

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 100/2017

M/s Sanjeev Brothers, Having Its Office At C-10, Vaishali Nagar
Jaipur Through Its Partner Sanjeev Mittal S/o Late Sh. Mangatu
Ram Mittal Age About 44 Years

----Petitioner

Versus



1. North Western Railways, Through Its General Manager,
Near Jawahar Circle, Malviya Nagar, Jaipur

2. Chief Engineer (Construction) Iv, North Western Railways,
Head Quarter, Near Jawahar Circle, Malviya Nagar Jaipur

3. D. Chief Engineer (Construction)-Ii, North Western
Railway, Bikaner, Rajasthan

----Respondents

For Petitioner(s) : Mr. Jatin Agarwal

For Respondent(s) : Mr. Shailesh Prakash Sharma

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

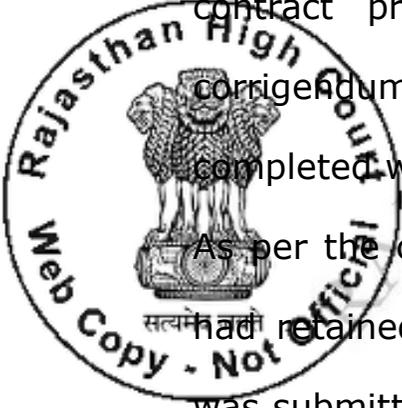
Judgment

02/02/2018

This application under Section 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996, has been filed by M/s Sanjeev Brothers, a partnership firm engaged in the business of construction of road over bridges, laying of railways lines, erection of platforms etc. through its partner Mr. Sanjeev Mittal, praying for appointment of Sole Arbitrator for settlement of its differences and disputes with the respondent Railways.

Facts of the case are that erstwhile Deputy Chief Engineer (Const.), NWR, Hanumangarh, floated a tender for execution of the work of construction of Foot Over-bridge and platform shelter at Hanumangarh Junction, Hanumangarh Town, Ellenabad and

Nohar Station in connection with Suratpura-Hanumangarh-Sriganganagar Gauge Conversion Project. The petitioner, being desirous and fulfilling all the qualifications took part in the bidding process and was found the lowest bidder and accordingly was awarded the work order vide letter of acceptance dated 16.12.2011 for a total contract price of Rs.3,02,87,669.14. The contract price was revised through second addendum cum corrigendum to Rs.3,75,43,800.28. The work was initially to be completed within 12 months from the date of letter of acceptance. As per the condition of the letter of acceptance, the respondents had retained a sum of Rs.2,87,000/- as security deposit, which was submitted as earnest money. The petitioner was also required to submit performance bank guarantee equivalent to 5% of the contract price. The petitioner in terms of the directives as mentioned under the letter of acceptance had submitted a bank guarantee dated 10.01.2012 amounting to Rs.15,14,400/-, valid up to 09.01.2013, which was extended from time to time till completion of the work. After the letter of acceptance, an agreement dated 03.05.2012 was executed between the parties which made General Conditions of Contract, Indian Railways USSOR, Special Conditions and special specifications as the part of the contract. The petitioner completed the awarded work up to the satisfaction of the respondents with actual date of completion i.e. 15.11.2014. A completion certificate dated 27.07.2015 was also issued to the petitioner to the effect that the work completed by the petitioner was satisfactory. After completion of the work, the final bill was prepared by the respondents and the petitioner was requested to sign the same in the month of April, 2016. The final bill prepared by the respondents had not considered various

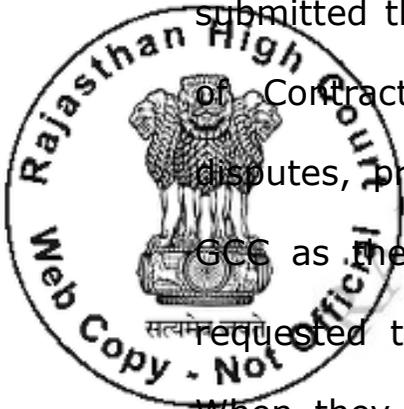


claims raised by the petitioner. The petitioner clarified the situation to the respondents and tried to sort out the same. The petitioner had also submitted its claim under Clause 43(1) of the GCC but no fruitful action has been taken by the respondents. Hence this application.

Mr. Jatin Agarwal, learned counsel for petitioner, has submitted that Clause 35 of the Special Conditions/Specifications of Contract (Non-Technical) provides for settlement of the disputes, provided for settlement of disputes. Clause 64 of the GCC as the next stage, provides for arbitration. The petitioner requested the respondents to refer the dispute for arbitration.

When they failed to do so, the petitioner sent a notice to the respondents through its counsel for appointment of Sole Arbitrator. The respondents, despite receipt of notice, failed to act upon in accordance with the prescribed procedure. Since the respondents failed to act within 30 days as per the agreed procedure and did not refer the dispute to the Arbitrator therefore they, in view of Section 11(6) of the Arbitration and Conciliation Act, 1996, have forfeited their right to now appoint the Arbitrator. Moreover, even otherwise, the respondents cannot, as per the procedure envisaged in the agreement, now appoint their own employee as the Arbitrator in view of Section 12(5) of the Arbitration and Conciliation Act, 1996, by virtue of the disqualifications contained in Fifth and Seventh Schedule of the Act of 1996, which debar their employee to act as an Arbitrator.

Learned counsel submitted that all the issues that respondents have raised in the reply are covered by the judgment of this Court dated 14.07.2017 in S.B. Arbitration Application No.16/2016 – Dilbag Singh Contractor Vs. North Western Railway



and Others, including about the 'excepted matters', wherein it was held that all such issues should be left to be decided by the Arbitrator.

Mr. Shailesh Prakash Sharma, learned counsel for the respondents, opposed the application and submitted that total contract price of the matter was Rs.3,02,87,669.14. The work was to be completed within 12 months from the date of letter of acceptance. All the due payments of the work as per its specification have already been made to the petitioner through running bills and final bill of the work. The petitioner has accepted the measurements entered in the final bill under protest. Since the points raised by the petitioner were baseless and not acceptable as per the general conditions, as such, his final bill was passed by the respondents on 27.05.2016.

The respondents, in their reply, have referred to eight items with details, whereof payment was withheld contending on merits that as per the general conditions, these claims fall within 'excepted matters' and therefore cannot be referred to arbitration.

All these issues that the respondents have raised in their reply to the application, especially the objection that disputes pertaining to the 'excepted matters' cannot be referred to for adjudication to the Arbitrator and with regard to ineligibility of an employee of Railway to act as an Arbitrator have been considered and decided by this court in Dilab Singh Contractor, supra, and therefore, the objections of the respondents is liable to be rejected and present dispute deserves to be referred to the Sole Arbitrator. Signing of 'no claim certificate' under protest can not be a basis for resolving to refer the dispute to Arbitrator.



The application deserves to succeed and same is allowed. Hon'ble Mr. Justice Mahesh Chandra Sharma (Retd.), (landline no.0141-2359326), R/o Plot No.62, "Neelkanth", Neelkanth Colony, Behind old chungi chowki, Ajmer Road, Jaipur, is hereby appointed as an independent sole arbitrator to resolve the disputes between the parties. Payment of the costs of arbitration proceedings and the arbitration fees shall be made as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 read with Manual of Procedure for Alternative Dispute Resolution, 2009 of this Court, as amended from time to time.

A copy of this order be sent to Hon'ble Mr. Justice Mahesh Chandra Sharma (Retd.), for needful.

(MOHAMMAD RAFIQ),J

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