IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 30.08.2019

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

O.P. No.970 of 2018

M/s.TATA Projects Limited,
MITHONA TOWERS-1,
Opposite Wesley Co-ed Junior College,
Prenderghast Road,
Secunderabad 500 003
thorough its Power of Attorney holder
Mr.K.Venkata Ramana .. Petitioner

-vs-

Southern Railway,
represented by Chief Electrical Engineer-
Construction,
Office of Chief Administration Officer,
Electrical Construction,
Poonamallee High Road,
Egmore, Chennai 600 008. .. Respondents

Prayer: Petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 and clause 1.2.54 of the Conditions of Contract Part-1, Chapter-II of the Contract Agreement dated 23.4.2009 to appoint the panel of arbitrators.

For Petitioner : Mr. Krishnan Srinivas,
Senior Advocate for
S.Ramasubramaniam and
Associates

For Respondent: Mr.P.T.Ramkumar

O R D E R

The above petition is filed for a direction to appoint panel of arbitrators in exercise of power conferred under section 11(6) of the Arbitration and Conciliation Act, 1996, as amended by the Arbtiration and Conciliation (Amendment) Act, 2015.

2. According to the petitioner, the facts in brief is as follows;

2.1 The petitioner and the respondent Southern Railway entered into a contract agreement on 23.4.2009 for the performance of the works-design, supply, erection, testing and commissioning of traction over-head equipment, switching stations including modifications to the existing OHE between Chengalpattu and Olakur stations in connection with doubling and electrification of tracks in Chengalpattu-Villupuram Section of Chennai of Chennai Division of Southern Railway. The agreement consist of an arbitration clause in Article 1.2.54 of the conditions of contract, Part-1, Chapter-II .

2.2. The entire work, as per the letter of acceptance dated 5.2.2009, should be completed within 20 months. Accordingly the work to be completed on or before 4.10.2010, but the contract got substantially delayed due to the reasons attributable to the respondent Southern Railways.

2.3. Due to the delay, the petitioner had to incur additional cost. On request, the respondent agreed to consider the same in the meeting dated 7.6.2014, but has not informed of the development. Therefore by letter dated 7.3.2016, the petitioner submitted computation of claims, which was quantified at Rs.8,13,26,628/-. The respondent did not respond to the above letter also.

2.4. Hence, the petitioner has sent another letter dated 23.6.2016. The petitioner invoked arbitration clause by sending a letter dated 16.7.2016. On 1.11.2016, the respondent acknowledged the receipt of the letter dated 16.7.2016 sent by the petitioner requesting for arbitration, and replied that it is under consideration.

2.5. On 4.11.2016, the respondent requested the petitioner to give its consent for the appointment of Railway Officers as Arbitrators, but the petitioner expressed its inability to accept Railway Officers as arbitrators by its letter dated 5.12.2016.

2.6. Again, by letter dated 2.1.2017, the petitioner requested the respondent to communicate its consent for the appointment of panel of arbitrators. Since the respondent has not taken any steps for considerable period, the petitioner approached this court for appointment of panel of arbitrators under section 11(6) of the arbitration and Conciliation Act 1996, read with clause 1.2.54 of the conditions of contract part(i) Chapter II of the Agreement dated 23.4.2009.

3. The respondent filed a reply denying the averments made in the petition for appointment of an arbitrator.

4. According to the respondent, due to failure on the part of the petitioner, the work could not be completed within stipulated time as per the contractual terms and at the request of petitioner, the contract was extended for 13 times, up to 30.6.2015 and the work was finally completed on 15.5.2015.

5. At the time of availing extensions, the petitioner had agreed to execute the work as per the terms and conditions of the Contract during the extended period also by duly signing Rider Agreements. As per the Rider Agreements, the terms and conditions of contract is the same during the extended period also. Once the terms and conditions of the agreement is mutually varied, the petitioner is not entitled to claim any additional payments. As agreed, the work was

completed on 15.5.2015 and all the payments were made to the petitioner as per the final variation statement.

