

(1976) 05 DEL CK 0021

In the Delhi High Court

Case No : Original Miscellaneous Petition Appeal No. 72 of 1975

Gem Plastic Industries

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-05-1976

Acts Referred:

Citation : AIR 1977 Delhi 30 : (1976) ILR Delhi 404

Hon'ble Judges : Yogeshwar Dayal, J

Bench : Single Bench

Advocate : D.C. Singhanian, S.K. Khurana and J.L. Saxena, for the Appellant;

Judgement

Yogeshwar Dayal, J.

(1) Gem Plastic Industries, the applicants herein, have filed the present application u/s 41 read with Schedule 2 of the Arbitration Act and Order 39. rules 1 and 2 read with Section 151 of the CPC for an ad interim injunction against the non-applicant respondents restraining them from recovering/withholding/appropriating/adjusting and/or in any manner giving effect to their illegal threat contained in their letter dated March 5. 1975 and/or enforcing the illegal recovery of Rs. 75,530 as contained in their letters, in any manner whatsoever.

(2) The application arises in the following circumstances:

(3) The applicants have filed a petition under Sections 32 and 33 of the Arbitration Act, inter alia, challenging the existence or validity of the arbitration agreement said to be contained in the alleged acceptance of tender No. BP-4/2059-J/516/PAOD dated July 5, 1973 on the ground that the said acceptance of tender never created a valid binding contract between the parties. It is not necessary to give the grounds on which the existence of the agreement is being challenged. Suffice it to say that the respondent non-applicants are claiming Rs. 75,530 from the petitioner-applicants for breach of the aforesaid acceptance of tender allegedly committed by the applicants.

(4) The non-applicant respondents are opposing the main petition tiled under Sections 32 and 33 of the Arbitration Act and submit that there was a valid and binding contract between the parties and since they have suffered the alleged damage, the paying authority has withheld the entire amount of recovery against the demand for Rs. 75,530.00 . It is submitted that the action taken to withhold the Government dues is on the basis of administrative procedure laid down from time to time.

(5) After the admission of the main petition under Sections 32 and 33 of the Arbitration Act, the present application came up for admission before Safeer. .J. and the learned Judge while admitting the petition and issuing notice of the application (1.A. 1003 of 1975) to the respondent non-applicants, also passed the following ad interim order:

"".....TILL that date respondents will not recover the sum of Rs. 75.000"- from the applicants by adjusting or withholding any payment due on account of other supplies made by the applicants."

By order dated May 23, 1975, the aforesaid interim order dated April 23, 1975. was directed to remain in force.

(6) After the reply was filed to this application, it was submitted by counsel for the respondents that the ad interim order not to "recover the sum of Rs.....from the applicants by..... withholding any payment due on account other supplies made by the applicants" virtually amounts to an order to pay the sums due on account of the other pending bills and such a positive injunction cannot be issued in the present proceedings.

(7) Learned counsel for the applicants, however, submitted that such an order has been granted by this Court in numerous cases and is in accord with the judgment of the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, and, Therefore, at this stage, the order of learned single judge may be made absolute till the disposal of the main petition under Sections 32 and 33 of the Arbitration Act.

(8) It is true that the claim of the respondent non-applicants for damages alleged by the respondent has not yet become a "sum due" from the applicants. Though I have normally been passing the order in such matters by restraining the respondents from appropriating such sums from the other pending bills of the contracts, learned counsel for the applicants submitted that the practice of this Court is to order staying recovery of such sums including withholding of any payment due to such applicants from the other, pending bills". In this connection, the applicants cited before me ad-interim orders of this Court passed by Jagjit Singh and Prithvi Raj. JJ. in Civil Writ No. 506-W/74, dated May 7. 1974 and by Avadh behari, J. in Civil Writ Nos. 70 and 72 or 1975 dated February 5, 1975 and February 17, 1975 respectively. The learned counsel also cited before me the decision of F. S. Gill, J. dated February 20. 1976 while deciding I.A. 1735 of 1975 in Omp 107 of 1975 (M/s. Southern Alloy Foundries (P) Ltd. v. Union of

India etc.) (2). It was pointed Out by learned counsel for the applicant: that the decision of F. S. dill. J. was a similar application for ad interim relief during the pendency of similar petition under sections 32 and 33 of the Arbitration Act, wherein the learned Judge had restrained the respondents from "appropriating, adjusting, withholding or in any other way recovering the sum of Rs. 31.071.88 against the demand made in the letter dated 4th. July, 1975".

