

\$~35

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

+ **O.M.P. (COMM) 136/2018 & IA No. 4264/2018**

SEW INFRASTRUCTURE LIMITED Petitioner

Through: Mr Arun Kumar Varma, Senior
Advocate with Mr S.K.
Chandwani, Mr Sameer
Chandwani and Mr Ashish
Joshi, Advocates.

versus

STEEL AUTHORITY OF INDIA LIMITED
(SAIL) Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

03.04.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'SEWIL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 22.11.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three members, namely, Dr Vishwapati Trivedi, Sh M.M. Sharma and Sh K.K. Singal (hereafter 'the Arbitral Tribunal'). The impugned award was rendered by the majority with Sh K.K. Singal passing a separate order dated 30.11.2017 in the matter.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to a contract dated 28.09.2007 (hereafter 'the Agreement'), in terms of which SEWIL had agreed to carry out the civil work for the expansion of a Cold Rolling Mill Complex in Zone-2A of the respondent (SAIL).

3. The dispute between the parties related to the price payable by SAIL for the work of expansion of a Cold Rolling Mill Complex of SAIL's Salem Steel Plant to SEWIL.

4. The controversy involved in the present petition relates to SEWIL's claim for the entitlements with respect to three invoices raised on SAIL. The first invoice dated 02.04.2013 for an amount of ₹12,54,36,396.80/- towards price adjustments and the other two invoices both dated 21.10.2013 on account of service tax for an amount of ₹42,758/- (that is, Service Tax at the rate of 12.35% on 40% of the pre-final bill released in May 2012 of ₹51,89,098/-) and ₹5,01,787/- (that is, Service Tax at the rate of 12.36% on 40% of the retention money released in January 2013 of ₹60,561,489/-).

5. The principal question to be addressed is whether the Arbitral Tribunal had the jurisdiction to adjudicate the dispute relating to the termination of the contract on account of the No Claim Certificate issued by SEWIL.

6. Briefly stated, the controversy between the parties arise in the following context:-

5.1 On 03.03.2007, SAIL issued a Notice Inviting Tender (NIT) for "*Civil Work for Expansion of a Cold Rolling Mill Complex (Zone-2A) at its Salem Steel Plant*" (hereafter 'the Work'). SEWIL submitted its

bid pursuant to the said NIT, which was accepted. Consequently, SAIL issued a Letter of Acceptance (LoA) dated 13.09.2007 awarding the subject works for a contract value of ₹ 85,18,51,773/- (that is , ₹83,46,61,396/- other than Service Tax and Education Cess on Service Tax amounting to ₹1,71,93,951/-).

5.2 On 31.12.2010, a Virtual Completion Certificate was issued by SAIL's Consultant (M/s M.N Dastur & Co).

5.3 On 16.08.2012, SEWIL submitted its final bill towards the work done for ₹6,29,86,871.77/- along with Price Adjustment Bill dated 01.08.2012 for ₹12,29,54,654.80/-. On 17.10.2012, SEWIL submitted a 'No Claim Certificate' as per Clause 57.1 & 57.2 of the Agreement stating that 'except the payments to be received by them from SSP against their Final Bill and Price Adjustment Bill'. On 17.01.2013, SAIL released payment against the Price Adjustment Bill dated 01.08.2012.

5.4 On 02.04.2013, SEWIL submitted another bill for an amount of ₹12,54,36,396.80/- including Service Tax and Education Cess at the rate of 4.12% on account of price variation/escalation.

5.5 On 15.04.2013, SAIL issued a letter to SEWIL in response to the invoice dated 02.04.2013 along with the letter dated 09.04.2013 by M/s M.N. Dastur & Co informing SEWIL that their bills could not be certified and was accordingly returned.

5.6 SEWIL issued a letter dated 18.04.2013 to SAIL notifying SAIL that the price adjustment bills were returned thereby denying the genuine payment due to SEWIL.