6. The performance bank guarantee valuing a sum of Rs.1,33,30,614/- was also returned to the contractor on 15.5.2015 itself. On 7.5.2016, the petitioner submitted no claim certificate. In view of the no claim certificate, all the pending payments have been settled without any dues and the agreement came to a close. The petitioner cannot revive the concluded contract and raise any dispute between the parties.

7. When the petitioner demanded to refer the dispute for arbitration by its letter dated 16.7.2016, a reply dated 5.12.2016 was sent disputing the existence of the arbitrable dispute. The petitioner in receipt of the reply notice issued a notice dated 13.3.2017 under section 80(b) of CPC intimating that he would initiate civil suit before the competent court seeking recovery of Rs.8,13,26,628/- as per clause 43.2 of the General Conditions of Contract, which is an excepted matter and excluded from arbitral dispute.

8. The respondent had replied the notice issued by the

petitioner on 4.7.2017 stating that since the petitioner issued no claim certificate, he is not entitled to any further payment from the Railways which is followed by another notice dated 12.9.2017.

9. It is further stated that as per clause 64(1)(V) of General Conditions of Contract, the contractors should have to prefer specific and final claims within 90 days of receiving the intimation from the Railways that the final bill is ready for payment. Since the petitioner has received all the payments on 15.5.2015 itself, the claim for additional costs after a period of one year i.e., on 7.3.2016 is not maintainable and that too as accepted in the matter of Rider Agreement supplementary to the contract dated 23.4.2009. Therefore, the petition is not maintainable.

10. I have considered the materials placed before this Court. Admittedly, it is a contract between the parties for executing certain works, such as performance of the works-design, supply, erection, testing and commissioning of traction over-head equipment, switching stations including modifications to the existing OHE between Chengalpattu and Olakur stations in connection with doubling and electrification of tracks in Chengalpattu-Villupuram Section of Chennai Division of Southern Railway.

11.After several extensions, it is seen that the work was completed on 15.5.2015 and a no claim certificate was submitted by the petitioner on 7.5.2016. But the petitioner would submit that the no claim certificate pertains to a different contract. A closer perusal of the document reveal that there are interpolations and the said interpolation makes it clear that the document relied on by the petitioner is for a different contract in a different route. Therefore it is clear that the submission made by the petitioner is incorrect and it proves that pursuant to the completion of contract on 15.5.2015, the petitioner has issued a no claim certificate to the respondent.

12. It is further amplified by the legal notice issued by the petitioner on 13.3.2017 to the respondents under section 80(b) of CPC. The relevant portion at paragraph of the notice reveals as follows;

> *'During the deliberations, it was conveyed to my Client that the said request for alternative mode of resolution is not permissible under clause 43(2) of General Conditions of Contract as final assessment value of contract was released upon collecting a non claim certificate towards the same and the said clause*

stands excluded to be referred to Arbitration for resolution'

13. Now that the petitioner claims appointment of arbitrator on the basis of letters issued by him on 23.6.2016, 16.7.2016, 5.12.2016 and 2.1.2017. To the notice that was issued by the petitioner to the respondent on 16.7.2016, the respondent vide interim reply dated 1.11.2016, informed that request for arbitration is under examination. In the reply given by the respondent on 4.11.2016 also, the respondent sought the petitioner to convey its consent to appoint Railway officers as arbitrators.

14. In normal circumstances, this Court without any hesitation would have appointed an arbitrator as per section 11(6) of the Arbitration and Conciliation Act 1996. Now the situation is different. Subsequent to the notice issued by the petitioner dated 13.3.2017, whether he can insist on appointment of arbitrator ? In case where there is a demand to appoint an arbitrator and if it is accepted, an arbitrator may be appointed as per the terms of the contract. In cases where there is a demand/request and when it is not accepted, the party can approach the court under Section 11(6) of the Arbitration and Conciliation Act, 1996.

