
(2009) 03 DEL CK 0014

In the Delhi High Court

Case No : OMP No. 699 of 2008 and CCP No. 14 of 2009

Kunj Bihari Construction Co. Pvt. Ltd.

APPELLANT

Vs

Nidhi Builders Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Citation : (2009) 2 ARBLR 103 : (2010) 7 RCR(Civil) 69

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : S.D. Singh, Rahul K. Singh and Bharti Tyagi, for the Appellant;
Rajeev Mehra and Arvind Sharma, for Respondents No. 1 and 2 and Sanjeev Bhandari, for the Respondent

Judgement

Manmohan Singh, J.—This petition u/s 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act") has been filed by the petitioner before this Court which was listed on 26th December, 2008 and on the said date the following interim orders were passed:

In the meanwhile the respondents shall maintain status quo with regard to the material and the work at the construction site of Provision of Married Accommodation Project for ORS (196 DUS) JCO (53 DUS) including external allied services at Kabul Lines, New Delhi.

2. The controversy in the matter arises out of a contract whereby the respondents No. 1 and 2 were awarded the contract by Respondent No. 3 Director General, Marketing Accounts Project (for short "DG, MAP) vide work order dated 28th August, 2005 with respect to construction of Married Accommodation Project including external allied services of Kabul Lines, Delhi Cantt, New Delhi commonly known as Kabul Line Project. The value of the contract was Rs. 23,14,68,336/-. The project was to be completed by Respondents No. 1 and 2 till 15th June, 2007 who were unable to execute the works. Admittedly, the respondents had completed and executed the work to the value of Rs. 8,74,56,426/- but due to the ill health of respondent No. 2, the work

got adversely affected and on the request of respondent No. 3 to make alternate arrangements, the Respondents No. 1 and 2 decided to give the remaining work to the petitioner herein pertaining to Kabul Line Project.

3. The work order in this respect dated 28th November, 2007 was issued to the petitioner for balance/left out work. The value of the work assigned to the petitioner by respondent Nos. 1 and 2 was of the value of Rs. 15 crores plus additional value of Rs. 1.50 crores. Hence, the net value of the contract assigned to the petitioner was approximately Rs. 16.50 crores. The mode of payment of the contract between the petitioner and respondent Nos. 1 and 2 was back to back in nature. Clause F(b) of the contract contemplates the mode of payment of Rs. 1.50 crores in the following manner:

- i) Rs. 10,00,000/- as advance paid to the petitioner.
- ii) Rs. 40,00,000/- payable on back to back basis ("Received Rs. 24,35,000/- by way of adjustment towards unbilled works done by respondent Nos. 1 and 2). The petitioner further received a sum of Rs. 6,92,162/- and Rs. 10 lakhs by way of cheques.
- iii) Rs. 36,27,162/- was to be adjusted towards materials lying at the site as on 28th November, 2007 (adjusted).
- iv) Rs. 43,72,838/- on back to back basis towards S.D. deducted from the bills of Respondent Nos. No. 1 and 2.
- v) Rs. 20,00,000/- was payable on completion of the Project.

4. A formal agreement dated 25th January, 2008 was entered into between the parties. Most of the clauses in the formal agreement were same except the arbitration clause No. 9 which provides as under :

In case of dispute between the First and Second Party in connection with the interpretation and application of any term, condition or otherwise, first the matter shall be resolved by mutual consultation and discussion and in case it is not possible then through arbitration to be appointed by the First Party from the panel of CPWD arbitrators.

5. The value of the material lying on the site at the time of handing over the site to the petitioner was accessed at Rs. 35 lakhs. At the time of the agreement, the unbilled amount of work was to the tune of Rs. 24,35,000/-. The said amount was to be adjusted later on. Most of the material left at the site and unbilled amount formed part of the contract and agreement.

6. As per agreement, it was the petitioner's obligation to seek extension of time from respondent No. 3. However, it is not in dispute that respondent Nos. 1 and 2 had been obtaining extension of time from respondent No. 3.

