



Shardul Amarchand Mangaldas

# How to Survive

A No Claims Certificate







# How to survive a no claims certificate

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## Abstract

In construction contracts, employers generally insist on submission of 'no due/ certificate' claims signed by the contractors, as a pre-condition to release payments due under the final bill. To secure the full amount, contractors generally send an arbitration invocation notice setting out their claims (or in cases where there is no arbitration clause, a legal notice) to the employers, in defiance of any such settlement certificate/ voucher. When the employers contend that the dispute is not 'arbitrable' on account of discharge of the contract in terms of the No Dues/ Claims Certificate, the contractors refute it by stating that any such settlement certificate/voucher was obtained by fraud, coercion or undue influence and that there was absence of free consent. The article analyses the Indian law on validity of such no dues certificates/settlement certificates/discharge vouchers in construction contracts and the possible course of action that contractors may adopt to contest claims, despite such certificates.

## The Settlement Conundrum

Construction contracts often require contractors to raise a final bill upon completion of the last major milestone defined under the contract. Such a final bill sets out details of all payments due, including any additional amounts not provided for under the contract. Before releasing payments under the final bill, employers ordinarily request submission of a 'no dues' certificate, settlement agreement or discharge voucher signed by the contractors to restrict the contractor's ability to recover payment for any additional amounts outside the scope of the contract.<sup>1</sup> Contractors are usually compelled to sign such a No Claims Certificate and to accept a lower amount, as full and final settlement of claims, than what the contractors consider legitimately due to them under the contract.

This is because in complex construction contracts, the contractors, almost invariably, are under tremendous pressure to meet liabilities arising from the execution of the construction contract (such as interests on loans, labour cost, vendor payments, monetary dues to employees and officers, monies owed to sub-contractors, electricity cost, etc.) and final payment for the last milestone (cumulatively a large amount) is usually kept at the end of such contracts. The contractors usually succumb to the pressure and sign such settlement certificate/voucher, to ease their

financial burden and accept any payment (even if discounted) offered by the employer. This offer weakens or disentitles them from claiming amounts legitimately due to them for works carried out by them. This problem is exacerbated in public sector contracts that are poorly negotiated (impacting price) and have a skewed power equation and also in construction contracts with involving substantial investments.

This article analyses the Indian law on validity of such NCCs and the possible course of action that contractors may adopt to contest such certificates. Part 1 i.e. the present introduction is followed by a description of the settlement conundrum faced by the contractors in referring closed claims to arbitration (Part 2). Part 3 examines the employer's perspective in attempting to obtain such no claims certificates. In part 4, we have sought to analyse the judicial interpretation of the term "without prejudice" and examine how a contractor in one particular case was able to satisfy the Supreme Court of India and the arbitral tribunal to set aside a no dues certificate. Part 5 describes an illustrative set of facts involved in landmark judgments. Part 6 examines the legal principles laid down in various judgements in the context of the example in Part 5. Part 7 sets out the timelines in such disputes, followed by the conclusion and analysis in Part 8 of the article.

## Arbitrability of closed claims

The question of whether disputes, in cases where a signed NCC has been executed, are arbitrable has repeatedly vexed Indian courts. Two streams of judgments/precedents exist in this regard. One line of authorities takes the view that a claim for arbitration cannot be rejected solely on the ground that such settlement certificate has been executed by the contractor, if the contractor is able to demonstrate coercion/undue influence. The other line adopts the view that upon performance/discharge of a settlement, the contract stands completely discharged and no further disputes/claims survive. As per the second line of judgments, there cannot be any dispute and therefore, there cannot be reference to arbitration. Naturally, the two views are relatable to facts of the respective cases.

To be able to refer disputes pertaining to the balance amount (i.e. difference between amount paid by employer from total

sum claimed by contractor) to arbitration, the contractor would be required to establish that 'disputes' are 'live' claims and are arbitrable. In order to establish existence of a 'dispute', contractors would have to establish that (a) the claims are not time barred as per prescribed limitation period in terms of the Limitation Act, 1963; (b) there exists *prima facie* evidence of coercion/undue influence/fraud, etc., and/or absence of free consent.

