

(2013) 01 DEL CK 0315
In the Delhi High Court
Case No : FAO (OS) No. 608 of 2011

Bhandari Engineers and Builders Pvt. Ltd.	APPELLANT
Vs	
Maharia-Raj J.V. and Others	RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Citation : (2013) 2 ARBLR 469 : (2013) 134 DRJ 440

Hon'ble Judges : Sanjay Kishan Kaul, J;Indermeet Kaur, J

Bench : Division Bench

Advocate : S.S. Jauhar, for the Appellant; Ravi Gupta, with Mr. Mukesh Kumar and Ms. Meenakshi Sood, Advocate for R-4/NHAI, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—M/s. MAHARIA-Raj-JV and another (hereinafter referred to as "MRJV") was awarded a contract of six laning of the National Highway NH-1 from Km. 44.30 to Km 66.00 in the State of Haryana in terms of a contract dated 31.5.2001 entered into between National Highways Authority of India (NHAI-hereinafter referred to as the "respondent no. 4") and MRJV. M/s. Bhandari Engineering & Builders Pvt. Ltd. (BEBPL-hereinafter referred to as the appellant) was the sub-contractor of MRJV. This was in terms of the sub contract dated 27.05.2002 and in terms of clause 3 all provisions of the principal contract (dated 31.05.2001) would mutatis mutandis apply to the sub contract. Pursuant to the contract dated 31.5.2001 admittedly mobilization advance was released by respondent no. 4 to MRJV and equipment was also disbursed to it for the execution of the works. Appellant claims himself to be the owner of the batching plant used in the execution of the said contract.

2. In the course of the execution of the work, it transpired that the bank guarantee advanced by MRJV was forged and respondent no. 4 accordingly terminated the contract. Clause 61.1 of the terms of the contract was relied upon by respondent no. 4 to take over the materials lying at the site including the plant, equipment, temporary works and other works; contention of respondent

no. 4 being that the batching plant and other equipments used for the execution of the contract are deemed to be the property of respondent no. 4; the submission being that it was from the mobilization advance, advanced by respondent no. 4 to the principal contractor/MRJV that the said batching plant had been purchased; and a further submission that respondent no. 4 has yet to recover more than Rs. 14 crores from the MRJV against advances made to it.

3. Disputes arose between MRJV and the appellant and the matter was referred to an Arbitral Tribunal comprising of three members. The Arbitral Tribunal passed an Award dated 10.01.2006. Objections were filed against the said Award by MRJV u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") numbered as OMP No. 220/2006. Respondent no. 4 was admittedly not a party in this pending OMP but he had moved an application (IA No. 1668/2010) before the learned single Judge seeking to set up his stand.

4. The submission of learned counsel for the appellant is that in terms of the Award dated 10.01.2006 the appellant had been granted a restoration of the concrete batching plant and the two transit mixtures which settles this dispute now set up by respondent no. 4; this Arbitral Award has since become final and has conclusively decided that the appellant being the owner of this batching plant was entitled to be reimbursed and accordingly adjustments were permitted and the contention of MRVJ that this batching plant had in fact been given on hire to the appellant had been negated.

5. The submission of learned counsel for the appellant is that the learned single Judge has failed to appreciate the controversy in its correct perspective and that he has wrongly interpreted Clause 61.1 of the contract between the parties which already stood appreciated by the Division Bench of this court in the matter of K.P.M. Builders on 16.9.2005 and further fortified by the order dated 25.02.2010 of the Supreme Court. The submission being that in that case also, the stand of NHAJ was that it has a concern only with the machinery and equipment lying at the site and not outside the site. This was also noted by the Apex Court on 25.02.2010 in SLP(C) No. No. 3300-3301/2009 while disposing of the appeal filed by NHAJ against this order of the Division Bench dated 25.02.2010. Submission being that the learned single Judge has disregarded all these submissions which had been brought to the fore by the appellant and has wrongly interpreted the provisions of Clause 61.1 when the Apex Court had already had an occasion to deal with this Clause and had negated the arguments propounded by respondent no. 4 and which have now been accepted by the learned single Judge.

6. Our attention has also been drawn to the order dated 15.4.2005 in OMP No. 119/2005 wherein a Bench of this court on an application made by respondent no. 4 (in a dispute between the respondent no. 4 and MRVJ relating to the same contract) had restrained MRVJ from creating any third party interest in the "plant, equipment, machinery, temporary works and other works existing at the site i.e. stretch of National Highway from Km. 44.300 to Km 66.00 of NH-1 in the

State of Haryana". Submission being that even at that stage the concern of respondent no. 4 was only with the plant, equipment and machinery lying at the site and respondent no. 4 had never claimed any interest in the machinery lying away from the site i.e. at the camp. Further submission being that in the present case, the batching plant and the concrete mixtures are lying at the camp which is more than seven kilometers away from the actual site.

7. Arguments have been countered. Learned senior counsel for respondent no. 4 points out that before the Apex Court only a concession had been granted by the NHA where it had restricted its claim only to the machineries which were lying at the work site and it had not claimed any machinery outside the work site and this concession cannot now be read adversely against him. This submission of the learned senior counsel for the respondent is evident from a reading of para 7 of the order of the Apex Court.