5.7 On 15.07.2013, SEWIL informed SAIL that they are facing financial hardship and requested SAIL to release the amount of ₹8,26,00,742.45/- towards Price Variation/Escalation.

5.8 On 04.11.2013, SAIL responded to SEWIL stating that the amount payable towards price variation comes out to be ₹6,00,38,669.78/- and requested SEWIL to submit a No Claim Certificate. On the same date, that is 04.11.2013, SEWIL submitted a 'No Claim Certificate'.

Thereafter, on 12.11.2013, SAIL released an amount of ₹5,76,37,124/- towards price variation after obtaining the No Claim Certificate by SEWIL.

5.9 On 25.11.2013, SEWIL lodged a protest stating that the No Claim Certificate was issued without free consent.

5.10 On 19.02.2016, SEWIL invoked the arbitration under Indian Council of Arbitration (ICA) Rules.

Submissions

7. Mr Varma, learned Senior Counsel appearing for SEWIL contended that the Arbitral Tribunal had grossly erred in concluding that the contract between the parties had come to an end by accord and satisfaction of the parties. He submitted that the Arbitral Tribunal had erred in not appreciating the chain of events that had led SEWIL furnishing a No Claim Certificate. He submitted that SEWIL had submitted an invoice for ₹12,29,54,654.80/- towards price adjustment bill alongwith letter dated 01.08.2012. Thereafter, on 16.08.2012, SEWIL had submitted its final bill towards work done for a sum of

₹6,29,86,871.77/-. Since the said amount was not released, the petitioner sent another letter dated 15.07.2013 informing SAIL of the acute financial hardship being faced by SEWIL. SEWIL further requested SAIL to release appropriate funds to meet with their liabilities. He stated that SAIL by its letter dated 04.11.2013 reduced the amount payable towards price variation/escalation to ₹6,00,38,669.78/- and had called upon SEWIL to submit a 'No Claim Certificate' for release of the said sums. He states that in this backdrop, SEWIL was left with no option but to submit a letter dated 04.11.2013 enclosing therewith a No Claim Certificate as per the format communicated by the respondent.

8. On receipt of the No Claim Certificate, SAIL released a sum of ₹5,76,37,124/- towards price variation, which was received by SEWIL on 13.11.2013. Thereafter, by a letter dated 25.11.2013, SEWIL lodged protest stating that the No Claim Certificates were issued without free consent and under duress and coercion.

9. He submitted that the course of the aforesaid events clearly indicated that the No Claim Certificate was issued by SEWIL without its free consent and, thus, SEWIL was not precluded from raising its claims.

10. Mr Varma earnestly contended that even in a case where No Claim Certificate has been issued, the Arbitral Tribunal is obliged to examine the case on merits. He referred to the decision of the Supreme Court in ***R.L. Kalathia & Co. v. State of Gujarat: (2011) 2 SCC 400*** in support of his contention. He further submitted that although the aforesaid decision was also cited before the Arbitral Tribunal, the

same has been completely ignored in the impugned award.

11. He further submitted that the Arbitral Tribunal grossly erred in rejecting SEWIL's claim by relying on the decision of the Supreme Court in *National Insurance Co. Ltd. v. M/s. Boghara Polyfab Pvt. Ltd.:* (2009) 1 SCC 267 without referring to the subsequent decision in *R.L. Kalathia & Co.*(*supra*).

12. He also drew the attention of this Court to the reasons indicated in the impugned award. He submitted that the Arbitral Tribunal also proceeded to deny SEWIL's claims on the ground of delay of twenty one days in lodging the protest reckoned from submission of the No Claim Certificate. He contended that this approach is wholly unsustainable and the impugned award is liable to be set aside. The Arbitral Tribunal (by majority) had also rejected SEWIL's contention on the basis that SEWIL had failed to produce any material or evidence to establish that the No Claim Certificate had been issued under duress or coercion. He submitted that the aforesaid considerations were outside the scope of the decision of the Supreme Court in *Boghara Polyfab Pvt. Ltd.* (*supra*) and *R.L. Kalathia & Co.* (*supra*). He contended that the Arbitral Tribunal could not extend the scope of the said decisions and, therefore, the entire approach of the Arbitral Tribunal was flawed.