15. The peculiar circumstances that prevail in this case is that there was a demand for appointment of arbitrator and non it was not accepted by the noticee. Thereafter, the non acceptance was accepted by the petitioner. In that situation, revival of the demand for appointment of arbitrator is not sustainable. In other words, the present claim for appointment of arbitrator was given up and the petitioner waived the demand for appointment of arbitrator. In such situation, the noticee is not under any obligation to appoint the arbitrator as per the terms of the contract.

16. In view of the notice issued dated 13.3.2017, the petitioner has categorically given up its request and waived its right of appointment of arbitrator. Since there is no communication after 13.3.2017 from the side of the petitioner seeking appointment of arbitrator, it can be renewed only by issuing a fresh notice.

17. Learned counsel appearing for the petitioner would contend that as per the judgment of the Honourable Supreme court reported in (2016) 8 Supreme Court Cases 267 ***Wexford Financial Inc.Panama Vs.Bharat Heavy Electricals Limited***, has held as follows;

' '9. We have heard the learned counsel for the parties at some length. The material facts are not in dispute. That a Service Provider Agreement was executed between the parties is admitted. That Article 7 of the said agreement provides for settlement of the dispute in relation to the agreement by way of arbitration is also not in dispute. That disputes have actually arisen between the parties in relation to the agreement is also evident from the averments made in the pleadings. The only method for determination of such disputes is by way of arbitration. Whether or not the petitioner has provided the services envisaged under the agreement and, if so, whether the said services were adequate and satisfactory are matters that can be examined only by the arbitrator. So also the question whether the claim made by the petitioner is time-barred cannot be examined in the present proceedings and shall have to be left open to be raised before the arbitrator. There is, in that view, no gainsaying that the present petition under sections 11(5) and 11(2) shall have to be allowed with appropriate directions, particularly when this Court is concerned primarily with the question whether an arbitration agreement exists between the parties and if so whether the disputes falling within the scope of the agreement have arisen for determination. Our answer to both these questions being in the affirmative, the petitioner has made out a case for appointment of an arbitrator and for reference of the disputes for adjudication to him/her.

18. He would also rely on the judgment of the Honourable Supreme Court in the case of ***M/s. Duro Felguera, S.A, Vs. M/s.Gangavaram Port Limited,*** reported in ***(2017) 9SCC 729,*** has quoted the case ***National Insurance Company Limited v. Boghara Polyfab Private Limited,*** *wherein it has been* held as follows;

12.This position was further clarified in National Insurance Company Limited v. Boghara Polyfab Private Limited
To quote:(2009) 1 SCC 267 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
22.The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.
(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.3 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
(a) Whether the claim is a dead (long-barred) claim or a live claim.
(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their
mutual rights and obligation or by receiving the final payment without objection.
22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:
(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from

arbitration).

(ii) Merits or any claim involved in the arbitration.

59.The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Courts intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.

19. In the light of above decisions, the learned counsel for petitioner would contend that when there is an arbitration agreement, as per section 11(6A) of the Arbitration and Conciliation Act, the court cannot go into any further issue than to refer the matter to arbitration.

20. In so far as the issuance of No Objection Certificate is concerned, the Honourable Supreme Court in **(2006) 13 Supreme Court Cases 475 Ambica Construction Vs. Union of India,** had held as follows;

'From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been

included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in the case of Reshmi Constructions's, it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such No Claim Certificate.'