Under Section 10 of the Indian Contract Act, 1872 ("**Contract Act**"), free consent of parties is the first and foremost requirement for its enforceability in a court of law. In simple terms, two or more persons are said to consent when they agree upon the same thing in the same sense. As per Section 14 of the Indian Contract Act, consent is said to be free, when it is not caused by *inter alia* coercion, undue influence and fraud. Consent is said to be so caused, when it would not have been given but for the existence of such coercion, undue influence or misrepresentation or mistake.

This is the most important requirement to vitiate the NCC and courts would be unable to vitiate an NCC in case the contractor is unable to indicate *prima facie* absence of free consent.

### The employer's perspective

The practice of obtaining an NCC is an accepted norm in most government departments, public sector enterprises and in certain corporate sectors too. While an NCC is collected for the ostensible purpose of internal compliance, they are used to ensure that there are no further claims arising out of a project. Therefore, when faced with a claim after the NCC (or similar 'settlement'), employers avail of the following measures to avoid unnecessary lawsuits and arbitrations.

- Acceptance of joint measurement and issuance of receipt – In some cases, a contractor accepts the joint measurement carried out along with the employer and voluntarily provide a receipt indicating confirmation of full payment. Such a receipt bars contractors from pressing on future claims and is considered by the Court as acceptance in full accord and satisfaction of the parties to the contract.<sup>2</sup>
- Disputing the method/principle of calculation of settlement figure - Whatever be the principle or method or manner of working the settlement figure out, if a particular figure is arrived at by the employer and is submitted to the contractors

to consider - the contractor's acceptance of the same and consequent receipt of the amount will bar the contractor from disputing the claim on any ground.<sup>3</sup>

- Calculation errors - If the contractors sign an NCC pursuant to a settlement arrived at in presence of the architect, they cannot take a plea of existence of a calculation mistake/error.<sup>4</sup> Such a plea cannot be allowed without setting aside the settlement agreement as the sanctity of such settlement would be lost.

### Absence of free consent - Setting aside a no claims certificate

#### Judicial Interpretation - "Without Prejudice"

One of the landmark cases involving appointment of an arbitrator where a no claims certificate was issued by a contractor is the case of **Chairman and M.D., NTPC Ltd. v. Reshmi Constructions, Builders and Contractors**.<sup>5</sup> The case involved a contractor issuing an NCC and immediately issuing a protest letter for payment of the lesser amount by the employer.

The protest letter issued by the contractor clearly indicated that there was several outstanding dues that the contractor owed to its financiers, creditors, workers, truck-owners, etc. Further, the contractor made it clear that they were accepting whatever was offered by the employer only for the sake of its survival. The contractor also stated that the no demand certificate was being issued under coercion and undue influence, "without prejudice" to the contractor's rights to claim full payments due. The employer, on being subsequently served with an arbitration notice, refused to appoint the arbitrator, claiming that upon execution of the NCC certificate, the arbitration clause 'perished' and no arbitrable claim could exist. The Supreme Court observed as follows:

*"27. Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other*



persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, *necessitas non habet legem* is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position.

29. We may, however, hasten to add that such a case has to be made out and proved before the Arbitrator for obtaining an award."

The maxim *necessitas non habet legem* which translates to "necessity knows no law" is often referred to in cases of NCC discrepancies. The requirement of *prima facie* evidence of undue influence or absence of free consent is a direct corollary to this maxim. Contractors may sometimes have to succumb to the pressure of the employers to the bargain who are in a stronger position.

In the facts that led to *Reshmi Constructions*, in response to the contractor submitting its final bill, the employer prepared another final bill and attached an NCC for the contractor to sign. The Supreme Court, upon considering the statements in the protest letter, was convinced by the contractor's argument that the NCC was *prima facie* procured under coercion/undue influence. Accordingly, the contractor was directed to prove before the tribunal existence of coercion or undue influence that compelled them to issue the NCC.