Reasons and conclusion

13. In view of the above submissions, the only question that falls for consideration of this Court is whether the Arbitral Tribunal had erred in holding that the contract had come to an end by accord and

satisfaction on account of the No Claim Certificate issued by SEWIL.

14. Before proceedings further, it is relevant to refer to the 'No Claim Certificate' and the same is set out below:

“NO CLAIM CERTIFICATE

Name of Work: Salem Steel Plant Expansion Project - Civil Work for Expansion of Cold Rolling Mills (Zone-2A)

Contract Agreement No. : PU-E782205/01 Dated: 28.09.2007 and Subsequent Amendments.....

This is to state that SEW Infrastructure Ltd. (SEW) **does not have any claim with Salem Steel Plant (SSP) pertaining to the above Work and Contract Agreement except the payments to be received by them from SSP against their Final Bill and Price Adjustment Bill.**

For SEW Infrastructure Ltd.

Sd/-

(Subrata Banerjee)

Sr. General Manager

Authorized Signatory”

15. The Arbitral Tribunal, in a hearing held on 16.08.2016, had

framed issues that were required to be addressed. The two issues that are relevant are set out below:-

- “1 Whether the Arbitral Tribunal has the jurisdiction to adjudicate the claimant’s claim, the subject contract having come to an end/having being discharged by accord and satisfaction?
2. Whether the “No Claim Certificate” dated 04/11/2012 issued by the Claimant upon request by the Respondent, is vitiated due to financial duress, coercion or undue influence or without free will?”

16. The aforesaid issues were decided in favour of SAIL and against the petitioner.

17. The Arbitral Tribunal (majority) referred to the decision of the Supreme Court in ***Boghara Polyfab Pvt. Ltd. (supra)*** and concluded that in view of the same, it was incumbent upon the Arbitral Tribunal first to determine whether the Agreement between the parties have been validly discharged. Clearly, this approach cannot be faulted. If SAIL was correct that the Agreement was discharged by accord and satisfaction, the question of determining any disputes in relation to the Agreement would not arise.

18. After examining the rival stand, the Arbitral Tribunal (by majority) proceeded to accept that the Agreement stood discharged by accord and satisfaction.

19. It would now be relevant to refer to the reasons indicated by the

Arbitral Tribunal (majority) for deciding the aforesaid issues in favour of SAIL.

20. First of all, the Arbitral Tribunal noticed that the No Claim Certificate, which was furnished by SEWIL under the cover of the letter dated 04.11.2013 did not indicate any reservations in this regard. Further, the No Claim Certificate also clearly stated as under:-

“It is further declared that the amount under “No Claim” has been certified purely based on our calculations & not under any coercion or interference, whatsoever.”

21. Secondly, although SEWIL had sent a letter dated 22.11.2013 in respect of another issue; however, SEWIL did not allude to any coercion or duress suffered by it and in fact made no mention of the No Claim Certificate dated 04.11.2013. It is only on 25.11.2013, that is, almost twenty one days later that SEWIL for the first time stated that the No Claim Certificate was without its free consent. The said letter also indicated that the detailed communication in this regard would follow. However, no such detailed communication was issued by SEWIL thereafter. This conduct did not indicate that SEWIL was coerced in any manner in submitting the No Claim Certificate.

22. Thirdly, the Arbitral Tribunal also noted that SEWIL did not produce testimony of any witness in support of its claim. Plainly, if any coercive pressures were brought on SEWIL, the particulars of such coercive discussions or measures and the identities of the persons involved would have be pleaded and established.

23. Fourthly, the Arbitral Tribunal noticed that the amount alleged to have been retained by SAIL was not a significant amount considering that a sum slightly less than ₹100 crores had already been paid. Indisputably, this factor is relevant to examine whether withholding of the claimed escalation amount could have the effect of exerting an overwhelming economic coercion.

