(2011) 07 DEL CK 0381

In the Delhi High Court

Case No : EX. P. 38 and 165 of 2010

Associated Builders and Contractors — APPELLANT

Vs

Sahyadri Cooperative Group Housing Society Ltd.
 Sahyadri Cooperative Group Housing Society Ltd. Vs Associated Builders and Contractors — RESPONDENT

Date of Decision : 25-07-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1, Order 21 Rule 1(1)

Citation : (2011) 07 DEL CK 0381

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Sandeep Sharma, Vikash Sharma and Anuj Malhotra, in Ex. P. 38 of 2010, C.V. Francis, Amit George, Arun Francis and Manpreet Kaur, in Ex. P. in 165 of 2010, for the Appellant; C.V. Francis, Amit George, Arun Francis and Manpreet Kaur, in Ex. P. 38 of 2010, Sandeep Sharma, Vikash Sharma, Anuj Malhotra, in Ex. P. in 165 of 2010, for the Respondent

Final Decision : Disposed Off

Judgement

Vipin Sanghi, J.—These are two execution petitions preferred in relation to and arising out of the arbitral award dated 29.08.2009 made by Mr. Justice R.P. Gupta (Retd.), the Arbitral Tribunal. While Execution Petition No. 38/2010 has been preferred by M/s Associated Builders & Contractors, who acted as the contractor, Execution Petition No. 165/2010 has been preferred by M/s Sahyadri Cooperative Group Housing Society Limited, the Cooperative Society.

2. Before I deal with the respective submissions of the parties, I may first set out a few relevant facts. The parties entered into a contract on 11.10.1995, whereunder the contractor agreed to raise construction of residential flats for the society. The work was to be completed within 18 months. The work order was issued on 01.01.1996 and the date of completion of the work was 31.07.1997. The Society terminated the contract on 01.01.1999. Disputes arose between the

parties. The society preferred O.M.P. No. 27/1999 before this Court to seek interim measures u/s 9 of the Arbitration & Conciliation Act, 1996. The Contractor claimed that its dues were outstanding. On 12.05.1999, the parties agreed that on the society depositing Rs. 39 Lakhs with the Registry of this Court, it shall be open to the society to engage another agency for completing the balance work of the dwelling units. The court also appointed a Local Commissioner to measure the work done by the contractor. It was agreed that the possession of the site shall be handed over by the contractor to the society immediately after measurement work is completed by the Local Commissioner and after the deposit of the amount of Rs. 39 Lakhs with the Registry of this Court.

3. On 29.03.2000, the said O.M.P. was taken up by the court as an application had been preferred by the society to seek appointment of another Local Commissioner. However, the society, with a view to save time, withdrew its application to seek appointment of another Local Commissioner. The court also recorded on 29.03.2000, that the society had deposited the amount of Rs. 39 Lakhs. The society was held entitled to possession of the work site. The contractor was directed to hand over the possession of the site within a week. In relation to the deposit made by the society, the court directed that "the question of entitlement to Rs. 39 Lakhs lying in deposit will be decided after the arbitration proceedings are over". The O.M.P. was disposed of by the court.

4. Subsequently, the contractor filed I.A. No. 3027/2001 for release of the amount of Rs. 39 Lakhs deposited by the society in this Court. I.A. No. 3027/2001 was taken up for consideration by the court on 04.02.2002. The court allowed the said application and directed that the amount of Rs. 39 Lakhs deposited by the society in this Court be released to the contractor on the contractor furnishing a bank guarantee to securitise the said amount and on furnishing an undertaking that the contractor shall keep the bank guarantee alive and that it will refund the amount to this Court without demur as and when required by the court.

5. I may note that the arbitration agreement was invoked by the society a few days before the passing of the said order.

6. The order dated 04.02.2002 was challenged in appeal in FAO(OS) No. 96/2002 without much success. It was further challenged before the Supreme Court by filing SLP (Civil) No. 12180/2002, again, without much success. The result was that the contractor after furnishing the bank guarantee for Rs. 39 Lakhs withdrew the said amount on 08.08.2002.

7. Before the Arbitrator, both the parties raised their claims and counter - claims.

8. The learned Arbitrator made the aforesaid award which has been accepted by both the parties. No. objections to the award were filed by either of them. The learned Arbitrator, after adjusting the claims and counter-claims, which were partially allowed, awarded a net amount of Rs. 19,74,472/- as the principal

liability in favour of the contractor and against the society. He also awarded interest on the amount of Rs. 9,74,472/- from 01.01.1999 to 11.05.1999 amounting to Rs. 31,671/- The amount of Rs. 10 lacs (the refundable security) was held payable on 01.01.2000 and, therefore, was not to carry interest from 01.01.1999.