The court held that correspondence marked 'without prejudice' may have to be interpreted differently in different situations.<sup>6</sup> The effect of protest letters marked 'without prejudice' would be determined by the arbitrator, particularly as regards the claim of the contractor that the final bill was accepted without prejudice.

In a later case of **Peacock Plywood Pvt. Ltd. v. The Oriental Insurance Co. Ltd.**,<sup>7</sup> the import of including the phrase "without prejudice" in a correspondence was held to be limited to its context and merely because the expression "without prejudice" is mentioned in a correspondence was not considered to be sufficient. The Supreme Court observed "*the first question is to*

*determine what communications attract without prejudice privilege [and to then] consider when the Court will, nevertheless, admit such communications. Correspondence will only be protected by without prejudice privilege if it is written for the purpose of a genuine attempt to compromise a dispute between the parties. It is not a precondition that the correspondence must bear the heading without prejudice. If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible. The converse is that there are some circumstances in which the words are used but where the documents do not attract without prejudice privilege. This may be because although the words without prejudice were used, the negotiations were not for the purpose of a genuine attempt to settle the dispute."*

### Proceedings before the Tribunal

As discussed previously, employers generally reject any such attempt by the contractor to claim the balance amount. The employers would contend discharge of the contract, and absence of 'arbitrable dispute'. Such an issue is thereafter decided under (i) proceedings filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**Act**"); or (ii) by an Arbitral Tribunal, if so directed by a Section 11 court; or (iii) by the Tribunal as a preliminary issue *qua* maintainability in a civil suit. To seek reference to arbitration and appoint an arbitrator, the contractor would have to indicate absence of free consent i.e. *prima facie* evidence of existence of coercion/undue influence/fraud.

Indicating *prima facie* evidence is different from proving actual evidence. Following the Supreme Court's judgment in *Reshmi Constructions*, the parties participated in an arbitration, which proceedings were discussed by the division bench of the Kerala High Court<sup>8</sup> (in proceedings under Section 37 of the Act) in a judgment delivered on 24 July 2017. Although the award is not in public domain, based on the judgment of the Kerala High Court, the following inferences can be made.

Firstly, the award rejected the validity of the final bill that was prepared by the employer (NTPC). The contractor (M/s Reshmi Constructions) was able to establish that there were a necessity of funds as amounts were required to be paid to financial institutions. Accordingly, there was dire necessity for funds to wipe

off these debts and the contractor had no other option but to accept payment under the settlement offered by the employer. The arbitrator found that there was no free consent and the certificate was signed out of coercion. Hence, the payment under the final bill did not amount to complete discharge of all claims under the contract. In this regard, the High Court noted,

*“Huge amounts were outstanding from the claimant to financial institutions and there was dire necessity for funds to wipe off the debts. The claimant had no other option but to accept payment under Ext. R3 since it was put across under threat of withholding payments. According to the claimant there was no free consent for the issuance of the ‘no demand certificate’. Taking note of the entire facts and circumstances, the Arbitrator found that Ext. R3 could not be considered as the final bill and that the payment thereunder did not amount to the complete discharge of the claims under the contract. The said factual finding entered into by the Arbitrator with reference to the circumstances cannot be said to be unfounded. The said finding is not liable to be interfered with.”*

Secondly, the contractor had raised a separate bill for losses suffered due to delay caused by the employer and submitted that the said bill was prepared as a compromise. This bill was rejected by the employer and accordingly, the contractor raised its full claim before the arbitrator for a much higher amount. The arbitrator found that it was mainly delay in handing over of the site which resulted in extra work and the High Court noted that the contractor was accordingly entitled to some additional payment thereof.

The issues pertaining to quantification of damages and tribunal’s assessment on quantum was subject matter of dispute in the Section 37 proceedings before the Kerala High Court. Ultimately, the parties agreed to a consent order and the High Court was not required to go into the merits of the appeal and the quantum award on damages. However, it is clear that the contractor was able to defeat the effect of an NCC, as they were able to prove circumstances that demonstrate undue influence/coercion or lack of free consent.