8. Facts emanating show that initially the contract was between respondent no. 4 and MRVJ; the principal contractor was MRVJ. The appellant before this Court is the sub-contractor. The sub-contractor has only stepped into the shoes of the original contractor and he cannot have any better right than the principal contractor himself. This has also not been canvassed before us.

9. To appreciate this controversy, relevant would it be to first extract Clause 61.1 which reads as under:

61. Property

61.1 All materials on the site, plant, equipment temporary works and works are deemed to be the property of the employer, if the contract is terminated because of a contractor's default.

10. Clause 61.1 which was part of the contract dated 31.5.2001 between respondent no. 4 and MRVJ was binding upon the appellant. This clause has to be read in juxtaposition with the definition of the various words appearing in Clause 61.1 i.e. "site", "plant", "equipment", "temporary works" and "works"; which are as follows:

Site - The site is the area defined as such in the Contract Data.

Plant - Plant is an integral part of the works which is to have a mechanical, electrical, electronic or chemical or biological function.

Equipment - The equipment is the Contractor's machinery and vehicles brought temporarily to the Site to construct the works.

Temporary work - Temporary works are works designed, constructed, installed, and removed by the Contractor which are needed for construction or installation of the Works.

Works - The works are what the Contract requires the Contractor to construct, install, and turn over to the Employer, as defined in the Contract Data.

11. Thus all the materials on the site together with the plant, equipment, temporary works and the works are deemed to be the property of the employer (NHAI) and this was in the contingency when the contract was terminated because of the contractor's default.

12. This Court while hearing this petition on 04.01.2012 has noted that undisputedly the contract between respondent no. 4 and the contractor stood terminated because of the contractor's default and consequently the contract of the sub-contractor/appellant also stood terminated and Clause 61.1 stood attracted.

13. A plain reading of this Clause along with the definitions as culled out from the contract show that the plant, equipment, temporary works and works, by a deeming fiction would be the property of respondent no. 4 which also included the materials outside the physical site. This is clear from the punctuation used in the said clause which is further fortified by the definition given to each of these words. Each word has a separate connotation and by a reading of these definitions along with clause 61.1 of the contract it is clear that it is not only the materials which were lying at the site but all equipments, plant, temporary works and works which have been used by the contractor in the course of the execution of the contract, in the case of the termination of the contract on the contractor's default, by the deeming fiction would be the property of respondent no. 4. Merely because the camp office was located 1.4 Km. away from the actual physical site would not take away the intent and meaning of Clause 61.1 which has been appreciated by the single Judge in its correct perspective. It has rightly been construed that after the words "all materials on the site" the punctuation by a comma was meant to indicate that the materials on the site are distinct and separate from the plant, equipment, temporary works and works which are located even outside the physical area of the contract but were nevertheless being used for the execution of the contract.

14. Learned counsel for the respondent has drawn attention of this court to a letter dated 29.4.2002 written by the principal contractor/MRVJ wherein it has been admitted that out of the mobilization advance advanced by respondent no. 4 a sum of Rs. 22 lacs has been spent on the purchase of the concrete batching plant. Attention has also been drawn to the averments made by the appellant in OMP No. 316/2003 which was a petition filed by the appellant u/s 9 of the said Act. Para 12 and the prayer clause of the said petition are relevant. The prayer was only restricted to the preparation of an inventory of the equipments lying at the site; there was never a claim for the equipments lying at the camp. These submissions have not been disputed by the learned counsel for the appellant.

15. The submission of the appellant that the orders passed in a connected writ petition by the Division Bench and by the Apex Court in the matter of K.P.M. Builder would apply to the facts of the instant case as well is an incorrect submission. Before the Apex Court a concession has been given by respondent no. 4 that they were only making a claim of the material at site and not of the

material outside the site. This concession made by the respondent no. 4 cannot be read against him especially as the whole issue now boils down to the interpretation of Clause 61.1 which has to be read along with the submission of the said respondent that it is making a specific claim of the batching plant and other equipments lying at the camp office.

16. Relevant would it be to state that the status quo order passed by the single Judge on 17.6.2009 had been passed on the application of the appellant where admittedly respondent no. 4 was not a party; this was on the application I.A. No. 7932/2009. This was in pending proceedings u/s 34 of the said Act where the Award dated 10.01.2006 was under challenge. Admittedly, the NHAI/respondent no. 4 was not a party in those proceedings. It was never heard at the time when that order was passed. In the course of these proceedings it had sought impleadment and the impugned order has been passed on its application (I.A. No. 1668/2010) seeking vacation of the interim status quo orders dated 17.6.2009.

17. Learned single Judge on merits had rightly interpreted Clause 61.1. It was not only the material lying at the site but all plant, equipment, temporary works and other works which were found even outside the physical site and (in the present case the camp office was located at about 1.4 Km away which fact finding was never disputed even before the learned single Judge) admittedly this batching plant and machinery had been set up by the contractor and the sub-contractor only for the execution of the present contract and the money having been utilized out of the mobilization advance, advanced by respondent no. 4, the learned single Judge had rightly concluded that this was the property of respondent no. 4. The ex-parte interim order of status quo in favour of the appellant stood rightly vacated. Impugned order calls for no interference. Appeal is without any merit. Dismissed.