

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 4/2018

M/s. Park Infrastructure Limited , Having Its Registered Office At 102-B, Ist Floor, Dda Flats, Pocket-A, Shri Harihar Apartments, Ashok Vihar, Phase-II, New Delhi, Through Its Authorized Signatory Mr. Ak Jindal.

----Petitioner

Versus

1. Union Of India, The General Manager, North Western Railways , Nwr Head Quarter, Jawahar Circle, Jaipur-302017
2. Chief Administrative Officer Construction, North Western Railways , Nwr Head Quarter, Jawahar Circle, Jaipur-302017
3. Chief Engineer Construction-I, North Western Railway , Jawahar Circle, Jaipur

----Respondents

Connected With

S.B. Arbitration Application No. 5/2018

M/s. Park Infrastructure Limited , Having Its Registered Office At 102-B, Ist Floor, Dda Flats, Pocket-A, Shri Harihar Apartments, Ashok Vihar, Phase-II, New Delhi, Through Its Authorized Signatory Mr. Ak Jindal.

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3. Chief Engineer, Construction-I, North Western Railway , Jawahar Circle, Jaipur

----Respondents

For Petitioner(s) : Mr. Jatin Agrawal

For Respondent(s) : Mr. Shailesh Prakash Sharma

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI**Judgment****03/08/2018**

The applications under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "**the Act of 1996**") have been filed when the non-applicants failed to appoint the Arbitrator in pursuance of notices dated 31st August, 2017 and 25th September, 2017.

It is stated that despite a clause for arbitration and the notice, the non-applicants have defaulted to appoint Arbitrator. The applications under Section 11 of the Act of 1996 have been filed after expiry of 30 days thereupon. In view of the above, an independent Arbitrator may be appointed by this court to resolve the dispute between the parties.

Learned counsel for applicant-company submits that after execution of work, the non-applicants did not make final payment and refused to release the security deposit. It was when the period of six months thereupon had already expired. The applicant-company was compelled to sign "no claim certificate" in the set proforma. It was obtained by putting pressure by denying payment of due amount and even to release the security deposit in absence of it. Under those circumstances, the applicant-company was left with no option but to give letter about final settlement of its dues. The due amount of the bills and performance security was released thereupon.

In view of the above, the plea taken by the non-applicants for taking it to be a case of acceptance of bill in final settlement is not made out. To support the argument, learned counsel has given

a reference of judgment of the Apex Court in the case of **National Insurance Company Limited Vs. Boghara Polyfab Private Limited, reported in (2009) 1 SCC 267**. The practice of the government to take "no objection certificate" on blank papers or undated documents for release of due payment has been deprecated. The similar practice was adopted by the non-applicants herein. A reference of Annexure-20 to the application has been given apart from reference of other documents to show, under what conditions, "no claim certificate" was given. A prayer is, accordingly, made to appoint an independent Arbitrator to resolve the dispute between the parties.

Learned counsel for non-applicants has raised objections about maintainability of the applications under Section 11 of the Act of 1996. It is submitted that vide letter dated 12th July, 2017, the applicant-company certified that no claim is outstanding against the non-applicants other than payment for price variation which was said to be at an advanced stage and, accordingly, no claim certificate was signed without any pressure. The applicant-company would have otherwise made protest against "no claim certificate" immediately after receipt of the amount, if any, or would not have made a claim of price variation while giving letter dated 12th July, 2017. It is moreso when even the amount of security was released on 20th July, 2017 itself. The letter showing issuance of "no claim certificate" to be under pressure was given much subsequent to the notices for appointment of Arbitrator. It is to fill up the gap. In view of the above, applications under Section 11 of the Act of 1996 deserve to be dismissed. A reference of the judgment of the Apex Court in the case of **M/s. ONGC Mangalore Petrochemicals Ltd. Vs. M/s. ANS Constructions**

Ltd. & Anr., Special Leave Petition (C) No.12939/2015, decided on 7th February, 2018 has been given. Therein, similar application under Section 11 of the Act of 1996 was dismissed.

I have considered the rival submissions made by learned counsel for the parties and perused the record.

It is not in dispute that there exists arbitration clause between the parties. The Special Condition of Contract (General) provides that on signing of "no claim certificate", the claim by the contractor would not be acceptable. Clause 31(2) of the Special Condition of Contract (General) is quoted hereunder for ready reference:

"31(2) Signing of "No Claim" Certificate(Clause No 43(2) of GCC):- The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if make by the Contractor, after the shall have signed a "No Claim" Certificate in favour of the Railway in such form as shall be required by the Railway after the works are finally measured up. The Contactor shall be debarred from disputing the correctness of the items."