The next section will attempt to simplify these issues in order to understand how a contractor may be able to contest an NCC successfully.

## Example

To understand issues better, we have set out below certain landmark cases simplified in terms of an example. Let it be supposed that the contractor was required to execute a conventional industrial project, perhaps a power plant. The contract (for purposes of illustrations in this article, referred to as **“Agreement”**) mandated the plant to be commissioned by 31 December 2017 and contained an arbitration clause.

Let us assume further that the work overran by one month (i.e. January 2018), requiring the contractor to incur prolongation costs and expenses. Further, as per the Agreement, the contractors were required to raise regular monthly bills, which had to be checked and paid by the employer. The Agreement contained a provision for the contractor to raise a final bill (along with statement of completion, value of works done, sums claimed and supporting documents) to the employer ten days after issuance of a commissioning certificate. The final bill was required to be processed and paid in 30 days.

Now, let us assume that due to the delays to the Project, the contractor was able to raise the final bill of INR 100,000/- on 10 February 2018. The employers, instead of releasing the amount per the final bill immediately, insisted that only 40% of the amount is valid and assured to make payment only after the contractor issued a no claims certificate.

The Contractor acceded to the employer’s demands and issued the said NCC and called upon the employer to release INR 40,000/- as agreed immediately. The amount was released *vide* cheque on 16 February 2018 and the security deposit was released by the employer. On 17 February 2018, the contractor invoked the arbitration clause, referring the rest of the claims (for INR 60,000/ ) to arbitration (nominating an arbitrator and requesting the employers to do so) claiming that the signed NCC was procured through duress and the final payment of INR 40,000/- was accepted, solely due to the contractor’s urgent need to forward payments due to its subcontractor.

The employers rejected the arbitration notice, stating that the Agreement had been discharged/lapsed and the arbitration clause did not survive. Further, the employer claimed that the NDC estopped contractor from pursuing claims under the Agreement.



The issues that arise in the above example are identified as under:

- Can the contractor turn to legal recourse to recover the unpaid balance amount?
- Is the contractor estopped from claiming any amount by virtue of the NCC?

### Modalities to survive an NCC

Let us examine legal principles laid down in various judgments to facts set out in the above example. To be able to seek reference of disputes to arbitration, the contractor has to establish (*prima facie*) undue influence/coercion that would evince absence of free consent. Accordingly, the following safeguards should be borne in mind:

- Amount claimed under final bill same as amount cleared by employer – Let us assume a situation wherein the contractor's final bill for INR 40,000/- was processed and paid by the employer, upon obtaining an NCC. The court would reject any subsequent attempt by the contractor to claim the balance INR 60,000/-.<sup>9</sup>
- Delayed Payment after issuance of NCC - The proposal for final payment in return for an NCC must be initiated by the employers. If the NCC contains a term indicating full and final settlement against receipt of final payment, and if it is shown that such payment was made much later, the contractor can successfully argue that there was no consideration for which the NCC was issued.<sup>10</sup> Let us consider in the above example that the employers proposed final payment within 30 days in exchange of an NCC. The contractors responded by issuing an undated NCC indicating receipt of payment. The contractor would be able to contest the said certificate if the payment was made afterwards i.e. after the 30 day period assured by the employer pursuant to issuance of NCC.
- The contractors are entitled to rely on evidence to demonstrate that payment was made after signing the NDC.<sup>11</sup> Even after a token of acceptance was issued by the contractor to the employer, in lieu of release of funds and signing of the NCC, the contractor may rely on evidence that he had accepted the payment with an endorsement of 'under protest' made on the certificate. In such a case, the division bench of the Allahabad High Court ruled that the endorsement clearly showed that the acceptance of

the cheque was conditional and that such an endorsement safeguarded the position of the contractor that he was accepting the payment with reservation.<sup>12</sup>