24. Fifthly, the Arbitral Tribunal also held that there were no averments in the Statement of claim regarding any duress or coercion in regard to furnishing of the No Claim Certificate. The Arbitral Tribunal noted that the only averment made in the pleadings relevant to the issue was as under:-

“discussions were held with the Respondent and during such discussions, the Claimant explained the hardship being faced from its creditors and suppliers despite having completion of work (sic) their dues as for which invoice dated 2.04.2013 for Rs. 12,54,36,396.80 is still remain unpaid. Accordingly, on the Respondent’s persistence and their directions, the Claimant under compelling circumstances left with no option except to mitigate its hardship and furnished a letter dated 15.07.2013 under compelling circumstances along with Revised Price Adjustment Invoice for Rs.8,26,00,742.45 as per stand adopted by the Respondent taking advantage of their dominant position as that of Employer for releasing the amounts towards price adjustment due to variation in prices. In the meanwhile the Claimant by letter dated 17.06.2013 also at the Respondent’s insistence terminated the Conciliation proceedings.”

25. It is apparent from the above, that the pleadings filed by SEWIL were also insufficient to set up a case of coercion.

26. In the impugned award, the Arbitral Tribunal (majority) has observed as under:

“34. Both the parties argued at length before the tribunal and placed reliance on various judgments of the Supreme Court, and also filed their detailed arguments, and summaries of their oral arguments before the Tribunal. The Respondent No.1 examined its sole-witness who was cross-examined in extensive detail by the Claimant for over 3 sittings of the Tribunal. Both the Claimant and the Respondent have placed some reliance upon the above-mentioned judgment of the Supreme Court. Crucially, the Claimant did not lead any witnesses, at all in the present proceedings, for reasons best known to it. The employees of the Claimant who had participated in discussions where the Respondent’s representatives exerted or attempted to coerce or exert any duress of any nature upon the Claimant, would have been able to speak clearly as to these facts, and could have thrown much needed light on what actually had transpired between the parties.”

27. After observing the above, the Arbitral Tribunal held as under:-

“40. As may be seen from the above, when confronted with a similar situation, the highest court in the country was prepared to take the view that the plea of duress and coercion was not made out. We are inclined in the present facts to concur with that

view. The fact that no independent oral evidence of coercion has been led, coupled with the fact that there was a long period of time between the grant of the certificate and its rescission, and in view of the fact that the present was not a case where the majority of payments had been withheld from the Claimant, in fact a sum higher than original contract price and already been paid, we hold that the plea that the No-Claim Certificate was vitiated by duress and coercion is not made out. It was well within the Claimant's reach to lead any number of available witnesses to testify as to the nature of the duress faced by them, and the exact mode and manner in which the Respondent exerted its coercive influence on the Claimant. It must be remembered that the Claimant had specifically averred in its Statement of Claim that discussions had been held following which the Claimant had been compelled to follow the Respondent's directions and reduce its claim amounts, and yet having made such an averment, the Claimant has been completely unable to substantiate such averment."

28. This Court finds no infirmity with the aforesaid conclusion. Plainly, it was incumbent upon SEWIL to establish by sufficient material that it had been coerced to issue the No Claim Certificate. Merely stating that SEWIL was compelled to issue the No Claim Certificate would be wholly insufficient for the Arbitral Tribunal to enter an award in favour of SEWIL.

29. The contention that the considerations that weighed with the

Arbitral Tribunal were extraneous to the point in issue, is also bereft of any merit. The Arbitral Tribunal had referred to the decision of the Supreme Court in *New India Assurance Company Ltd. v. Genus Power Infrastructure Ltd.*: (2015) 2 SCC 424 as well as *Union of India & Ors v. M/s Master Construction Co.*: (2011) 12 SCC 349. The Arbitral Tribunal emphasized that in the aforesaid decision, the Supreme Court had clearly held that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must *prima facie* establish the same by placing material before the Chief Justice/his designate.

