

RAJASTHAN HIGH COURT

Tolani Fabricators

Vs.

R.U. I. Development Project

Arbitration Appln. No. 25 of 2005

(Shiv Kumar Sharma, J.)

25.05.2006

ORDER

Shiv Kumar Sharma, J.

1. The core question springing up for consideration is as to whether after full and final settlement of the claim, the matter is still arbitral?

2. The applicant-firm completed the work as per contract agreement and final bill was drawn. The payment of final bill was received by the applicant-firm on January 13, 2005. However, being dissatisfied with the decision of Engineer concerned, a notice was issued by the applicant-firm on April 16, 2005 in accordance with the provisions of Clause 21.2 of Section IV (Contract Data) expressing intention to commence arbitration for settlement of the dispute. When no action was taken by the respondent, the applicant-firm filed the instant application under Section 11 of the Arbitration and Conciliation Act, 1996.

3. The respondents in their reply averred that since the applicant-firm accepted the payment without any objection/protest, they now cannot ask for arbitration.

4. I have reflected over the rival submissions canvassed before me.

5. Mr. A. K. Gupta, learned counsel for the respondents raised preliminary objection in regard to maintainability of the application. Reliance is placed on *M/s. P. K. Ramaiah and Company v. Chairman and MD, National Thermal Power Corporation*,¹ wherein their Lordships of Supreme Court indicated that in view of voluntary and unconditional written acceptance of payment in full and final settlement of the contract, subsequent claim for further amounts in respect of the same work held not an arbitrable dispute.

6. In *M/s. P. K. Ramaiah and Company v. Chairman and MD, National Thermal Power Corporation* (supra) Two-Judge Bench of Hon'ble Supreme Court

distinguished the judgement rendered by another Bench of Hon'ble Two Judges in *Union of India v. L.K. Ahuja*, ² thus (Para 8) :

"... In L, K. Ahuja and 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."

7. In *Union of India v. L. K. Ahuja* (supra) their Lordships of the Supreme Court indicated as under (Para 8) :-

"... 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 subsists, is a matter which is arbitrable."

(Underlining is mine)

8. Ratio indicated in *Union of India v. L.K. Ahuja* (supra) was approved by their Lordships of the Supreme Court in *Jayesh Engineering Works v. New India Assurance Co. Ltd.*, ³ and it propounded as under (Para 1) :-

"... In an identical situation, this Court in *Union of India v. L. K. Ahuja and Co.* held that on completion of work, the right to get money would normally arise thereafter on settlement of the final bill, the right to get further payment gets weakened but whether the claim subsists or not, is a matter which is arbitrable. When the direction was cited before the High Court, the same was distinguished by stating that it was a decision on its own facts and has no application to the case. We find that this view does not appear to be correct. Whether any amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the arbitrator. In fact, whether the contract has been fully worked out and whether the payments have actually been made in full and final settlement are questions to be considered by the arbitrator when there is a dispute regarding the same."

(Emphasis supplied)

9. Coming to the facts of the instant case as already noticed, the applicant- firm being dissatisfied with the decision of Engineer served a notice to Project Director under

Clause 21(2) and requested him to give concurrence for appointment of Arbitrator, but the request was not acceded. Whether any amount is due to be paid and how far the claim is tenable, are the matters to be considered by the Arbitrator.

10. I find no merit in the preliminary objection raised by learned counsel for the respondents. Evidently the ratio indicated in *Union of India v. L. K. Ahuja* (supra) was not considered in M/s. P. K. Ramaiah's case (supra). The observations made in L. K. Ahuja's case (supra) that "but the claim subsists and whether it does subsists, is a matter which is arbitrable" escaped notice. Doctrine of per incuriam, therefore, applies. In Court of *A. P. v. Satyanarayana Rao*,⁴ it was propounded by their Lordships of the Supreme Court that the rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same Court or superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue.

11. Following the ratio indicated in L. K. Ahuja (supra) and Jayesh Engineering Works (supra), I hold that even after full and final settlement of claim the matter is still arbitrable and it is for the arbitrator to resolve as to whether any amount is due to be paid and how far the claim is tenable.

12. For these reasons, I allow the instant application and appoint Hon'ble Justice Fateh Chand Bansal (Retired) as Sole Arbitrator to resolve the disputes between the parties. The fees and other terms and conditions shall be settled by Arbitrator himself.

Application allowed.

Cases Referred.

1. (1994 Supp (3) SCC 126)
2. (1988) 3 SCC 76: (AIR 1988 SC 1172)
3. (2000) 10 SCC 178
4. (2000) 4 SCC 262: (AIR 2000 SC 1729)