

In the High Court of Judicature at Madras

Dated : 09.09.2016

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.507 of 2016

TCR Selvam (JV)
Rep. by its Partner, Mr.R.Selvaraj. ... Petitioner

-vs-

- 1.The Union of India,
Rep. by the General Manager,
Southern Railway, Head Quarters Office,
Park Town, Chennai-3.
- 2.The Chief Engineer (Construction)
Office of the CAO/Construction, Egmore,
Southern Railway, Chennai-600 008.
- 3.The Deputy Chief Engineer (Construction)
Southern Railway, Salem 636 005. ... Respondents

Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator to arbitrate all the claims and disputes between the petitioner and the respondents arising out of the Agreement No: 51/CN/2010 dated 07.05.2010.

For Petitioner : Mr.Amalaraj S.Penikilpatti

For Respondents : Mr.P.T.Ramkumar

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O R D E R

The petitioner has filed the present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') for reference of disputes to arbitration arising from the agreement dated 07.05.2010 for construction of Permanent Divisional Office Building (G+2), Landscaping, Service Road, Compound Wall, etc. including watering and drainage arrangements (PBW Item No.489 of year 2010) at Salem.

2.It is the say of the petitioner that the contract was awarded to the petitioner on 05.10.2009 for a sum of Rs.9,55,59,896/- with the original time period stipulated of 18 months requiring the work to be completed by 05.04.2011. The petitioner claims that however, there was delay in handing over the site and that the site was also not in a proper condition. The contract work is alleged to have got delayed and frustrated on account of various defaults of the respondents.

3.The petitioner, thus, submits that on account of list of claims which totalled to Rs.5,11,18,835/-, as set out in the list of claims, the petitioner invoked the arbitration clause vide notice dated 16.06.2016. But, no arbitrator was appointed, despite certain interdepartmental

communications.

4.The petition is opposed by the respondents. It is alleged that there were delays on the part of the petitioner / contractor from the very inception, i.e. delay in commencement, non-submission of performance guarantee, non-submission of Joint Venture Agreement, etc. and the currency of the agreement was extended at least 10 times upto 01.08.2014 based on written request by the petitioner as per Clause 17 A (ii) of the General Conditions of the contract. Any fault on the part of the respondents is specifically denied. In the original specified period for completion of work, only 30% of the work is stated to have been completed.

5.On completion of the work after 58 months, final measurements were recorded on 07.11.2015 and the final variation statement was prepared to the value of Rs.8,91,71,279/- against the agreement value specified aforesaid. The final measurements recorded in the measurement book have been signed by the petitioner without any protest. The petitioner also received price variation to the value of Rs.1,52,18,865/-. Even the additional payments involved during the extended period of work have been paid.

6.What is all significance is that the petitioner/contractor submitted a 'no claim certificate' accepting the measurement and the amount as full and final satisfaction of the claim of the petitioner. The final payments of the bills were received on 05.02.2016 acknowledging them as such and even the security deposit of Rs.47,79,995/- including E.M.D. was released vide pay order dated 15.03.2016.

7.The say of the respondents is that all these facts have been concealed from this Court by neither making pleadings nor filing the relevant documents.

8.It is also the submission on behalf of the respondents that as per Clause 43 (2) of the General Conditions of contract, once a 'no claim certificate' in favour of the Railways is given and final measurements take place, the contractor is debarred from disputing the correctness of the items.

9.The petition is also stated to be premature as the period stipulated in the arbitration clause for taking various steps towards arbitration had not expired. In this behalf, learned counsel for the respondents has relied upon an order of this Court in O.P.No.454 of 2015

(A.Radhakrishnan vs. The General Manager, Southern

Railway) decided on 11.09.2015 observing that the dispute resolution clause (which is identical in the present case) makes it abundantly clear that it is on failure to resolve the dispute within 120 days of the notice, the 60 days period would commence to appoint an arbitral Tribunal in terms of the arbitration clause.

10. Be that as it may, to my mind, two aspects are of significance which arise for consideration: (a) whether, in the given facts of the case, a petition can be preferred after the 'no claim certificate' has been issued; and (b) whether non-disclosure of facts and pleadings in respect of the 'no claim certificate' is fatal to the petition.

11. In respect of the first aspect, documents have been filed by the learned counsel for the respondents. The first is a letter dated 01.09.2014 received on 03.09.2014 from the petitioner, which reads as under:

"With reference to the above work, we have completed the above works in all respects. Hence kindly release the Performance Guarantee Bond. In this connection, We have no claim against the Railway Administration."

The second is the release of performance guarantee by the respondents informed to the petitioner by the letter dated 14.10.2014, which reads as under:

''With reference to the letter cited above, the B.G.No.23/10 of 21.4.2010 for Rs.47,78,000/- issued by Canara Bank, Suramangalam, Salem valid upto 15.09.2014 submitted towards Performance Guarantee in respect of agreement No.51/CN/2010 dated 07.05.2010 is discharged herewith in your favour.''