9. Thus the total amount payable under the award to the contractor was quantified as Rs. 20,06,143/-. The learned Arbitrator also held that "the future rights between the parties after 11.05.1999 are determinable by and within the jurisdiction of the High Court". He also held that as to "what are the rights of the parties in respect of the amount deposited and disbursed under the order of the High Court is not to be decided in these proceedings but remains within the jurisdiction of the High Court". The ultimate and effective relief granted in the award reads as follows:

In view of my findings on above issues, I pass an Award that the Contractor is entitled to recover from the Society a sum of Rs. 20,06,143/- including interest upto 11.5.1999 when the order of deposit of Rs. 39 Lacs by the Society was passed by the High Court and Society deposited as per those orders. Consequential effect of the deposit thereof and rights of the parties thereunder are within the jurisdiction of the Hon''ble High Court to decide.

10. The contractor in its execution petition has claimed that the amount payable as on 12.05.1999 was Rs. 20,06,143/-. The contractor further claims interest @ 18% from 12.05.1999 till 01.02.2010 (the date of filing of the execution petition) on the amount of Rs. 20,06,143/- which comes to Rs. 38,91,886/-. Thus, the total amount claimed is Rs. 58,88,029/-. After granting adjustment of Rs. 39 lakhs received by the contractor, in its execution petition the contractor claims Rs. 19,88,029/-. The contractor also claims bank guarantee charges from 08.08.2002 till 07.08.2010 quantified at Rs. 3,28,233/-. Thus, final amount claimed in the execution is Rs. 23,16,262/- along with future interest @ 10% per annum from 02.02.2010 on the amount of Rs. 23,16,262/-.

11. Mr. Sharma, learned Counsel for the contractor, places reliance on P.S.L. Ramanathan Chettiar and Others Vs. O. Rm. P. Rm. Ramanathan Chettiar, , to contend that the deposit by the society in this Court and the withdrawal of the said amount by the contractor from this Court does not tantamount to payment under the decree, and the withdrawal of such amount by the decree holder upon furnishing of security would not prevent the accruing of interest in favour of the decree holder. Reliance is placed on the following extracts from this decision:

12. On principle, it appears to us that the facts of a judgment-debtor''s depositing a sum in court to purchase peace by way of stay of execution of the decree on terms that the decree-holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. He can if he likes take the money out in terms of the order; but so long as he does not do it, there is nothing to prevent the judgment-debtor from taking it out by furnishing other

security, say, of immovable property, if the court allows him to do so and on his losing the appeal putting the decretal amount in court in terms of Order 21 Rule 1 CPC in satisfaction of the decree.

13. The real effect of deposit of money in court as was done in this case is to put the money beyond the reach of the parties pending the disposal of the appeal. The decree-holder could only take it out on furnishing security which means that the payment was not in satisfaction of the decree and the security could be proceeded against by the judgment-debtor in case of his success in the appeal. Pending the determination of the same, it was beyond the reach of the judgment-debtor.

12. He also places reliance on an order passed by the Division Bench of this Court in Delhi Development Authority v. Saraswati Construction & Company in EFA(OS) No. 01/2007 dated 22.01.2009, wherein the Division Bench referred to and relied upon the judgment of the Supreme Court in P.S.L. Ramanathan Chettiar (supra) and other decisions and observed as follows:

The principal which emerges is that where a party chooses to challenge the decree before the appellate forum and the appeal court grants conditional stay, the amount deposited was only keep the portion of the decree in abeyance and the amount so deposited was not akin to a tender of the amount to the decree holder. In such a situation, the interest would not stop running. If the deposit amount in court has earned some interest, they would enure to the benefit of the judgment debtor.

13. He also places reliance on the judgment of this Court in Engineering Projects (India) Ltd. Vs. Arvind Construction Company Ltd. wherein the Division Bench of this Court, inter alia, observed as follows:

17. ...Sub-rule 1 of Rule 1 of Order 21 of the said Code provides for payment to be made under the decree and the manner of the same. A deposit in Court has to be before the Court, which has to execute the decree. The executing court is the court which passed the decree and not the appellate court. Clause (b) refers to payment out of court and the latter provision of the said clause cannot be read de hors the original provision "out of court". The object of sub-rule 1 of Rule 1 of Order 21 of the said Code is only where money is paid unconditionally in the manners provided, such payment should be treated towards the decree and that is when interest would stop as per Clauses 4 & 5 of Rule 1 of Order 21 of the said Code. The significant aspect is that these are unconditional payments towards the decree and not payments made partial or in whole for obtaining stay of the decree. We may notice that the amount has been released to the Respondent on the condition of furnishing a bank guarantee and the Respondent has incurred a large amount as costs towards furnishing bank guarantee in terms of averments made in the application. This is, thus, not payment towards the decree.