21. But the Honourable Supreme Court, in a recent judgment reported in **2018(2) SCALE M/s.ONGC Mangalore Petrochemicals Ltd Vs. M/s.ANS Constructions Ltd and another)** in paragraph 24 and 25 as under;

'24) From the materials on record, we find that the contractee-Company had issued the No Dues/No Claim Certificate on 21.09.2012, it had received the full amount of the final bill being Rs. 20.34 crores on 10.10.2012 and after 12 days thereafter, i.e., only on 24.10.2012, the contractee-Company withdrew letter dated 21.09.2012 issuing No Dues/No Claim Certificate. Apart from it, we also find that the Final Bill has been mutually signed by both the parties to the Contract accepting the quantum of work done, conducting final measurements as per the Contract, arriving at final value of work, the payments made and the final payment that was required to be made. The contractee-Company accepted the final payment in full and final satisfaction of all its claims. We are of the considered opinion that in the presents facts and circumstances, the raising of the Final Bill and mutual agreement of the parties in that regard, all claims, rights and obligation of the parties merge with the Final Bill and nothing further remains to be done. Further, the appellant-Contractor issued the Completion Certificate dated 19.06.2013 pursuant to which the appellant-Contractor has been discharged of all the liabilities. With regard to the issue that the No-Dues Certificate had been given under duress and coercion, we are of the opinion that there is

nothing on record to prove that the said Certificate had been given under duress or coercion and as the Certificate itself provided a clearance of no dues, the contractee could not now turn around and say that any further payment was still due on account of the losses incurred during the execution of the Contract. The story about duress was an afterthought in the background that the losses incurred during the execution of the Contract were not visualised earlier by the contractee. As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute. The conduct of the contractee clearly shows that no-claim certificate was given by it voluntarily; the contractee accepted the amount voluntarily and the contract was discharged voluntarily.

Conclusion:

25) Admittedly, No-Dues Certificate was submitted by the contractee-Company on 21.09.2012 and on their request Completion Certificate was issued by the appellant- Contractor. The contractee, after a gap of one month, that is, on 24.10.2012, withdrew the No Dues Certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the Contract site was made vide letter dated 12.01.2013, i.e., after a gap of 3 ½ (three and a half) months whereas the Final Bill was settled on 10.10.2012. When the contractee accepted the final payment in full and final satisfaction of all its claims, there is no point in raising the claim for losses incurred during the execution of the Contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting Final Bills that too in the absence of exercising duress or coercion on the Contractee by the appellant-Contractor. In our considered view, the plea raised by the contractee-Company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High

Court was not, therefore, justified in exercising power under Section 11 of the Act.'

22. Same view was taken in the judgment of the Apex Court reported in **(2011) 12 Supreme Court Cases 349 (Union of India and others Vs. Master Construction Company)** wherein, in page 13, 18 and 19, it is held as follows;

'13. The Bench in Boghara Polyfab Private Limited1 in paragraphs 42 and 43 (page 291), with reference to the cases cited before it, inter alia, noted that there were two categories of the cited cases; (one) where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, it was held that there could be no reference of any dispute to arbitration and (two) where the court found some substance in the contention of the claimants that `no dues/claim certificates' or `full and final settlement discharge vouchers' were insisted and taken (either in printed format or otherwise) as a condition precedent for release of the admitted dues and thereby giving rise to an arbitrable dispute.

18. In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all.

19. It cannot be overlooked that the cost of arbitration is quite huge - most of the time, it runs in six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.'

23. In view of the above stated legal position, as of today, there is no demand or request exist in view of section 11(5) of the Arbitration and Conciliation Act. In the absence of any demand as per section 11(5) of the Act, on the side of the petitioner and after giving up its right to seek appointment of arbitrator, the claim is not sustainable.

24. It is not open to the petitioner to raise all the demands now and request for appointment of Arbitrator in the light of the judgments of the Apex Court referred above.

25. Any order appointing an arbitrator at this stage will take

away the contractual right of the respondent to nominate the panel of arbitrators.

26. In the result, this petition is dismissed. No costs.

30.08.2019

msr
Index:Yes/No
Internet:Yes/No
speaking order/non-speaking order

M.GOVINDARAJ, J.

msr

O.P. No.970 of 2018

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