
(2012) 02 DEL CK 0568
In the Delhi High Court
Case No : FAO (OS) 143 of 2010

K.K. Cooperative Group Housing Society Ltd.

APPELLANT

Vs

Goel Associates

RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33, 8, 9
Contract Act, 1872 — Section 70

Citation : (2012) 1 ARBLR 367 : (2012) 128 DRJ 310

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Yunus Malik, for the Appellant; D.R. Bhatia, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The appellant society entered into an Agreement with the respondent on 07.05.1988 in terms whereof the services of the respondent were engaged to carry out the work of development of land allotted to the society and construction of different types of houses including providing electrical and sanitary installations and other services. The services as an Architect to be provided by the respondent were detailed in para 1 of the Agreement while the fees and reimbursement was provided in para 2 therein. The drawings were to be prepared by the respondent. The relevant clauses are extracted hereunder:

"1. ARCHITECTS" SERVICES : The Architects will render all services including helping in :- the land allocation at PAPANKALA, New Delhi, arrangement of loan, sanctioning of quotas of Steel, Cement, G.I. Pipes, Bricks, etc. and all services from the drawing of the site-plan, sketches, etc. to the obtaining of completion certificate, and the appointment of various contractors and sub-contractors which will be wholly choice of the Managing Committee of the Society (Employer). The Architects shall take the Employer's instructions and carry out all work such as survey of land, preparation of Master Plan, preparation of sketch designs for the houses and, on approval, preparation and submission of plans for the sanction of

the local authorities, preparation of architectural, structural drawings with details and drawings of utility services, and specifications for all works, preparation of tenders documents in consultation with the Employer for Civil, Electricals, Sanitary works, advising on them, checking Bill of Contractors, certifying payments, carrying out periodical inspections of the works and attending, on request the Society's meeting.

2. FEES & REIMBURSEMENT : The Employer agree to pay the Architects as remuneration for the professional services, as detailed in para 1 above to be rendered by the Architects a fee of 2.75% on the total cost of the executed works (Excluding the cost of land).

2. The Agreement dated 07.05.1988 contained an arbitration clause no. 8 on the second page of the agreement, which reads as under:

8. ARBITRATION : In the event of any dispute, difference of question arising out of or touching or concerning this agreement or execution of the said works, the same shall be referred to the arbitration of two persons, one each appointed by the parties, who in turn may appoint an umpire, if required.

3. There is a significance of the page number on which the arbitration clause is typed as the appellant has denied the terms of the agreement including specifically the arbitration clause and during the course of hearing, learned counsel for the appellant pleaded that while page 3 bore the signatures of the Secretary of the appellant society, the signatures on pages 1 and 2 were not of the Secretary allegedly being short signatures. The other fact to be noticed is that though the fee as per clause 2 was fixed, the payment was to be made in instalments as per clause 6 of the Agreement at different stages of the project.

4. The case of the respondent is that the appellant society stated certain deficiencies by a letter dated 11.09.1991, which was replied to by the respondent vide letter dated 19.09.1991. The appellant terminated the Agreement dated 07.05.1988 vide letter dated 30.09.1991. This gave rise to disputes inter se the parties and the respondent invoked the arbitration clause vide letter dated 08.08.1994 suggesting the name of Mr. Charan Shah Singh, Retd. Executive Engineer (Civil) as the nominee Arbitrator of the respondent and requesting the appellant to appoint its nominee Arbitrator. No reply is stated to have been received to this letter and, thus, another letter dated 15.02.1995 was sent by the respondent to the appellant reiterating the contents of the letter dated 08.08.1994 and stating that if the appellant does not appoint its nominee, the Arbitrator Mr. Charan Shah Singh would act as the Sole Arbitrator. Once again, there was no response and the Arbitrator thereupon entered upon the reference and issued notice to the parties. A counsel entered appearance on behalf of the appellant society. Thereafter, the society stopped appearing and despite proceedings being adjourned on various occasions and registered A.D. letters being sent to the society, there was no appearance on behalf of the society, which was proceeded ex-parte on 21.04.1996. The Award was made and

published on 10.05.1996 awarding a sum of Rs. 18,78,117.10 to the respondent to be paid within a month of receipt of the Award, failing which, interest would be payable at 18% p.a. simple interest from the date of Award till the date of decree. The Arbitrator framed two issues to be decided:

Issue No. 1 :

Whether the Agreement dated 07.05.1988 is valid and binding on both the parties?

