

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J.**---Through the instant writ petition, the petitioner seeks direction to be issued to NHA and Member Finance, NHA (Respondents Nos. 1 and 2, respectively) to release the payment vouchers due to the petitioner under payment certificate (I.P.C. No.24) for a net of amount of Rs.130,228,452/-.

2. On the other hand, respondents filed C.M.A. No.233/2018 and C.M.A. No. 3471/2020 under section 34 of the Arbitration Act, 1940 seeking stay of the captioned writ petition on the ground of there being an arbitration agreement between the parties. Likewise, the NHA/respondent No.1 also filed the captioned C.M.A. No.2685/2020 seeking amendment of pleadings mentioned in C.M.A. No.233/2018.

3. Succinctly, NHA/Respondent No.1, after concluding due bidding process, awarded contract to the petitioner on 16.01.2009, for construction of an approach road for the bridge constructed over the Indus River connecting District Larkana with District Khairpur to be completed within the period of 16 months at the approximate cost of Rs.3.2 Billion. The NHA had been releasing payments in favour of petitioner for the completed work up to Interim Payment Certificate No.19, whereafter NHA had withheld the amounts certified as IPC Nos.20 and 21 though same were released pursuant to contempt proceedings initiated through Criminal Original No. 398/2015 before this Court, but Member Finance NHA (Respondent No.2) withheld the release of payment vouchers prepared for disbursement in respect of IPC No.24 to the tune of Rs.130,228,452/- Hence instant writ petition.

4. Learned counsel for petitioner contended that in earlier round this Court, vide judgment dated 19.05.2015, passed in W.P. No.1711/2013, directed that failure to make payments to the petitioner on account of failure by the NHA to have variations orders approved by its Executive Board, is no ground; that petitioner is being unlawfully and unjustifiably, deprived of the right to receive undisputed payment owed to it by the NHA, as such, NHA is under obligation to make such payments as per terms of the contract, that the Engineer as well as Project Director of NHA and other concerned officials of NHA have duly certified payments under the petitioner's submitted bills in the form of IPC No.24, but the NHA has failed to make such payment and continues to withhold the same without any reason or legal basis; that IPC No.24 represents the works undertaken and completed in terms of the contract and approved by the Engineer along with other concerned officials of NHA, therefore, NHA is estopped from withholding such payments in respect of such past and closed transactions, per se, such actions on the part of NHA are unwarranted and are in derogation of the fundamental rights of the petitioner.

5. Conversely, learned counsel for respondents opposed the filing of instant writ petition on the grounds that as per agreement executed before the parties, any dispute arising out of agreement shall in the first place be referred to the Engineer, as such, a party aggrieved by the decision/determination of the Engineer may refer the dispute to arbitration under the Arbitration Act, 1940; that respondents are willing and ready to settle all disputes arising out of the agreement between the parties through the Alternative Dispute Settlement; that the petitioner has brought on record intricate details of a contractual dispute, factual controversies and entitlement to payments under the agreement, such conduct clearly shows that the present dispute between the parties is incapable of adjudication in constitutional jurisdiction, therefore, the dispute between the parties may kindly be referred to dispute settlement as provided under the agreement.

6. Arguments heard, record perused.

7. Perusal of record reveals that the petitioner Sardar Muhammad Ashraf D. Baluch (Pvt.) Ltd., a company incorporated under the companies law, is engaged in the business of providing construction services to NHA. Both the parties engaged in a contract, dated 16.01.2009, for a work on Package-I (construction of an approach road for the bridge constructed over the Indus River connecting district Larkana and Khairpur and others associated works). The work was agreed to be completed within a period of 16 months (inclusive of mobilization period) at the approximate cost of Rs.3.2 Billion. The petitioner commenced the work on 16.02.2009, but

the work was not completed within the stipulated period due to unprecedented floods and discharge of 11.5 Lakh cusecs of water. Accordingly, the work required certain variations in aftermath of floods of 2010, whereby NHA's Engineer under the instructions of NHA issued direction to the petitioner to expeditiously implement the Omitted River Training work in accordance with modern study on emergency basis, pursuant to Clause 51 of GC read with sub-clause 2.1 (viii)(a) of the PC through Variation Order No.2 to the contract duly approved by respondent Board on 29.11.2010. In terms of Clause 60.1 of the GC the petitioner is entitled for the amount in respect of value of permanent work, which was verified by the NHA's Engineer. On verification, the Engineer is to deliver within 14 days to NHA an Interim Payment Certificate (IPC). It was also settled between the parties under the terms of contract that when payment becomes due and payable by NHA within 30 days of joint verification of the IPC by the petitioner and respondent.

