

(2011) 11 DEL CK 0057

In the Delhi High Court

Case No : I.A. No's. 7932/09, 1668 of 2010 in O.M.P. No. 220 of 2006

M/S Maharia-Raj Jv and Another

APPELLANT

Vs

M/S Bhandari Engineers and Builders Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 04-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 9

Citation : (2011) 10 AD 185

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Ravikesh Sinha, for the Appellant; Ravi Gupta with Mr. Mukesh Verma and Ms. Meenakshi Sood, Advocates for NHA/applicant in IA 1668/2010. Mr. S. S. Jauhar, Advocate for R-1/BEBPL, for the Respondent

Judgement

Justice S. Muralidhar

1. The present application (IA No. 1668 of 2010) has been filed by the National Highways Authority of India (`NHA'), which is Respondent No. 3 in OMP No. 220 of 2006, seeking the vacation of an interim order dated 17th June 2009.
2. The background to the application is that OMP No. 220 of 2006 is a petition u/s 34 of the Arbitration and Conciliation Act, 1996 (`Act') challenging the arbitral award dated 10th January 2006 of the arbitral tribunal allowing some of the claims of Respondent No. 1 M/s Bhandari Engineers and Builders Pvt. Ltd. (`BEBPL') against the Petitioners 1 and 2 and two others. Notice was issued in the main OMP on 4th July 2006 and later it was clubbed with other OMPs filed by the other parties to the arbitral proceedings. IA No. 7932 of 2009 was filed in OMP No. 220 of 2006 by BEBPL in which order was passed on 17th June 2009 by this Court directing status quo to be maintained.
3. Petitioner No. 1 M/s Maharia Raj -JV, a joint venture comprising Petitioners 1 and 2, was awarded the work of six laning of km 44.300 to 66.00 km of NH-1 in

the State of Haryana-Contract package No. NS-17/HR. BEBPL was the sub-contractor of Petitioner No. 1 and claimed to be the owner of the batching plant used in the execution of the contract by the BEBPL. Pursuant to the contract dated 31st May 2001 entered into between NHAI and Petitioner No. 1, mobilization advance as well as equipment and additional advance was disbursed to Petitioner No. 1 by the NHAI for mobilization and for arranging equipment and plant required for the execution of the work. According to NHAI, during the execution of the work, it made enquiries and found that the bank guarantees furnished by Petitioner No. 1 were forged and accordingly a complaint was lodged with the police. By a notice dated 11th December 2004 the NHAI terminated the contract. The NHAI acting under Clause 61.1 of the contract took over all the materials lying on the site including plant, equipment, temporary and other works. The NHAI claims that on the termination of the contract the batching plant and other equipments used for the execution of the contract are deemed to be the property of the NHAI since advances have already been received and accepted by Petitioner No. 1. According to the NHAI it had yet to recover Rs. 14,28,27,450/- from the Petitioner No. 1 against the advances made till 31st January 2010.

4. Anticipating arbitral proceedings, NHAI filed OMP No. 119 of 2005 u/s 9 of the Act in this Court. On 15th April 2005 this Court restrained the Petitioner No. 1 herein from removing, tampering, alienating or parting or in any manner disposing of or creating any third party interest in "all materials i.e. any plant, equipment, machinery temporary works and works existing at the site i.e. 44.300 to km 66.00 of NH-1 in the State of Haryana."

5. NHAI states that the batching plant in question along with certain other plants, equipments and materials used in execution of the contract have been kept in the main Camp Office approximately 1.4 km from the site. Out of the amount of Rs. 6,98,23,601, a sum of Rs. 75 lakhs towards mobilization advance was given by NHAI to Petitioner No. 1 who later utilized a sum of Rs. 22 lakhs for purchasing the concrete batching plant. According to the NHAI, the said batching plant, equipments and materials etc. lying on the site have been used for storing the equipments were deemed to be in lawful custody of the NHAI upon termination of the contract by NHAI.

