
(2012) 04 DEL CK 0004
In the Delhi High Court
Case No : EX. P. No. 369 of 2008

Sh. Suresh Kumar Gola

APPELLANT

Vs

M/s Puja Cooperative GHS Ltd.

RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 36
Delhi Co-operative Societies Act, 2003 — Section 76(4), 76(5), 76(6)

Citation : (2012) 04 DEL CK 0004

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sandeep Sharma with Ms. Kanika Singh, for the Appellant; Tushar Rao with Mr. Atanu Mukherjee, for the Respondent

Judgement

Manmohan Singh, J.—The decree holder filed the present execution u/s 36 of the Arbitration and Conciliation Act, 1996 read with the provisions of the Order XXI of the Code of Civil Procedure, 1908 for attachment of funds of the judgment debtor for a sum of Rs.56,000/- lying in the account of the judgment debtor with SB A/c No.566 Union of India, I.P. Extension Opposite Shanti Mukand Hospital, Near Hargobind Enclave, Delhi and also prayed for attachment of the basement having an area of 1503.17 sq. ft. and stilt portion having an area of 1503.17 sq. ft. over the basement of the judgment debtor M/s Puja Co-operative Group Housing Society by selling the same for satisfaction of the decree. Prayer is also made in the execution that the judgment debtor comprising of 71 members and each member may be directed to pay its share in terms of the decree passed in favour of the decree holder. The court issued the warrants of attachment of the properties as detailed in the schedule of properties dated 15.10.2008 which were executed as far as attachment of immovable properties being basement and stilted portion over the basement of group Housing Society is concerned.

2. In the order dated 19.8.2009 as far as the attachment of bank account is concerned, it was mentioned before the court that there was no substantial

money in the bank accounts. The court also recorded on that day that a larger number of persons claiming to be residents of judgment debtor Group Housing Society were present in court who are the effected parties and claim that they had paid the dues of construction and they are in possession of their respective flats. Their claim is that fraud has been played upon them and sought time to make their submission.

3. Thereafter, the members of the judgment debtor society filed the objections to the execution on 3.9.2009 being EA No.537/2009. Time was sought to file the reply to the said application. The following are the main contentions of the members of the cooperative society;-

A. The members have paid full dues before taking possession of their flats. The society has issued no dues certificate to the individual members who are the bona fide residents of the society. According to them, the society was completed in June, 1994 and the possession was handed over by the contractor to the society and the society started giving the possession to the members against the maintenance charges etc.

B. It is the further contention of the objectors that the total value of the contract awarded to the contractor was Rs.2.50 crores which was later on revised to 2.75 crores. While checking the 15th running bill, it appears that the contractor used to claim much higher amount in every bill while architect used to cut in every bill. However, the 16th bill was raised with the mala fide intention ever after handing over the possession of the flats to the society as it is evident from the table, the 16th bill was raised on 21.11.1996 which took two years and two months to architect to pass the bill.

C. It is contended that the said 16th bill was never entered in the books of the society. The balance sheets for the year 1995-96 to 1998-99 were given to the members on 1.9.2000 and were passed in AGM held on 2.10.2000 shows a debit balance of Rs.22,29,523/- due from the contractor.

4. The facts of the case are that the work of "construction of 71 Dwelling Units at Plot No.77, I.P. Extension, Patparganj, Delhi" was awarded by M/s Puja Co-operative Group Housing Society Limited (hereinafter called the "Society or the "Respondent") to M/s Kanwarji Construction Company, then a partnership firm, on the basis of tenders invited and their tender having been accepted vide letter of Award dated 16.11.1987, on the terms and conditions mentioned in this award letter, the agreement dated 18.11.1987 was executed between the parties with other tender documents forming part of the contract. The contract was given for total of Rs.250 lac.

5. The rates were on lump sum flat rate basis, grouped under four categories. The work was to be completed within two years. M/s R.K. & Associates were appointed by the Society as the Architect for the works.

