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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 155/2016

PRAGATI CONSTRUCTION CONSULTANTS Petitioner

Through: Mr. Pankaj Gupta and Mr. Sumit
Bansal, Advocates

versus

**MINISTRY OF RAILWAYS THROUGH ITS
GENERAL MANAGER**

..... Respondent

Through: Mr. Jagjit Singh, Sr. Standing
Counsel for Railways, Mr. Preet
Singh and Ms. Kiran Kaushik,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

19.01.2017

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VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to the works for construction of two lane ROB (Road Over Bridge) in lieu of level crossing No. 69 (Spl) at KM 120/11-13 at Karnal on Delhi - Ambala Section (hereafter 'the works').
2. The aforesaid works were awarded to the petitioner by a letter dated 24.02.2012 and the works were to be completed by 23.02.2013. The execution of works was delayed and the petitioner alleges that the same was for reasons which were attributable to the respondent.
3. Admittedly, the works were completed on 15.01.2015. Subsequently, on 03.02.2015, a completion certificate was issued by the respondent and the

petitioner's performance bank guarantee was also released. The petitioner asserts that during the term of the contract as well as after completion of the works, the petitioner made several requests for release of the payments which were withheld. It is the petitioner's grievance that even after completion of the works, the respondent did not release the amounts which, according to the petitioner, were admittedly due and payable to the petitioner.

4. This led the petitioner to invoke the dispute resolution mechanism. In terms of the dispute resolution clause, the petitioner made a representation dated 21.09.2015 enumerating its claims amounting to ₹4,56,59,413/- and requesting the respondent to process the same within seven days failing which to treat the representation as a notice for invocation of the arbitration clause. However, the petitioner did not receive any response to the said representation as well.

5. Mr Singh, the learned counsel for the respondent does not dispute the existence of the arbitration clause. It is also not disputed that the petitioner had invoked the arbitration clause by its letter dated 21.09.2015. The only objection urged on behalf of the respondent is that, thereafter, the parties had executed the supplementary agreement dated 13.01.2016 in the prescribed form and thereafter, the admitted amounts were released by the respondent to the petitioner on 19.01.2016 (the petitioner claims that the same were released on 21.01.2016). The security deposit of the petitioner was released thereafter on 29.01.2016. Mr Singh, submitted that in terms of the supplementary agreement, the arbitration clause stands discharged.

6. Mr Singh further submits that the supplementary agreement was necessary for release of any funds in terms of the Special Tender Conditions

and Instruction To Tenderer (hereafter 'the tender conditions'). He also referred to Annexure 'B' to the tender conditions which included the format of the supplementary agreement. The learned counsel for the petitioner states that the said agreement was executed under undue influence and coercion and the same was not as per its free will. He states that the respondent had illegally withheld even the admitted amounts due to the petitioner and had refused to entertain the petitioner's request for release of the consideration unless the petitioner issued a No Objection Certificate (NOC) and signed the supplementary agreement. The respondent had also failed to respond to the petitioner's request for appointment of the arbitrator.

7. The petitioner further stated that on 15.01.2016 - that is, immediately after execution of the supplementary agreement - the petitioner had sent a legal notice clearly stating that the petitioner had been forced to sign the No Claims Certificate and the Supplementary Agreement.

8. In view of the aforesaid controversy, the respondent was called upon to produce the requisite files as to how the petitioner's request for arbitration, which was issued on 21.09.2015, was dealt with.

9. A perusal of the noting indicates that although the respondent had received the request for arbitration, it took no steps in furtherance of the same. The noting on the file also indicates that there was no dispute that certain sums were payable to the petitioner. The issue which mainly involved the officers of the respondent was the petitioner's reluctance/failure to sign the final bill. This is explained by the petitioner as it alleges that the respondent was forcing the petitioner to sign the final bill, which did not include any of its claims.

10. It is also material to mention that the file noting of 03.11.2015

indicates that the funds would only be released on execution of the NOC. This, *prima facie*, establishes the contentions as advanced by the petitioner that the respondent had refused to release even the admitted amounts till the NOC and supplementary agreement were executed by the petitioner.

11. The contention that execution of the supplementary agreement was necessary before release of any funds, is not borne out by the tender conditions. Clause 9.8 of the tender conditions, which provides for execution of the supplementary agreement, reads as under:-

“9.8 **SUPPLEMENTARY AGREEMENT**

After the work is completed and taken over by the Railway as per terms and conditions of the contract agreement or otherwise concluded by the parties with mutual consent and full and final payment is made by the Railway to the contractor for work done under the contract the parties shall execute the supplementary agreement annexed here to as Annexure-‘B’.”

12. This clearly indicates that the supplementary agreement is to be signed after a full and final payment has been made by the Railways for the work done under the contract. In the present case, the petitioner had sent several communications calling upon the respondent for payments under the contract, which were not made. Further - as the file notings indicate - the respondent had insisted on issuance of NOC before releasing any funds.

13. Mr Singh had stated that there are standing instructions given to the officers and department that no payments are to be released without execution of the NOC and the supplementary agreement and, therefore, this

is a practice that is followed in all contracts. The petition was held over to after lunch session to enable Mr Singh to produce such instructions, but he fairly stated that no such instructions were available.

14. It is a matter of concern, that as a matter of practice, the respondent is insisting on signing of a supplementary agreement before release of even the admitted dues. The plain language of clause 9.8 of the tender conditions indicate that the supplementary agreement is to be signed after the full and final payment is made to the contractor and not as condition precedent for making such payments.

15. It is also plainly evident that even the petitioner's request for appointment of an arbitrator was not considered. The files produced by the respondent contain no noting, made at the material time, concerning the petitioner's request for appointment of an arbitrator. This Court gets distinct impression that the endeavour of the concerned officers of the respondent was to make recourse to arbitration more of an obstacle course, which is contrary to principle of fair dealing that the respondent as a State is enjoined to follow.

16. It may also be mentioned that it is not the first case where such conduct has been brought to light and there are several cases where the parties have approached this Court alleging that it is a matter of practice that the respondent does not release the payment until the supplementary agreements are signed. This is clearly a pernicious practice and contrary to the tender conditions.

17. In view of the above, this Court cannot readily accept that the arbitration agreement has ceased to be of any effect and is non-existent as claimed by the respondent. Thus, an arbitrator is required to be appointed to

adjudicate the disputes between the parties.

18. Accordingly, Justice Manmohan Sarin (Retd.) (Mob: + 91 9818000210), a former Chief Justice of the Jammu & Kashmir High Court, is appointed to adjudicate the disputes between the parties. The same is subject to the necessary disclosure being made under Section 12 of the Act and the arbitrator not being ineligible under Section 12(5) of the Act.

19. The arbitrator shall fix his fees in consultation with the counsel for the parties.

20. It is clarified that all contentions of the parties are reserved and the arbitrator shall decide the disputes, uninfluenced by any observation made in this order.

JANUARY 19, 2017
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VIBHU BAKHRU, J