Issue No. 2 :

Whether the respondent society terminated the contract awarded as per the Agreement dated 07.05.1988 unilaterally without reasonable cause. If so, to what amount, is the claimant entitled as compensation and interest?.

5. Learned Arbitrator noticed while giving a finding on Issue No. 1 that a sum of Rs. 20,000/- as the advance fee was remitted to the respondent by the appellant society is that the Agreement had been acted upon by both the parties, which was a valid and binding contract and, thus, answered the issue in favour of the respondent. On Issue No. 2, the Arbitrator found that the Agreement dated 07.05.1988 had been unilaterally revoked by the society without consideration of the reply of the Architect. Thereafter, he proceeded to grant the amount towards the fee, which would have been payable to the respondent at 2.75% of the total cost of construction taking into consideration the area to be constructed along with the rate of construction.

6. The Award dated 10.05.1996 was filed in the Court and registered as CS (OS) No. 2015/1996. The appellant filed an application being IA No. 11173/1996 under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter to be referred to as, "the said Act"). Learned Single Judge by the impugned Order dated 21.12.2009 has found no merit in the objections, but taking into consideration the fact that the respondent had actually not rendered any services, called upon Mr. M.P. Goel, Sole Proprietor of the respondent to indicate whether he was willing to accept a lesser compensation in respect of the awarded amount. Mr. Goel stated that though he was entitled to the entire fee as stipulated in the Agreement dated 07.05.1988, he would be satisfied in case the Court was to vary the impugned Award and award him only 40% of the fee along with 6% p.a. simple interest. Learned Single Judge accordingly modified the Award awarding the sum of Rs. 7,51,270/- along with simple interest @ 6% p.a. from 10.05.1996 till realization of the amount to be paid within 90 days, failing which, the interest rate would stand increased from 6% p.a. to 12% p.a. simple interest. The Award was, thus, made Rule of the Court with the said modification. This is, thus, the third round of scrutiny of the disputes between the parties.

No Binding Arbitration Agreement :

7. The first aspect urged by learned counsel for the appellant was that there was no binding arbitration agreement inter se the parties. In this behalf, learned

counsel invited our attention to the affidavit by way of evidence filed by Shri K.K. Bhargava on behalf of the appellant society before the learned Single Judge. In para 5 of this affidavit, Shri Bhargava has denied that there was an arbitration clause in the Agreement dated 07.05.1988. It was his say that the Agreement did not bear the signatures and that his signatures on the Agreement had been traced out from his signatures as contained in the letter dated 07.05.1988 addressed by him as Secretary of the appellant society to the respondent. Learned counsel for the appellant pleaded by reference to the cross-examination that the witness was not specifically cross-examined on this aspect.

8. We may note at this stage that during the course of arguments, learned counsel for the appellant sought to present a different picture than what is set out in the affidavit, i.e., the signatures of Shri K.K. Bhargava are present on the 3rd page of the Agreement as he used to sign, but pages 1 and 2 containing propounded signatures were not that of Shri K.K. Bhargava. Learned counsel suggested that the Court should itself compare the signatures of Shri K.K. Bhargava on the 1st and 2nd pages of the Agreement with his admitted signatures. Thus, the plea, in effect, is that there is a page 3 of the Agreement, but pages 1 and 2 are different and there was no arbitration clause on page 2.

9. If the aforesaid factual position existed, in our considered view, nothing prevented the appellant from producing the office copy of the Agreement which they purport had been executed between the parties. No such copy of the Agreement was produced, but, on the other hand, the stand, which was sought to be taken before the learned Single Judge was that there was no agreement between the parties. There was no endeavour made to produce any expert evidence of a hand-writing expert, which could substantiate the plea of the appellant.

10. This aspect has been analyzed by the learned Single Judge in paras 13 and 14 of the impugned Order giving a finding that there was an Agreement dated 07.05.1988 executed inter se the parties. This finding is based on the contents of an admitted letter dated 07.05.1988 addressed by Shri K.K. Bhargava of the appellant to the respondent. The letter reads as under:

Date : 7-5-88

M/s. Goel & Associates,

A-72/1, S.F.S. Saket,

New Delhi.

Dear Sir,

With reference to your Quotation, we are pleased to appoint you as our Architect for the Group Housing Complex. A cheque consisting No. 050781 Dt. 7-5-1988 on the Delhi State Co-op. Bank Ltd., Darya Ganj, New Delhi for Rs. 20,000/- is enclosed herewith as an advance. The agreement duly signed is returned

herewith.

Yours faithfully,

sd/-

K.K. Bhargava

Hony. Secretary

Encl. : a.a.