6. Due to various reasons attributed by parties to each other, the work could not

progress much and work of the value of Rs.63,10,187/- only could be executed when some disputes arose. The parties referred their disputes to one Shri Inder Narayan. The disputes were resolved amicably and terms and conditions were revised/modified as mentioned in letter dated 12.3.1991 (Exhibit C-10). Cost of the whole work was revised to Rs.275 lacs. Payment for additional extra items of work, not included in this letter was to be made as per stipulated terms. Other terms of the original agreement of November 18, 1987 remained unchanged, operative and binding on the parties. Work was to be completed within two years thereafter. Revised terms were also agreed by the parties in writing dated 20.3.1991. The work resumed and progressed. During the progress of the work, some extra and substituted items of work were also executed.

7. As already mentioned, the contract was revised for the value of Rs.275 lacs on 12.3.1991. Before revising the contract, the contractor had started the work and raised the 1st R.A. bill dated 18.5.1990 for Rs.74.42 lacs which was passed for Rs.63.74 lacs.

8. The decree holder had submitted in all 16 bills, 15 RA bills and 16th as pre-final bill. 15 running bills were certified by the Architect, appointed by the Society and payments as certified by the Architect are admitted to have been made and received.

9. Last 16th bill was submitted on 21.11.1996 of the total value of the work of Rs.3,53,55,586/-.

10. Handing over of the flats by the contractor to the allottee was completed by the end of the year 1998 and then the architect treated it as the final bill and certified the total work of the value of Rs.3,47,68,946/- on 21.1.1999. After adjusting the payments already made against 15 bills, he found an amount of Rs.33,13,204/- due and payable to the contractor and the architect certified it for payment by the society. An amount of Rs.8 lacs was paid by the society on 12.3.1997 and the balance amount of Rs.15,13,204/- remained due, which has not been paid inspite of several written demands made by the decree holder.

11. By order dated 18.11.2002 passed in AA 272/2001 this court appointed a retired judge of this court as an arbitrator to enter upon the reference. The decree holder submitted its statement of claims dated 27.4.2003 raising claims under 6 heads. The judgment debtor, M/s. Puja Cooperative Group Housing Society submitted its reply with the counter-claim dated 11.8.2003 refuting the claims of the decree holder by alleging that the work was defective, deficient and incomplete. The decree holder abandoned the work and that over payment of Rs.31,30,759/- had been made. Both the parties thereafter, led oral and documentary evidence, one affidavit each has been filed and cross examined each of the witness. The arbitrator framed following issues:-

- (i) Whether the claimant has right and locus standi to make the claim?
- (ii) Of what value the claimant has executed the work?

12. After considering the submissions of the parties the following award was passed in favour of the decree holder in terms of para 30.1 and 30.2 of the award which read as under:-

30.1 In the result I award the following amounts to the claimant (Shri Suresh Kumar Gola, sole proprietor of Kanwarji Construction Co.) and against the respondent (M/s Puja Cooperative Group Housing Society Ltd:-

(a)

Principal balance amount (claims 1 &2)

Rs.15,63,204/-

(b)

Interest @ 12% p.a. for pre-reference period (on claims no.1 &2)

Rs.10,74,375/-

(c)

Pendentelite interest @ 12% p.a.

Rs.5,00,225/-

(d)

Costs of the arbitration proceedings

Rs.212,500/-

(e)

Stamp duty paid on award

Rs.3,360/-

(f)

Total

Rs.33,53,664/-

(Rs.Thirty three lakhs fifty three thousand six hundred & sixty four only)

30.2 Future interest @ 12% p.a. from the date of award till payment on Rs.17,79,064/- (on items (a) (d) & (e) of para 30.1 above is also awarded to the claimant and against the respondent.

13. The counter-claim filed by the respondent for refund was disallowed. Thereafter, admittedly no objections were filed by the judgment debtor to the award.

14. Learned counsel appearing on behalf of objectors argued that Mr. Suresh Gola, contractor himself is an attorney holder of one 3BHK flat No.B-502. On

receipt of the balance sheet he was supposed to have raised the objection that why his bill is not entered in the books of society and why it is shown in the balance sheet that amount is recoverable from him. When the contract work was awarded he was one of the partner and the partnership firm was dissolved w.e.f. 1.4.1992. No intimation was given to the society, rather, he kept on submitting the bills claiming amounts from the society under the same name and style as that of the erstwhile partnership firm and kept the members and society in dark. The said act of the contractor was amounting to fraud being committed against the society members.

