

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

Reserved on: 12.07.2018
Pronounced on: 08.04.2019

+ **FAO (OS) 431/2012**
SUKUMAR CHAND JAIN Appellant
versus
DDA Respondents

+ **FAO (OS) 558/2012**
KUBER CONSTRUCTION CO. Appellant
versus
GOVT. OF NCT OF DELHI Respondent

+ **FAO (OS) 570/2012**
GURUMUKH SINGH AND CO. Appellant
versus
MCD Respondents
Through : Sh. Sandeep Sharma and Sh.
Aman Dhyani, Advocates, for appellants.
Ms. Jyoti Taneja, Advocate, for GNCTD.
Ms. Mini Pushkarna, Standing Counsel with
Ms. Swagata Bhuyan and Ms. Shiva Pandey,
Advocates, for MCD.
Sh. Pawan Mathur, Standing Counsel, for
DDA.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. All three appeals impugn separate orders passed by the learned Single judge on applications filed by the respondents under Section 34 of the *Arbitration and Conciliation Act, 1996* (hereafter, “the Act”). The common strain in all the appeals is that since the respondents/contractors had accepted

the final bills without protest, their claims could not have been entertained. The awards granted in favour of such respondent/claimants (hereafter collectively “claimants”, “contractors” or by their names, i.e. “Sukumar”, “GSC” and “Kuber”).

Facts:

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2. The correctness of the learned single judge’s order and judgement, in OMP 399/ 2007 preferred by the respondent Delhi Development Authority (hereafter referred as “DDA”) under Section 34 of the Act is questioned in this appeal. DDA had challenged an award dated 15.12.2006 of the sole arbitrator in the disputes between it (DDA) and claimant, Sukumar. The claimant was awarded the work of construction of 8314 houses in Sector-XV, Rohini, Delhi, SH & Construction of 252 LIG houses in Pocket Nos. 6 & 7, Block- G, Sector XV, Rohini, Delhi by DDA by letter dated 16.12.1985. An agreement bearing No. 15/EE/RPD-II/85-86 was executed between the parties. The work was to be completed within 12 months from the date of commencement which was 26.12.1985. Under the letter of award, the work consisted of two schemes, viz. Scheme No. 31 and Scheme No. 35-A. The stipulated date of completion was 26.12.1986. The awarded work was completed by the claimant on 30.08.1991 and the DDA extended time up to this date without levy of compensation. Due to the failure of the DDA, the work could not be commenced till 17.01.1986 (Scheme No. 31) and 20.01.1986 (Scheme No. 35-A). Further, the layout plan, foundation and other drawings were not provided to the claimant before the said dates. Cement and steel too were not made available to the claimant by DDA within time. The claimant sought compensation, which was denied. The

resultant disputes were referred to the arbitrator. The claimant invoked the arbitration clause by letter dated 26.06.1993 and by an order dated 22.10.2003, this court appointed Justice J.K. Mehra (Retired) as sole arbitrator. The Tribunal passed an award dated 15.12.2006 after hearing both the parties to the dispute. This was challenged by the DDA in the year 2007 under Section 34 of the Act. DDA's contention was that the claimant could not claim damages on account of delay, because it had, in the extension of time proforma, agreed not to do so. The Tribunal rejected this defense and relied on the decision in *Bedi Construction v. Delhi Development Authority* 1995 (1) ALR 575. The Tribunal rejected Sukumar's plea that the final bill was accepted by DDA in full and final settlement and held that payment of only undisputed items was made by the DDA on 05.06.1993 and with respect to the remaining claimant, without delay, it invoked arbitration on 26.06.1993.

3. These findings had not been challenged by the DDA. DDA had challenged the award in respect of Claim nos. 1, 2, 4, 8, 9, 14, 15, 17B-H and 19. For claim No. 14, the arbitrator awarded ₹ 4,00,000/- on account of extra expenditure due to overheads etc. for prolonged periods. DDA's objection that such amounts could not be awarded, because the claimant had accepted previously, the amounts given and given up any claim for further amounts, was rejected; the Tribunal held that:

"After considering the contentions and the pleadings of the parties including the submissions made in writing, the oral submissions and the case law it is clear that such recording by respondent on the performa of the extension of time up to 31.8.1991 is not with free consent and on this basis the claim of the claimant because of prolongation of the contract period cannot be disallowed."

4. Before the learned single judge, the contractor contended that it had offered four rebates on the estimated cost of ₹56,09,304/-. 1% on running bills if monthly paid, 0.5% on the final bill if paid in 6 months from date of completion, 0.5% on security deposit if released within one month after the expiry of maintenance period of 6 months from actual date of completion and 0.2% rebate was offered on gross amount of extra and substituted items if sanctioned within 3 months from the date of their occurrence. The claimant also submitted that under the contract, DDA had numerous obligations which were to be fulfilled by them to enable the appellant to execute the work. It was submitted that despite full resources having been deployed at site the appellant was not getting the return in consonance with the resources deployed at site. After considering all the arguments and the circumstances of the case, the learned single judge concluded that the award could not be sustained.

5. DDA's main objection to the Award in respect of Claim No.14 was that payment had been made to the claimant, (between the parties) under Clause 10(CC) of the agreement. Hence, the formula for calculation of escalation due to prolongation of work was already provided under the terms of the agreement that were binding on the parties as well as the Tribunal. The award could not have been in derogation of Clause 10(CC). DDA relied on *Anant Raj Agencies v. Delhi Development Authority* (2005) 1 Arb.LR 590, where this court held that when a contract provided a formula as per which escalation has to be worked out, the arbitrator being bound by the contract between the parties could not adopt a different methodology. It was

submitted that the impugned Award is contrary to the terms of the contract and is, therefore, patently illegal and against the public policy of India.

6. The impugned judgment of the learned single judge upheld DDA's objection and held, *inter alia*, that:

"14. It is not understood on what basis the learned Arbitrator concluded that the Respondent contractor had given the undertaking without his "free consent". This could not have been a matter of conjecture or surmise but had to be based on evidence. The learned Arbitrator makes no reference to any such evidence placed on record by the Respondent to substantiate the plea.

