
(2022) 05 DEL CK 0273

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (Comm.) No. 452 Of 2019

M/S Satish Chand Rajesh Kumar Pvt. Ltd.

APPELLANT

Vs

New Delhi Municipal Council

RESPONDENT

Date of Decision : 30-05-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9
Code Of Civil Procedure, 1908 — Section 151

Citation : (2022) 05 DEL CK 0273

Hon'ble Judges : Neena Bansal Krishna, J

Bench : Single Bench

Advocate : Sanjay Bansal, Karan Sharma, Mohit Siwach

Final Decision : Disposed Of

Judgement

Neena Bansal Krishna, J

1. A petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act, 1996) read with Section 151 Code of Civil Procedure, 1908 has been filed for grant of interim order to restrain the respondents from encashing the Performance Bank Guarantee.

2. It is submitted in the petition that the respondent had floated a tender for the work of redevelopment of Bapu Samaj Sewa Kendra, Panchkuian Road, New Delhi. The petitioner being the lowest bidder was awarded the contract which was accepted vide letter dated 07th February, 2018 by NDMC. The date of start of work was 22nd February, 2018 and the date of completion was 21st August, 2019. The stipulated period of work was eighteen months to be reckoned from 15th day of the issue of letter of Acceptance. The value of the work awarded was Rs.24,66,00,633/-. Petitioner in terms of paragraph 2 of Acceptance letter dated 07th February, 2018 furnished the Performance Guarantee in the shape of Bank Guarantee drawn on Punjab National Bank for an amount of Rs.1,23,30,032/- @ 5% of the tendered value, to be valid up to 31st August, 2019 valid up to 08th

November, 2019 was deposited vide letter dated 13th February, 2018. However, later on the value of work was modified to Rs.24,54,00,633/- vide respondent's letter dated 12th March, 2018 and the performance guarantee was reduced to Rs.1,22,70,032/- which was furnished from Kotak Mahindra Bank Ltd., Rohini, Delhi, which was valid up to 02nd January, 2020. The site, however, was occupied by a dispensary and trees were standing on both the sides and on the requests of petitioner it was finally cleared only on 05th October, 2018. The petitioner has claimed that execution of work for its timely completion within the stipulated time was delayed essentially on account of respondent for the reasons stated as under:

- (i) Non-approval of drawings, which otherwise is required to be provided along with the Agreement;
- (ii) Initial delay in providing the site;
- (iii) Approval of design mix was not provided timely which resulted in extraordinary delay and thereafter had again changed the same;
- (iv) Delay in approval of GFC Architectural and Structural drawings; and
- (v) Others as referred in various letters.

3. The petitioner had apprised the respondents about the hindrances at site at regular intervals vide various letters and had further sought shifting of milestones and release of withheld amount of Rs.24,54,006/- which was wrongly withheld from the running bills, in addition to the amount retained towards security deposit over and above the amount of Rs.1,10,1,000/- for which Bank Guarantee dated 20th April, 2019 had been submitted by the petitioner. The petitioner executed gross work for value of Rs.6,71,83,639/- and submitted the bill along with the measurements to the respondents on 21st September, 2019 but the respondents have failed to release the payment thereof. Though the respondents had admitted the payment for Rs.5,34,62,913/-, but the balance amount of Rs.1,37,20,726/- was claimed yet to be released.

4. It is claimed that the respondents were responsible unilaterally for delay and prolongation of contract Agreement. The petitioner had determined the contract on the expiry of stipulated date of completion i.e 09.09.2019, 16.09.2019 and 19.09.2019 and had requested for release of his legitimate dues as the respondents had breached the contract Agreement. The petitioner in terms of Clause 25 of the Agreement, requested the Superintending Engineer for referring the claims as have arisen in the letter dated 24th October, 2019. The respondents have directed the petitioner to revalidate the Performance Guarantee for a period of one year vide letter dated 15th November, 2019 and the petitioner had got it revalidated upto 2nd January, 2021.

5. The respondents had granted unilateral and arbitrary provisional extension of time up to 31st May, 2020 but that too by reserving the right to levy compensation and at the same time had terminated the contract Agreement vide

letter dated 15th November, 2019. The petitioner agreed to execute the work subject to grant of extension of time without levy of compensation, release of its legitimate payments, providing of drawings and decision and approval of extra items in time, so that the payment towards extra items may be released immediately. However, the respondents have failed to agree to any of the stipulations as requested by the petitioner and have wrongly determined the contract and forfeited the Performance Guarantee under Clause 3 of the Agreement vide letter dated 15th November, 2019.