7. Admittedly the 15th running bill of the Project was raised by respondent Nos. 1 and 2 prior to 28th November, 2007 i.e. on 28th May, 2007. The cumulative

value of the 15th running bill of work done by respondents No. 1 and 2 was Rs. 8,74,57,756/-.

8. The petitioner has not disputed the fact that approximately 35% of the work was already completed by respondents No. 1 and 2 on the date of the contract. The petitioner was to complete the remaining work left out by respondent Nos. 1 and 2.

9. According to the counsel for the petitioner, the petitioner started the work in full force from day one of the work order and the extension of time was granted by respondent Nos. 3 till 14th August, 2008 for completion of the Project. The contention of the petitioner is that there has been delay on the part of the respondents on various counts viz opening of Escrow Account as well as obtaining the extension of time for work to be executed from the employer.

10. The petitioner raised the 16th running bill dated 28th June, 2008 for a sum of Rs. 69,91,000/- against the work done. The respondent No. 3 duly passed the entire payment of Rs. 65,63,092/- against this bill after deduction of TDS, VAT, Surcharges, Educational Cess and postage charges. The said amount was issued in favour of the petitioner from the Escrow Account. Similarly, the petitioner raised 17th running bill dated 13th August, 2008 for a sum of Rs. 47,28,115/- which was approved by respondent Nos. 3 and 4 and admittedly the petitioner received payment of Rs. 42,78,357/- after deduction of Taxes.

11. It is not in dispute between the parties that the petitioner was at the site till 15th November, 2008 and on that date according to the petitioner, the value of the material and work executed by the petitioner at site would be Rs. 2,21,83,067/- summary wherein is provided in Annexure P-12 of the petition as under :

Summary (A) Kabul Line Site Amount (Rs.)

(1) Bill due against work done 94,06,000.00 (Annexure I, Page 1-31)

(2) Balance stock/material at site 58,31,817.00 (Annexure II, Page 1-4)

(3) Infrastructure/machinery installed 19,45,250.00 Lying at site (Annexure III, Page -1)

(4) Difference in % age of yardstick as per 50,00,000.00 Stage of payment and current market Price (Details to be produced on demand)

TOTAL 2,21,83,067.00

12. It is submitted by the petitioner that during this period, the petitioner had executed the work worth Rs. 94,06,000/-. The material worth Rs. 58,31,818/- purchased on credit by the petitioner and various infrastructure, equipments and machines lying at the site were also brought by the petitioner.

13. According to the petitioner, it has completed the work allotted to him upto 48% of the entire work which comes to approximately Rs. 4,30,00,000/- and the

petitioner has only received Rs. 1,08,29,399/- plus TDS plus WTC and other taxes and, therefore, the petitioner is entitled to receive about Rs. 3 crores towards the work executed during the period.

14. In support of his contention, the petitioner has relied upon the letter dated 16th June, 2008 written by respondent Nos. 1 and 2 to respondent No. 3 wherein an admission was made by respondent Nos. 1 and 2 that infrastructure lying at the work site was not less than Rs. 3 crores and manpower at site was more than 250 workers and the petitioner's work was stated to be satisfactory at the site. It was also stated in this letter by respondent Nos. 1 and 2 that there was no possibility of the petitioner/contractor running away without completion of the work. The contention of the petitioner is that in view of the admission made by respondent Nos. 1 and 2 to the respondent Nos. 3 and 4, in the abovesaid letter, it is apparent that when there exists material costing such a huge amount, it must have been used by the petitioner in the Project. Hence, the petitioner is entitled to the said amount.

15. On the other hand, the Respondents No. 1 and 2 have denied that the petitioner has performed any work at the site. It is submitted that if any work was performed by the petitioner it was negligible, as appeared from the various complaints of no work/slow work by the respondent No. 3 to respondent Nos. 1 and 2. As regards the letter dated 16th June, 2008 by the petitioner, the respondents have stated that the said letter was written by respondent Nos. 1 and 2 to respondent No. 3 only at the instance of the petitioner to seek extension of time from the employer. During that time, there were cordial relations between the petitioner and Respondents No. 1 and 2, therefore, in order to present a good picture of the petitioner, the said letter was written. According to Respondents No. 1 and 2, the statement made in the said letter is not an admission.