(emphasis supplied)

Thus, a completely false plea has been taken by Shri K.K. Bhargava in his affidavit that there was no agreement between the parties when the admitted document of the appellant while sending the advance payment seeks to enclose the Agreement duly signed and returned.

11. Learned Single Judge has, in fact, himself perused the document dated 07.05.1988 and came to the conclusion that it cannot be said that the signatures of Shri K.K. Bhargava have been traced on the Agreement from the letter dated 07.05.1988.

12. We, thus, find no merit in this plea.

13. We may note that in the rejoinder, learned counsel for the appellant sought to rely upon the judgment of the Supreme Court in Criminal Appeal No. 1356/2004 titled "Union of India & Ors. v. Ramesh Gandhi" decided on 14.11.2011 to contend that fraud would vitiate all judicial proceedings including judicial acts. The aspect of fraud has been discussed in detail in this judgment. We, however, put to learned counsel as to how the said judgment would apply to the facts of the present case and the reason propounded before us by the learned counsel was that the Agreement itself was a forged document and, thus, the proceedings are vitiated by fraud. This was a fruitless endeavour of the learned counsel for the appellant at the end of the hearing since the finding of both the learned Arbitrator and of the learned Single Judge is of a valid and binding agreement inter se the parties containing arbitration clause which finding has been affirmed by us.

Absence of Notice of Arbitration as per law :

14. The second aspect urged by learned counsel for the appellant and examined before the learned Single Judge arose out of a plea of absence of any effective service of notice on the appellant at its registered office at Quarter No. 75, Sector-6, P & T Quarters, R.K. Puram, New Delhi on which address, communications had been exchanged between the parties.

15. This plea has been negated by the learned Single Judge, and rightly so, in view of the changed address of the appellant, D-20, Dalhousie Square, Kali Bari Marg, Near Gole Market, New Delhi, which fact was admitted by Shri K.K.

Bhargava in his cross-examination. Learned Single Judge in para 15 of the impugned Order has extracted the cross-examination of Shri K.K. Bhargava admitting to the address being of Dalhousie Square in April, 1996. Not only that, other communications addressed contemporaneously by the appellant society in December, 1995 and April, 1996 also establish this fact. Once again, the deposition of Shri K.K. Bhargava has been proved to be false. We may only note that hardly any credence can be given to the testimony of such a witness, who has been found to be deposing falsely on two material aspects.

Improper Constitution of Arbitral Tribunal :

16. The third aspect arises from a plea of an improperly constituted Arbitral Tribunal, i.e., the Tribunal should have been of two Members and not of a Sole Arbitrator. The appellant submitted that in case the appellant had failed to nominate the Arbitrator, then the remedy of the respondent was to approach the Court by filing an application u/s 20 of the said Act for appointment of the second Arbitrator and in this behalf relied upon the judgment of the Supreme Court in *Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd.*, . The ratio of the said judgment has been correctly appreciated by the learned Single Judge in the impugned Order as in the facts of the present case, the issue was not of appointment of an Arbitrator with consent of the parties. Both the parties had to appoint their nominee Arbitrator and on the failure of the appellant to appoint its nominee Arbitrator, the appellant had been put to notice that the nominee of the respondent would act as the Sole Arbitrator. Such a course of action is permissible u/s 9 of the said Act and the provisions of Sections 8 and 20 of the said Act would have, thus, no application.

Quantification of Compensation :

17. The last aspect urged before us arises qua the issue of quantification of the compensation, i.e., the fee held payable to the appellant. Learned counsel for the appellant contended that since no work had been done by the respondent, the respondent was not entitled to any amount. In this behalf, learned Single Judge has relied upon the judgment of the Division Bench of this Court in *Bhatia Nidhi Ltd. v. Union of India Ltd. & Ors.*, 26 (1984) DLT (SN) 21 where it was held that the governing purpose of damages is to put a party, whose rights have been violated, in the same position so far as money can do so, as if his rights had been observed. Thus, the respondent had to be put in a position as if the contract had been satisfactorily performed by him, the Agreement having been terminated wrongfully.

