

R.K. Aneja Vs. Delhi Development Authority and ors.

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Court : Delhi

Decided On : Mar-13-1992

Reported in : 48(1992)DLT572; 1992(23)DRJ195

Judge : Mohd. Shamim, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1; [Specific Relief Act, 1963](#) - Sections 34

Appeal No. : Interim Application Nos. 8 and 115 of 1992 and Suit No. 3956 of 1991

Appellant : R.K. Aneja

Respondent : Delhi Development Authority and ors.

Advocate for Pet/Ap. : I.S. Alagh,; Ravinder Sethi,; J. Sethi and;

Judgement :

Mohd. Sharnim, J.

(1) This is an application by the plaintiff under Order 39 Rules 1 & 2 Civil Procedure Code for issue of ad interim injunction restraining the defendants from withholding retraining the amounts having become due to the plaintiff in respect of the work executed under the agreement No. 12 & 13/EE/E.D.I./83-84 by the plaintiff or which may become due to the plaintiff under any other contract or

agreement awarded to the plaintiff by the defendants.

(2) Brief facts which led to the present application are as under: That the plaintiff is an Electrical Engineer.(hereinafter referred to as 'applicant'). He is duly registered with the defendant for 'A' Class contracts. The applicant was awarded a work by the defendant for the internal electric installation at Bhikaji Cama Bhawan, R.K-Puram District Centre vide their letter dated 5.10.84. The applicant commenced the work with effect from 6.10.84. The parties to the present application entered into an agreement No. 14/EE/E./D. 111/A/84-85 in respect of the aforesaid work. It was agreed upon in between the parties that both the parties shall be bound by the Terms & Conditions contained in the tender form and the conditions of the contract attached to the agreement. As per Clause 2 of the Contract, the time allowed for carrying out the work was to be the essence of the contract and the applicant was to be liable for penalty at the rate stipulated therein in the event of delay to commence the work or to finish the work by proper dates. Clause 3 of the Conditions provided that in case of delay or breach of the Terms & Conditions by the applicant the defendant would be entitled to terminate the contract and to forfeit the security deposit and get the remaining work completed at the risk and cost of the contractor. Clauses 29 and 30 empower the defendant to withhold the security deposit or any sum or money due to applicant under the said contract or any other contract. Progress of the construction was very slow from the very beginning and therefore the work of the electric installation could not be carried out as per the time schedule envisaged in Clause 2 of the Conditions. The Contractor who was constructing the building suspended the work from February, 1986 onwards on account of certain disputes in between him and the defendant and the site as such could not be handed over to the applicant to carry out electric installation. The above dispute could only be resolved in June, 1987 much after the expiry of the date for the completion of the contract. The execution of the work awarded to the applicant was entirely dependent upon the completion of the construction. No electric installation could have been done till the site was handed over to him. Hence no allegation of delay or negligence could be attributed to the applicant. The applicant later on agreed to resume the work vide his letter dated 19.6.87 in response to the letter dated 12.6.87. The applicant during the course of the work demanded the payment in accordance with the terms and conditions of

the contract from the defendant but they refused to release the payment on one pretext or the other. The applicant brought this fact to the notice of the Chief Engineer who directed the officers to release the payment with regard to the work completed by the applicant. He further directed the supply of the requisite material to the applicant in order to enable him to complete the work. The said orders were not complained with the applicant again complained to the Chief Engineer on 20.3.89 and 30.3.89 that neither the payments were released for the work completed nor material was supplied for further work. The Chief Engineer thereupon convened a meeting on 4.4.89. It was towards the end of the said meeting that the Executive Engineer informed the Chief Engineer that the agreement awarded to the applicant had been rescinded vide his letter dated 31.3.89.