15. The first objection raised by the objector is that the contract was awarded to a partnership firm. However, the constitution of M/s Kanwarji Construction Co. a partnership firm, was changed to sole proprietorship firm w.e.f. 1.4.1992, which was never informed to the society. Even after dissolution, Mr. Gola (one of the partners) kept on signing the bills/letters as partner and never signed as sole proprietor.

16. I have considered the said objection raised by the objector. It appears from the award passed that the said objection has already been decided by the learned Arbitrator while considering Issue No.1 at para 10.1 to 10.3. The issue reads as under :

Whether the Claimant has right and locus-standi to make the claim?

The award was not challenged by the Society or by any member of the society. The objection of the society was comprehensively considered and speaking order was passed. Hence, it cannot be agitated again by the objector.

17. Second objection raised by the objector is that 16th RA bill was never entered in the books of the society and the in AGM held on 2.10.2000 the debit balance of Rs.22.00 lac was shown due from the contractor. The alleged balance is only a creation of the society as the books are prepared by them. As far as 16th RA bill is concerned, society in reply to the arbitration application had stated as under:

It is denied that a sum of Rs.18 lac which was paid to M/s. Kanwarji Construction Co. on 12.3.1997 was on account payment. It was in fact in full payment of all dues payable to M/s. Kanwarji Construction Co. However, assuming without admitting that it was an account payment, this would also not save limitation as reference to arbitration was sought much beyond 3 years ever from 12.3.1997.

18. It was argued by Mr. Sandeep Sharma, learned counsel appearing on behalf of decree holder that the work was completed on 16.11.1996 and thereafter, 16th RA bill was submitted. As the verification of the said bill was being delayed, an amount of Rs.18 lac was paid by the judgment debtor to the decree holder. Thereafter, the said bill was certified by the architect vide certificate dated 21.1.1999 and after certification of the bill, the same was sent to the judgment debtor for payment. When the payment of the balance amount was not made the

decree holder wrote various letters dated 18.1.2001, 2.2.2000, 18.6.2000, 4.1.2001, 13.6.2001 and 18.10.2001 in this regard. Thus, the allegations that 16th RA bill was never entered in the books of the society and the balance sheet, is nothing but an attempt to mislead this Court.

19. Admittedly, society raised this issue before the arbitrator which was considered by the learned Arbitral Tribunal and was decided in favour of the decree holder. Learned Arbitral Tribunal in paras 11.1 to 25 has dealt with each and every objection which were decided in favour of the decree holder by deciding the claims and counter claims. Now, it appears that the objectors want to re-agitate the same points again in the present objection. There is no cogent and clear evidence available on record to show that the objectors were not aware of the arbitration proceedings. Thus, under these circumstances, trial in denovo cannot be started again in this regard. Society is run by the members, presumption in the present case is that members must be aware about the same very issue. All the counter claims and objections were raised before the Arbitral Tribunal by the executive members of the society. It appears that now different group of members are re-agitating the same objections by filing of the objection which are not tenable as the issues have also decided.

20. Third objection raised by the objectors is that the decree holder himself is an attorney holder of one 3 BHK flat bearing No.B-502, but, despite that in the year 1998-99 he could not raise objections that why his bill is not entered in the books of the society and why it is shown in the balance sheet that the amount is recoverable from him. The said allegation is also without any substance and in fact contrary to the record. As stated earlier, after the certification of the bill by the Architect on 21.1.1999 decree holder wrote various letters in the year 2000-2001 thereby, demanding the amount from the society and thereafter, they filed the application u/s 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of arbitrator. In reply, it is alleged by the decree holder that there had been no whisper. Even society made six claims including interest and cost which were rejected by the learned Arbitrator after considering the counter-claim of the society. The said aspect was also considered by the learned Arbitrator.

21. The next objection is with regard to the material supplied by the society. Decree holder has alleged that whatever materials was supplied by the society, its recovery was accordingly made and the payment was made to the decree holder. There was no question of defrauding the society as is being alleged. The payment to the decree holder was made only after those were passed by the architect of the society that the bills those were prepared on the basis of work executed.