18. Learned counsel for the respondent pointed out that in the impugned Order, learned Single Judge has relied upon his earlier judgment in *Goel Associates v. Shama Coop. Group Housing Society*, 2009 (113) DRJ 523. The said judgment, in turn, relied upon the observations with approval in *Thomas v. Hammersmith Borough Council*, (1938) 3 All ELR 203 wherein it was observed as under:

... I think it helpful first to consider what would have been the agreement

between the parties if the appointment had been simpliciter to act as architect for the erection of the new town hall, without any provision as to scale of charges, and if the council had then, before the work was completed without cause other than their mere volition, terminated the agreement. In such case, I entertain no doubt that the architect would have been entitled to reasonable remuneration for the work which he had already done, and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished : see *Planche v. Colburn* (1831), 8 Bing. 14 and *Prickett v. Badger* (1856), 1 C.B.N.S. 296. Although the contract in this assumed form would contain the no express term to this effect, I think that it would be implied that the council, having employed the plaintiff to build their town hall, agreed with him that they would not prevent him from doing the work, and so prevent him from earning his remuneration.

19. As to what should be the principles governing compensation in such a case needs to be examined in some more detail and we consider it appropriate to refer to some of the treaties in this behalf.

20. In *McGregor on Damages*, Eighteenth Edition, while dealing with the breach by an owner, it was observed in para 26-022 as under:

II. BREACH BY OWNER

1. PREVENTION RESULTING IN NON-COMPLETION

On measure of damages where the owner acts so as to bar completion there is surprisingly, a dearth of authority¹. General principles would put the normal measure at the contract price less the cost to the builder of executing or completing the work.² In calculating the builder's costs the indirect as well as the direct costs must be included, especially overheads. This measure, however, should be subject to reduction if the defendant can show that the time made available to the claimant by the breach has been, or could have been, used by him in executing other profitable contracts with which he would not otherwise have been able to contend. This is analogous to the cases of manufacturing and erecting machinery dealt with under sale of goods.³

21. The same treaties in Chapter 29 while dealing with contracts for professional and other services and breach by a party engaging the services, it has been observed in para 29-002 as under:

I. BREACH BY THE PARTY ENGAGING THE SERVICES

Whereas with contracts of employment the accent is on damages claims by employees rather than by employers, with contracts for services it is the other way round. A cornucopia of claims by those who have engaged the services of others is met by virtual silence on the part of those others who have provided them. He whose services have been improperly dispensed with has a number of alternative remedies open to him, similar to those available to the employee⁴, above and also to the agent acting on behalf of a principal.⁵ He may sue on the

contract for such remuneration or fees as have been agreed and, if suit on the contract is not available, he may sue on a quantum meruit for the value of the services already rendered.⁶ With these actions at his command, an action for damages may not prove necessary. When it is brought into play the measure of damages is likely to be the amount that he would have earned from the services had he not been prevented from continuing to act; consequential losses are somewhat difficult to envisage⁷. As with the employee, he will be required to mitigate his damage by seeking alternative remunerative occupation. However, since he has a freer hand in performing the services and may not have to devote his time exclusively to the contract, other services upon which he embarks will not be truly alternative if he could have performed both concurrently, and will therefore not go in mitigation of damage.

22. The aforesaid treaties, thus, seek to carve out a distinction in the case of dispensation of services of a professional improperly when damages should be the amount that he would have earned from the services had he not been prevented from continuing to act. While discussing the aspect of mitigation of damages, it has, thus, been observed that since a professional has a freer hand in performing the services, he may not have to devote his time exclusively to the contract and, thus, this aspect would not go in mitigation of damages.

23. In G.T. Gajria's Law Relating to Building and Engineering Contracts in India, Fourth Edition, it has been observed at page 846 as under:

5. DAMAGES FOR DEFAULT OF THE EMPLOYER

A contractor works for a profit, and, apart from his entitlement to the price, especially where there is a breach of non-payment, the damage to the contractor caused by any other breach of contract by the owner will be assessed in the light of its impact upon his profits. Hence, if there is a repudiation of the contract by the employer before any work is carried out, the damages recoverable are prima facie the amount of profit which the parties knew, or must be taken to have assumed, the contractor would have made if he had been permitted to complete in the ordinary way.

At page 850, while dealing with the nature of contractor's right to damages due to the employer's default, it has been observed as under:

In the case of prevention, that is to say where the employer has wrongfully terminated the contract, or has committed a fundamental breach justifying the builder in treating the contract as at an end, and the latter accordingly ceases work, the measure of damages will be the loss of profit which he would otherwise have earned.

Thus, the aforesaid treaties also adopt the same principles, i.e., on cessation of work, the Architect would get what would have been his profits, had he performed his job as the Architect.