15. As regards the plea of the DDA that the Respondent had accepted payment against the final bill without protest, the learned Arbitrator noted the submission and held in Para 17 as under:

"The plea of respondent that final bill was accepted by the claimant in full and final settlement of all the claims is not accepted. The respondent in the final bill made the payment only of undisputed items. Clause 7 of the agreement provides that if there be any disputes about any items of the work, then the undisputed items or item only, should be paid within the time provided in the agreement. The full payment having not been made and only the payment of undisputed items made by the respondent on 5.6.1993, the claimant demanded the amounts in respect of disputed items etc. invoked the arbitration vide letter dated 26.6.1993. Thus reliance by the respondent on clause 7 is misplaced."

16. The above rejection is again without any reason. If as held by the learned Arbitrator, the final bill only dealt with undisputed items, there is no reason why the Respondent did not record this in the final bill while accepting payment. It is in the above context that the ground urged by the DDA about the

Respondent not complying with the requirements of Clause 7 of the contract assumes significance. The fact remains that the Respondent failed to show that he had, in fact, raised a dispute in terms of Clause 7 about the disputed items within 30 days of their disallowance. The invocation of the arbitration, under Clause 25, would arise only if the dispute had been raised under Clause 7 and referred to the DDA. This was a mandatory procedure and could not have been simply sidestepped by the learned Arbitrator by holding that the reliance by the DDA on Clause 7 is 'misplaced'."

7. This court also notices that the learned single judge cited and relied on Supreme Court in *National Insurance Company Ltd v. Boghara Polyfab (P) Ltd* (2009) 1 SCC 267.

8. The learned counsel for the appellant urged that all the hindrances and failures which were created by DDA were informed to it from time to time and a number of letters were also written to it in this regard. The work was completed on 30.08.1991. After, that the claimant, in terms of the agreement submitted the prescribed time extension proforma on 24.04.1992. It was urged that the contractor/claimant's partner was called to DDA's office and was forced to add the following to the proforma dated 24.04.1992:

"we will not claim anything as liquidated or unliquidated damages if extension is granted without levy of compensation"

9. It was argued that since a huge amount of money were due and payable by DDA, the appellant had no choice but to add the above-mentioned statement in the proforma. Thereafter, DDA by the letter dated 10.07.1992 communicated the extension of time without levy of compensation. It is urged that the learned single judge erred in not appreciating the entire facts and circumstances of the case. Due to the delay

on part of DDA the claimant was subjected to great hardships and losses. Further, the impugned judgment failed to appreciate that the recording in the proforma submitted was done under coercion and duress. Furthermore, the learned single judge also erred in not considering that all the grounds which the DDA raised under objections filed against the award were notarized by DDA before the Arbitrator and therefore the same cannot be allowed at a later stage. It is submitted that the scope of Section 34 is very limited and the learned single judge has re-appreciated evidence and given findings of fact which are outside the purview of Section 34 of the Act. It is settled law that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence and the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct. The claimant relied on *M/S. Sab Industries Ltd. v. M/S Gas Authority of India Ltd. & Ors* 2015(6)ArbLR210(Delhi); *Union of India v. Tejinder Kumar Dua* 200 (2013) DLT 60; and *Delhi State Industrial Development Corporation v. Mohan Construction Company* 2015 (5) Arb. LR564(Delhi).

10. DDA, on the other hand, argued that the learned single judge acted within the bounds of law given that the claimant had voluntarily agreed not to claim any damages or compensation towards work for the delayed period.

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11. In this appeal, the common judgment of the learned single judge dated 27.08.2012, allowing the objector's petition under Section 34 of the Act (in OMP 297/2005) and rejecting the claimant's petition under Section 34 (in OMP 196/2005) is challenged by the claimant (hereafter "GSC"). The

objector respondent in these appeals is the Municipal Corporation of Delhi ("MCD" hereafter).

12. In this case, in terms of the contract, the work was to be completed within 24 months from 13.07.1989. The MCD awarded a lump sum contract (₹ 3,91,00,000). Though the date of completion of work under the agreement was 12.07.1991, the actual date of completion was 03.09.1997. MCD granted extension of time ('EOT') till that date, without levy of compensation in terms of Clause 2 of the agreement. The 28th and final bill was prepared and accepted by GSC on 27.10.1999 in the bill form with the remarks: *"Final bill and measurement accepted as full and final settlement of accounts"*. Thereafter, the 10 CC Bill was also prepared and a similar endorsement was made by GSC on the bill form on 10.09.2001. Concededly, the amounts under both bills were paid to GSC. On 10.07.2002, it requested the MCD's Executive Engineer ('EE') to settle the dispute arising out of the contract; on 01.08.2002, a legal notice was served on the MCD seeking reference of the dispute to arbitration. Thereafter, by an order dated 24.02.2003 passed by this court in AA No. 200/2002, an Arbitrator was appointed to adjudicate the claims and counter claims of the parties.

13. In the arbitral proceedings, MCD applied under Section 16 of the Act, urging a preliminary objection to maintainability of GSC's claims. It relied on copies of the two bills, containing the endorsement and Clause 10 CC Bill, (showing acceptance of the full and final settlement of the accounts), MCD urged that GSC was precluded from raising any further claims contrary to the above undertaking. It further urged that claims were time-barred in terms of Clause 25 of the agreement in terms of which GSC had to apply for arbitration within 90 days of the intimation from the department

that the final bill was ready for payment. GSC invoked the arbitration clause on 01.08.2002 whereas the work was completed on 03.09.1997. The arbitrator heard submissions of both parties on the above application on 24th March, 20th April, 5th May and 15th May 2004. On 01.06.2004, he rejected the MCD's Section 16 application. The operative portion of the order is as under:

"(1) That there is no "Accord and Satisfaction" towards full and final settlement between the parties. It is evident from the endorsements made by the claimant on the 28th and final bill on page 44 of M.B. no. 5173. This bill is the final bill of the work done (except 10 CC bill) and has been accepted by the claimant on 6.10.99. There are three different acceptance endorsements by the claimant on this bill, two of which are conditional. This itself shows that there is no "Accord and Satisfaction" towards full and final settlement.

(2) Cause of action to invoke the arbitration clause starts from this date i.e. 6.10.99 when the claimant comes to know as to what is being paid to him and what is not being paid to him.

(3) Through various judgments of various courts including those of Apex Court cited by the claimant, claimant has been successful in establishing that Article 137 of the Limitation Act applies in this case as regards the question of limitation is concerned."