8. In this backdrop, the NHA is under obligation to release the payment, but since 2011 the amounts certified as IPC Nos. 20 and 21 were not released, therefore, petitioner filed W.P. No.1711/2013 before this Court, which was allowed vide judgment dated 19.04.2015 and even Criminal Original No. 398/2015 was filed against Respondent No.2/Member Finance, NHA, as such the said matter is now pending before the apex Court. Although, the amounts of IPC Nos. 20 and 21 and EPC No.8 have been recovered, however the petitioner is aggrieved by the conduct of respondents/NHA, who has now withheld the payment vouchers prepared for disbursement in respect of IPC No.24 i.e. net amount of Rs.246,861,814/-. On 02.12.2015, the NHA made part payment to IPC No.24, amounting to Rs.109,084,776/- through a cheque, leaving outstanding amount of Rs.130,228,452/- under IPC No.24, regarding which repeated requests have been made to the NHA to release the due payments for already having been agreed, verified and admitted.

9. The respondents on the other hand filed C.M. No.233/2018 in terms of section 34 of the Arbitration Act, 1940 with the claim that the agreement executed between the parties contains Clause 67.1 (Engineer's decision in case of dispute), Clause 67.2 (amicable settlement) and Clause 67.3 (arbitration). The respondents have also filed C.M. No.2685/2020 seeking amendments in C.M. No.233/2018 on the following ground:

17. That, the subject of the claim in the instant writ petition is the deduction from the petitioner's IPC No.24 which was raised by the petitioner against works done in pursuance to Variation Order No.3 ("VO # 3"). the deduction made by the Respondents' Authority from IPC # 24 was in lieu of the rebate offered by the petitioner, which initially had mistakenly not been catered for but later corrected by the relevant Accounts Section of respondent No.1, authority. It is pertinent to mention here that VO # 3 amounting to Rs.1,563,153,145/- had been approved by Respondent No.1 wherein the term "rebate" was mentioned similar to the similar to the earlier variation orders. During process of approval, "Cost of VO # 3 (after rebate)" was mentioned similar to the earlier variation orders. During process of approval, "Cost of VO # 3 (after rebate)" was expressly mentioned on the summary page for approval. This stance was communicated to the petitioner verbally and inter alia through letter dated 27th December, 2017. On the contrary, the petitioner disputed the decision of deduction of rebate by contending that VO # 3 did not form part of the Agreement, thus the rebate offered on the contract not being applicable. This stance of the petitioner clearly requires recording of pro and contra evidence, involving inter alia the issue of whether or not VO # 3 was part of the original Agreement between the parties."

10. In view of above, deduction made by the NHA from IPC No.24 was in view of rebate offered by the petitioner, which initially had mistakenly not been catered for, but later on corrected by the relevant Account Section of NHA. It was further referred in said C.M. that Variation Order No.3, amounting to Rs.1,563,145/- had been approved by the NHA, wherein term rebate was mentioned similar to earlier variation order.

11. It has been observed from the record that till date neither party has issued any notice to initiate the process of arbitration or raise any dispute in terms of the contract under Clause 67, such aspect demonstrates that both the parties have no dispute to be resolved through

arbitration mechanism. It is settled law that a dispute has to be referred in application in terms of section 34 of the Arbitration Act, 1940 by the party, who claims to raise a dispute in a pending matter.