16. Respondents No. 1 and 2 further stated that the alleged final bill dated 15th November, 2008 raised by the petitioner was not received by respondent Nos. 1 and 2 as it was purportedly sent by petitioner only by UPC on 2nd December, 2008. The respondents No. 1 and 2 submit that the 16th and 17th running bills were sent by the petitioner directly to respondent No. 3 but the alleged final bill dated 15th November, 2008 has been raised upon Respondents No. 1 and 2. Therefore, it creates doubt about the service of letter by the petitioner. It is further submitted that one day earlier i.e. on 14th November, 2008 the petitioner had sent a letter to the respondent Nos. 1 and 2 wherein the petitioner had, inter-alia, made the following statement:

We are indeed indebted to you, Sir, for helping us and our company M/s. Kunj Behari Construction Co. Pvt. Ltd. from financial and liquidity crunch although your firm had been very helpful to us in order to enable us to complete the work entrusted to our company but due to financial constraints and financial mismanagement of our company we could not complete the work within the stipulated time of two months. Our intention is to complete the work earlier but

not later than 10th December, 2008. and we also hereby give an irrevocable undertaking that the said work shall be completed by 10th December, 2008. In case we fail to complete the said work by the said date the agreement for the work as well as for the work of Kabul Line work will stand automatically terminated without any further reference to us and we shall be liable to pay damages as per the terms and conditions of the agreement and all decisions taken by you in the matter shall be final and binding on us.

17. On the same day another handwritten letter was issued by Mr. Dinesh Sharma, Managing Director of the petitioner company to the respondent No. 2 to the following effect:

I Dinesh Sharma, Managing Director, Kunj Behari Construction Co. Pvt. Ltd. by passing a resolution has terminated Mr. Navin Kumar Jain and his wife Ms. Shikha Jain from their services of monitoring the R.R. Hospital Project and Kabul Line works on behalf of our company and I shall submit a copy of resolution to this effect of our company within 4 or 5 days.

18. On 15th November, 2008 the Respondents No. 1 and 2 wrote a letter to the petitioner acknowledging the letter dated 14th November, 2008 accepting the proposal to make payment for the material procured after 15th November, 2008 and clearly mentioned that in case the work is not completed by the petitioner by 10th December, 2008 as promised by the petitioner in his letter, the agreement of both the works i.e. R.R. Hospital and Kabul Line work dated 25th January, 2008 will stand automatically terminated without making any further reference.

19. The contention of the respondents is that the writing of the said letter is totally contrary to the alleged final bill raised by the petitioner on 15th November, 2008 for the amount of Rs. 94,06,000/- wherein the summary of the total amount due pertaining to the Kabul Line project and balance of another project to the tune of Rs. 2,21,83,067/- was also made.

20. The payments against the 18th running bill has been received by the respondent Nos. 1 and 2 qua the mobilization advance given by DG(MAP) on interest @ 14% against 100% bank guarantee to be recovered in four equal installments. The payment qua the 19th running bill made to the respondent is against the retention money claimed against bank guarantee given by the respondents No. 1 and 2. As such the payment qua the 18th and 19th RA Bills in any event has been given on respondents No. 1 and 2 furnishing BGs.

21. The respondents submit that the entire payment against the work done by the petitioner has been made and the material lying at the site belong to the respondents. The unbilled amount of work of Rs. 24,35,000/- plus stock and material of Rs. 35 lakhs which were left on the date of contract are yet to be adjusted. The Respondents have admitted during the course of hearing that the total value of the work completed during the said period was Rs. 1.40 crores approximately out of which admittedly Rs. 1,15,00,000/- have been paid to the petitioner. The abovesaid details are also mentioned in the written submission of

respondent Nos. 1 and 2. The respondent Nos. 1 and 2 further submit that the amount of Rs. 26,92,162/- as advance payment made to the petitioner by respondent Nos. 1 and 2 by cheque has not been mentioned by the petitioner in its petition.

