliance placed on the said no dues certificate by the petitioner. I must hasten to add that the arbitral tribunal has also held that the said no dues certificate was indeed signed under pressure, coercion and undue influence. The following aspects need to be noted in the facts of this case:

- (i) The no dues certificate was issued in accordance with Clause 94.4 of the general conditions of contract. 94.4(b) mandates that a *"No Claim Certificate"* shall accompany the final bill. It, therefore, follows that whether or not the contractor agrees with the final measurement/rates that the petitioner employer may agree to treat as the basis for computing the amount due, and whether or not the contractor agrees with the deductions that the petitioner employer may make for whatsoever reason, the contractor is obliged to give a no claim certificate along with the

final bill and without such a certificate, the submission of the final bill itself would be defective and may not be processed by the petitioner employer.

- (ii) The no dues certificate was issued for an amount of Rs.8,68,551/-. The said certificate stated that the contractor had *received the sum of Rs.8,68,551/- (Rupees Eight Lakhs Sixty Eight Thousand Five Hundred and Fifty One Only) "in full and final settlement of all the payment due to us for construction of Club Building & Shopping Complex at UPPC Nagar, Dist. Atawah, UP executed by us under the contract agreed between us and giving including all amount payable to us as per the contract, we hereby unconditionally and without any reservations whatsoever certify that with this payment we shall have not claim whatsoever described. On aim account whatsoever from against the aforesaid job executed by us use full fledge ok claim unequivocally that with this payment we have received all the amounts payable to use and have no outputs of any description what so ever regarding the amount wanted out of payable by us and the amounts receive by us and that we shall be continued be bound by the time and concidile of the agreement as regards the performance of the Contract.* However, even according to the petitioner the petitioner made payment of a sum of Rs.9.02 Lacs on 14.09.1999 to the respondent. If full and final payment had been made by the petitioner on 14.09.1999 for the amount of

Rs.9.02 Lacs, where was the occasion for the respondent contractor to issue a no dues certificate five days later for a lesser amount of Rs.8.68 Lacs?

- (iii) Admittedly the petitioner made further payments to the respondent contractor after 22.12.1999 i.e. Rs.5,65,244/- towards escalation bill. A further amount was paid on 08.03.2000. The aforesaid clearly shows that the no dues certificate which in categorical terms stated that the amount of Rs.8.68 Lacs had been received in full and final satisfaction of all claims, and that no amount was due from the petitioner was not worth the paper it was written on. Though the evidence brought on record in this respect has not been discussed in the award itself, my attention has been drawn to an affidavit by way of evidence filed by the respondent, namely, the affidavit of Nav Rattan Tripathi, who was working as the Project In-charge of the respondent for the work in question. In this affidavit he has stated as follows:

“(a) That I was authorised by Sh. S K Bansal, Director, New Delhi to collect the cheques of certain payments due under the works contract for construction of club building and shopping centre complex of G.A.I.L. at Dibiyapur. I went to GAIL office to collect the cheque payments on the 14th Sep 1999 as usual. The Dy. Manager Sh. P.K. Singh of GAIL told me that the cheque No.953725 dt. 9.9.99 was ready for delivery but could not be given to me unless and until a certificate of full and final settlement is given to him. I replied that in addition to this payment, the payment for

served extra items & claims for Rs.68,25,192/- is due to be paid as per my HO letter dt. 3.9.98 and also Escalation Bill for materials and labour.

- (b) The Dy. Manager of the Authority gave a threat to me on 14.9.99 that if the prescribed certificate of settlement was not given to him, he would not hand over the cheque dt. 9.9.99 for Rs.9,02,651/- and would stop the payments of Running Bills of other two contracts and also recommend for non-grant of extension of time and stop the payment of Escalation Bill. He refused to hand over the cheque dt. 9.9.99 asking me to call Sh. S K Bansal Director.
- (c) That I called Sh. S K Bansal Director of my Company on 14.9.99 who also protested for such full and final certificate but he was given the same threat to him and the Dy. Manager (Finance) gave a typed certificate to me in the presence of Sh. S K Bansal to write and sign in my own hand-writing. The labourers and the material suppliers had been giving a threat to go on strike under the two other contracts for construction of 34C-type quarters and one Hostel Building (started in March 99) due to non-payments and therefore I and Sh. S K Bansal signed the No Demand certificate on 14 Sep 99 under duress and undue influence exercised by the Dy. Manager (Finance) of the Authority.
- (d) That the Dy. Manager (Finance) released the last payment under this contract on 8.3.2000 towards the Escalation bill for Rs.5,67,344.00 after the Extension of time was communicated on 22 Dec 1999 by the Authority."

6. The arbitral tribunal in the impugned award, while rejecting the aforesaid primary objection of the petitioner, has held as follows:

"I have gone through the pleadings of both sides as well as their arguments. Courts have agreed that the decision whether there was a

full and final settlement is within the jurisdiction of the Arbitrator. There are judgments to the effect that once full and final settlement has taken place, the cases should not be reopened and no further claims can be made. At the same time, there are judgments to the effect that when No Claim Certificates do not fulfill the requirements of full and final settlement they are not binding. A study of these judgments shows that the NOC is considered as an estoppel on further claims where the NOC has been preceded by discussions of disputes, if any, and both Claimant and Respondent have come to an agreed amount as the payment due. In such cases, the receipt is signed by the Claimant as full and final settlement for the amount to which both the parties have agreed. However, where a No Claim Certificate has been signed without the parties coming to an agreed amount or where the Claimant is not aware of the total amount (and break up of the amount) he is being paid or where the No Claim Certificate is merely by way of a precondition for processing of bills, the Courts do not favour rejection of consideration of claims merely on the basis of a No Claim Certificate.