14. The MCD urged before the learned single judge that since there was 'accord and satisfaction' of the claims of GSC, none of the claims made by GSC were maintainable. It was submitted that the conclusion drawn by the learned Arbitrator that there was no accord and satisfaction since there were three different acceptance endorsements on the final bill, two of which were

conditional, was contrary to the record. MCD relied on *Boghara Polyfab (supra)* to say that in such cases, GSC's claims could not have been entertained by the learned Arbitrator.

15. GSC referred to the reply filed by it to the application of the MCD under Section 16 of the Act in which it claimed that *"it is essential and customary that in MCD not a single payment is released without extracting the acceptance from the contractor which is always under duress"*. It was contended by GSC that the final bill paid on 27.10.1999 did not reflect all the works executed. It was stated that the 10 CC Bill in the sum of ₹ 42,38,602 was passed on 30.11.2001 *"and whatever amount was being paid, it was accepted by the claimant under duress."* It was stated that *"consequently, the claimants under duress/coercion recorded acceptance on 14th September 2001 (Annexure D) and on 19th September 2001 the claimants intimated the respondent EE that acceptance was given under duress and accordingly it was not voluntary."* Reliance was also placed on the arbitration proceedings dated 20th April, 5th May and 15th May 2004 recording the submissions of both the parties. It was urged that GSC had merely signed the final bill, and that too under duress and coercion, and it was the EE who affixed a rubber stamp over the signature later on. GSC contended that the fact that the measurement book ('MB') had been signed thrice by it itself showed that the signature was obtained under duress. Reliance was placed on *Pandit Construction Company v. Delhi Development Authority* 2007 (3) Arb.LR 205 (Delhi). Lastly, it was submitted that the 28th and final bill as well as the Clause 10 CC bill did not cover Claim Nos. 7, 8, 9 and 11 and, therefore, they were arbitrable.

16. The learned single judge rejected GSC's arguments, and allowed MCD's petition; at the same time, GSC's petition was rejected. The impugned judgment relied on *Boghara Polyfab (supra)* and another judgment - *Union of India v Master Construction* 2011 (12) SCC 349. The reasoning in the impugned order is as follows:

“13. In the present case, apart from pleading that the no claims certificate was given under duress or coercion, GSC would have had to, in terms of the above decision in Boghara Polyfab produce evidence to make good that plea. The extent of evidence that would have to be led will of course vary from case to case. But in no instance can it be said that the mere plea that the no claims certificate was given under coercion or duress is sufficient. In the order dated 1st June 2003 the learned Arbitrator simply concluded that there was no accord and satisfaction since there were three different endorsements. The endorsements as to accord and satisfaction in the 28th and final bill as well as the 10 CC bill are identically worded. They bear the signatures of the authorised signatory of GSC. Merely because the signatures were taken on the MB as well, will not automatically mean that the signatures were taken under coercion and duress. Further, the letter dated 19th September 2001, the receipt of which is denied by the MCD, does not state that GSC's endorsement either on the 10 CC bill or the 28th and final bill was obtained under duress. It only refers to a letter dated 14th September 2001 having been given "under pressure". As already noticed, the letter dated 14th September 2001 appears not to deal with the issue of full and final payment. No other evidence of any sort was led by GSC to make good its plea that it appended its signatures of accord and satisfaction under coercion and duress. The order dated 1st June 2004 of the learned Arbitrator holding that there was no 'accord and satisfaction' towards full and final settlement is unsustainable in law. The learned Arbitrator ought to have allowed the application of the MCD under Section 16 of the Act and declined to entertain the claims of the Contractor.”

17. The arguments made in GSC's appeals follow, and are along the same lines as in the appeal preferred by Sukumar. It is also contended that the learned single judge erred in the facts of the case, because the entire discussion as to why the MCD's objection was rejected is not contained in the order rejecting the Section 16, application, but rather that it has to be read in conjunction with, the reasoning and discussion in the previous proceedings. It was also urged the courts, in deciding the cases, such as the present one, should be cognizant of commercial realities, where the dominant and economically powerful entity such as a public corporation or agency, which gets the works executed, can easily prevail over the private agency, which depends on it, by such tactics as withholding- willfully, legitimate payments, arm-twisting them into not accepting any payments or desisting from making claims towards undue and inordinate delay that is solely caused by the public undertaking, corporation or agency.

18. Counsel for MCD refuted the arguments of the appellant GSC and urged that the learned single judge could not be faulted for following *Boghara Polyfab (supra)* and *Master Construction (supra)*, which are binding on all courts.

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19. The appellant (hereafter "Kuber") challenges the judgment and order of the learned single judge, dated 10.09.2012, which allowed the respondent Govt of NCT's (hereafter called "NCT") petition under Section 34 to an Award dated 17.03.2008 passed by the learned sole Arbitrator in the dispute between the parties.

20. Like in the other two cases, the contract was for execution of works, i.e for providing service roads on both sides of M.B. Road No. 63 from Loni

Flyover to UP Border by its letter dated 27.01.1997. The stipulated date of start of work was 11.01.1997; to be completed within 12 months. It was actually completed on 01.10.1999. The NCT's position was that the 15th final Bill was finalized on 12.10.2000. By its letter dated 20.01.2003, Kuber addressed a letter to the EE raising seven claims amounting to ₹21,85,000. The dispute was referred to arbitration, on the intervention of this court, under Section 11(6) of the Act. The preliminary objection to limitation was rejected by the Tribunal, which then went on to decide the merits.

21. Quite apart from the issue of limitation, NCT had also articulated the following objection, in its reply to Kuber's statement of claim (para 8):

“The claimant vide letter No. Nil dated 20th January 2003 addressed to EE, PWD-29 and copy to Superintending Engineer PWD Circle-VII and Chief Engineer PWD Zone-II (R-55) raised seven claims amounting to Rs.21,85,000 (Twenty one lacs eighty five thousand only). The claimant was requested vide respondents letter dated 27th December 1999 (R-37), letter dated 31st December 1999 (R-38) letter dated 15th December 2000 (R-41), letter dated 24th April 2000 (R-42), and letter dated 22nd July 2000 (R-45) for submission of extension of time performa Part-I which was abnormally delayed by him which shows his lack of interest in the work. Even while submitting EOT performa Part-I, the claimant himself requested for EOT upto 1st October 1999, that is, upto the date, the work was considered complete without assigning any valid reason for prolongation of contract with a undertaking that ‘I have not suffered any loss, and shall not claim any damage on this account, which was considered while sanctioning EOT case.’”