22. The other contention of respondent Nos. 1 and 2 is that the petitioner has concealed various material facts and documents from this Court while filing the present petition. The details of the same are given as under:

i) The petitioner has made a wrong statement in the petition that the Escrow account was not opened by respondents No. 1 and 2.

ii) The petitioner has not filed the letter dated 27th June, 2008 and undertaking dated 1st July, 2008 to complete the work by 14th August, 2008 and further did not plead the letter dated 14th October, 2008 and similarly not pleaded his two letters dated 14th November, 2008 as well as letter dated 15th November, 2008.

iii) The factum of receipt of Rs. 26,92,162/- by the petitioner as an advance payment has also not been mentioned in the petition.

23. In view of concealment of facts, the learned Counsel for the respondent Nos. 1 and 2 contends that the petition filed by the petitioner is liable to be dismissed on this ground itself. Various decisions have been referred by the learned Counsel for the respondents on this point. He further submits that the entire issue is as to whether the petitioner is entitled to any amount for the work done by him during the period mentioned earlier has to be decided by the arbitrator and in case the petitioner succeeds he can be compensated in terms of damages as per settled law. As the petitioner has to establish his case before the arbitrator about the work done by him, granting of any relief at this stage would amount to granting the relief to the petitioner without the matter being considered on merit.

24. There is no dispute that the agreement between the parties has been terminated. The parties are also disputing about the material, equipment and machinery lying at the site. During the hearing of this petition on 27th January, 2009, this Court, with the consent of the parties, appointed a Local Commissioner to verify the latest position about the construction of the project in question and execution of the work done at the site. The learned Local commissioner in Paras 10 to 14 of his report gave full details about the present state of construction and execution of the work done at the site after 26th December, 2008 and the details of the equipment and worth of material lying at the site.

25. The petitioner has also filed contempt petition being CCP No. 14/2009 on the ground that the respondents have disobeyed the interim orders of this Court granted on 26th December, 2008 and has referred the report of local commissioner in support of his contempt petition.

26. I have heard learned Counsel for the parties for considerable time and perused the pleadings and documents of the parties. Considering the rival

contentions of the learned Counsels for both parties, this Court feels that the sole dispute is as to whether the termination of sub contract agreement by the respondents was justified or not and whether the said action of termination was taken by the respondents as per the sub contract agreement amongst the parties validly or not. Such a dispute has to be adjudicated by the arbitrator in terms and conditions of the said agreement. This Court, therefore, is of the opinion that it is not prudent to decide this question at this stage as, it may prejudice either of the parties in view of the allegations and counter allegations raised by them.

27. Thus, the only question left for consideration of this Court is as to whether it is a fit case where the interim order granted by this Court on 26th December, 2008 should continue or not and secondly as to whether the petitioner is entitled to any other relief at this stage, as the main dispute which has arisen is to be adjudicated upon by the arbitrator.

28. There is no consensus between the parties as far as appointment of arbitrator is concerned. The petitioner has relied upon the arbitration clause (16) mentioned in the Work Order dated 28th November, 2007. On the other hand, the respondent No. 1 and 2 by letter dated 30th December, 2008 have already invoked the arbitration under Clause 9 of the formal agreement dated 25th January, 2008. None of the parties have so far filed the application u/s 11 of the Act. At this stage, the question arises as to what relief can be granted to the petitioner in its application u/s 9 of the Arbitration Act.