(3) The applicant was served with a show cause notice under Clause 2 of the Conditions of Contract on 27.4.89 as to why the penalty be not levied on him for the delay and negligence committed by him in execution of the contract. The said notice is illegal and invalid as the action under Clause 2 can be taken during the subsistence of the contract only and not after termination of the same. Clauses 2 and 3 of the conditions of the contract are mutually exclusive of each other. The applicant cannot be penalised more than once for the same breach. The applicant replied to the letter dated 27.4.89 through his letter dated 10.5.89 where through he informs the defendant that the work could not be completed on account of non co-operation by the officials of the D.D.A. The applicant again received a letter from the Superintending Engineer on 25.10.90 for a sum of Rs. 1,34,729.00 as compensation under Clause 2 of the Conditions of the Contract for the alleged delay and default on his Contract for the alleged delay and default on his part. Pursuant to the letter dated 25.10.90, the applicant received another letter dated 17.11.90 from the Executive Engineer threatening action under clause 29 of the agreement for the failure of the applicant to deposit the alleged sum of Rs. 1,34,729.00 .

(4) The applicant again received a letter dated 21.5.91 from the Executive Engineer in-charge of the contract 928 L.I.G. Jhilmil Phase-II Zone E-7 calling upon him to explain as to why the amount available with the division be not

withheld as per the instruction contained in letter dated 17.11.90. The applicant through his letters dated 25.5.91 and 31.5.91 informed the defendants that he was not liable to any penal action under Clause 2 and 29 of the agreement. Having failed in his attempts to receive justice from the defendants, the applicant has approached this Court through the present suit. Hence, this application.

(5) The defendant No. 1 have opposed the application inter-alia on the following grounds: that the applicant had filed a similar suit No. 2689/91. The said suit was got dismissed as withdrawn. The applicant also presented in the suit an application bearing No. 9728/91. The Court vide order dated 9.9.91 directed that the amount withheld by the defendant would not be adjusted. No restraint order was passed that the amount could not be withheld. The applicant thereafter moved an application under Section 151 & 152. Civil Procedure Code (i.e. I.A.No-10793 of 1991) for modification of the order dated 9.9.1991. The said application was also dismissed vide order dated 4.11.91. The present application seeking the same relief is not maintainable. The applicant was required to execute the work by 14.10.86. The time for execution of the work was essence of the contract. The applicant delayed the execution of the work. Hence the contract was rescinded under Clause 3 of the contract on 31.3.89 and security deposited was forfeited. The Superintending Engineer also levied a compensation to the tune of Rs. 1,34,729.00 under Clause 2 of the contract. The decision of the Superintending Engineer to leave the compensation and quantum of compensations under Clause 2 in final and binding and is neither justiciable before a Court of law and nor before an arbitrator. The defendant can withhold the amount that may become due and payable under other contracts to the plaintiff can be appropriated by the defendant towards the compensation.

(6) The suit for mere declaration is not maintainable under Section 34 of the Specific Relief Act. The applicant along with the relief of declaration should have also sought the relief of the recovery of the amount on the ground that levying of compensation is bad.

(7) There is no prime facie case in favor of the applicant. Balance of convenience is also not in favor of the applicant inasmuch as the compensation has been levied

in accordance with the terms and conditions of the contract. It is wrong and false that the applicant would suffer any irreparable loss and injury in case the injection is not granted. Loss in terms of money is not considered irreparable loss under law. The application is false and frivolous and is as such liable to be dismissed.

(8) I have heard the learned counsel for both the parties at sufficient length and have very carefully examined their rival contentions, have given my anxious thought thereto.

(9) Learned counsel for the applicant Mr. Alag has vehemently contended that the order in question imposing the penalty on the applicant for the alleged non-execution of 'the work within the time schedule is illegal and invalid inasmuch as the same is beyond the powers of Superintending Engineer. The next limb of his argument is that it was not open to the defendants to have imposed the impugned penalty on the applicant after the termination and rescission of the contract. It is thus beyond their forte. The argument further proceeds that Clause 29 of the General Conditions of the Contract is not available to the defendants in the circumstances of the present case for withholding the amounts which have fallen due to the applicant, or which may become due to him under other contracts. Assuming for the sake of argument that the applicant is guilty of the delay in execution of the contract even then, according to the learned counsel, he cannot be penalised thrice for the same lapse. It would be a punishment out of all proportions.