6. BEBPL, on the other hand, claims to be owner of the batching plant and other assets. It filed OMP No. 316 of 2003 u/s 9 of the Act against Petitioners 1 and 2 seeking interim reliefs including appointment of a receiver to make an inventory of all the equipments lying on the site and restraining the Petitioner No. 1 herein (Maharia Raj - JV) from continuing any further work on the site till the joint measurement and the inventory is complete. BEBPL's claim was based on an agreement dated 27th May 2002 entered into by it with Petitioner No.1 herein. BEBPL was under Bill No. 5 of BOQ subcontracted the work titled "Culverts, Bridges and protective work for six laning of km 44.3 to km 66.00 of NH-1 in the State of Haryana". One of the terms of the sub-contract was that the provisions

of the principal contract between NHA I and Petitioner No. 1 was to apply mutatis mutandis to the sub-contract. It is NHA I's case that although the sub-contract was subject to the approval of the NHA I, the Petitioner No. 1 failed to obtain such approval. BEBPL alleges that it was unable to complete the work on account of the breaches committed by the Petitioner No. 1. It was able to execute the sub-contracted work only to the extent of Rs. 49,75,476.71. According to the BEBPL, it is owed by the Petitioner No. 1 a sum of Rs. 67,16,565.71/- against which it received only a sum of Rs. 38,05,291.81. BEBPL further alleges that the concrete batching plant and two transit mixers required for execution of the sub-contracted works were purchased by it from Petitioner No. 1. The BEBPL further stated that Petitioner No. 1 had illegally terminated the sub-contract and refused to permit the BEBPL to dismantle and take possession of the batching plant and any other equipment lying at the site.

7. By an order dated 28th January 2005 passed in OMP No. 315 of 2005 this Court directed NHA I to withhold a sum of Rs. 60 lakhs out of the payments to be made by the Petitioner No. 1. Subsequently on 4th March 2005 an interim order was passed in IA No. 1557 of 2005 in OMP No. 316 of 2003 by the BEBPL whereby wet mixed plant of 250 tonnes was ordered to be attached till the passing of the award by the arbitrator.

8. According to the NHA I, it was not a party to the proceedings even at that stage. Further, BEBPL was given the liberty to remove the batching plant and other equipments which, it claimed, belonged to it and which was lying at the site. Subsequently, the BEBPL approached this Court with an application, IA No. 2931 of 2005 in OMP No. 316 of 2003, praying inter alia that Receiver should be appointed to take charge of the batching plant and the equipments claimed to be belonging to Petitioner No. 1. The said application was listed on 19th April 2005 and this was re-notified on 29th April 2005. After completion of pleadings in the application on 5th October 2005 this Court appointed receiver to make an inventory of the batching plant and other equipments and take charge of the same and then hand over the same to the BEBPL on superdari of the appropriate amount with a direction to produce the same in court as and when required.

9. Aggrieved by the order dated 5th October 2005 in IA No. 2931 of 2005 in OMP No. 316 of 2003, the Applicant/NHA I filed an appeal, FAO (OS) No. 320 of 2005. The Division Bench of this Court on 11th October 2006 disposed of FAO (OS) No. 320 of 2005 by setting aside the order dated 5th October 2005 passed by the learned Single Judge and directed that no interim order appointing a receiver could have been passed without hearing NHA I. Thereafter the NHA I moved an application dated 6th December 2007 before the learned Arbitrator for sale of plant and machinery in terms of the Award dated 3rd February 2009.

10. BEBPL filed in this Court IA No. 7931 of 2009 in OMP No. 220 of 2006 in which, as already noticed, a status quo order was passed on 17th June 2009 "in light of the order dated 4th March 2005 of this Court."

11. The present application, IA No. 1668 of 2010 has been filed by the NHAI seeking vacation of the said order which, according to it, was passed without affording the NHAI an opportunity of being heard. It is submitted that the order dated 4th March 2005 passed by the Court in IA No. 1557 of 2005 in OMP No. 316 of 2003 ought not to have been continued by the impugned order dated 17th June 2009 in IA No. 7932 of 2009 in OMP No. 220 of 2006 since both were separate matters with no co-relation between them. Moreover, NHAI was not even served with copy of the IA No. 7932 of 2009. Further, since BEBPL is not a party to the arbitration agreement it had no locus standi to file an application u/s 9 of the Act seeking interim measures. Mr. Ravi Gupta, learned Senior counsel appearing for the NHAI further contended that under Clause 61.1 all materials and equipment at the site were deemed to be belonging to the NHAI upon termination of the contract. It is submitted that the status quo order dated 17th June 2009 was severely prejudicing the NHAI and should be vacated.