22. With reference to para 6 of the statement of claim, NCT urged *inter alia*, that:

“6. A number of references were made to the claimant to submit extension of time performa and attention is invited to Respondent letter No. 81 dated 27th December 1999 (R-37), Respondent letter No. 490 dated 15th December 2000 (R-41), Respondent letter No. 1156 dated 24th April 2000 (R-42), Respondent letter No. 82 dated 26th April 2000 (R-43), Respondent letter No. 1284 dated 4th May 2000 (R-44), Respondent letter No. 2078 dated 22nd July 2000 (R-45). Ultimately, the claimant submitted the application for EOT proforma vide their letter dated 31st July 2000 with these remarks i.e. I have not suffered any loss on account of this delay.

For reasons of above statement/undertaking the claimants have no right to make any claim on account of delay in execution of work even if Respondent might have to least extent contributed to it. The undertaking is with free will of claimant.

In this behalf the Respondent rely on the following decisions:

- (i) Decided on 29th February 1996 by Delhi High Court in Democratic Builders v. Union of India 1996 (Suppl) Arb.LR 53.*
- (ii) Decided on 14th July 1995 by the High Court of A.P. Hyderabad in Govt. of Andhra Pradesh v. G. Kandela Rao 1995 (3) AL 591 (DB).”*

23. Kuber’s rejoinder to the above preliminary objections/submissions read as under:

“8. It is totally wrong that the bill was finalised and paid on 12th October 2000. As per agreement, all intermediate payments or payments made through running bills are advances, finally to be adjusted in the final bill, which has not been paid so far. Extension of time has already been granted without levy of compensation till the actual date of completion, owing the responsibility of all delays. At the time of granting extension the Respondents extracted this certificate

under duress. It is a routine for the Respondents to obtain such certificates while granting extensions. The certificate so extracted is of no consequence. Had the claimants been responsible for the delays, the Respondents would have levied liquidated damages under Clause 2 of the agreement to compensate loss suffered by the Government. The certificate was extracted on the false hope that the contract (claimants) would be prevented from claiming damages. Can such a certificate obtained under duress oust the claims of the claimants? Certainly not.”

24. The rejoinder to para 6 on merits reads as under:

“6. The contents of the para are misleading and hence denied. The competent authority has already granted extension upto actual date of completion owing the responsibility of all the delays. The Respondents may please be directed to present original performa containing reasons of delay and granting extension by the competent authority. As already clarified, the certificate was extracted under duress, threatening that if such certificate is not recorded though may not be reasonable or proper still the claimants would be penalised by way of levy of compensation. Consequently, the certificate so obtained is of no consequence. The undertaking was extracted under coercion and not voluntary or out of free will of the claimants. It is totally false that the EOT was sanctioned without levy of compensation taking a lenient and practical view. The fact is that realising the reality and accepting all the delays the competent authority was legally and contractually under obligation to grant extension of time without levy of compensation. The Respondents have already admitted all the delays as communicated to them by the claimants. The site was to be handed over in such a way that the work could be completed within ten months. However, the full site could not be made available even during the extended period of 22 months and the work was declared as complete even when the claimants had executed work worth Rs. 1,01,08,295 against the tendered amount of Rs.1,36,21,274.”

25. The tribunal, in Kuber's case, proceeded to reject NCT's submissions and awarded some amounts claimed by it, holding them to be legitimately due. The NCT, in its objections under Section 34 urged that the preliminary objection- as to acceptance by Kuber of amounts, and voluntarily giving up claims on account of delay had not been dealt with. Kuber, on the other hand, urged that the award ought not to be interfered with as the Tribunal was the final fact-finding authority and the forum agreed to by the parties to decide questions of law, finally. The learned single judge, in the impugned judgment, set aside the award. He again relied on *Boghara Polyfab (supra)* and reasoned as follows:

“15. A perusal of the Award shows that the learned Arbitrator did not deal with the above objection raised by the Petitioner under para 8 of the preliminary objection/submission and para 6 of the para-wise reply of the statement of claim which recorded the Respondent having given an undertaking that he would not claim damages after extension of time ('EOT') was granted to him. The Respondent had in its rejoinder contended that the said certificate was 'extracted' from it 'under duress, threatening that if such certificate is not recorded though may not be reasonable or proper still the claimants would be penalized by way of levy of compensation.' It was further pleaded that 'the undertaking was extracted under coercion and not voluntary or out of free will of the claimants.' As noted by the learned Arbitrator barring Claim No. 1, the other claims stemmed from basic issue of prolongation of the contract. The above undertaking was relevant to the said issue and was required to be dealt with by the learned Arbitrator.

16. It was submitted by Mr. Sandeep Sharma, learned counsel for the Respondent that the orders passed by the learned Arbitrator as well as the final Award did not anywhere

reflect the Petitioner having raised the above contention at any point in time before the learned Arbitrator. He submitted that with the Petitioner not having actually argued the point before the learned Arbitrator, it cannot be permitted to raise such objection at this stage. Alternatively, it was submitted that this Court should, in exercise of its power under Section 34 (4) of the Act, remit this issue to the learned Arbitrator for a decision.

17. With the Petitioner having specifically raised issue of its preliminary objection/submission, it cannot be said that the question whether undertaking given by the Respondent precluded it from claiming damages was not raised before the learned Arbitrator. It was certainly put in issue with the Respondent urging before the learned Arbitrator that the said undertaking was given by the Respondent under duress and coercion. It was incumbent on the learned Arbitrator to have dealt with such issue as it had a bearing on most of the claims of the Respondent.

18. It may be noted that even in the present petition under Section 34 of the Act the Petitioner has in ground 'H' reiterated its submission in regard to the Respondent's undertaking. Apart from a general denial by the Respondent, there is no specific denial that such undertaking was given by the Respondent. Factually there appears to be no dispute that the Respondent had given such an undertaking. The only question was whether the undertaking was given by the Respondent under duress and coercion as claimed by it.