In the present case, the final bill was required to be submitted along with the No Claim Certificate as a pre-requisite for examination and processing of the bill. It could not be understood to be an Agreement to the amount of the final bill as passed by the Respondents, as the bill was still to be scrutinized. Claims existed before the final bill was passed regarding liquidated damages, escalation, extra items, deduction items etc. and there is no evidence to show that a consensus was arrived at these disputes. Even after the "final bill" was paid on 14.9.99, the disputes continued. The Claimants – BCIL represented on 29.10.1999 against recovery of liquidated damages etc. and Respondents – GAIL held meetings on 20.12.99, during which the Consultants Raj Rewal Associates put on record that they had recommended extension of time without liquidated damages initially as well as on subsequent review. The Contractor also

agreed to withdraw all other items subject to reconsideration of time extension without liquidated damages. No consensus was arrived at. The extension of time with 8% compensation was finally granted to the Claimants – BCIL on 22.12.99. Final escalation was paid on 16.2.2000. It is obvious that under these circumstances, the No Claim Certificate, signed on 14.9.99, cannot be treated as full and final settlement and as an Agreement between Claimants and the Respondents.

7. It is well-settled that the arbitral tribunal is the master of the facts and the award made by the arbitral tribunal cannot be interfered with in proceedings under Section 34 except on the specific grounds provided for under the law and as interpreted by the Supreme Court in the case of **ONGC vs. Saw Pipes** (2003) 5 SCC 705. From the aforesaid extract, it cannot be said that the arbitral tribunal has committed any patent illegality or that the award is not in accordance with the law. The award on this aspect cannot be said to be an award opposed to the public policy.

8. The practice of the petitioner requiring the submission of a no claim certificate/no due certificate along with the final bill itself appears to be pernicious. The said requirement, by itself, is a clear indicator of the fact that the contractor has been subjected to coercion and undue influence as the contractor is left with no option, but to submit such a certificate so as to get whatever payment the petitioner employer is willing to release, even if, according to the contractor the said amount is not the complete amount.

9. Moreover the fact, that repeatedly further payments were made to the contractor even subsequent to the signing of the no dues certificates, shows that there was no sanctity attached to the said no dues certificate. If it were actually a no dues certificate, prepared after taking full and complete accounts between the parties, there would have been no occasion to make any further payment to the contractor after the issuance of the no dues certificate. Consequently, I reject the aforesaid submission of Mr. Bansal.

10. Mr. Bansal has also raised objections to the award on claim Nos.4, 7 & 10. Claim No.4 had been made for the amount of Rs.85,904/- to seek reimbursement of deductions made against the alleged shortcomings in the execution of the works. The learned arbitrator has noted that most of the defects, which were belatedly pointed out by the petitioner, were in items of finishing. One of the items of deduction of Rs.34,000/- was on account of mosaic tiles for which no details were available in the inspection notes. Taking into account the aforesaid position, the learned arbitrator awarded an amount of Rs.40,000/- as excessive recovery. From the award it cannot be said that the same is, in any way, unreasonable. I, therefore, find no merit in this submission and reject the objections raised to claim No.4.

11. Claim No.7 had been made by the respondent contractor for reimbursement of deductions made towards rectification done by another contractor, namely, S.B. Construction. The respondent had

provided MDF door frames according to the item in the contract. They had been purchased from the various authorized dealers as approved by the petitioner's architect. Defects pointed out also been rectified. However, the petitioner got the MDF door frames replaced by wooden frames without notice to the respondent and deducted the amount from the respondent's bill. The arbitrator noticed that the supplies had been made through approved bills and there was no complaint during construction and even during the routine checks. He also notes that only after the MDF door frames had been received and fixed, orders were issued on 27.10.1997 not to use MDF shutters as the material itself was defective. As no notice was issued to the contractor prior to replacement at its risks and costs the learned arbitrator allowed the claim to the extent of Rs.87,084/-. Here again I see no merit in the objection raised by the petitioner to the said award. The MDF doors were not replaced because of any deficiency in the service of the respondent but because of inherent defect in the material. Neither is there any patent illegality nor can it be said that the arbitrator has adopted a legal principal which is opposed to public policy of India.

12. So far as the objection to the award made on claim No.10 is concerned, once again I find no merit in the submission of Mr. Bansal. The claim No.10 had been made to seek refund of the amount of bank guarantee of Rs.1,24,323/-. In response to the said claim, the stand taken by the petitioner in its notice was that the work was under CTE observations and the same was yet to be received. The learned

arbitrator has held that the petitioner GAIL had already made all the deductions in response to CTE's observations and, therefore, directed refund of the full amount of bank guarantee of Rs.1,24,323/-.

13. The submission of the petitioner is that a deduction of about Rs.30,000/- had been made from the aforesaid amount of Rs.1,24,323/- and consequently the arbitrator ought to have allowed the deduction to that extent. However, there is no pleading to the aforesaid effect found in the reply filed by the petitioner before the arbitral tribunal. The issue with regard to the deduction not having been raised before the tribunal, the same has not been even adjudicated upon and, therefore, there can be no justification for making any deductions for the bank guarantee amount. In my view, the award of claim No.10 cannot, therefore, be assailed.

14. Accordingly, this petition is dismissed, leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

OCTOBER 18, 2010
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