
(2016) 02 MP CK 0009

In the Madhya Pradesh High Court

Case No : Arbitration Case No. 30 of 2015.

R.C. Enterprises and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)

Citation : (2016) 3 CivilLJ 222 : (2016) 1 JabLJ 366 : (2016) 2 MPLJ 395

Hon'ble Judges : S.K. Gangele, J.

Bench : Single Bench

Advocate : Shri Akhilesh Kumar Jain, Advocate, for the Appellant; Smt. Kanak Gaharwar, Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.K. Gangele, J. - The petitioners have filed this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act of 1996") for appointment of arbitrator.

2. The petitioners were awarded the contract for construction of Boundary Wall, installation of security lights and provision of 2 Dug out signal centers at MCTE Mhow in the year 2004-05. In accordance with the work order, the work had to be completed of phase-I upto 16/09/2005 and of Phase-II upto 15/06/2006, however the work was not completed within time, it was completed by 31.10/2006 of Phase-I and on 31/05/2010 of Phase-II. The petitioners submitted final bill after completion of the work @ Rs. 132.98 per Sq. M. which was reduced to Rs. 69.37 per sq.m.. The petitioners raised dispute vide letter dated 17th March 2012 it was informed to the petitioners that the matter was referred to Head Quarter. The petitioners informed the authorities vide letter dated 15th July, 2012 Annexure A/4 that because the payment of final bill has inordinately been delayed, hence the petitioners agreed to accept under protest undisputed amount of final bill and would seek redressal through arbitration in regard to other claims. Thereafter, the petitioners accepted the bill and further reserved his

right to raise claim in regard to disallowed amount. Certificate was also given by the petitioners in this regard.

3. The petitioners made a request for appointment of arbitrator to settle the dispute in accordance with clause 6(b) of the contract agreement. The respondents refused to appoint arbitrator on the ground that the petitioners had received full and final payment, hence as per arbitration clause, it is obligatory on the part of the court not to appoint an arbitrator.

4. The learned counsel for the respondents contended that the petitioner signed final bill without any protest, he received the final payment and issued the certificate to this effect, hence the application filed by the petitioner for appointment of arbitrator is not maintainable. In support of her contentions, the learned counsel relied upon the judgment of the Supreme Court in the case of Union of India and others v. Master Construction Company (2011) 12 Supreme Court Cases 349.

5. The principle of law in regard to appointment of arbitrator if the claimant received full and final payment without any protest is well settled. The Apex Court in Union of India and others v. Master Construction Company (2011) 12 Supreme Court Cases 349 has held as under in this regard in paragraphs no. 13 and 18:-

"13. The Bench in Boghara Polyfab Private Limited 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."

In the aforesaid case the Apex Court has held that if full and final settlement is under satisfaction and there is no coercion, undue influence, hence there is no question of reference of any dispute to arbitrator. However, if no claim certificate

has been obtained by fraud, coercion, duress or undue influence then the matter can be referred for arbitration.

6. In the present case, the respondents filed copy of final bill prepared on 19/01/2013 where the petitioners mentioned the fact that they had received payment as per claim certificate given by us there is also a note of the officer that contractor had signed the same without any protest. On 15th July 2012 the petitioner no. 1 had written letter Annexure A/4 to the GE(P) Mhow to the effect that there was inordinate delay in payment of final bill, hence, the agreed portion of final bill be paid to the petitioners which shall be accepted under protest and the petitioners shall seek redressal through arbitration in regard to other claims. Thereafter, on 27th January, 2013 again a letter was written to the GE(P) Mhow to the effect that they are accepting the final bill under protest and they would raise claim upto the extent of disallowed amount. A certificate was also signed by Mr. S.P. Agrawal AE (Civ.), Engineer-in-Charge and the contractor to the effect that the claim have been included in the final bill, however, in regard to disallowed claims, the contractor has a right to raise claim.

7. From the aforesaid facts, it is clear that the petitioners did not accept the final bill voluntarily without any protest. The petitioner's contractor accepted the final bill under protest with liberty to raise the dispute in regard to disallowed portion of amount of contract. In such circumstances, in my opinion, the petitioners have not forfeited their right to raise the dispute before the arbitrator. It is an admitted fact that there is an arbitration clause in the contract agreement. The petitioners notice as per clause 70 of the agreement.

"70. Arbitration. - All disputes, between the parties to the Contract (other than those for which the decision of the CWE or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an [Serving Officer having degree in Engineering or equivalent or having passed final/ direct final Examination of Sub-Division II of Institution of Surveyor (India) recognised by the Govt. of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof."

8. The next question is in regard to appointment of arbitrator by the Court or by the respondents inspite of notice. The respondents did not appoint arbitrator, hence as per the judgment of Supreme Court reported in Deep Trading Company v. Indian Oil Corporation and others (2013) 4 Supreme Court Cases 35, the respondents forfeited their right to appoint arbitrator inspite of acceptance of notice from the petitioners. The Apex Court has held as under in this regard:-

"15. In Datar Switchgears, a two-Judge Bench of this Court considered the scheme of Section 11, noted the distinguishing features between Section 11(5)

and Section 11(6) and then considered the question whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. This Court held that in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application under Section 11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till application under Section 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited.

19. If we apply the legal position exposited by this Court in Datar Switchgears to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly."

9. Consequently, application filed by the petitioners is hereby allowed. Shri M.A. Khan, Retired District Judge is appointed arbitrator to decide the dispute. The Arbitrator shall receive the fees as per statutory provisions of amended Arbitration Act 1996. No order as to costs.