19. The arbitral record has been perused. It contains copies of the application for EOT submitted by the Respondent. The undertaking given by the Respondent is in Hindi. It clearly states that the Respondent would not make any claim for damages if granted EOT. The Respondent has further stated that he has not suffered any loss due to the delay. It is plain that on the basis of the said undertaking the EE of the Petitioner had granted EOT without levy of compensation. The EE

remarked that neither the Government has suffered any liquidated damages ('LD') nor the Contractor had suffered any loss on account of the delay in the completion of the work."

26. As in the other two cases, similar arguments were addressed by learned counsel for the parties. Kuber's counsel stressed on the fact that it is not what is stated in the pleadings, but also what is argued before the tribunal which is of importance. In this regard, counsel submitted that this aspect was highlighted before the learned single judge, who nevertheless did not give any importance to it, and brushed it aside, erroneously. NCT's counsel urged the court not to interfere with the learned single judge's reasoning, stating that the claimant, Kuber had consciously given up its right to claim any amount or compensation for the work done during the extended time.

Analysis & Conclusions

27. As is evident from the factual discussion in all the appeals, the common issue requiring decision is whether the learned single judge's rejection of the claimant's submission after they had succeeded before the Tribunal, in arbitral proceedings, was justified. In the Sukumar's appeal, the learned single judge relied on *Boghara Polyfab (supra)*; in the other two appeals, the impugned judgments relied on that decision as well as *Master Construction (supra)*.

28. In *Boghara Polyfab (supra)*, the Supreme Court, dealing with the contention that the dispute sought to be referred was not arbitrable, in the context of an application under Section 11 (6) dealt with the issue, holding that if there was accord and satisfaction due to a no dues certificate, a reference under Section 11 *per se* was precluded. It held, *inter alia*, that:

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

52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the Conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The 'accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have

agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.

52. Let us now examine the receipt that has been taken in this case. It is undated and is in a pro forma furnished by the appellant containing irrelevant and inappropriate statements. It states : "I/we hereby assign to the company, my/our right to the affected property stolen which shall, in the event of their recovery, be the property of the company". The claim was not in regard to theft of any property nor was the claim being settled in respect of a theft claim. We are referring to this aspect only to show how claimants are required to sign on the dotted line, and how such vouchers are insisted and taken mechanically without application of mind."

29. The Supreme Court in the later decision in *Master Construction* (*supra*) stated that:

"20. The Bench in Boghara Polyfab Private Limited in paragraphs 42 and 43 (page 291), with reference to the cases cited before it, inter alia, noted that there were two categories of the cited cases; (one) where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, it was held that there could be no reference of any dispute to arbitration and (two) where the court found some substance in the contention of the claimants that 'no dues/claim certificates' or 'full and final settlement discharge vouchers' were insisted and taken (either in printed format or otherwise) as a condition precedent for release of the admitted dues and thereby giving rise to an arbitrable dispute.

21. In *Boghara Polyfab Private Limited*, the consequences of discharge of the contract were also considered. In para 25 (page 284), it was explained that when a contract has been fully performed, then there is a discharge of the contract by performance and the contract comes to an end and in regard to such a discharged contract, nothing remains and there cannot be any dispute and, consequently, there cannot be reference to arbitration of any dispute arising from a discharged contract. It was held that the question whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, such question is arbitrable. The Court, however, noted an exception to this proposition. The exception noticed is that where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Yet another exception noted therein is with regard to those cases where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim. It was observed that issuance of full and final discharge voucher or no-dues certificate of that kind amounts to discharge of the contract by acceptance or performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.

22. In paragraph 26 (pages 284-285), this Court in *Boghara Polyfab Private Limited* held that if a party which has executed the discharge agreement or discharge voucher, alleges that the execution of such document was on account of fraud/coercion/undue influence practiced by the other party, and if that party establishes the same, then such discharge voucher or agreement is rendered void and cannot be acted

upon and consequently, any dispute raised by such party would be arbitrable.

23. In paragraph 24 (page 284) in Boghara Polyfab Private Limited, this Court held that a claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher has been executed by the claimant. The Court stated that such dispute will have to be decided by the Chief Justice/his designate in the proceedings under Section 11 of the 1996 Act or by the Arbitral Tribunal.

24. In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate 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 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.”

30. The third decision on the issue, (in line with *Boghara Polyfab*) of the Supreme Court is *New India Assurance Co Ltd v Genus Power Infrastructure* 2015 (2) SCC 424. The court held that:

“8. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prime facie establish the same by placing material before the Chief Justice/his designate. Viewed thus, the relevant averments in the petition filed by the Respondent need to be considered, which were to the following effect:

(g) That the said surveyor, in connivance with the Respondent Company, in order to make the Respondent Company escape its full liability of compensating the Petitioner of such huge loss, acted in a biased manner, adopted coercion undue influence and duress methods of assessing the loss and forced the Petitioner to sign certain documents including the Claim Form. The Respondent Company also denied the just claim of the Petitioner by their acts of omission and commission and by exercising coercion and undue influence and made the Petitioner Company sign certain documents, including a pre-prepared discharge voucher for the said amount in advance, which the Petitioner Company were forced to do so in the period of extreme financial difficulty which prevailed during the said period. As stated aforesaid, the Petitioner Company was forced to sign several documents including a letter accepting the loss amounting to Rs. 6,09,55,406/- and settle the claim of Rs. 5,96,08,179/- as against the actual loss amount of Rs. 28,79,08,116/- against the interest of the Petitioner company. The said letter and the aforesaid pre-prepared discharge voucher stated that the Petitioner had accepted the claim amount in full and final settlement and thus, forced the Petitioner company to unilateral acceptance the same. The Petitioner company was forced to sign the said document under duress and coercion by the Respondent Company. The Respondent Company further threatened the Petitioner Company to accept the said amount in full and final or the Respondent Company will not pay any

amount toward the fire policy. It was under such compelling circumstances that the Petitioner company was forced and under duress was made to sign the acceptance letter.