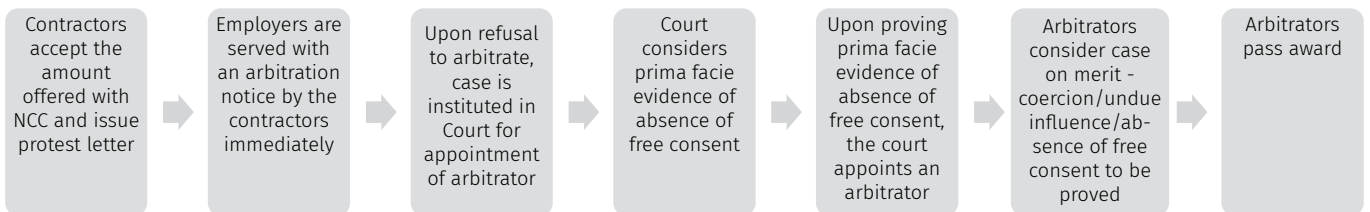
- Acceptance and processing of final payment by contractor without protest - Let us suppose that the employers offer an amount to the contractors in the form of a cheque requesting it to be returned if the offer was not acceptable. In such a case, the cheque should be returned forthwith, failing which it would be deemed that the contractor accepted the offer in full and final settlement of its claims. The Supreme Court held in **Bhagwati Prasad Pawan Kumar v. Union of India**<sup>13</sup> that retention of the cheque and/or encashment thereof will automatically amount to satisfaction in full and final settlement of the claim. Thus, if the contractors accept the cheque and encash it, such act would amount to acceptance of employer's offer, and would not be referred to arbitration. Therefore, it is important that the protest and non-acceptance, if any, must be conveyed by the contractor before the cheques are encashed. Therefore, the rule of thumb is that protest must be attempted to be conveyed to the employers before encashing any instrument for settlement/final amount.
- Insistence of certificate before raising final bill - Lastly, the contractors may rely on evidence to demonstrate that the NCC was forced upon by the employers even before a final bill could be raised by the contractors.<sup>14</sup> If the employers make an estimate thereof based on regular bills signed by the contractors, and insist on an NCC for payment, the NCC shall have no value whatsoever. In *Ambica Constructions* (supra) this Court considered a clause in the contract which required the contractor to give a no claim certificate in the form required by Railways after the final measurement is taken and provided that the contractor shall be debarred from disputing the correctness of the items covered by 'No claim certificate' or demanding a reference to arbitration in respect thereof. There was some material to show that the certificate was given under coercion and duress since works were yet to be completed and final measurement was not carried out. This Court following *Reshmi Constructions*, observed that such a clause in contract would not be an absolute bar to a contractor raising claims which were genuine, even after submission of a no-claim certificate.

- Other written evidence that may be filed before the Tribunal
  - Further, to successfully challenge the NCC<sup>15</sup>, contractors may rely on other documentary evidence indicating urgent need for money such as a legal notice, insolvency notice, police complaint, to symbolise external circumstances necessitating urgent requirement of funds which compelled the contractor to issue the NCC. A claim for arbitration for the balance amount of INR 60,000/- cannot be rejected merely or solely on the ground that an NCC had been executed by the contractors, if its validity is disputed by the contractors.<sup>16</sup> Although we have not come across any case wherein an insolvency notice or police complaint was successfully used by a contractor to survive an NCC, we believe such *prima facie* evidence may be relied upon by the contractor.

Once the contractor is able to establish prima facie evidence of absence of free consent, the contractor would have to discharge its burden of proof in the arbitration proceedings.<sup>17</sup> It is at this stage of arbitral proceedings that the contractors are required to argue their case on merits. If the award is not in favour of the contractors, a challenge to the arbitral award can be made to the Court under Section 34 or Section 37 of the Act. However, once the matter is adjudicated upon by the tribunal/ sole arbitrator, the Court is unlikely to interfere with the findings of the arbitrator or tribunal made during the course of the arbitration proceedings in relation to matters of evidence and facts.