(10) Learned counsel for the defendant No. 1 (hereinafter referred to as 'respondent for the sake of convenience) has urged to the contrary. He has urged that the present application is incompetent and not maintainable inasmuch as the applicant would an application for and interim injunction in an earlier suit being Suit No. 2689 of 1991, for the same relief which is being sought through the present application under disposal. The Court vide its order dated 9.9.91 simply directed that the amount withheld by the defendant would not be adjusted. Thus the respondent were never restrained from withholding the said amount. The applicant subsequently moved another application for the modification of the order alluded to above but without any success. The said application was rejected vide order

dated 4.11.91. Later on the aforesaid suit was got dismissed as withdrawn. No appeal was preferred against the order dated 9.9.91 and 4.11.91. Hence the said orders have become final inter se the parties. Once a matter has been finally adjudicated upon it cannot be reagitated. The applicant delayed the execution of the work entrusted to him. Hence he has been rightly and justly penalized since the time was the essence of the contract. The contract in question was rescinded and terminated vide order dated 31.3.89 since the applicant failed to perform the contract within the stipulated period. The defendant can withhold the amounts under Clauses 29 and 30 of the Contract which have fallen due to the applicant under the present contract or under any other contract.

(11) Since the learned counsel for the respondent has raised a preliminary objection with regard to the maintainability of the present application, it would be just and proper to examine the said contention first of all before proceeding any further in the matter.

(12) Admittedly the applicant filed a suit No. 2689/91. The applicant through the said suit wanted that the letters dated 25.10.90, 17.11.90 and 21.3.91 be declared as null and void. The applicant through the present suit has also claimed the same relief though the relief sought is couched in different words. Though the present application he wants the operation of the said letters to be suspended. The applicant along with the said suit adverted to above also moved an application bearing no. 9728/91. He through the said application claimed that the defendant be restrained from taking any action against the applicant under Clauses 29 & 30 of the contract on the basis of the letters dated 1.11.90 and 21.5.90. This is exactly the same relief which is being claimed in the present suit. Application No. 9728/91 came up for hearing before Justice Anil Dev Singh who vide his order dated 9.9.91 permitted the defendants to withhold the amounts but not to appropriate the same. Having felt aggrieved and dis-satisfied with the said order the applicant sought the modification of the said order through an application No. 10793/91. The said application was dismissed on 4.11.91 and the earlier order dated 9.9.91 passed on the application No. 9728/91 was confirmed and made absolute. The applicant for the best reasons known to him did not go in appeal against the said order. He neither challenged its correctness nor propriety. Hence the said order has become

final inter se the parties. The applicant through the present application No. 115/92 again wants that the defendants be restrained from withholding and retaining the amounts which have fallen due to him.

(13) Now the question which comes to the tip of tongue is as to whether the applicant can be permitted to against the same matter over again before the Court through the presentation of the present application. My answer to the above question is an emphatic No. It is a well established principle of jurisprudence which needs no reiteration that once a matter has been heard and finally disposed of once thus got a quietus at the hands of a Competent Court, should not be allowed to be revived again. It is in the interest of the litigants. Judicial propriety also demands, that once a matter has been decided, it has attained finality in between the parties, none from amongst the said parties, can be allowed to breach the said matter over again through a different Court. I am thus of the view that the present application is incompetent. It is not maintainable.