24. Learned counsel for the respondent has also relied upon the judgment of the

Division Bench of the Andhra Pradesh High Court in *Mir Qudrath Ali Khan (alias) Nawab Qudrath Jah Vs. Muzaffar Ali Khan*, . The principles relevant for the present case culled out from the said judgment are as under:

(a) In a suit for breach of contract, the question of mitigation of damages does not arise in case of professionals. There can be no limit in regard to the work that can be accepted by an Architect and there may be instances where a professional may be having ample time at his disposal and still no one may come forward to engage his services. Thus, whether a professional is busy or not, the question of mitigation of damages does not arise. Professionals can attend to work of more than one during the same day, same week or month. Hence, if one of the clients commits breach of contract, and even if some more clients engaged the same Architect later, the person who committed breach cannot claim that the remuneration received from the new contracts should be taken into consideration for reducing damages.

(b) Where a contract is broken, the professional is entitled to damages equivalent to the amount of fee to which he would have been entitled if the contract is performed. On the basis of the project cost and the percentage of fee payable to the Architect as specified in the Agreement, the damages were calculated and the plea of a lesser percentage of work to be taken into account on the basis of work carried out till prior to termination was rejected as not tenable.

(c) The principle of quantum meruit contained in Section 70 of The Indian Contract Act, 1872 applies only to cases where there is no valid agreement between the parties. Section 70 is not founded upon contract, but on quasi-contract or restitution. However, if there is a valid contract between the parties, then the claim of damages on breach of contract would not be governed by the principles of quantum meruit.

25. The aforesaid legal principles, thus, leave us in no doubt whatsoever that the appropriate methodology had been followed by both by the learned Arbitrator and the learned Single Judge while coming to the conclusion that the respondent is entitled to compensation of the fee, which would have been paid had he performed his functions as an Architect.

26. We may, however, notice an important aspect of the Agreement dated 07.05.1988, i.e., the nature of the architect services to be rendered by the respondent as provided in clause 1 of the Agreement required varied works to be done and some of which would have required actual out of pocket expenses. No separate provision for reimbursement of these expenses has been made in this Agreement. Thus, deduction would have to be made towards these out of pocket expenses. However, no evidence has been led in this behalf.

27. We would have gone into this issue in more detail to estimate as to what would have been a reasonable percentage of the total amount deductible towards expenses out of the total amount of the fee payable to the respondent, but for

the fact that the respondent had volunteered before the learned Single Judge to accept only 40% of the fee payable. Certainly, deduction on account of out of pocket expenses would never be in the range of 60% of the amount. Thus, the appellant has already got benefit of the same.

28. The respondent has also voluntarily accepted a cut in the rate of interest from 18% p.a. to 6% p.a. simple interest in case payment is made within one month, failing which, interest would be chargeable at 12% p.a. simple interest.

Conclusion :

29. We, thus, find the appeal without merit and dismiss the same leaving the parties to bear their own costs. Since the appellant has not deposited the amounts in terms of para 24 of the impugned Order within 90 days from the date of the said Order, interest rate would stand increased from 6% p.a. to 12% p.a. simple interest. In view of the pendency of the appeal, we consider it appropriate to grant further 60 days" time to the appellant to make the payment of Rs. 7,51,270/- along with interest @ 6% p.a. simple interest from 10.05.1996 till realization, failing which, interest would stand increased from 6% p.a. to 12% p.a. simple interest as per para 24 of the impugned Order.

1. *Stocznia Gdanska SA v Latvian Shipping Co* (2002) 2 Lloyd's Rep. 436 CA, which concerned a ship-building contract, is a case of this nature but there is no clarity on the measure of damages in the report of the case before the Court of Appeal. The matter below, at (2001) 1 LR 537, did not deal with damages.

2. If, of course, the builder has completed the building he can sue under the terms of the contract for the price.

3 See paras 20-125 and 20-126, above, especially *Re Vic Mill* (1913) 1 Ch. 465 CA, and *Hill v Showell* (1918) 87 L.J.K.B. 1106 HL

4 See para 28-001, above.

5 See para 30-002, below.

6 The early, well-known case of *Planche v. Colburn* (1831) 8 Bing. 14 which paved the way for quasi-contractual, now restitutionary, quantum meruit claims in this field is of the nature of a contract for services: the defendant had commissioned articles from the claimant and had then refused to publish them. Factually similar is *Sadler v. Reynolds* (2005) EWHC 309 QB where the claimant had contracted with the defendant in breach of contract had agreed with another to write it; he received a modest amount in damages for the loss of the opportunity to enhance his reputation. Compare the position where the contract is one of employment, at para 28-025 above.

7 The loss in *Sadler v. Reynolds* (2005) EWHC 309 QB (in preceding note) can be

seen as a consequential loss.