12. The minute scanning of C.M. No.233/2018, filed under section 34 of the Arbitration Act, 1940 by respondent NHA, shows Para 7 as relevant in the matter, which is as under:

"7. That, furthermore, the issues raised before this Hon'ble Court in the titled petition involve intricate details of a contractual dispute factual controversies over works purportedly done by the petitioner, and alleged entitlement to payments under the Agreement. The factual and intricate nature of the controversy is evident from the details set out in the memo. of the petition, clearly showing that the present dispute between the parties is incapable of adjudication in constitutional jurisdiction. As per settled law, the titled petition is liable for dismissal in limine on this point alone. Furthermore, the petitioner's averment that the titled petition is an attempt to enforce the judgment of this Hon'ble Court in Writ Petition No.1711/2013 is entirely fallacious, since the final order passed in that petition, as amended by the Hon'ble Supreme Court, was given full effect to as evidenced from the proceedings and the order of this Hon'ble Court in Criminal Original No. 398/2015. Thus, the dispute between the parties that was agitated by the present petitioner in Writ Petition No. 1711/2013 has been settled, save for respondent No.1's appeal that is presently pending before the Hon'ble Supreme Court. The petitioner's further insinuation that the present dispute is somehow a part of the previous dispute is also entirely false, since the disputed amounts pertain to different works, and were claimed in different IPCs. Even if the petitioner's plea were accepted for the sake of argument, such claim, if any would be barred under Order II, Rule 2, C.P.C."

13. The above mentioned reason submitted in the application filed under section 34 of the Arbitration Act, 1940, if considered on the touchstone of term "dispute" amongst the parties, there is nothing which falls under the category to be considered relevant as the NHA has not disputed the amount nor denied the work done, even acknowledged and admitted all the IPCs as well as variation orders. I have not come across a single argument advanced on the part of respondent/NHA to elaborate that any amount has been denied nor is there any notice issued by the NHA disputing the work done against the petitioner. In this backdrop, it seems that the NHA is not willing to pay the amount to the petitioner due to a reason best known to them and under garb of section 34 of the Arbitration Act, 1940 the NHA intends to prolong the agreed payments and claims the reference of matter to the arbitration, per se, it is settled that a dispute does not mean simply refusal to pay money for which a person is liable. Reliance is placed upon 2016 YLR 2322 Karachi (Shin Satellite Public Company Limited v. Messrs Kasb Technology Services Limited).

14. Similar view has also been taken by the Hon'ble Sindh High Court in case reported 2013 CLC 767 Karachi (BOC Pakistan Limited v. Natural Gases (Pvt.) Ltd.), whereby it was held that:

"The mere fact that the defendant has not prepared to pay the amount to which he is liable under the agreement, does not mean that there is a dispute between the parties. When an application is moved under section 34 of the Arbitration Act, 1940 for stay of proceedings and defendant fails to state the dispute between the parties, but makes only a reference to arbitration clause, this shortcoming and flaw is sufficient to cause dismissal of application."

15. Another view has also been rendered that, when carrying of work in question has not been denied by the respondent NHC, they are not permitted to withhold the payment. Reliance is placed upon 2011 MLD 1644 Karachi (Shaman Mal v. Executive Engineer Irrigation)

16. The NHA have raised the ground that petition is based on disputed question on facts, but surprisingly the NHA has not referred a single stance in their application filed under section 34 of the Arbitration Act, 1940, where any particular fact has been referred or denied, rather the record appended, with this petition discloses that there was no dispute, hence denial of

right is apparent on record and it does not mean that a question of disputed fact has arisen. Reliance is place upon 2005 CLC 1979 SC AJK (Muhammad Aslam v. Azad Government of the State of Jammu and Kashmir).

17. While going through the entire record, it has been observed that payment under IPC No.24 is not pursuant to any new work and after additional work done by the petitioner, the Engineer certified IPC Nos.20 and 21 of such work done. The NHA has failed to make the payments and earlier the petitioner has got its payment on the direction of this Court in W.P. No. 1711/2013, but the NHA has illegally deducted Rs.140 Million from IPC Nos.20 and 21 by stating that petitioner has given rebate over work done against IPC Nos. 20 and 21, such payment was claimed by petitioner in IPC No.24, hence there is no factual controversy qua the work done, which was earlier acknowledged in the judgment of this Court passed in W.P. No.1711/2013.

18. Evidently, the respondent NHA has never raised a dispute nor issued any notice through their officials qua any work done or payment to the petitioner. In this backdrop, the NHA is not permitted to withhold any payment of petitioner under the garb of false and frivolous application filed under section 34 of the Arbitration Act, 1940, hence instant writ petition is ALLOWED with direction to the NHA to release the payment within the period of 30 days. The C.Ms. filed under section 34 of the Arbitration Act, 1940 and its amendments through second application i.e. C.M.A. No.2685/2020 are not made out, therefore, the captioned C.Ms. are DISMISSED

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