IN THE HIGH COURT OF SIKKIM

Arbitration Appeal No. 3 of 2000

Sagarmull Agarwala ..... Appellant.

Versus

1. Union of India
   through the Garrison Engineer

2. Garrison Engineer ..... Respondents.

Coram :
The Hon'ble Mr. Justice Ripusudan Dayal, Chief Justice.
The Hon'ble Mr. Justice Anup Deb, Judge.

Present: Mr. A. Moulik, Advocate for the appellant.

Mr. S. P. Wangdi, Senior Central Govt. Standing Counsel with Mr. U. P. Sharma, Additional Central Govt. Standing Counsel and Mr. Karma Thinlay, Advocate for the respondents.

Date on which Judgment reserved : 11th October, 2001.

Date of Decision : 15th *October, 2001.*

JUDGMENT

Dayal, C. J.

This appeal is directed against the Judgment dated 21.2.2000 by the learned District Judge (East & North), Sikkim in Civil Misc. Case No. 13 of 1992 allowing the application filed by the respondents under

sections 30 and 33 of the Arbitration Act, 1940 and setting aside the award passed by the Arbitrator.

2. The appellant/contractor and the respondents entered into a contract for provision of electrification of certain units, located at Rongli and Rhenock under Contract Agreement No. GE/867/5 of 1979-80. Some disputes and differences arose between the parties. The appellant/contractor filed Civil Misc Case No. 5 of 1986 in the Court of the District Judge, Sikkim at Gangtok under sections 8 and 20 of the Arbitration Act, 1940 for appointment of an Arbitrator. On 31.8.1987, the learned District Judge allowed the application and directed the Chief Engineer, Siliguri Zone, Bengdubi to appoint an Engineer Officer as the sole Arbitrator. Accordingly, an Arbitrator was appointed by the Chief Engineer Siliguri Zone, Bengdubi vide his letter dated 2.11.1987. The Arbitrator passed an award in favour of the contractor on 11.9.1992. The respondents filed an application under sections 30 and 33 of the Arbitration Act for setting aside the award. Vide order dated 27.1.1993 in Civil Misc Case No. 13 of 1992, the then learned Additional District Judge made the award the rule of the court. The judgment of the learned Additional District Judge was challenged by the respondents in First Appeal No. 2 of 1993 before the High Court. That appeal was dismissed. Thereafter, the Union of India filed Civil Appeal No. 14751 of 1996 in the Supreme Court. That appeal was allowed on 4.2.1999. The Supreme Court held that a plea had been specifically raised before the learned Additional District Judge as well as before the High Court that the dispute was not arbitrable in terms of the contract agreement, but the same had not

been dealt with by either of the courts and this plea goes to the root of the matter and required consideration by the Additional District Judge. Accordingly, the order dated 27.1.1993 passed by the learned Additional District Judge and that passed by the High Court on 30.4.93 were set aside and the matter was remanded to the District Judge to decide the matter afresh in accordance with law. In compliance with the decision of the Supreme Court, the District Judge considered the matter again and held that "No Claim Certificate" had been given by the appellant and as such, there was full and final settlement of all the claims and nothing remained to be done under the contract. The learned District Judge took note of the appellant's allegations made in paragraph 19 of the application under section 8 read with section 20 of the Arbitration Act as under :

> "19. That the petitioner submits that the petitioner has signed the 'No-Claim Certificate' under pressure as otherwise payment of Final Bill was threatened to withhold. Since the petitioner had to make the labour payment and pay the suppliers, he signed the no claim certificate. However, before and after signing the No Claim Certificate he had issued protest letters. The Chief Engineer has also assured appointment of Arbitrator admitting some claims of the petitioner."

The learned District Judge observed that 'No Claim Certificate' indicated that there was full and final settlement of all the claims and nothing remained to be done under the contract. The petition under section 8 read with section 20 of the Arbitration Act was dated 2.4.1986, whereas the date of the final bill as per the said petition was 28.7.1981. The learned District Judge observed that from 1981 to 2.4.1986 there was no whisper of such allegations and such vague allegations had been made in the

petition for the first time after a gap of five years. Relying upon the decision of the Bombay High Court in Union of India Vs. M/S. Ajit Mehta and Associates and others , AIR 1990 Bom. 45, the District Judge held that apart from the question of estoppel and waiver, as mentioned in clause 65 of the agreement, the parties had brought an end to the contract after settling it between them and since all the claims stood fully paid and adjusted, no dispute remained between them as the contract had come to an end by mutual agreement and the arbitration clause being an integral part of the contract had no separate life, with the result, there was nothing left for the arbitrator to decide.

2. Shri A. Moulik, learned counsel appearing on behalf of the appellant has submitted that it was for the arbitrator to consider as to whether the claims made by the appellant were tenable and once the award has been rendered by the arbitrator, it is not open to the respondents to challenge the award on the ground that the dispute was not arbitrable. In support of his submission, he has referred to paragraph 8 in Union of India Vs. M/S L.K. Ahuja & Co., AIR 1988 SC 1172:

> "8. In view of the well-settled principles we are of the view that it will be entirely wrong to mix-up the two aspects, namely, whether there was any valid claim for reference under S.20 of the Act, and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an Order under S.20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under S. 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of

> the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case, the claim for reference was made within three years commencing from April, 16, 1976 and the application was filed on December 18, 1976. We are, therefore, of the view that the High Court was right in this case. See in this connection the observations of this Court in Major (Retd.) Inder Singh Rekhi v. D.D.A. (1988) 2 JT 6: (AIR 1988 SC 1007)."