The third is the 'no claim certificate' issued by the petitioner on 19.12.2015, which reads as under:

''Certified that the above work has been completed by me satisfactorily to the department in all respects. We have accepted the measurements have been fully and finally recorded by SSE/Works/CN/Sa and we have No Claims against the Railway Administration as far as the above work executed under the Agreement No.51/CN/2010 dt.07.05.10.''

The fourth is a letter dated 05.02.2016 of the petitioner requesting for release of security deposit and acknowledging the receipt of final bill amount, which reads as under:

''With reference to the above work has completed as per agreement and the Final Bill also received. In this connection we have No claims against the Railway administration.

Hence, we request your good self to kindly release the Security Deposit with EMD as early please.''

12.It may be noticed from the aforesaid letters of the petitioner that they are not in any formatted proforma of the respondents, but on the letter-head of the petitioner. This aspect came up for consideration in O.P.No.452 of 2015 (**Subalakshmanan Constructions, Engineers & Contractors, rep. by General Power of Attorney Holder and Authorized Signatory vs. The General Manager, Southern Railway,** reported in **Manu/TN/4010/2015**) decided on 18.12.2015. This Court dealt with the issue of the plea of duress and pressure in issuance of 'no claim certificate'. The Court noticed that other than alleging financial duress, there was nothing brought on record to show any kind of duress or pressure, but it is the commercial decision of the petitioner to compromise and settle the disputes. Paras 9 and 10 dealing with the legal position are re-produced as under:

9.The legal position qua what amounts to full accord and satisfaction is already settled. In **M/s. IRCON International Limited v. Shri Krishna Trading Co. & Anr., 2007 (10) AD (Del) 309,** (of which Bench I a member), this issue has been dealt with and the legal principle enunciated therein is as under:

'24. The legal position in respect of as to how such a No-Claim Certificate has to be appreciated has been

discussed in *Pandit Construction Company v. Delhi Development Authority and Anr.*, 2007 (3) Arb LR 205 (Del), a judgment of this Court. It was found that often endorsements are made on the final bill as "accepted in full and final". The judgment of the Apex Court in *Bharat Coking Coal Ltd v. Annapurna Construction*, 2003 (3) R.A.J. 44 (SC) was averted to where the Supreme Court has observed that merely because a party had accepted the final bill, the same would not mean that it was not entitled to any other claim. In order for the claim to be presumed to be fully settled, it should unequivocally be stated so that no further claims would be raised and thus the Supreme Court held that in the absence of such a declaration, the contractor must be held not to be estopped and precluded from raising any claim. This Court held that in view thereof, the settlement must be recorded in clear and unambiguous terms."

10. The above decision has also been referred to in **The Oriental Insurance Co. Ltd V. Mercury Rubber Mills**, 2012 (127) DRJ 650. A Division Bench of this Court also had an occasion to deal with the similar issue in **Adam and Coal Resources Pvt. Ltd. vs. Interbulk Trading Sa**, 2014 (5) CTC 704, (of which Bench also I was a member), where in para 18, it has been observed as under:

"18. In our view, the legal principles are not in doubt that if there is full accord and satisfaction of the claims of the parties, then nothing remains to be arbitrated upon. The fact that it is in writing would support it."

13. Learned counsel for the respondents also referred to the judgment of the Hon'ble Supreme Court in **Union of India and others vs. Master Construction Company, (2011) 12 SCC 349**, opining that mere allegation that no claim certificates were obtained under financial duress and coercion without anything more on record does not lead to arbitrable dispute.

14. In the facts of the present case, even this plea has not been raised. In fact, there is complete absence of disclosure of relevant facts regarding the settlement and thus, what stares the petitioner in the face is there was a settlement which is not even assailed on a specious plea or otherwise. Thus, clearly, in view of these documents, no arbitrable dispute survives.

15. As far as the second aspect is concerned, it is a clear case of non-disclosure of material facts and misleading the Court to issue notice in this matter by not disclosing even the factum of settlement. The question of challenge to the settlement or it being under duress or pressure would have arisen if it had been disclosed. There is complete non-disclosure. In fact, this aspect alone is fatal to the petitioner as non-disclosure of

material facts goes to the root of the dispute and disentitle the petitioner to any relief whatsoever even if merits of the case are made out.

16.I am, thus, of the considered view that this petition not only fails but the petitioner must be burdened with exemplary costs.

17.Original Petition is, accordingly, dismissed with costs of Rs.10,000/- (Rupees ten thousand only) payable to the respondents.

Sd/.S.K.K.,CJ.

09.09.2016

//Certified to be a true copy//
Dated this the day of 2016.

S.s/24.10.2016

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