18. The Respondent cannot charge the bank guarantee charges which bank guarantee was furnished to withdraw the amount but the payment cannot be

construed as a payment towards the decree. Thus, the amounts as specified in the decree would continue to earn interest till the decision in the matter and only at the stage of the decision in appeal would the question arise of adjustments of the amount of Rs. 1.5 crore towards the amount of principal and interest due thereon since at that stage on dismissal of the appeal, the bank guarantee would be discharged and the amount would be unconditionally available to the Respondent.

14. On the other hand, the society in its execution petition claims Rs. 39 Lakhs along with interest @ 18% per annum on the said amount from 08.08.2002 (the date on which the contractor withdrew the amount of Rs. 39 Lakhs from this Court) up to the date of filing of the execution petition, i.e. 25.05.2010. After granting adjustment of the amount claimed by the contractor of Rs. 58,88,029/-, the society claims recovery of Rs. 34,85,167/- from the contractor.

15. Learned Counsel for the society places reliance on Union of India (UOI) Vs. Raman Iron Foundry, , to submit that until the making of the award there was No. debt or liability on the society to make any payment. He submits that in case this Court holds that the contractor is entitled to any interest, the same principle has to apply to the society as well. He relies on Indian Hume Pipe Co. Ltd. Vs. State of Rajasthan, , wherein the Supreme Court, inter alia, observed:

If the Appellant was not entitled to claim interest then how the Respondent State would get powers or competence to receive it. Same doctrine should have been made applicable for the Respondent''s case also. Two persons, similarly situated, could not have been treated differently as the same may amount to discrimination.

16. He also relies on a decision of this Court in Sudha Gupta Vs. BSES Rajdhani Power Ltd. wherein the court while quashing the demand of the Respondent BSES Rajdhani Power Limited and granting refund to the consumer had directed the said refund with 7% interest.

17. The issue which arise for consideration is as to which of the two parties is liable to pay to the other any amount under the award, and the second issue is about the quantification of the amount.

18. The decisions relied upon by Mr. Sharma, learned Counsel for the Petitioner, in my view, have absolutely No. application in the present fact situation. Those are all cases, where the liability had already been adjudicated upon and, consequently, there was a debt which was due and recoverable. However, that is not the position in the case in hand. When the Contractors received the amount of Rs. 39 lacs, there was No. ascertained liability of the Society. The principle stated by the Supreme Court in P.S.L. Ramanathan Chettiar and Ors. (supra), which has been followed in Engineering Projects (India) Ltd. (supra), and Saraswati Construction & Company (supra), has No. application in the present fact situation. The contention of Mr. Sharma that the Contractor should continue to earn interest on the subsequently awarded amount, even after the date of

receipt of the amount of Rs. 39 lacs cannot be accepted. If the amount of Rs. 39 lacs had continued to remain in the deposit in this Court, the position would have been different. The Contractor would have, in that situation, continued to earn interest on the awarded amount till the date of receipt by him of the awarded amount.

19. The Society deposited the amount of Rs. 39 lacs in this Court with a view to ensure that its construction project is not unduly held up, as the contractor was retaining possession of the project. u/s 9 of the Act, upon making out a deserving case, the Contractor could have asked for security from the Society of the amount in dispute in the arbitration. There was No. admitted liability of the Society and, consequently, No. direction was passed by the Court to release any amount, whatsoever, to the Contractor unconditionally. As aforesaid, the amount was deposited by the Society in pursuance of the order dated 12.05.1999 some time after 12.05.1999 and before 29.03.2000.

20. Without getting the extent of the Society''s liability determined, the Contractor on its own, and at its own peril, moved I.A. No. 3027/2001 for release of the entire amount of Rs. 39 lacs lying deposited in this Court. At the Contractors'' behest, that application was allowed and the amount of Rs. 39 lacs was directed to be released upon furnishing of a bank guarantee by the Contractor.

21. It has been found by the learned Arbitrator that the Contractor was entitled to payment of Rs. 9,74,472/- on 01.01.1999, i.e. the date of termination of the contract. The Contractor was also entitled to payment of Rs. 10 lacs after one year, i.e. on 01.01.2000. The learned arbitrator takes note of the fact that the amount of Rs. 39 lacs was deposited by the Society under the order of this Court dated 12.05.1999 and the amount was released under the subsequent order dated 04.02.2002.