On the other hand, Shri S. P. Wangdi, Senior Central Government Counsel assisted by Shri Udai P. Sharma, Additional Central Government Standing Counsel, has urged that the question as to whether, in view of the full and final settlement of the claims of the appellant, the disputes raised by the appellant before the arbitrator were arbitrable or not, is a matter which goes to the root of the matter requiring decision by the Court and has in support of his submission referred to M/S P.K. Ramaiah and Company Vs. Chairman & Managing Director, National Thermal Power Corpn., 1994 Supp (3) SCC 126.

3. Final bill was submitted by the appellant on 18.2.1981. It contains a No Objection Certificate in the following terms:

> "I/We have no further claims under this W.O. beyond the net amount of this bill."

The contractor gave receipt on 29.7.1981 to the following effect:

> "Received Rs. 58,157.15.
>
> This payment is in full and final settlement of all moneys under CA No. GE/867/5 of 79-80. And I have no further claim in respect of the said CA.
>
> STAMP
> Sd/-

Signature of Contractor

Date 29.7.1981 Sd/- **Witness**

Date ..... Kalimpong **Address**"

Thus there is no doubt that the payment was made of the final bill in pursuance of the No Claim Certificate furnished by the contractor and on getting receipt to the effect that the payment was in full and final settlement of all money under the contract and no further claim remained in respect of the contract. Clause 65 of the General Conditions of Contracts applicable to the contract in question reads as under :

> "65. **Final Bill (Applicable only to Measurement and Lump Sum Contracts).-**
> The Final Bill shall be submitted by the Contractor on IAFW-2262 in duplicate within three months of physical completion of the Works to the satisfaction of the Engineer-in-charge.
>
> It shall be accompanied by all abstracts, vouchers, etc., supporting it and shall be prepared in the manner prescribed by the G.E.
>
> No further claims shall be made by the Contractor after submission of the Final Bill and these shall be deemed to have been waived and extinguished.
>
> The Contractor shall be entitled to be paid the final sum less the value of payments already made on account, subject to the certification of the final bill by the G.E.
>
> No charges shall be allowed to the Contractor on account of the preparation of the final bill."

Thus the contract in specific terms provided that no further claim shall be made by the contractor after submission of the final bill and if the

contractor chooses to make, subsequently, further claims they shall be deemed to have been waived and extinguished.

4. Shri A.Moulik, learned counsel for the appellant has referred to the appellant's letter No. 293/27/E dated 16.6.1981 addressed to the Assistant Garrison Engineer, material portion of which reads as under :-

> "The above work of the C.A. No. GE/867/5 of 79-80 was completed in the month of March '80 and due to non-completion of Sub-station Building, our all labours were sitting idle up to the month of December '80. And for their idleness Department will be held responsible and department will have to pay the idleness of the labours. The buildings, which double wiring is made, item extra payment is also to be made by the Deptt.
>
> From very beginning this work was stated "UNDER PROTEST", which please note. The payment of the final Bill not yet been made to us. Please expedite and arrange to pay this final Bill within 15 days 'INDIAN ARBITRATION ACT.' 1940 we will forward an application for ARBITRATION, which may be noted."

It is worth noting that this letter did not make any mention as to the circumstances under which No Claim Certificate had been furnished by him earlier. For example, it was not stated that the certificate had been furnished under coercion or mistake. Rather, it was asserted that the payment of the final bill had yet not been made to him and he made a request for early payment of the final bill. Request for early payment was also made by the appellant vide letters dated 15.5.1981 (Annexure R-1) and 3.7.1981 (Annexure R-2). The allegation that no claim certificate was issued by him under pressure was made nearly after five years of receiving the payment in the application under sections 8 and 20 of the Arbitration Act. Even then, the pressure canvassed by him was that

payment of final bill was threatened to be withheld and he had to make payment to the labour and the suppliers. As noticed earlier the amount found due on the final bill was not large. It was merely Rs. 58,157.15. If a contracting party gives no claim certificate in order to get early payment and the other party acts upon it and makes the payment, the contractor cannot turn around and say that no claim certificate was issued because he needed the money early. The allegation about pressure is in the nature of an after-thought and even if there remained any claims, they stood waived in view of the specific provision made in clause 65 of the General Conditions of Contract. After the contractor received payment in full and final settlement of his claim, the contract did not survive any longer with the result that the terms of the contract providing for arbitration also ceased to survive. The Supreme Court held in M/S P.K. Ramaiah and Company Vs. Chairman & Managing Director, National Thermal Power Corpn. (supra) :

> "8..... In *L.K. Ahuja & Co. case* this Court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of accord and satisfaction but one of pleading bar of limitation without prior rejection of the claim. Therefore, the ratio therein is of little assistance. The Calcutta High Court merely followed the statement of law laid in *Ahuja & Co. case.* It is not shown to us that the Chief Construction Manager was competent to acknowledge the liability or an authority to refer the dispute for arbitration. So neither his letter binds the respondent nor operates as an estoppel. Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In *Russell on Arbitration*, 19th Edn., p. 396 it is stated that "an accord and satisfaction may be pleaded in an action

> on award and will constitute a good defence". Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration."

Thus in the present case there is accord and satisfaction of the final settlement of the claims by the appellant. The plea about accord and satisfaction goes to the root of the matter and has to be dealt with by the court even where the arbitrator has made the award in favour of the contractor after final settlement of the claims of the contractor. We see no reason to differ from the learned trial court.

5. In the result, we dismiss the appeal leaving the parties to bear their own costs.

15.10.2001

(Anup Deb)
Judge
15 .10.2001

15.10.2001

(Ripusudan Dayal)
Chief Justice
15 .10.2001