(14) Assuming argue do that the present application is maintainable, then even, otherwise, it cannot be sustained on account of other reasons given hereinafter. Learned counsel for the applicant has argued that notice dated 27.4.89 purporting to take action under Clause 2 of the Contract has been issued by the Superintending Engineer. Similarly letter dated 27.10.90 where through the applicant was intimated that a penalty to the tune of Rs. 1,34,729.00 by way of compensation, has been imposed on him was also issued by him. According to the learned counsel the Superintending Engineer is not competent to do so. In fact it is the Executive Engineer who can take action, initially under the said Clause 2 of the agreement. Superintending Engineer comes into picture subsequently when an appeal or revision is preferred against the order of Executive engineer imposing penalty. The argument further proceeds that in case the Superintending Engineer is allowed to take action initially, in that eventuality the applicant would lose his right appeal or revision. Thus it would be highly prejudicial and to the detriment of the applicant. The learned counsel in support of his argument has placed reliance on the observations of their lordships of the Supreme Court in Vishvanath Sood vs Union of India, : [1989]1SCR288 . The contention of the learned counsel, I feel is devoid of any force. I further find that the learned counsel has construed amiss the

observations of their Lordships in the above said pronouncement.

(15) A close scrutiny of Clause 2 of the contract reveals that it is the Superintending Engineer who alone has been authorised to impose the penalty in case of delay of the execution of the work. I am tempted over here to cite a few lines from the said clause in order to substantiate my point. '...The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent, or such smaller amount as the superintending Engineer D.D.A. (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished after the proper dates....' 'In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation as amount equal to one percent or such smaller amount as the Superintending Engineer, Delhi Development Authority (whose decision in writing shall be final) may decide.....provided that the entire amount of compensation to be paid under the provisions of this Clause shall not exceed ten provisions of this Clause shall not exceed ten percent, on the estimated cost of the work as shown in the tender'.

(16) It is manifest from the relevant portions of Clause 2 extracted above, that the Superintending Engineer is the only competent officer under the said clause, to impose a penalty in case of the failure of the contractor to execute the work within the stipulated period. Thus, the argument of the learned counsel that the action should have been taken initially by the Executive Engineer for the imposition of the penalty is not tenable and without any substance. The observations of their lordships of the Supreme Court in the above cited authority are of no avail to the learned counsel. The Hon'ble Judges nowhere laid down in the said authority that the compensation is to be levied in all cases by the Engineer. What their Lordships desired in the said authority was only this much that it would be better in case the compensation is levied by the Engineer in-charge so that the contractor may approach the Superintending Engineer by way of revision or appeal in case he feels aggrieved with the said order. In order to appreciate the above point the observations of their Lordships of the Supreme Court can be cited with profit at this stage '....But it will be appreciated that in practice the amount of compensation

will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. As we see it, Clause 2 contains the complete machinery for determination of the Compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation payable under clause 2 has to be decided only by the Superintending Engineer and no one else.' In the circumstances stated above I am of the view that the Superintending Engineer as per the terms of Clause 2 is the only competent officer to impose the penalty. Hence, the plaintiff, I feel, should have no quarrel and grievance on the said score.

(17) The next contention put forward by the learned Counsel for the applicant is that the defendants could not have imposed the penalty after the termination and rescission of the agreement. The provisions of Clause 2 of the agreement were available to the applicant only during the subsistence of the agreement. The impugned contract was terminated by the Engineer in-charge vide his letter dated 13.3.89 and the action under clause 2 of the agreement was taken subsequent thereto by the Superintending Engineer vide his letter dated 27.4.89. Hence, the impugned action taken by the defendant is illegal and invalid and is liable to be set aside. The contention of the learned counsel, I feel, is without any merit.

(18) A close scrutiny of Clause 3 reveals that there is no such condition envisaged therein that the action under clause 2 of the agreement can be taken only in those discerning few cases where the contract is subsisting and not after the termination of the contract. Thus the subsistence of the contract is not a condition precedent for an action under clause 2 of the contract.