30. It is relevant to state that the said decision was referred to in the context of applications under Section 11 of the Act. In the present case, the Arbitral Tribunal was finally considering the merits of the plea raised by SEWIL and at this stage, the Arbitral Tribunal was called upon to conclusively decide whether the ‘No Claim Certificate’ was extracted by exertion of any coercion, economic duress or any undue influence. Clearly, the burden to establish the same would rest with SEWIL. Concededly, SEWIL had not produced any evidence or material which would establish the same. Although, one of the letters issued by SEWIL referred to the liabilities towards the creditors, SEWIL did not produce any material to establish that its financial condition was precarious and withholding of the admitted amounts by SAIL would be catastrophic to SEWIL. On the other hand, the Arbitral Tribunal notices that the amount claimed was a small fraction of the total contract value and, thus, presumed – in my view rightly so

– that withholding of the admitted amount was not likely to exert any overwhelming pressure so as to coerce SEWIL to act against its free will.

31. As noticed above, SEWIL also did not produce any evidence of any discussions held with the representative of SAIL, which would establish that SAIL had exerted any undue influence on SEWIL. Clearly, in the present case, SEWIL had failed to discharge the burden of establishing that it had issued a No Claim Certificate under undue influence, duress or coercion. The Arbitral Tribunal's finding in this regard cannot be faulted.

32. The contention that the chain of events was sufficient for SEWIL to establish coercion and undue influence on the part of SAIL is plainly unmerited.

33. The reliance placed on behalf of SEWIL on the decision in ***R.L. Kalathia and Co. v. State of Gujarat*** (*supra*) is also misplaced. The said decision must be read in the context of the facts and issues placed before the Court. In that case, the parties had entered into a contract for execution of certain works. The Executive Engineer, who was Incharge of the project had made certain additions, alterations and variations in respect of certain items of work. It is in the aforesaid context, that the appellant firm (plaintiff) claimed that it was entitled to extra payment and had filed a suit to recover the same. Although, the Civil Judge decreed the suit in favour of the appellant, the same was set aside by the Division Bench of the Gujarat High Court

principally on the ground that the appellant (plaintiff) had accepted the final bill. The Court reasoned that having accepted the final bill – albeit, under protest – the plaintiff was stopped from raising any claims since the agreement included clauses to the effect that the acceptance to the final bill would be binding notwithstanding anything such as “without prejudice” or “under protest”.

34. In the aforesaid backdrop, the Supreme Court referred to the earlier decision in the case of ***Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors: (2004) 2 SSC 663*** and ***Ambica Construction v. Union of India: (2006) 13 SCC 475*** and explained that issuance of any no due certificate would not be an “absolute bar” to the contractor raising claims which are genuine. The aforesaid conclusion was premised on the basis that there are cases where ‘No Due Certificate’ is issued under coercion and duress. Thus, in cases, where the claimant is able to establish that a ‘No Due Certificate’ has been issued under coercion, duress or undue influence, he could not be precluded from agitating his genuine claims. In such cases, issuance of a ‘No Claim Certificate’ would not be an absolute bar for the claimant to recover its genuine claims. However, where the claimant is unable to establish that the ‘No Claim Certificate’ has been issued without his free consent, the question of examining any other claim on merits does not arise.

35. The decision in ***R.L. Kalathia and Co. v. State of Gujarat*** (*supra*) is not an authority for the proposition that even where the Court comes to the conclusion that the contract has been discharged

by accord and satisfaction, the Court must, nonetheless, decide the claims relating to the said contract on merits. The said decision does not support the proposition that notwithstanding that the Court finds that the 'No Claim Certificate' has been issued with free consent and without coercion or undue influence, it is required to examine the claims relating to the contract on merits.

36. In view of the above, this Court finds no infirmity with the impugned award. The petition is, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 03, 2018

RK



सत्यमेव जयते