22. The other objection is escalation. It was also considered by the learned arbitrator in his award particularly in para 29.3 when the counter claim No.3 is decided in favour of the decree holder and in fact the condition No.19 relates to the decree holder as per the provision and contract and only for unskilled labour and the same has been granted by the engineer and the architect of the society

after being satisfied with the same.

23. The next objection is with regard to deviation items. It is stated that extra items of the value of Rs.48,16,452.81 as per the case of decree holder. The decree holder submitted to the architect who certified the payment of Rs.42,30,480.62 and according to the society Rs.39,44,681/- was payable. Thus accordingly, the amount was awarded to the decree holder.

24. It is alleged by the decree holder that the payment in respect of providing and making balcony rain water pipe is that the various rate analysis submitted by the decree holder were not passed by the engineer of the judgment debtor society and the architect. It is stated that as per the design and specifications no rain water pipe was to be provided in the balcony. Only GI spouts were to be provided. The judgment debtor society desired that the rain water from balcony should not fall below and as such required the decree holder to provide CI rain water pipes in all balconies. Accordingly, the same was provided and the payment for the same was certified. Thus, I feel that in view of the explanation given by the decree holder the objections raised by the objectors is liable to be rejected.

25. Further, reference to the minutes of meeting dated 3.3.1996 is inter se matter of the society, with which the decree holder has no control. The reference to the Delhi Cooperative Societies Act, 2003 is a matter of record. However, Section 76(4) has no relevancy as far as present execution is concerned. The decree holder further submitted that Section 76 sub Sections 5 and 6 also have no relevance as the decree holder has executed the work for which payment is being demanded.

26. The learned Arbitrator has by speaking order decided the claims of the decree holder in para 28.1 and 28.8. Similarly, counter claim of the society has been considered in detail in para 29 to 29.11 including the objection that the members have paid full dues. It appears that most of the objections raised by the objectors were raised by the society to the claim raised by the decree holder and in its counter claim. Award passed by the Arbitrator is a reasoned award. No objections to the award were filed by the society. The objection of fraud and re-agitating all the same very counter-claims cannot be raised again by another set of members.

27. The other plea of the objectors is that the present proceedings are executed against the management of Puja Cooperative Group Housing Society at 77, I.P. Extension, Patparganj, New Delhi-93, therefore, members are not responsible to pay any due towards the society. There is no force in the submissions of the objectors as proceedings are against the society and its members. The decree holder has no concern, whether the management is there or not. The society is existing. The members are living in the flats and enjoying them without making the payment of the full cost of the constructions and the decretal amount. It is not correct that the execution proceedings are not maintainable and the same

cannot be raised against society members.

28. Admittedly, principle balance amount due to the society was Rs.15,63,204/-. The arbitrator has awarded interest for pre-reference period, pendent lite and future interest @ 12% as well as costs of arbitration proceedings and stamp duty which comes to Rs.17,79,064/-, the same is more than principle balance amount. Admittedly, the 15th RA bill was raised and pre-final bill was raised on 21.11.1996 which was passed by the architect after passing of 26 months i.e. 21.01.1999. It is the admitted case of the parties that the work was completed in the year 1996 and possession was also handed over to the members. They have also alleged that they were not aware about the arbitration proceedings and about the illegal conduct of the members of executive committee of the society. They are unable to pay the decretal amount. Considering the overall facts and circumstances of the matter, I am of the view that as far as the principal balance amount is concerned, they have to pay to the decree holder. Regarding other recovery such as interest, pre-reference, pendent lite future and cost, the said interest amount is decreased to 6% per annum from the date of pre-reference period till the date of payment alongwith principal balance amount i.e. Rs.15,63,204/-. The other reliefs granted in favour of decree holder in the award are called for. The amount as referred to be paid by the members of the society within the period of four months from today. Incase, the said payment is made within the time granted, attachment order shall stand vacated. In failure to do so, the prayer made in the execution would be treated as allowed. With these directions, the present execution and objections are decided. No costs.