(19) It has then been urged for and on behalf of the applicant that the defendants cannot invoke the provisions of clause 29 of the General Conditions of Contract for

the purpose of withholding any amount which may have fallen due to the applicant in the impugned contract or which may become due to him under any other contract. According to the learned counsel clause 29 envisages for the withholding of the money only in those cases where the claim is to be determined by the arbitrator or by a competent court. The argument further proceeds that in the present case neither the amount is to be determined by a competent court nor by the arbitrator. Hence, Clause 29 of the agreement is not available to the defendants. In view of the above the learned counsel contends that no action can be taken on the basis of the letters dated 17.11.90 and 21.5.91. The learned counsel in support of his argument has led me through a judgment as reported in Uttam Singh Duggal vs. Union of India. Habitation 1990 (2) L R 344 where a learned Judge of this Court observed, 'To my mind Clause 29 does not come to the help of the defendants as far as their writings to the Government Companies and statutory corporations and over to Government Departments are concerned requiring them to withhold payments due from them to the plaintiff. Under Clause 29 the Engineer-in-charge or the Government is entitled to withhold payment pending finalisation or adjudication of any of the claims of the department. Further, the amounts so withhold or retained would be for such period till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) or by the competent court as the case may be. Clause 29 therefore, cannot be applied where the compensation has been levied under Clause 2 which contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contracts as per the time Schedule agreed to between the parties. No question of any finalisation or adjudication of any claim therefore arises for the Engineer-in-Charge or the Government to take action under Clause 29....Acting under Clause 29, therefore the Engineer-in-charge or the Government cannot write to other departments of the Government, Government Companies or statutory corporation to withhold payment due to the contractor because fo levy of compensation by the Superintending Engineer under Clause 2 aforesaid....' The learned counsel on the basis of the observations by a Single Judge of this Court in the judgment alluded to above wants this Court to hold that the defendants can withhold the money only in those discerning few

cases where the claim is to be determined by the arbitrator or by a competent court and in no other case. According to the learned counsel the matter in the instant case is neither pending decision before an arbitrator or before a competent court. Hence, the defendants are not entitled to withhold the amount. The contention of the learned counsel is no doubt an ingenious one but can be brushed aside within an anon without much difficulty.

(20) After going through Clause 29 as well as Clause 30 of the terms and conditions of the contract I find that the pendency of the matter before the arbitrator or before the court is not a condition precedent for the application of the said clauses. It is true that the provisions of the said clauses can be made applicable to those cases also where the disputes are pending before an arbitrator or before a Court of Law, but to say that the said clauses are alternative only when the claim is pending decision before the arbitrator or before a Court of Law would be a travesty and is not warranted by the provisions of the said clauses. The said clauses come into play without any strings attached to them whenever there is any claim or claims for payment against the contractor. I am supported in my above view by the observations of their Lordships of the Supreme Court as reported in *M/s H.M.Kamaluddin Ansari & Co. vs. Union of India and others*, and *Shankar Vijay Saw Mills vs. Union of India and others*, : [1983]3SCR607 . It was observed by the Hon'ble Supreme Court while interpreting Clause 18 of the agreement which is in pari materia with the Clauses 29 and 30 of the agreement in the present case: '....It may, however, be pointed out that even after the change in the Clause 18 of the standard agreement the Union of India cannot be enjoined from withholding the amount under other bills of the contractor....'.

(21) The observations of the learned Single Judge of this Court in the above cited authority i.e. *Uttam Singh Duggal vs. Union of India (supra)*, do not come to the rescue of the applicant. A close scrutiny of the said authority reveals that the Union of India according to the facts of the said case not only wrote letters to a particular department but to the different departments of the Government of India, Government companies and statutory corporation all over the country under the signatures of the financial officer who was not competent to sign the said letters to withhold the payment. Faced with the said fact situation the learned Judge

observed that the Union of India was not justified to do so. The fact situation of the case in hand is altogether different. Here the Delhi Development Authority has written to its own department to withhold payments.

(22) The Union of India went in appeal against the said judgment and order passed by the learned Single Judge. The matter came up before a Division Bench consisting of Ms. Justice Sunanda Bhandare and Mr. Justice Arun Kumar. The said appeal was decided on 27.11.90 (FAO(OS) 134/90 & Cm 2548/90). The learned Judges while disposing of the said appeal observed: 'From Clause 29 it is clear that it is either the Engineer-in-Charge or the Government who can issue such a letter. The learned Single Judge has therefore, rightly observed that the letter in question has not been issued by a duly authorised person. This, however, does not preclude the appellant from issuing letters to the Government departments afresh, but signed by a duly authorised person'.