(9) It will be noticed that the learned Judges of this Court have been passing ad interim orders in view of the decision of Avadh Behari. J. in Air Foam Industries Pvt. Ltd. Vs. Union of India, as confirmed in appeal by the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, .

(10) For purposes of appreciating as to what relief may be granted in the present case. the best guide is the judgment of the Supreme Court in the case of Union of India (UOI) Vs. Raman Iron Foundry, . In this case at page 1268 of the report, the order of Avadh Behari, J. from which the appeal was taken, has been reproduced as under:

"THE learned Judge accordingly by an order dated 15th November, 1972, allowed both the interim applications and issued an interim injunction restraining the appellant "from effecting recovery of the amounts claimed to be due from the other pending bills" of the respondent".

while interpreting this order, Bhagwati, J. speaking for the Supreme Court, observed at page 1269 of the report, as under:

"BUT here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo motu, the damages claimed by it from out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondent. The appellant can still refuse to pay such amounts if it thinks it has a valid defense and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decider whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim".

The ratio of this decision of the Supreme Court came up for consideration before a full Bench of this Court in Mohan Meakin Breweries Limited Vs. Union of India and Others, and the full Bench observed as under:

"THE ratio of the decision of the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, is (1) that so far as the sums due to the contractor under

other contracts are concerned, the Union of India can refuse to pay such amounts if it thinks that it has a valid defense, and if it does so, the only remedy open to the contractor would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the Union of India is liable to pay such amounts to the contractor or not, and (2) that Clause 18 of the terms and conditions of the contract applies only where the Union of India, as purchaser has a claim against the contractor for a sum presently due and payable by the contractor, a mere claim by the Union of India for damages for breach of contract is not a claim for a sum presently due and payable. and that the "Union of India had, Therefore, no right or authority under Clause 18 to appropriate the amounts of other pending bills of the contractor in or towards satisfaction of its claim for damages against the contractor.the Union of India had no right under Clause 18 of the Terms and conditions of the Contract to adjust or recover the amount claimed by it for breach of contract from out of the security amount or the other pending or future bills of the petitioner company, and the Union of India is to be restrained from in any manner adjusting or recovering the amount from out of the security amount and the pending or future bills of the petitioner company".

It will be noticed that the full Bench while interpreting the Supreme Court judgment restricted the relief to merely restraining "from in any manner adjusting or recovering the amount from out of the security amount and the pending or future bills of the petitioner company". No relief was granted by means of an injunction against making recovery by way of "withholding" any payment due on account of other bills.

(11) Considerable light is also thrown on this aspect of the matter by decision of the Division Bench consisting of Hon'ble the Chief Justice and Deshpande J, J. in Aqeel Ahmed v. The Director General of Supplies and Disposals in C.M. 458-W/74 in C.W. 329 of 1974(5). In this case on a similar application, the Division Bench has passed the following" order dated March 27, 1974:

"THERE shall be injunction restraining the respondents, their servants, agents and subordinates from in any manner withholding, adjusting and/or recovering from/out of the pending bills of the petitioner, the amount of Rs. 53,229.00 till the disposal of the writ petition".

Later on, an application (C.M. 1293-W/74) was filed by the respondent for clarifying the aforesaid order dated March 27, 1974. In this application, it was submitted that in view of the aforesaid stay order passed by the Division Bench, the petitioner herein had applied to the Chief Pay & Accounts Officer to release the payments due to the petitioner on account of the other bills and that this application was meant to seek clarification of the stay order dated March 27, 1974. When this application came up before the same Division Bench, the Division Bench passed the following order dated September 6" 1974:

"IN view of the decision of the Supreme Court in Union of India (UOI) Vs. Raman

Iron Foundry, , we direct that the word "withholding" in the order passed by us on March 27, 1974, be deleted. C.M. is disposed of accordingly."