9. *In our considered view, the plea raised by the Respondent is bereft of any details and particulars, and cannot be anything but a bald assertion. Given the fact that there was no protest or demur raised around the time or soon after the letter of subrogation was signed, that the notice dated 31.03.2011 itself was nearly after three weeks and that the financial condition of the Respondent was not so precarious that it was left with no alternative but to accept the terms as suggested, we are of the firm view that the discharge in the present case and signing of letter of subrogation were not because of exercise of any undue influence. Such discharge and signing of letter of subrogation was voluntary and free from any coercion or undue influence. In the circumstances, we hold that upon execution of the letter of subrogation, there was full and final settlement of the claim. Since our answer to the question, whether there was really accord and satisfaction, is in the affirmative, in our view no arbitrable dispute existed so as to exercise power Under Section 11 of the Act. The High Court was not therefore justified in exercising power Under Section 11 of the Act.”*

31. The same view has been endorsed in *Velugubanti Hari Babu v Parvathini Narasimha Rao & Ors* 2016 (14) SCC 126. Of more recent vintage is another decision, in *ONGC Mangalore Petrochemicals Ltd v ANS Construction Ltd* 2018 (3) SCC 373, where the court held as follows:

“24. From the materials on record, we find that the contractee-Company had issued the "No Dues/No Claim Certificate" on 21.09.2012, it had received the full amount of the final bill being Rs. 20.34 crores on 10.10.2012 and after 12 days thereafter, i.e., only on 24.10.2012, the contractee-Company withdrew letter dated 21.09.2012 issuing "No Dues/No Claim Certificate". Apart from it, we also find that the Final Bill has

been mutually signed by both the parties to the Contract accepting the quantum of work done, conducting final measurements as per the Contract, arriving at final value of work, the payments made and the final payment that was required to be made. The contractee-Company accepted the final payment in full and final satisfaction of all its claims. We are of the considered opinion that in the presents facts and circumstances, the raising of the Final Bill and mutual agreement of the parties in that regard, all claims, rights and obligation of the parties merge with the Final Bill and nothing further remains to be done. Further, the Appellant-Contractor issued the Completion Certificate dated 19.06.2013 pursuant to which the Appellant-Contractor has been discharged of all the liabilities. With regard to the issue that the "No-Dues Certificate" had been given under duress and coercion, we are of the opinion that there is nothing on record to prove that the said Certificate had been given under duress or coercion and as the Certificate itself provided a clearance of no dues, the contractee could not now turn around and say that any further payment was still due on account of the losses incurred during the execution of the Contract. The story about duress was an afterthought in the background that the losses incurred during the execution of the Contract were not visualised earlier by the contractee. As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute. The conduct of the contractee clearly shows that "no-claim certificate" was given by it voluntarily; the contractee accepted the amount voluntarily and the contract was discharged voluntarily.

Conclusion:

25. Admittedly, No-Dues Certificate was submitted by the contractee-Company on 21.09.2012 and on their request Completion Certificate was issued by the Appellant-Contractor. The contractee, after a gap of one month, that is, on

24.10.2012, withdrew the No Dues Certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the Contract site was made vide letter dated 12.01.2013, i.e., after a gap of 3 1/2 (three and a half) months whereas the Final Bill was settled on 10.10.2012. When the contractee accepted the final payment in full and final satisfaction of all its claims, there is no point in raising the claim for losses incurred during the execution of the Contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting Final Bills that too in the absence of exercising duress or coercion on the Contractee by the Appellant-Contractor. In our considered view, the plea raised by the contractee-Company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power Under Section 11 of the Act. The High Court was not, therefore, justified in exercising power Under Section 11 of the Act.”

What is striking [and this court, in *Sab Industries (supra)* noticed] is that the contextual setting of all the judgments [i.e. *Boghara Polyfab (supra)*, *Master Construction (supra)* and *Genus Power (supra)* and the later decisions as well] was *whether the disputes urged and for which reference was sought, was arbitrable*, when a party aggrieved approached the court, for an order under Section 11(6). The court held, in all the cases, that a mere “bald plea” of coercion is insufficient to get over a document (or a condition indicating settlement or accord and satisfaction over the claim, by the parties) and that much depended on the circumstances- if the plea was a plausible one, the court could nevertheless refer the dispute to arbitration.

32. This aspect was highlighted in *Sab Industries (supra)* in the following terms:

“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 v. C.P. Joshi AIR 2011 SC 1127, 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 & Ors. v. B. Shama Rao & Ors. AIR 1956 SC 593; Nedunuri Kameswaramma v. Sampati Subba Rao AIR 1963 SC 1884; Kunju Kesavan v. M.M. Philip & Ors. AIR 1964 SC 164; Kali Prasad Agarwalla (dead) by L.Rs. & Ors. v. M/s. Bharat Coking Coal Ltd. & Ors AIR 1989 SC 1530; Sayed Akhtar v. Abdul Ahad, (2003) (7) SCC 52; and Bhuwan Singh v. Oriental Insurance Co. Ltd. AIR 2009 SC 2177) "

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 Commission vs. Saw Pipes, (2003) 5 SCC 705). 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 v. ONGC Ltd. 2010 (11) SCC 296 and Kwaliti Manufacturing Corporation v. Central Warehousing Corporation 2009 (5) SCC (Civ) 406*). 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 v. Union of India 2009 (6) SCC 414; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 and Renusagar Power Co. Ltd. v. General Electric Co. 1984 (4) SCC 679*). 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 (P) Ltd. v. ONGC* [MANU/SC/0803/2003 : (2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [MANU/SC/0419/2004 : (2004) 5 SCC 325]).*

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. v. Union of India* 2011 (5) SCC 758). 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."

33. In FAO (OS) 431/2012, the facts are that the works contract was awarded on 16.12.1985. The work commenced on 21.12.1985 and was completed on 30.08.1991. The claimant offered rebates in the estimated costs: 1% on running bills to be monthly paid; 0.5% for final bills if paid within 6 months from the date of completion; 0.5% on security fee realized from one month after expiry of maintenance period – six months from the date of actual completion and 0.2% rebate on gross amount on extra and substituted fee sanctioned within six months. The claimant had argued that despite the deployment of full resources within the stipulated 12 months period, hardly 50% of the work could be executed. Though concededly, the completion of work was on 30.08.1991, the extension of time was on account of DDA's omissions and hindrances at site and inability to make

timely payments which was communicated on 10.07.1992 without levy of compensation. Sukumar urged that this was because it was coerced into signing a performa that it would not claim extra in liquidated or unliquidated damages. Its claim was that ₹12,68,360/- was the amount incurred on account of extension of time quite apart from the escalation and other formula indicated in clause 10CC of the agreement.

