

(2010) 02 SC CK 0088

In the Supreme Court Of India

Case No : Civil Appeal No(s). 3300-3301 of 2008

K.P.M. Builders Pvt. Ltd.

APPELLANT

Vs

National Highways Auth. of India

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Citation : (2011) 129 FLR 729

Hon'ble Judges : Mr. R.V. Raveendran and Mr. K.S. Radhakrishnan, JJ.

Bench : Division Bench

Advocate : Mr. Neeraj Kr. Jain, Sr. Advocate. Mr. G. Sivabala Murugan, Mr. Umang Shankar, Mr. Pratham Kant, Mr. Sanjay Singh, Mr. L.K. Pandey, Advocates, for the Appellants; Mr. Ramji Srinivasan, Sr. Advocate. Mr. T.S. Sidhu, Mr. Praveen Jain, Mr. Mukesh Kumar, Ms. Padma Priya, For M/S. M.V. Kini and Associates, Mr. Arun Kumar Beriwal, Advocates, for the Respondents

Final Decision : Disposed Of

Judgement

The first respondent - National Highways Authority of India (for short "NHAI"), entrusted the execution of a project (eight laning of Km.16.500 to Km.29.295 of National Highway No.1) to the second respondent (M/s. You One Maharia-Jv), hereinafter referred to as "the Contractor" on 31.5.2001. Under the said contract, NHAI made an advance payment of Rs.14,10,27,337/- to the Contractor (in terms of clause 51 of the General Conditions) for being used to pay for the Equipment, Plant and Mobilization expenses required specifically for execution of the work. The said amount was secured by an unconditional bank guarantee furnished by the Contractor. Clause 61 of the General Conditions of Contract provides that all material on the site, Plant, Equipment, (apart from Temporary Works and Works) are deemed to be the property of the Employer, if the Contract is terminated because of a Contractor's default.

2. NHAI learnt that the bank guarantee produced by the Contractor towards the advance payment was forged. As a consequence, NHAI terminated the contract with the Contractor on 11.12.2004 and in exercise of its rights under clause 61,

claimed that all movables at the Site including plant, machinery, equipment etc. were its property.

3. The appellant claims that it had given its machinery and equipment to the contractor on hire basis on the understanding that the Contractor would take the machinery every day from appellant's Camp Office, which was situated near the work site. The appellant alleges that when NHAH terminated the contract and took over the movables at site, it also seized the appellant's machinery and equipment and prevented the appellant from removing its machinery from its own camp office, by placing security guards around its premises. This was however denied by NHAH who contended that it was only claiming the plant and machinery at the work site in terms of clause 61 of the contract with the contractor.

4. The appellant filed W.P.(C) No.6065/2005 before the Delhi High Court seeking a direction to NHAH to remove its security guards from its premises (camp office) and release all its machinery which had been illegally seized by NHAH. The petition was resisted by NHAH. In the rejoinder affidavit filed in the writ petition, the appellant confirmed that the writ petition did not involve any disputed questions of fact and asserted that it was claiming relief only in regard to the machinery which were lying in its own premises and not those at the work site and that clause 61.1 of the General Conditions of Contract forming part of the contract between NHAH and the Contractor empowered NHAH to take possession of the machinery on the Site, that is KM 16.5 to 29.295 on National Highway-1. Therefore, the limited contention of the appellant was that NHAH was trying to take possession of Plant and Machinery of the appellant, which were situated away at its camp office which was outside the Work Site. A learned single Judge of the High Court, by order dated 23.8.2005, allowed the writ petition and directed NHAH to remove its security guards from the office premises of the appellant and release its machineries which was detailed in the annexure to the writ petition.

5. Feeling aggrieved, NHAH filed a Letters Patent Appeal. The Division Bench appointed a Commissioner to list the machineries lying at the work site and the machineries lying outside the work site. On the basis of the report of the Commissioner, after hearing arguments, the Division Bench disposed of the appeal by order dated 16.9.2005 with the following directions:

"(1) The machinery/equipment lying within the contract site (as enlisted in Annexure A to the Local Commissioner's Report) shall continue to remain with the Appellant and will be subject to the outcome of any adjudication or result of the disputes between the Appellant and the second Respondent (Contractor).

(2) The machinery/equipment found to be lying outside the contract site (as enlisted in Annexure B to the Local Commissioner's Report) shall be released by the Appellant (first Respondent). A proper inventory of this machinery/equipment should be made and a copy be supplied to both the Respondents. The first

Respondent, while receiving this machinery, shall also execute an undertaking to the satisfaction of the Registrar that in case it is found in any proceedings or otherwise to be the property of the second Respondent, he shall return this machinery/equipment to the custody of the Appellant on deposit of its cost, in the event of any such need arises.

(3) Any security guards posted by the Appellant at any site falling in Annexure B or at first Respondent's office, if that office is falling in Annexure B shall be removed.

(4) The first Respondent shall enjoy the liberty of claiming any costs or compensation against the Second Respondent (Contractor) in terms of any hire purchase or any other agreement between them. The order of the writ court shall stand modified to this extent."

6. The appellant filed a review petition which was dismissed by the Division Bench on 20.4.2007. In pursuance of the order of the High Court, the machinery/equipments claimed by appellant which were lying outside the Work Site have been released to the appellant.

7. The appellant has filed this appeal contending that it is entitled to take all its machineries wherever they are situated. It further contends that some of the machineries are not actually situated in the Work Site but on the access road to the Work Site and NHAH is claiming the said access road as Work Site and wrongly refusing to release the machinery. On the other hand, NHAH contends that it only claimed the machineries found within the work site and it was not claiming any of the machinery outside the work site.

8. There is no privity of contract between NHAH and the appellant. Before allegedly hiring the machineries/equipments to the Contractor, the appellant did not notify NHAH that its machineries/equipments were being hired to the contractor or given to the use of the Contractor and that it was the owner of any particular machinery. The appellant was aware of the contract between NHAH and the contractor as also its terms, in particular clause 61 of the General Conditions. In spite of it, it did not require NHAH to exclude its machineries from the operation of Clause 61, before the termination of the contract. It also did not produce the alleged contract entered into by it with the Contractor, providing that at the end of each day's work, the machineries were to be returned to the appellant. In these circumstances, we are of the view that the writ petition against NHAH was misconceived. NHAH had not entered into any contract or arrangement with the appellant, nor given any assurance to it in regard to the machineries, nor owed any duty or obligation towards the appellant. Nor can NHAH's action in taking over the machineries at site in pursuance of a specific contractual term with the contractor can give rise to any public law remedy to a third party against NHAH. If the appellant had entered into any contract with the Contractor and if it has any enforceable rights in that behalf, it is open to the appellant to enforce such rights against the Contractor. But that cannot

obviously, be done in a writ proceedings. As noticed above, as far as NHA I is concerned, it owes no duty or obligation towards the appellant. Appellant cannot come in the way of NHA I enforcing its rights as against the contractor.

9. In the circumstances this appeal is dismissed as having no merit. Intervention application filed by Citicorp Finance (India) Ltd., who alleges to be the financier for appellant, is also dismissed. Dismissal of this appeal will not however come in the way of appellant taking against the contractor, such action as may be available to it in law.