Learned counsel for non-applicants have referred to the letter dated 12th July, 2017 wherein applicant-company accepted release of due payment other than payment towards price variation. The relevant parts of letter dated 12th July, 2017 at

Annexure-19 and Annexure-15 written by the applicant-company are also quoted hereunder for ready reference:

“In continuation of our previous letter dt. 08.07.2017, it is certified that we have no other claim outstanding against the NW Railway for the work done or any other amount except the payment of Price Variation bill which is already in the advance stage of payment. The no claim certificate is already signed along with the final bill which may be treated as final settlement from our side.

Therefore, it is once again requested to kindly release the aforesaid bank guarantee in lieu of security deposit of the subject work as the maintenance period is already expired on 31.03.2017 and a payment of final bill is also received on dt. 06.07.2017.

Thanking you and assuring you of our best services always.”

“In continuation of our previous letter dt.08.07.2017, It is certified that we have no other claim outstanding against the NW Railway for the work done or any other amount except the payment of Price Variation bill which is already in the advance stage of payment. The no claim certificate is already signed along with the final bill which may be treated as final settlement from our side.

Therefore, it is once again requested to kindly release the aforesaid bank guarantee in lieu of security deposit of the subject work as the maintenance period is already expired on 30.06.2017 and a payment of final bill is also received on dt.29.06.2017.

Thanking you and assuring you of our best services always.”

Learned counsel for non-applicants, however, submitted that letter aforesaid was sent under pressure because in absence of it, the non-applicants were not releasing due amount of bills and performance security. For this, reference of Annexure-20 has been

given to show standard format to seek "no claim certificate". It is said to have been signed prior to release of actual amount of bills.

This court, however, find that even a letter was sent on 8th July, 2017 at Annexure-17 and Annexure-13 endorsing receipt of payment of final bills on 6th July, 2017 and 30th June, 2017 itself. The only request, thereupon, was to release the bank guarantee of security deposit. It was after expiry of period of six months of completing the work on 30th September, 2017 and 31st December, 2016. The applicant-company could not clarify as to why they endorsed payment of final bills for release of bank guarantee even by indicating the date of receipt of payment. Even if it is taken to be a case where "no claim certificate" was taken for release of due amount and even the security deposit, the applicant-company did not make protest immediately thereupon to show that "no claim certificate" has been obtained under pressure. It is moreso when according to the applicant-company itself, the amount of bills and security deposit was released on 20th July, 2017 itself. The notices for appointment of Arbitrator were given much subsequent to it and therein also, it was not said that "no claim certificate" was taken under pressure. It is only after notices when Arbitrator was not appointed that such a plea was taken.

The applicant-company sent a letter to indicate that "no claim certificate" has been given under the circumstances explained therein. The allegation cannot be accepted because the letter dated 12th July, 2017 giving "no claim certificate" is not unconditional, rather, it specifies about pendency of the claim of price variation. The ground taken by the applicant-company that the proforma printed by the non-applicants had to be signed and if at all it was done previously, there was no reason for the

applicant-company to sent a letter dated 12th July, 2017 to show release of due amount and therein also, to maintain its claim regarding price variation. When claim towards price variation has been made by the applicant-company, then no one prevented them to make reference of other claim.

Taking into consideration the conduct of the applicant-company, it cannot be said that "no claim certificate" was under pressure. I find dismissal of the similar application by the Apex Court in the case of M/s. ONGC Mangalore Petrochemicals Ltd. (supra).

Learned counsel for applicant-company has referred judgment of the Apex Court in the case of National Insurance Company Limited (supra). Therein, in Para 49, the practice of the State Government for taking "no objection certificate" on blank paper or undated document has been referred. It is not the case herein.

In view of the above, I am unable to accept the applications for appointment of Arbitrator as they are barred by Clause 31(2) of the Special Condition of Contract (General).

At this stage, learned counsel for applicant-company has made reference of Section 11(6A) of the Act of 1996, as amended, along with judgment of the Apex Court in the case of **Duro Felguera, S.A. Vs. Gangavaram Port Limited, reported in (2017) 9 SCC 729.**

I have considered the aforesaid aspect also and find that Section 11(6A) does not debar adjudication of the issue as to whether application under Section 11 is maintainable or not. If it debars adjudication then virtually the courts would act as a post office and, accordingly, as and when applications under Section