### Timeline

In essence, the following timeline may be considered to understand the steps involved in recovering the actual due amount from the employers.



### Conclusion and analysis

The sanctity of a lawful contract is paramount in the eyes of law. Thus, only a contract containing all essential requirements as per Section 10 of the Indian Contract Act would be enforceable. The court/tribunal, therefore, examines if there were negotiations and voluntary settlement of all pending disputes between the parties.

If the contract is discharged by accord and satisfaction, the court considers there to be no arbitrable dispute. The court would then reject any attempt by the contractor to seek reference of disputes by appointment of arbitrator or dismiss the contractor's suit upon framing a preliminary issue *qua* maintainability. To succeed in court for seeking reference to arbitration, it is essential for contractors to provide *prima facie* evidence of coercion/undue influence/fraud, etc.<sup>18</sup> This would question the genuineness of the NCC and keep the claims 'alive' and arbitrable. In case no such *prima facie* evidence is provided, it will be difficult for the Court to disregard the NCC.

The author believes that the ability to question an NCC in a manner set out in this article may have potential to disrupt this practise. Contractors would not hesitate to seek recourse to arbitration if they believe they can receive payment under the final bill and claim other costs/ damages subsequently.

Such certificates/vouchers are called upon by several public sector employers in order to process payments and for internal financial/ accounting compliances. Therefore, the parties should take care to not negate *bona fide* attempts by an employer to settle monetary claims.





- 1 Some construction contracts specifically stipulate submission of such a voucher/certificate before seeking release of final bill payment and even contain a draft voucher/certificate annexed to the contract documents. Such vouchers/certificates go by different names *inter alia* "no claim certificate", "no dues certificate", "no demand certificate", "discharge voucher", "full and final settlement of dues", etc. For the purposes of this article, we will refer to them hereinafter as "NCC" or "No Claims Certificate".
- 2 PK Ramaiya & Co. v. Chairman and Managing Director, NTPC, 1994 (1) SCALE 1.
- 3 State of Maharashtra v. Nav Bharat Builders , AIR 1991 (SC) 11.
- 4 Nathani Steel v. Associated Constructions, 1995 Supp (3) SCC 324.
- 5 2004 (2) SCC 663
- 6 A contractor may rely on Section 23 of the Evidence Act, 1872 to argue that correspondence marked 'without prejudice' are not to be construed as an admission.
- 7 Peacock Plywood Pvt. Ltd. v. The Oriental Insurance Co. Ltd, 2006 (14) SCALE 300.
- 8 NTPC Ltd. v. Reshmi Constructions, ILR 2017 (4) Kerala 39.
- 9 In a recent judgment of ONGC Mangalore Petrochemicals Ltd. v. ANS Constructions Ltd. & Anr. (Civil Appeal No. 1659 of 2018 disposed off on 7 February 2018), the Supreme Court declined to interfere in setting aside a no dues certificate since the contractor received the full amount under the final bill upon executing a no dues certificate and the contractor was unable to prove duress or coercion.
- 10 National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd, (2009) 1 SCC 267.
- 11 National Insurance Co. Ltd. *supra*; Damador Valley Corporation v. K.K. Kar, (1974) 2 SCR 240.
- 12 Amar Nath Chand Prakash v. Bharat Heavy Electricals Ltd AIR1972All176; MANU/UP/0046/1972.
- 13 AIR 2006 SC 2331. *See also*, Section 8, Contracts Act.
- 14 Ambica Construction *supra*.
- 15 In legal terms, to justify "no accord and satisfaction" of the NDC.
- 16 Ambica Construction v. Union of India, (2006) 13 SCC 475.
- 17 M/s SBP & Co. v. M/s Patel Engineering Ltd., (2005) 8 SCC 618.
- 18 New India Association Co. Ltd. vs Genus Power Infrastructure Ltd., (2015) 2 SCC 424.

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