34. In the Award, the Tribunal considered the DDA's objections with respect to the voluntary nature of the no claim for extension on damages on account of extension, through the note, and *inter alia* discussed this aspect as follows:

“14.....The fact is that the respondent being satisfied that no delay caused by the claimant, still got the above recorded in the proforma of extension of time, which was done by them only because of their official dominating position. In case delay would have been caused by the claimant and thus liable for levy of compensation in terms of Clause 2 of the agreement even giving such writing by the claimant would have been of no consequences. This submission of the claimant is supported by letters dated 29.6.1989 (C-11) and 30.6.1989 (C-12), wherein there is no whisper that respondent agreed to extend the time because the claimant has given in writing that they would not claim any compensation because of delays caused by the respondent. Rather the Executive Engineer in C-11 recorded the following:

It is considered justified that extension of time upto 30.6.1989 under clause 10 of the agreement to keep clause 10CC alive be granted.

15. Because of the hindrances on the part of the respondent the work could be completed only on 30.8.1991. The extension was granted by the respondent upto this date. Though in letter dated C-33(b) while extending the time it has been stated that

this is without prejudice to the right of the respondent to recover liquidated damages but no such liquidated damages were levied as the delay being on the part of the respondent.

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17. The plea of respondent that final bill was accepted by the claimant in full and final settlement of all the claims is not accepted. The respondent in the final bill made the payment only of undisputed items. Clause 7 of the agreement provides that if there be any disputes about any items of the work, then the undisputed items or item only, should be paid within the time provided in the agreement. The full payment having not been made and only the payment of undisputed items made by the respondent on 5.6.1993, the claimant demanded the amounts in respect of undisputed items etc. invoked the arbitration vide letter dated 26.6.1993. Thus, reliance by the respondent on clause 7 is misplaced.”

35. This Court is of the opinion that the document relied upon by the DDA (that Sukumar had given up its claim for damages or any other amount towards the extended period) was, having regard to the overall circumstances, justified the tribunal's findings. No doubt, the DDA urged this aspect in its preliminary submissions and subsequent pleadings. Evidence too was led and considered by the arbitrator who did not rely merely on the arguments made by the claimants. Rather he went by probabilities in the circumstances such as consideration of the Exhibit C-11 and C-12 were previous proformas issued by the DDA extending the time. The extension of time was in fact sanctioned on 30.08.1991. Given these circumstances, the endorsement issued subsequently could not be construed conclusive. Furthermore, this Court also notices that the claimant had referred to other documents, such as Ex.C-3, C-9 and C-10 apart from the

immediately preceding extension of time documents issued by the DDA -all of which stated that the work was completed and that extension of time was granted by DDA without levy of compensation by it, i.e. DDA claiming any compensation for delay on part of the contractor. In the circumstances, the claimant was justified in contending that the DDA coerced it into signing the document. The Tribunal's findings were based on reasons and after considering evidence. The learned single judge's interference with those findings were not called for.

36. In FAO(OS) 570/2012 (GSC), the MCD had contended that the claims in question were inadmissible because of accord and satisfaction by GSC reflected through a document dated 14.09.2001. The issue urged was cast as a preliminary one and separate proceedings were held. The Court notices that the proceedings are part of the record; however, unfortunately they appear not to have been noticed by the learned Single Judge. The relevant discussion – in the form of submissions of the parties can be found in the proceedings dated 05.05.2004 and 15.05.2004. The discussion of the claimant's arguments, on 05.05.2004 is as follows:

“In our case last payment was made on 13.6.02 and the limitation will start from that date and thereafter a letter dated 10.7.02 was sent to the Ex. Engineer for settlement of the claims as per list enclosed. This is exhibit Q. The limitation of 90 days as per clause 25 or 3 years as per Limitation Act should start from this date. Now I come to the acceptance of the bills by the Contractor. I contend that these bills were accepted under duress. This is evident from the acceptance of the contractor in the MB wherein 3 acceptance have been recorded. One is stamped of acceptable put by EE and signed by the contractor, the second is in the hand writing of contractor of 10.9.01. Here another acceptance of 10.9.01 in the hand writing of contractor is there where he has accepted

_____to the pending claim of de-watering. But this acceptance has been struck off. These 3 acceptances out of which one has struck off these proves that this acceptance has been accepted under duress. Further a letter dated 14.9.01 (Annexure-D) was extracted from the contractor accepting full and final settlement of the accounts. But no amount 'full and final settlement' has been mentioned in this letter. It is not known as to what has been accepted by the contractor. Against the bill was based on 30.11.01. It was got accepted again on the bill from the contractor. How the bill passed on 30.11.01 was got accepted on 14.09.01. In between there is a letter dated 19.9.01 written the claimant and deposited in the office of EE(Br)IV, Respondent vide diary No.266/EE(Br)IV dated 19.9.01 vide which the claimant withdrew the acceptance letter dated 14.9.01. Now in view of the fact that last payment was made on 13.6.02 and bill was passed on 30.11.01 and acceptance letter dated 14.9.02 and withdrawal of acceptance letter dated 19.9.01 it cannot be concluded that there was accord and satisfaction. It cannot be said to be an amicable settlement."

37. In the hearing dated 15.05.2004, the MCD's submissions were recorded by the Tribunal. They are extracted below:

"It has been admitted by the claimant in his reply to our application under Section 16 that he recorded the acceptance regarding full and final payment under duress as the E.E.(Br.)IV made it clear to him if such an endorsement is not recorded a single penny will not be released. By virtue of this note of settlement on MB/Bill the claimant made the Deptt. to pass and pay his bills. Had the claimant not given this undertaking regarding his satisfaction on the bill the Deptt would not have paid even this amount. It is actually the same situation which exists in Kapoor Chand case. In the Kapoor Chand case it was held

"The appellants were left in no doubt as to the condition on which payment would be made to them. The appellants clearly

accepted the condition and recorded full satisfaction on all the promissory notes. It has now been impossible to accept the position that the appellants reserve their right to sue the Respondent for the balance of the amount. The position in the present case is that the appellants must have known that they could receive the second installment and retain the first installment by accepting the condition on which the sum of Rs. 20 lacs was offered to them namely that they must record a full satisfaction of their claim. They accepted the money on the condition on which it was offered and it is now open to them to say either in fact or in law that they accepted the money but condition.