6. The petitioner thereafter invoked Clause 25 and requested Chief Engineer for appointment of Arbitrator but to no result. The petitioner has claimed that he has not violated any of the terms of the contract agreement and has suffered financial injury because of the breach of contract committed by the respondent. The respondents have also failed to release the payments for the work executed by him.

7. It is asserted that the acts of the respondents would further cause irretrievable harm and injury to the petitioner if they are not restrained from invoking the Bank Guarantee dated 07th January, 2019 towards Performance Guarantee and Bank Guarantee dated 20th April 2019 of Rs.1,10,1,000/- towards security deposit, till the disposal of the matter through arbitration.

8. The respondents in their reply have denied each and every assertion made in the petition. It is stated that pursuant to the letter dated 05th July, 2019 of the petitioner for rescheduling the milestones as per fair and reasonable hindrances and also not to initiate any action under Clause 2 of the Agreement in the interest of work, the respondents agreed to keep the contract alive and a provisional extension of time was granted up to 30th November, 2019 without prejudice to the rights of the respondents to claim liquidated damages in accordance with the provisions Clause 2 of the Agreement which was conveyed to the petitioner vide letter dated 11th July, 2019. The petitioner was also requested to deploy more labour and speed up the progress of the work so that it could be completed at the earliest. The petitioner vide letter dated 13th July, 2019 however fallaciously alleged that the work was lingering on account of respondent and falsely claimed hindrances. The contents of the letters were denied by the respondents. It is claimed that the averments made by the petitioner were in total contravention of the contents of the letter dated 10th July, 2019 issued by the respondents which dealt with the issue of want of drawings. The hindrances that were claimed by the petitioner, were not based on natural facts and were not matching with the records of the Department. The petitioner was requested to concentrate on the execution of the awarded work and not raise frivolous claims.

9. The petitioner vide letter dated 16th September, 2019 requested for extension of fifteen months for completion of work. The respondent vide his letter dated 23rd September, 2019 informed the petitioner that it had legitimate right to take action against the petitioner due to suspension of work. It was further

communicated that it had not executed the work as per terms of the Agreement and the Performance Guarantee was liable to be forfeited in the eventuality of non-resumption of work. The petitioner again requested for further extension of time without levy of compensation for a period of eighteen months vide letter dated 25th September, 2019. In a subsequent letter dated 30th September, 2019 petitioner fallaciously alleged that the work was delayed on account of adamant attitude of the respondent and denied the fact that it had removed the machinery from the site. A Show Cause Notice under Clause 3A and B of the Agreement was given by the Executive Engineer of the respondent on 22nd October, 2019, on account of suspension of the work by the petitioner which had resulted in breach of contract.

10. The respondent in order to keep the contract alive extended the completion period to 31st May, 2020 vide letter dated 11th November, 2019 without prejudice to its rights to levy any compensation under Clause 2. The petitioner vide letter dated 15th November, 2019 rejected the extension of time granted by the respondent for completion of work. The Show Cause Notice under Clause 3 of the Agreement was issued vide letter dated 15th November, 2019 for determining the contract and for forfeiture of the Bank guarantee. The petitioner was also advised vide letter dated 20th November, 2019 to raise the claims before Engineer-in-Charge under Clause 25 of the Agreement and in case he was aggrieved by the order of Engineer In-charge, he could approach Superintending Engineer (BM-1) Civil. The concerned Executive Engineer wrote a letter dated 06th December, 2019 to the Bank regarding encashment of the Bank Guarantee and also conveyed to the Bank that the Competent Authority has decided to forfeit the Performance Guarantee. It is, therefore, submitted that there is no merit in the petition which is liable to be dismissed.

11. The respondents in their additional affidavit has submitted that the NDMC Council vide its Resolution dated 04th August, 2020 has resolved to determine the work of redevelopment of Bapu Samaj Sewa Kendra, Panchkuian Road, New Delhi and also to forfeit the security deposit already recovered and the Bank Guarantee under Clause 3 of the Agreement which shall be absolutely at the disposal of NDMC. In view of the said decision, nothing survives in the petition and the NDMC may be allowed to encash the Bank guarantee towards Performance Guarantee and security deposit.

12. Submissions heard.

13. The learned counsel on behalf of the petitioner has submitted that the arbitration proceedings have already commenced. In the circumstances, the interim order restraining the encashment of Bank Guarantee towards Performance Guarantee and security shall continue for three months during which period the parties shall be at liberty to approach the Arbitral Tribunal for the necessary relief. The petition is accordingly disposed of.