(23) It has next been contended that assuming without admitting some delay was committed by the applicant in the execution of the contract even in that eventuality also the applicant can not be penalised thrice for the same lapse on his part. The defendants have forfeited his security deposit i.e. 10% of the tender price. They have levied a penalty on the applicant under Clause 2 of the agreement. They have also invoked the clause relating to risk purchases for the extra work got done by the defendant through some other agency. The learned Judges has thus argued that the defendants cannot be permitted to make profit with the help of the above said terms and conditions of the contract. The learned counsel further says that once an action has been taken under Clause 2 no action is permissible under Clause 3 simultaneously. The contentions of the learned counsel. I feel, are without any substance.

(24) To my mind, there is no warrant for such a proposition of law. The impugned clauses i.e. Clauses 2, 3, 29 and 30 of the contract are not amenable to any such interpretation. There is no such stipulation under any of the terms and conditions of the impugned agreement that once an action has been taken under Clause 2 the action under Clause 3 or subsequently under Clauses 29 and 30 would be automatically debarred. The defendants I feel are free to take action at one and

the same time under any of the clauses of the 'agreement/contract whichever is available to them. They cannot be compelled and impelled to have recourse to only a particular clause in a particular situation.

(25) There is another side of the picture. The applicant entered into an agreement with the defendants with his open eyes. He must have been aware of each and every term and condition of the contract at the time the contract was drawn up. Thus, I feel it is now too late in the day to assail the legality and the validity of the contract which has been acted upon by both the parties.

(26) In view of the above I am of the view that the applicant has miserably failed to show a prima facie case in his favor. The balance of convenience is also in favor of the defendants inasmuch as what they are doing is simply this that they are enforcing the clauses of the. agreement which are binding on both the parties where-under they have been permitted to withhold the amount which ever is due to the applicant.

(27) It has been urged for and on behalf of the defendants that the present suit is not maintainable and barred by Section 34 of the Specific Relief Act inasmuch as the plaintiff/applicant through the institution of the present suit has simply claimed the declaration. He wants through the present suit that the Clauses 29 and 30 of the conditions of the contract be declared as null and void. He further wants that the agreement whereby the penalty was imposed on the application be also declared as null and void. Thus, according to the learned counsel the applicant could have sought further relief i.e. the relief with regard to the recovery of the amount which has fallen due to him and which he has now omitted to do so. Consequently, the present suit is incompetent and is liable to be dismissed.

(28) Since we are concerned with the construction of Section 34 of the Specific Relief Act the provisions of Section 34 of the said Act can be adverted to with profit. Section 34 of the Specific Relief Act provides: 'Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

(29) Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so'.

(30) It is crystal clear from the prayer clauses reproduced above that the plaintiff through the institution of the present suit wants this court to declare clauses 29 and 30 of the conditions of contract as un-enforceable, null and void and action taken by the defendants under Clause 2 of the agreement also as null and void. The sum and substance of the reliefs sought is that the defendants may not withhold the amount and the same be paid to him. Similarly, no penalty be imposed on him by the defendants and he be got paid the amount which has fallen due to him in to. Thus, this Court feels that the applicant could have sought further relief after seeking the impugned declaration i.e. the recovery of the amounts which have fallen due to him. The applicant for the best reasons known to him confined himself to seeking a mere declaration without seeking the .further relief which he was entitled to. Such a suit I feel is clearly barred by Section 34 of the Specific Relief Act. The learned counsel for the applicant has failed to show any thing to the contrary.

(31) In view of the above I conclude that the present applications have got no force and the same are liable to be dismissed. Similarly, I am of the view that the present suit is not maintainable and is thus liable to be dismissed. The applications as well as the suit are hereby dismissed with costs.

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