29. The law relating to grant of injunction in exercise of power u/s 9 of the Act in the commercial contract has been discussed by this Court in the case of Techno Construction and Another Vs. Kunj Vihar Co-operative Group Housing Society Ltd., wherein it was held as under:

9. Law with regard to grant of interim injunction while exercising jurisdiction u/s 9 of the Arbitration and Conciliation Act, 1996 is well settled. The protection under this section can be granted only when prima facie case, balance of conveniences and irreparable loss and injury is made out. The first question requiring consideration is, whether the contract for construction of building can be ordered to be specifically enforced? Section 14(1)(a) of the Specific Relief Act, 1963 provides that a contract for non-performance, of which compensation in money is adequate relief, cannot be specifically enforced. In a suit for enforcement of contract for construction of a building, the party seeking specific performance of the contract has to satisfy three conditions, contained in proviso to clause (c) of Sub-section (3) of Section 14. These are (i) the building or other work is described in the contract in sufficiently precise terms to enable the court to determine the exact nature of the building or work. (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed. In short, before a construction

contract can be ordered to be enforced, it has to be held that compensation in money is not the adequate relief. It cannot be disputed that where a contract which cannot be enforced by a decree for specific performance, the same cannot be negatively enforced by issue of an injunction.

30. In the case of B.S.M. Contractors Pvt. Ltd. Vs. Rajasthan State Bridge and Construction Corpn. Ltd. and Another, it was held as under :

9. On a consideration of the facts and circumstances of the case, I am of the opinion that a building contract of the instant nature cannot be specifically enforced by granting interim relief u/s 9 of the Act. If there is a breach of such a contract, the appropriate remedy is to compensate the party damnified in damages. That apart, the granting of an injunction in favor of the petitioner will further delay the construction work considered very urgent by the respondent No. 3. Thus, the balance of convenience also swings against the grant of injunction sought by the petitioner.

31. From the above discussion, it becomes clear that where contract is not specifically enforceable as per the clauses stipulated u/s 14 of the Specific Relief Act, 1963, the interim order in the form of injunction qua contract cannot be passed enforcing negatively. In the present case also, the contract being the construction contract relates to disputes between the parties about the payment of amount, material lying at the site, machinery and equipment as well as the adjustment of the amount for unbilled work. The same can be enforced and compensated in terms of monetary relief as at this stage there are allegations made by the parties against each other and some of them are of serious nature.

32. Any order or interim relief in the form of status quo or injunction granted cannot be continued as it will further delay the completion of the project in question causing irreparable harm to the employer i.e. respondent No. 3 who is not concerned with the present controversy between the parties.

33. As a result, the status quo order dated 26th December, 2008 about the work of construction and material is vacated on the condition that respondent Nos. 1 and 2 shall deposit a sum of Rs. 25 lac within three weeks as security in order to secure the interest of the petitioner so that, incase the petitioner ultimately succeeds, the said amount may be paid to the petitioner from the said security deposited by the respondent Nos. 1 and 2. This condition is being imposed as interim measure without any prejudice to the rights and contentions of the parties. The security deposit of Rs. 25 lac shall be kept in fixed deposit with the Registrar General of this Court pending adjudication of the right of the parties before the Arbitrator. This figure of Rs. 25 lacs is a tentative figure fixed by this Court due to the reason that the respondent during the course of hearing has stated that the total value of work completed by the petitioner during the period was Rs. 1.40 crores approximately and out of which admittedly Rs. 1.15 crores have been paid, although both the parties are claiming huge sum to recover against each other on various reasons.

34. But, nevertheless the respondent Nos. 1 and 2 would be entitled to raise their alleged claims regarding other adjustment i.e. unbilled work of Rs. 24,35,000/- and Rs. 35 lac for stock and material and advance payment of Rs. 26,92,162/- which shall be considered by the Arbitrator at the appropriate stage as per merit of the case. Similarly, the petitioner would also be entitled to raise his claims and alleged pending bills pertaining to the work done by him before the learned Arbitrator.

35. On deposit of the above said amount, the respondents shall be free to execute the remaining work, by themselves or from any other contractor after taking measurements of the work already done. A separate account in this regard shall be maintained and produced before the learned arbitrator to be appointed in the matter. The main petition as well as the contempt petition are disposed of with the directions. The arbitrator when appointed shall be within his rights and power to consider and go into the entire gamut of dispute and effectively adjudicate the disputes between the parties. It is made clear that the observations made in this order are tentative and will not bind the Arbitral Tribunal. Parties to bear their own cost.