22. The learned arbitrator has awarded interest on the amount of Rs. 9,74,472/- upto 11.05.1999, i.e. the date of the passing of the order by this Court requiring the Society to deposit the amount of Rs. 39 lacs. He has also held that interest for the subsequent period is a matter within the jurisdiction of this Court. As aforesaid, while arriving at the figure of Rs. 20,06,143/-, the learned arbitrator has computed interest on the amount of Rs. 9,74,472/- from 01.01.1999 to 11.05.1999 @ 9% p.a., i.e. Rs. 31,671/-.

23. In my view, the Contractor would be entitled to interest at the same rate, i.e. 9% p.a. on the amount of Rs. 9,74,472/- from 12.05.1999 till the date of withdrawal of Rs. 39 lacs by the Contractor from this Court. On the amount of Rs. 10 lacs (security deposit), interest would accrue from 01.01.2000 till the date of withdrawal (i.e. 08.08.2002) of Rs. 39 lacs by the Contractor. The said amounts add up as follows:

i)

Interest on Rs.9,74,472/- @ 9% p.a. from 12.05.1999 to 08.08.2002 -

Rs.2,84,252/-

ii)

Interest on Rs.10 lacs @ 9% p.a. from 01.01.2000 to 08.08.2002 -

Rs.2,34,473/-

Total

Rs.5,18,725/-

24. The total amount recoverable by the Contractor as on 08.08.2002 was Rs. 20,06,143/- plus Rs. 5,18,725/- is equal to Rs. 25,24,868/-. The amount, in fact, released to the Contractor as on 08.08.2002 was Rs. 39 lacs. Therefore, the excess amount recovered by the Contractor as on 08.08.2002 was Rs. 39 lacs minus Rs. 25,24,868/- = Rs. 13,75,732/-.

25. Since the arbitrator has granted interest @ 9% on the claims of the Contractor, in my view, it would be fair and equitable if the same rate of interest is granted on the amount to be refunded to the Society from 08.08.2002 onwards till the amount is so refunded.

26. The Contractor would, however, be entitled to partial payment towards the cost of maintaining the bank guarantee. On the date on which the Contractor received the payment, i.e. 08.08.2002, the Contractor was entitled to receive Rs. 25,24,868/-, as aforesaid. Therefore, the bank guarantee charges incurred by the Contractor after 08.08.2002 in respect of that amount i.e. Rs. 25,24,868/- are recoverable by the Contractor. He would, however, not be entitled to recover the bank guarantee charges as pertain to the amount of Rs. 13,75,732/-, to which the Contractor was, in fact, not entitled.

27. The Contractor has claimed bank guarantee charges of Rs. 3,28,233/-. However, No. documents have been filed on record to substantiate the said claim. The Contractor is directed to place on record the documents evidencing the incurring of expenditure of renewal of bank guarantee and also to file alongwith an additional affidavit, a computation of the said charges for the amount of Rs. 25,24,868/- within two weeks.

28. So far as the entitlement towards the interest accrued on the amount of Rs. 39 lacs, from the date of its deposit in this Court, till the date of its withdrawal by the Contractor is concerned, the said amount, in my view, certainly cannot be claimed by the Contractor. The said amount has to be released in favour of the Society, as the Contractor has been fully compensated by grant of interest for the period for which the Contractor was found to be so entitled. I, therefore, direct as follows:

i) The Society shall be entitled to withdraw the amount of interest accrued on the deposit of Rs. 39 lacs from the date of its deposit till the date of its withdrawal by the Contractor, which is lying in this Court, forthwith;

ii) The Contractor shall pay to the Society the amount of Rs. 13,75,732/- alongwith interest @ 9% p.a. from 08.08.2002 till the date of its payment;

iii) The Contractor shall be entitled to adjustment from the aforesaid amount stated in para (ii) above, the bank guarantee charges incurred in relation to the bank guarantee amount of Rs. 25,24,868/- for keeping the bank guarantee alive after 08.08.2002 till date;

iv) In case the Contractor does not pay the amount, as aforesaid, within three weeks, the bank guarantee furnished by the Contractor shall be encashed by the Registrar General of this Court for the amount of Rs. 13,75,732/- plus 9% interest thereon from 08.08.2002 till the date of encashment, and the proceeds shall be forthwith released in favour of the Society.

29. List the matter for compliance on 26.08.2011.

