HIGH COURT OF M. P. PRINCIPLE SEAT : JABALPUR
Arbitration Case No.16/2013

M/s. Chandra Nirman Pvt. Ltd.
Vs.
Orient Paper Mills Ltd.

For applicant	:	Shri V. R. Rao, Senior Advocate assisted by Shri Nitin Gupta, Adv.
Respondent	:	Shri Kishore Shrivastava, Senior Advocate assisted by Shri Abhijit Shrivastava, Advocate.

O R D E R
(Passed on 18.4.2016)

PER S. K. Gangele J.

1. Applicant has filed this application under Section 11 (6) of Arbitration and Reconciliation Act 1996 for appointment of Arbitrator.

2. Applicant was awarded work of construction of Water Storage reservoir at Amlai by the non-applicant. Work order was issued in this regard on 31.12.2009. Time for completion of work was five months. It was due to be completed on 31.5.2010. The total valuation of construction was Rs.14,11,40,596/-. The applicant was not able to complete the work within time. It was completed by last September, 2010. Applicant pleaded that non-applicant was responsible for non-completion of work within time. Final Bill was submitted and applicant demanded an amount of rupees 4.50 crores on 27.11.2010. The non-applicant pleaded that applicant was not eligible to receive the amount because there was delay in construction and construction was not in accordance with the agreement and it was of inferior quality. The applicant prayed for appointment of Arbitrator, which was not accepted by the non-applicant. Thereafter, he filed a case before this court which was registered as Arbitration Case No.22/2011. This Court vide order dated 21.8.2012 disposed of the application with following directions:

> "Accordingly, for the present finding no case for constitution of an Arbitral Tribunal, this application is disposed of with liberty to the applicant to seek resolution of the dispute by reference to the CEO in accordance to the conditions stipulated in Annexure A.1 and thereafter if the applicant has any grievance still subsisting, or if the CEO does not resolve the dispute in accordance to the requirement of the agreement, liberty is granted to the applicant to

proceed afresh in accordance with law and seek enforcement of the arbitration agreement by invoking the jurisdiction of the appropriate Court in accordance with law.

With the aforesaid, the petition stands disposed of.”

3. Thereafter, applicant submitted its claim to the chief Executive Officer. The following is the summary of claims submitted by the applicant to the C. E. O.

S. No.	Particulars of claim	Amount (Rs. in lacs)
1	Cost of work done but not paid.	357.40
2	Refund of E.M.D.	15.00
3	Escalation due to increase in cost of input during the period of prolongation of work	18.00
4	Loss of overheads due to prolongation of work, calculated @ 10% of the prime cost of un-executed work during original period of completion.	20.55
5	Loss of profit due to loss of turn over @ 10% of the cost of un-executed work during original period of completion.	18.50
6	Ante-lite interest.	123.35
	Total Claims	552.80

(In words) Rupees Five Crores, Fifty Two Lacs, Eighty Thousand only.

4. The Chief Executive Officer vide order dated 30.11.2013 rejected certain claims of the applicant and issued one direction in favour of the applicant that non-applicant would calculate the work completed by the applicant from the record (if it is found to be possible with their records) and pay dues to the applicant. The direction which is in favour of the applicant is as under:

7. Further considering the work done by CNPL, I hereby direct OPM to calculate the value of work done (if it is found to be possible with their records) by CNPL as per rate mentioned in the Order. OPM is also directed to prepare an Account of such values within two weeks of the receipt of the judgment and pay the dues, if any, to CNPL after considering all entitled deduction as mentioned in Para 1 to 6 of this Order. With those deduction in place, I am of the opinion that OPM is sufficiently indemnified against possible losses or liabilities as Employer/ Principal

Employer. OPM should submit a compliance report to the undersigned for compliance of this direction within four weeks of the receipt of order."

5. The applicant was not satisfied by the order passed by the CEO. Hence, it has filed application for appointment of Arbitrator. Non-applicant in its reply pleaded that in accordance with the order passed by this Court CEO vide order dated 30.11.2013 has decided the dispute and issued directions to the parties. The order was communicated to the applicant. The applicant did not raise any objection against the order, it means that the applicant is satisfied with the order. Hence, the claim of the applicant is settled. There is no question for appointment of Arbitrator.

6. Learned Senior counsel has contended that Chief Executive Officer has not decided all the dispute raised by the applicant. Hence, applicant is entitled to seek appointment of Arbitrator in terms of the order passed by this Court. It is further submitted by the learned counsel that dispute still exists between the parties. Hence, it is obligatory on the part of the Court to appoint Arbitrator.

7. Contrary to this learned Senior counsel appearing on behalf of non-applicant submitted that in terms of the order of this Court CEO has decided the dispute. Some directions have been issued in favour of the applicant also by the CEO. The applicant has accepted some benefit, it means that the applicant has accepted the order passed by the CEO. Hence, the applicant has forfeited its right for appointment of Arbitrator.

8. As per terms and conditions of the contract, in case of any dispute, same be referred to CEO, whose decision shall be final and binding. The relevant terms and conditions are as under:

> "In case of any difference or dispute, the matter shall be referred to CEO, Orient Paper Mills Amlai, whose decision shall be final and binding on you."

9. In the present case, the applicant submitted a dispute to the CEO and thereafter CEO passed an order. The applicant also accepted certain portion of the order, which is in favour of the applicant quoted above.

The applicant did not mention any fact that why the applicant is not satisfied with the order of the CEO. In paragraph 17 of the application, it is mentioned that CEO has not taken any action in the matter and he has not decided the claim of the petitioner nor ordered for appointment of the Arbitrator. Hence, the applicant has no option except to approach the Court for appointment of Arbitrator. This fact is true, the CEO has already passed order dated 30.11.2013, which is on record and he has decided the dispute.

10. The Apex Court in the matter of **Union of India and others Vs. Master Construction Company (2011) 12 Supreme Court Cases 349** has held as under in regard to power of the Court to refuse appointment of Arbitrator, if the Court find that the applicant had accepted the claim voluntarily and the contract was discharged:

> "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.
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> 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."

11. In the present case, after passing of the order by the Chief Executive Officer dated 30.11.2003 the applicant did not raise any claim nor pleaded in the application that why the order passed by the CEO is illegal. Hence, in my opinion the dispute raised by the applicant has been settled and there is no ground to appoint Arbitrator. There is not merit in this petition it is hereby dismissed. No order as to costs.

(S.K.Gangele)
Judge

kkc

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Post it for 18.4.2016

(S.K.Gangele)
Judge