This is a clear instance where the Division Bench of this Court after considering the judgment of the Supreme Court (supra) modified the injunction by deleting the word "withholding" from the injunction order, as above.

(12) UNFORTUNATELY. the decision of" the full Bench mentioned above was not available when the aforesaid orders on interlocutory applications were passed by Avadh Behari. J. or by the Division Bench of Jagit Singh and Prithvi Raj, JJ. It also docs not appear from the decisions, whether such an injunction could be issued, was at all canvassed before the learned Judges. The decision of the Hon"ble the Chief Justice and Deshpande, J. in Aqeel Ahmed"s ease is a later decision.

(13) The question whether injunction by way of withholding the payment of other bills could be issued came up for consideration before Gill, J. in M/s. Southern Alloy Foundries (P) Ltd. v. Union of India etc. (I.A. 1735 of 1975 in Omp 107 of 1975. supra). The learned Judge relying upon the decision of Avadh Behari. J. in Air Foam Industries Pvt. Ltd. Vs. Union of India, was pleased to issue injunction by way of withholding the payment from other bills of the petitioner. Unfortunately, the ratio decidendi of the decision of the Supreme Court as interpreted in the aforesaid full Bench decision of this Court or the later decision of the Division Bench in Aqeel Ahmed"s case was not brought to the notice of the learned Judge.

(14) Sitting as a single Judge, I am bound by the decision of the full Bench and the Division Bench as opposed to the decision of the learned single Judges of this Court.

(15) Learned counsel for the applicants, in tins situation, suggested that the matter may be referred to larger Bench for consideration in view of the conflict in the decisions of Avadh Behari. J. and Gill. J. on the one hand and the full Bench and the Division Bench on the other. I am afraid, I cannot agree with this submission. The full Bench and the Division Bench judgments came after the orders of Avadh Behari, J. whereas before Gill, J, unfortunately, the full Bench and the Division Bench decisions do not appear to have been cited.

(16) If an injunction for restraining recovery by way of "withholding" other pending bills is issued, it virtually amounts to a direction to pay the other pending bills which, are not the subject-matter of the present petition under Sections 32 and 33 of the Arbitration. Act and no direction of the kind prayed can be made with respect to the other pending bills which are not the subject-matter of the present petition.

(17) The court has power u/s 41 of the Arbitration Act, during the pendency of petition under sections 32 and 33 of the Arbitration Act, to issue interim injunction but such interim injunction can only be "for the purpose of, and in

relation to proceedings" pending before the court. The proceedings pending before the court are merely for challenging the existence of a particular agreement as being non-existent and, Therefore, the petitioner challenges his non-liability to pay any damages for the alleged breach thereof. Therefore, the only thing which can be said to be the subject- matter of the present petition is the right of the respondents to recover the amount of damages from other pending or future bills of the petitioner. Whether the respondent non-applicants are liable to pay the sums due as against other pending or future bills to the petitioner is not the subject-matter of dispute in the present petition and. Therefore, even if it be construed that the injunction prayed for is of a "negative content" it is beyond the purpose of the proceedings pending in this Court. In the decision of Avadh Behari, J. in Air Foam Industries Pvt. Ltd. Vs. Union of India, , as confirmed in appeal by the Supreme Court, the respondents therein were relying upon clause 18 of the contract for their right to recover damages by appropriating "any sum then due or which at any time thereafter may become due to the contractor under the contract" or under any other contract. There is no such right being urged on behalf of the respondents. If an amount is due to the contractor on account of other bills, the payment thereof cannot be effected by such interlocutory injunction as prayed for. The contractor can recover it only by proceedings for recovery in appropriate forum where it would be decided whether the respondents are liable to pay such amounts to the contractor or not. In the result, ad interim order of Safeer, J. in the present case, is accordingly modified and it is ordered that the respondent non-applicants will be restrained from in any manner appropriating/adjusting or recovering the amount of the alleged claim of Rs. 75,530.00 from the other pending or future bills of the applicants till adjudication of the alleged claim by Arbitrator or by other appropriate proceedings before a court or till the decision of Omp 72 of 1975, whichever is earlier. There will be no order as to costs.