12. Mr. S.S. Jauhar, learned counsel appearing for Respondent No. 1 BEBPL and Mr. Ravikesh Sinha, learned counsel appearing on behalf of the Petitioner opposed the application. Reliance was placed on an order dated 16th September 2005 passed by a Division Bench of this Court in LPA No. 1949 of 2005 and the order dated 25th February 2010 passed by the Supreme Court dismissing Civil Appeal Nos. 3300-3301 of 2008 filed by K.P.M. Builders Pvt. Ltd. against NHAI. It was urged by Mr. Jauhar, learned counsel for the BEBPL that the words "plant, equipment temporary works and works" in Clause 61.1 had to be located on "the Site" which was the work site. In other words, only such plant and machinery etc., located on the work site could be deemed to be the property of the NHAI and not otherwise. He referred to the definitions of these terms and submitted that there can be no other meaning attributed to these terms.

13. The above submissions have been considered. Clause 61.1 of the contract 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.

14. A plain reading of Clause 61.1 indicates that the comma occurring after the word "site" was meant to bring about a disjunction between "all materials found on the work site" and the plant, equipment temporary works and works which could be located elsewhere but used for the purposes of the contract. This is fortified by the definition of those terms as contained in Clause 1.1 of the contract which read as under:

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

Materials are all supplies, including consumables, used by the contractor for incorporation in the works.

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

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

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

15. Each of the above definitions relates to equipment materials, plant etc. which are used for construction of works, including temporary works which are "needed for construction or installation of works." It is possible that the equipment used for the contract work is kept at a place situated outside the actual work site but either brought to the work site for the purposes of the contract or used, where it is located, for the contract work. The crucial determinant is that the equipment, materials etc must be used for the contract. If they are then the deeming fiction under Clause 61.1 gets attracted. The mere fact that the equipments, used for the work under the contract, may be located outside the work site will not ipso facto result in their being outside the ambit of Clause 61.1 read with the definitions in Clause 1.1 of the contract. From another perspective, the very fact that the Clause 61.1 introduces a deeming fiction indicates that in the absence of such deeming fiction, the plant, equipment, temporary works etc. which may be outside the work site, would not become the property of the NHAI. Consequently, this Court rejects the submission of learned counsel for the BEBPL that the plant, equipment, machinery etc. in the Camp Office, although used for the contract, would not become the property of the NHAI upon termination of the contract.

16. As regards the order dated 16th September 2005 of the Division Bench of this Court in LPA No. 1949 of 2005 (NHAI v. K.P.M. Builders P. Ltd), the facts as set out therein reveal that a direction had been issued after perusing a report of the Local Commissioner that the machinery equipment lying within the contract site shall continue to remain with the NHAI, and that the machinery/equipment found lying outside the contract site shall be released by the NHAI to the sub-contractor after a proper inventory is made. However, this was an interim arrangement and subject to the sub-contractor executing an undertaking that in the event that the said machinery is held to be the property of the second respondent in those proceedings (i.e the contractor), the sub-contractor shall return the machinery to the custody of the NHAI. When the matter was taken in appeal by the sub-contractor to the Supreme Court (C.A. Nos. 3300-01 of 2008 (K.P.M. Builders Pvt. Ltd. v. NHAI), the NHAI had contended that it was only claiming machineries found within and not outside the work site. It was observed by the Supreme Court that there was no privity of contract between the NHAI and the sub-contractor i.e. the appellant in that case. The appellant was aware of the terms of the contract between NHAI and the contractor. Clause 61 was also specifically referred to by the Supreme Court. In the circumstances, it was held

that the writ petition filed by the sub-contractor against the NHAI was misconceived. Even if the sub-contractor had an enforceable right against the contractor he could not resort to writ proceedings. The sub-contractor in any event would not come in the way of the NHAI in enforcing its rights against the contractor.

17. This Court fails to appreciate how the above order of the Supreme Court in the K.P.M. Builders case is of assistance to BEBPL, the sub-contractor in the present case. It is not clear from the order in the case of K.P.M. Builders whether any part of the equipment there was lying at any camp office outside the work site. Therefore, the statement made by the NHAI in that case that it was not seeking custody of the equipment lying outside the work site cannot ipso facto apply as far as the present case is concerned. Here the NHAI has specifically claimed that the equipment found in the Camp Office was used for the contract and therefore in terms of Clause 61.1 would be deemed to be the property of NHAI.

18. For the aforementioned reasons, the status quo order dated 17th June 2009 passed by this Court in IA No. 7932 of 2009 cannot continue and is hereby vacated. IA No. 7932 of 2009 filed by BEBPL is dismissed, and IA No. 1668 of 2010 filed by NHAI is allowed in the above terms.