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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 11, 2009

Date of Order: September 17, 2009

+Arb.283/2008

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17.09.2009

Kunj Bihari Construction Co. Pvt. Ltd.

...Petitioner

Through: Mr. S.D. Singh with Mr. Rahul Kumar Singh, Advocates

Versus

BPTP Ltd.

...Respondent

Through: Mr. A.K. Thakur with Mr. Rajiv Arora, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. The petitioner has preferred this petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 seeking appointment of an arbitrator in terms of arbitration agreement between the parties for resolution of disputes between the parties. The petitioner had undertaken civil construction work for the respondent under a contract and the petitioner's contention is that its dues had not been paid fully. Respondent had not denied existence of arbitration agreement but has taken the stand that the present petition was not maintainable since the petitioner has accepted full and final payment and after accepting full and final payment against the contract, the petitioner was not entitled to raise disputes.

2. The respondent is inferring full and final payment because of a letter dated 23rd April, 2008 written by respondent to the petitioner, the operative

part of which reads as under:

"Dear Sir,

Please find enclosed herewith cheque no.937466 dated 22.04.2008 for Rs.2,51,749/- (Rupees Two Lacs Fifty One Thousand Seven Hundred and Forty Nine Only) drawn on Punjab National Bank Faridabad towards full and final settlement for the subject work awarded vide work order and its subsequently amendments under reference.

The security deposit deducted from your bills as per work order condition will be released separately as per terms and condition of work order.

You are requested to acknowledge the receipt."

3. The petitioner received the above cheque by making following endorsement on the letter itself:

"Cheque No.937466 received against R/A Bill"

4. After receiving this cheque, petitioner wrote letter dated 1st May, 2008 to the respondent protesting that the cheque received by it was not against full and final settlement as mentioned vide respondent's letter and stated that the petitioner had claims in respect of extra /additional items like abnormal rate hike in structural steel, drastic deviation / reduction in the scope of work as per original contract. The petitioner in this letter stated that it had further claim of Rs.37 lac and also claimed the security deposit etc amounting to Rs.2,83,000/-.

5. It is apparent that the petitioner had not executed a receipt having received full and final payment for the contract. The respondent relied on *Union of India & Ors. v Talsan Builders 2008(3) Arb. LR. 542 (SC)* and

contended that the receipt issued by petitioner amounted to full and final settlement and the Court should decide the issue whether there was any dispute left for arbitration or not.

6. There is no doubt that while appointing an arbitrator under Section 11(6) of the Act the Court has to consider whether any live dispute was there between the parties and for this Court can consider the aspect if the petitioner has already received full and final payment and was raising dispute after giving a satisfaction of full and final payment. However, it is settled law that in order to infer full and final settlement; the Court has to consider the facts of each case.

7. The respondent relied on *Bhagwati Prasad Pawan Kumar v Union of India (2006) 5 Supreme Court Cases 311*. In *Bhagawti Prasad (supra)*, Union of India had written following letter to the contractor:

“ In case the above offer is not acceptable to you, the cheque should be returned forthwith to this office; failing which it will be deemed that you have accepted the offer in full and final satisfaction of your claim.

The retention of this cheque and/or encashment thereof will automatically amount to acceptance in full and final satisfaction of your above claim without reason and you will be estopped from claiming any further relief on the subject.”

Despite receipt of above letter along with the cheque, the petitioner encashed the cheque and did not return the cheque. The Supreme Court observed that the acceptance of the two cheques by the appellant amounted to acceptance of offer contained in the letter written by Union of India.

Retaining and encashment of the cheques amounted to full and final settlement of all claims of the contractor.

8. The situation in the present case is altogether different. In the present case, after the work was executed and final bill of the petitioner pending, respondent forwarded a cheque to the petitioner stating that the payment amounted to full and final settlement. However, the petitioner did not receive the payment as full and final settlement and received the said cheque stating that it was against running bill and after about a week of receipt of cheque, the petitioner lodged a protest stating that the amount received by it could not have been termed as full and final settlement.

9. I consider that the full and final settlement has to be inferred only in those cases where the employer offers an amount after completion of work as full and final settlement and the contractor accepts the amount also as full and final settlement either in writing or by his conduct. If the contractor after taking the amount against final bill as full and final settlement offer of employer, does not raise dispute for considerable time and keeps silent, it would amount to acceptance of amount as full and final settlement or while accepting the amount, the contractor gives a receipt that he has received the amount as full and final settlement, such acceptance would be termed as full and final settlement. Where the amount is offered as full and final settlement but is not accepted as a full and final settlement and a protest is made, it cannot be termed as full and final settlement.

10. In view of my foregoing discussion, it cannot be termed as a case of full and final settlement. I, therefore, allow this petition and appoint Shri G.P.

Thereja, Additional District Judge (retired) as the arbitrator to adjudicate the disputes inter se parties.

September 17, 2009
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SHIV NARAYAN DHINGRA J.