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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 29.11.2018

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ARB.P. 169/2018

KIRAN INFRA ENGINEERS LIMITED

..... Petitioner

Through

Mr. Siddharth Sharma and Ms. Shruti
Arora, Advs.

versus

NORTHERN RAILWAYS

..... Respondent

Through

Mr. Shivam Tripathi, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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29.11.2018

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') seeking appointment of an Arbitrator.
2. Upon notice being issued, reply has been filed by the respondent.
3. Briefly, the following facts need to be noticed for adjudication of the instant petition.
4. In and about 2010, the respondent floated a tender, *inter alia*, for S&T work at Prayag Ghat in connection with the provision of additional loop at Mehgawan, Khetasarai, Katehari Rudouli and Rasouli of Lucknow Division of Northern Railway.
- 4.1 The petitioner bid for the tender and was thereafter, declared successful.
5. A Letter of Acceptance was, consequently, issued in favour of the

petitioner on 9.2.2011.

6. It is the petitioner's case that it carried on the work of Signalling and Telecommunication as contemplated under the Contract Agreement between February 2011 and February 2013.

7. The petitioner avers that for it to discharge its part of the obligations under the contract, the respondent had to put in place the necessary infrastructure.

8. It is the petitioner's stand that since the respondent did not put in place the infrastructure and discharge its obligations, the petitioner was unable to fully and completely execute the subject contract agreement.

9. This, evidently, led to the petitioner writing to the respondent to short close the contract agreement and release payments against its final bill.

9.1 These letters were written by the petitioner on 4.2.2014 and 4.3.2014.

10. One of the major grievances of the petitioner, it appears, was that the service building had not been constructed by the respondent.

10.1 It is the petitioner's case that on 5.3.2014, it was informed that a tender for construction of service building was floated by the respondent.

10.2 Furthermore, the petitioner claims that not only was construction of the service building delayed but aspects such as markings for foundation, trenching, cable laying etc., which were part of the obligation of the respondent under the Contract Agreement had not been attended to by the respondent.

10.3 The petitioner, thus, not only entered into correspondence with the respondent with regard to short closing of the contract and, as indicated above, with regard to release of payment against its final bill but also in relation to payments towards price variation.

10.4 Correspondence with regard to price variation, it appears, was carried out by the respondent between February 2015 and February 2016.

10.5 On account of price variation, the petitioner claimed a sum of Rs.25,04,113.75.

10.6 The price variation was sought by the petitioner with regard to nine running account bills.

10.7 The record shows that the petitioner issued a notice dated 17.5.2016, to the respondent whereby the Arbitration Agreement contained in Clause 40.1 of the Contract Agreement was triggered.

10.8 This notice was followed by yet another notice dated 4.10.2016 which, though, was issued by the petitioner via its counsel. In this notice as well a similar request was made by the petitioner.

10.9 This state of affairs, it appears, continued till May, 2017, when, finally the petitioner had monies released in its favour against its final bill, *albeit*, only upon furnishing No Claim Certificate to the respondent.

11. The petitioner asserts that the No Claim Certificate was furnished to the respondent, on 10.5.2017, was submitted under coercion and duress.

11.1 It is also the assertion of the petitioner that in that communication the petitioner's authorised representative was made to make an endorsement in hand to the effect that "No PVC Bill would be claimed".

11.2 It is the petitioner's case that this endorsement was also made under coercion and duress, and therefore, disputes obtain between the parties which need to be adjudicated by an Arbitrator.

12. On the other hand, the stand of the respondent is that the petitioner is not entitled to any price variation.

12.1 It is the respondent's submission that Clause 45 of the Contract

Agreement which is relied upon by the petitioner pertains to Civil Work and not Signal and Telecommunication Work which was awarded to the petitioner.

12.2 Furthermore, the respondent's counsel takes the stand that in view of the No Claim Certificate furnished by the petitioner, no dues are payable.

12.3 The attention of the Court is also drawn to the endorsement made that no amount is payable between price variation.

13. In rejoinder, it is contended on behalf of the petitioner that Clause 45 of the Contract Agreement is not confined to civil work.

13.1 Furthermore, counsel for the petitioner says that the No Claim Certificate is given in terms of the Contract Agreement for release of monies which were payable under the final bill.

13.2 It is, thus, the submission of the counsel for the petitioner that it was not the intent and purpose of the No Claim Certificate to give up the claims on account of price variation.

13.3 Insofar as the endorsement on the No Claim Certificate dated 10.5.2017 is concerned, the counsel takes the stand in line with the averment made in the petition that the same was obtained by employing coercion and duress.

14. I have heard the learned counsel for the parties and perused the record.

15. In my view, the defence taken before me by the respondent is to be adjudicated upon by the Arbitrator once he is appointed.

16. The core aspect, insofar as this petition is concerned, relates to the existence of the Arbitration Agreement obtained between the parties. This aspect is not disputed by the respondent.

17. As to whether Clause 45 of the Contract Agreement is applicable in the instant case or whether or not the endorsement on the No Claim Certificate dated 10.5.2017 was obtained by employing coercion and/or duress, as alleged by the petitioner, are matters which would be required to be addressed by the learned Arbitrator

18. For the foregoing reasons, I am inclined to allow the petition.

19. Accordingly, Mr. Amit George, Advocate, (Cell no.:9910524364), is appointed as an Arbitrator.

19.1 The learned Arbitrator will be paid his fee according to the provisions of the Fourth Schedule appended to the 1996 Act.

20. The petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

NOVEMBER 29, 2018

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