

Prima Developers Vs. Lords Co-operative Group Housing Society Ltd.

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Court : Delhi

Decided On : May-08-2009

Reported in : AIR2009Delhi131; 159(2009)DLT586

Judge : Mukul Mudgal and; Valmiki J. Mehta, JJ.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 9 and 36

Appeal No. : FAO(OS) 164/2009

Appellant : Prima Developers

Respondent : Lords Co-operative Group Housing Society Ltd.

Advocate for Def. : Harish Malhotra, Sr. Adv. and ; Rajender Aggarwal, Adv.

Advocate for Pet/Ap. : Rohit Kumar, Adv

Judgement :

Mukul Mudgal, J.

CM No. 6198/2009

Exemption allowed subject to all just exceptions.

CM stands disposed of.

FAO(OS) No. 164/2009 and CM No. 6197/2009 (stay)

1. This appeal challenges the order dated 24th April, 2009 passed by the learned Single Judge in petition OMP No. 225/2009 under Section 9 of the [Arbitration and Conciliation Act, 1996](#) (for short 'the Act') filed by the respondent-applicant before the learned Single Judge. The dispute between the parties arose as the appellant/contractor was awarded construction work vide letter dated 25th October, 2004 by the respondent, Cooperative Group Housing Society, for constructing 115 dwelling units at the plot allotted to the respondent i.e. plot No. 7, Sector-19B, Dwarka, Phase-II, New Delhi. An agreement was also subsequently entered between the parties on 20th December, 2004 containing in detail the terms and conditions as agreed between the parties. The contract was for a lump sum payment per square foot basis for a total consideration of 26,26,00,000/- to be completed within 30 months. The appellant on being awarded the work immediately mobilized its labour, material and machinery for the work. The appellant submitted that it completed the superstructure of the four blocks between 1st April, 2006 and 2nd June, 2006.

2. However, the architect of the respondent society sent a letter dated 13th February, 2009 wherein it was alleged that the appellant had abandoned the work. Without considering the reply sent by the appellant, the respondent reiterated the allegation vide its letter dated 4th March, 2009 and further vide its letter dated 13th March, 2009 was said to have terminated the contract. Thus, the appellant had earlier filed a petition under Section 9 of the [Arbitration and Conciliation Act, 1996](#) being OMP No. 138/2009 praying for the appointment of an independent person who shall take measurements of the work already done by the respondent at the site i.e. Plot No. 7, Sector-19B, Dwarka, New Delhi-110075 and preserve the work executed by the appellant till the disputes were referred for arbitration and restraining the respondent from taking measurements and engaging another contractor which resulted in the order dated 20th March, 2009.

3. The learned Single Judge vide order dated 20th March, 2009 while declining the prayer for the appointment of an independent person to measure the work undertaken, permitted the appellant-applicant to depute its own competent

architect/civil engineer for the measurement of the work done by the appellant. Both the parties were to sign the said measurement and dissent, if any, upon the measurements was to be noted.

4. The order dated 20th March, 2009 reads as under:

This application has been made under Section 9 of the [Arbitration and Conciliation Act, 1996](#) with a prayer that this Court should pass an interim injunction restraining the respondent from taking measurements and engaging another contractor for execution of the balance work and should appoint a receiver/independent person/persons who shall take measurement of the work and preserve the work executed by the petitioner till the disputes are referred to arbitration.

In my view, none of the above prayers can be allowed by this Court. The petitioner had entered into a contract with the respondent to do the civil work of the respondent in respect of its project. Some disputes cropped up inter se parties and the contract has been terminated by the respondent. Since the contract has been rescinded, the work done by the petitioner so far has to be measured so that the petitioner can be paid for the work done. Stopping the respondent from measuring the work done would be rather against the interest of the petitioner. Any doubt about the measurement not being taken correctly can be set at rest if the petitioner deposes its own architect/engineer at the time of taking the measurement.

Counsel for the respondent is present and takes notice of this petition and submits that the respondent had rather served a notice to the petitioner for joint measurement of the work done by the petitioner.

In view of these submissions, I consider that the petitioner should depute its own competent architect/civil engineer at the time of measurement of the work done so far by the petitioner and wherever the measurements are agreed, both the parties should sign the measurements but where the measurements are not agreeable, the petitioner should give its dissent so that the matter can be, at the appropriate stage, be adjudicated.

With above directions, the petition stands disposed.

5. The impugned order dated 24th April, 2009 was passed in OMP No. 225/2009 filed by the respondent under Section 9 of the [Arbitration and Conciliation Act, 1996](#), and which sought a direction that the appellant herein should remove their tools, plant& machinery and labour from the site of work and another order restraining the appellant and his agents from interfering with the right of the respondent in getting the rest of the work executed through some other contractor. The learned Single judge has granted this latter prayer, though the prayer for appointment of Local Commissioner was not granted. The learned Single judge was of the view that it is not for this court to create evidence as to how much work has been done.

6. Section 9 of the Act reads as under:

9. Interim measures, etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court-

(i) For the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) For an interim measure of protection in respect of any of the following matters, namely:

(a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the and the Court to be just and convenient, shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

7. Section 9, thus, expressly permits the inspection of the property which is the subject matter of dispute for obtaining full information or evidence. Thus, what was denied by the learned Single Judge was specifically permitted by Section 9. In fact, Section 9 even permits obtaining of evidence which practice was frowned upon by the learned Single Judge as being impermissible in a Section 9 application. Accordingly, we are of the view that denial of the appointment of a local commissioner has been occasioned by the learned Single Judge losing sight of the clear mandate of Section 9 of the Act and cannot be sustained. The appointment of a local commissioner in respect of a construction dispute was not only permissible in law but indeed desirable.

8. In our view, this does not appear to be the correct approach, as recording of the measurements in respect of a dispute pertaining to construction work is the most appropriate remedy under Section 9 and cannot be denied by terming it as creating of evidence. Accordingly, while setting aside the above order dated 24th April, 2009 to the extent that it does not appoint a Local Commissioner, with the consent of the learned Counsel for the parties, the following order is passed:

a. The measurements shall be done by the Architect for the project, M/s. Design 'N' