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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 446/2009

M/S SUKUMAR CHAND JAIN

..... Petitioner

Through: Mr. Sandeep Sharma, Advocate

versus

DELHI STATE INDUSTRIAL CORPORATION LTD

..... Respondent

Through: Mr. Rahul Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

18.10.2010

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This petition has been preferred under section 11(6) of the Arbitration and Conciliation Act to seek the appointment of an independent arbitrator to adjudicate the claims of the petitioner against the respondent arising out of the contract for construction of Pucca School Building at Dwarka, Sector-22, Delhi vide award letter dated 18.07.2003, which culminated in agreement No.DSIDC/EE/CD-XIII/Accts/Agreement/47 dated 25.07.2003 between the parties.

The said agreement contains arbitration clause, which empowers the Chief Engineer, DSIDC or if there is no Chief Engineer, the Administrative Head of DSIDC to adjudicate the disputes between the parties or to appoint any other person to act as arbitrator. The clause further states that no person other than a person appointed by the Chief Engineer DSIDC or the Administrative Head of the DSIDC should

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act as an arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

The petitioner invoked the arbitration agreement vide letter dated 07.03.2008 to seek reference of its claims to arbitration. Since no arbitrator was appointed, this petition has been preferred. In response, the respondent has raised two submissions. It is firstly stated that the petitioner had issued no claim certificate and there was accord and satisfaction of the contract and therefore, there is no dispute which could be referred to arbitration. It is secondly submitted that the appointment of arbitrator in any event has to be made by the Chief Engineer or Administrative Head of DSIDC and not by this Court.

Learned counsel for the respondent has referred to paragraphs 50 and 51 of the judgment of the Supreme Court in **National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.** (2009) 1 SCC 267, which read as follows:

"50. *Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by the plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether the plaintiff had made out the claim on merits and decide the*

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matter accordingly. The position will be the same even when there is a provision for arbitration.

51. *The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance."*

In view of the aforesaid position, I have to prima facie examine whether there is accord and satisfaction, and whether the plea of the petitioner that no claim certificate was issued under coercion has any merit or not.

In this case, the contention of the petitioner is that the work had been completed on 27.01.2005. It is also the petitioners contention that the payment of amount of ₹ 540,574/- was made to the petitioner after more than two years from the said date of completion of the work. He submits that even the admitted payment was not released as the respondent insisted on the issuance of no claim certificate by the petitioner in the prescribed format of the respondent. The submission of the petitioner is that the claim which is sought to be

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urged in arbitration had been raised during the currency of the work and it was not a new claim raised after the issuance of the no claim certificate for the first time.

The no claim certificate issued by the petitioner has been filed by the respondent with its reply. The same is in a type format, wherein the blanks have been filled up in hand. The petitioner withdrew the said no claim certificate by the communication dated 08.11.2007. In this communication, the petitioner stated that despite the completion of the work and also expiry of defect liability period long back in May 2007, the respondent department required the petitioner to give the no claim certificate in the language of the said certificate as prepared by the respondent and then only the payment of undisputed amount of ₹ 540,574/- would be made to the petitioner. The fact that the amount of ₹ 540,574/- was made after more than two years from the date of completion of the work was also noted in this communication. It is also stated in the said communication that the respondent department had made it clear that the payment of the admitted amount would be made if no claim certificate in the proforma prepared by the department is submitted and not otherwise.

In its reply, the respondent has denied exercising any coercion upon the petitioner. The claim of the petitioner to have issued various communications pertaining to its claim under clause 10CA and 10CC have been denied.

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In my view, the submission of the petitioner that no claim certificate was issued under coercion cannot be outrightly rejected and it requires detailed consideration after permitting the parties to lead evidence, if any, in that regard before the arbitral tribunal.

Considering the fact that the arbitration agreement requires the Chief Engineer or Administrative Head of DSIDC to appoint the arbitrator and it further goes on to state that no person shall act as an arbitrator and if no arbitrator is appointed by the Chief Engineer or Administrative Head of DSIDC, there shall be no arbitration between the parties, I direct the Chief Engineer or Administrative Head of DSIDC to make appointment of the arbitrator within 30 days from today.

The arbitral tribunal so constituted shall examine the issue with regard to accord and satisfaction before examining the claim of the petitioner on its merits. Only if it is held that the no claim certificate was hit by coercion or undue influence, the occasion to hear the claim on merits would arise.

1. It is made clear that no observation made by me in this order shall come in the way of the arbitral tribunal in determining the aforesaid issue.

Petition stands disposed of in the aforesaid terms. Dasti.

OCTOBER 18, 2010
sr


VIPIN SANGHI, J

→ Fresh IA 248/11 filed.

(Petition disposed of)