The appellants were left in no doubt as to the condition."

Thus in view of Kapoor Chand judgement and in view of satisfaction given by the claimant on the bill there is complete discharge of the bill and it is not open to the claimant to raise any claim. Even otherwise as per the judgement of the Supreme Court Nathani Sales Limited Vs. Associated Constructions 1995 Supp(3)Supreme Court cases 324, first the settlement will have to be got set aside and then only the claims can be raised. It is not necessary that this issue of getting the settlement set aside to be raised before the Court delaying the appointment of Arbitrator. As per scheme of the new Act all such objections are required to be raised before the Arbitrator and not before the designate Court or Commissioner before the appointment of the Arbitrator. The contention of the claimant that had the Respondent been confident enough about the accord and satisfaction they should have raised before the Commissioner/Court is not acceptable to us because we opted to raise the issue before the Arbitrator and according to Section 16 of the Arbitration Act, the contention of the claimant that, had the respondent taken the plea that there is accord and satisfaction before the Court, the Court would have decided the matter in following ways:

i) Either the Court would have referred this matter of accord and

ii) After satisfying itself that accord and satisfaction is there the Court would have refused to appoint the arbitrator.

The above contention of the claimant is incorrect because the designate judge, while considering the application under Section 11 i.e. the appointment of Arbitrator is not concerned with the issues other than the appointment of arbitrator (Konkan Railway) and all other issues have to be left to be decided by the Arbitrator. The contention of the claimant that our theory of accords and satisfaction is false is also not tenable due to the reason that they have not disputed the signatures of the claimant on the bills/MBs. They have admitted that they have given the acceptance on final bill under duress.”

38. The order of the Tribunal of 01.06.2004 on the issue *inter alia* reads as follows:

“After hearing the arguments advanced by both the parties which are placed on record and after going through the various judgements cited by both the parties and after going through the documents relied upon by both the parties, it is concluded and held as under: -

(1) That there is no "Accord and Satisfaction " towards full and final settlement between the parties. It is evident from the endorsements made by the claimant on the 28th & final bill on page 44 of M.B. no. 5173. This bill is the final bill of the work done (except 10 cc bill) and has been accepted by the claimant on 6.10.99. There are three different acceptance endorsements by the claimant on this bill, two of which are conditional. This itself shows that there is no “Accord and satisfaction” towards full and final settlement.

(2) Cause of action to invoke the Arbitration clause starts from this date i.e. 6.10.99 when the claimant comes to know as to what is being paid to him and what is not being paid to him.

(3) Through various judgements of various courts including those of Apex Court cited by the claimant, claimant has been successful in establishing that Art. 137 of Limitation Act applies in this case as regards the question of limitation is concerned.

In view of the above, the preliminary objections raised by the respondent in his application dated 16.3.04 under section 16 of the Arbitration Act 1996 are dismissed.”

39. It is thus clear that like in Sukumar Jain’s case, in this appeal as well, the Tribunal did not rely merely on a “bald plea” but rather considered the submissions of the parties as well as the evidence on record to conclude that there was no satisfaction. The Tribunal was conscious of the fact that three separate documents were relied upon by the MCD which injected considerable ambit to whether they amounted to accord and satisfaction. Both were not clear documents. Moreover, the Tribunal also considered the overall circumstances. Having regard to these facts, the conclusion recorded by the Tribunal was reasonable and the evidence rendered within the realm. They cannot be set aside on the ground that the evidence was inadequate or such findings are patently erroneous in law. The Court further was of the opinion that in both the cases, the circumstances clearly indicate the existence of proposition (iii) in para 52 of *Boghara Polyfab (supra)* which is extracted below:

“(iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of rupees six lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of

coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.”

40. In the last appeal [FAO(OS) 558/2012, relating to Kuber], the facts are that the work was awarded on 27.01.1987 and was to be completed within 10 months within the stipulated dated of start, i.e. 11.02.1987. It was actually completed on 01.10.1999. The extension of time performa issued to claimant on 01.10.1999 contained a stipulation that the contractor would not claim damages on account of time prolongation. The GNCTD which had awarded the contract relied on various documents, i.e. R-34, R-35, R-36, R-38, R-39, R-40 and R-43 and alleged slackness on the part of the contractor and also further on the disclaimer dated 31.07.2000 to say that the claimant agreed not seek any damages for the extension contract. The claimant had urged before the Tribunal that it was coerced into signing the note and not claiming damages for the extended period. The learned Single Judge in this case set aside the award after considering that the Tribunal did not even deal with the NCTD's objections or discuss any evidence with respect to the plea of duress urged by the claimant. It was noted that there was no specific denial by the claimant that such an undertaking was not given.

41. The discussion and findings of the learned Single Judge in the impugned judgment in the opinion of this Court are justified. When the NCTD in its reply to the statement of claim (through preliminary submissions as well as in the detailed reply on the merits) specifically raised the issue with respect to the disclaimer, the claimant ought to have led evidence or relied on circumstances. Not only did it not do so, the error

appears to have been completely glossed over and dealt with by the arbitrator. Given these circumstances, the exercise of jurisdiction in setting aside the award for not returning any findings, are sound and do not call for interference. This appeal, therefore fails

42. For the above reasons, FAO (OS) 431/2012 and FAO (OS) 570/2012 have to succeed. They are accordingly allowed. The matter is remitted to learned Single Judge to deal with the merits of the award on the question on the findings of the arbitrators in the two cases with respect to the admissibility of the claims which was brushed aside on the ground that Sukumar Jain and GSC had issued valid no objection certificates or agreed not to claim compensation. No opinion is expressed on the merits of the findings rendered in the award on these heads of claim.

43. FAO(OS) 558/2012 (Kuber's appeal) on the other hand has to fail. Accordingly, FAO(OS) 431/2012 and FAO(OS) 570/2012 are partly allowed in the above terms. The parties in each of the two appeals [FAO (OS) 431/2012 & FAO(OS) 570/2012] are directed to be present before the concerned learned Single Judge, according to Roster allocation, on 30.04.2019. FAO(OS) 558/2012 is dismissed. There shall be no order on costs, in the circumstances.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 8, 2019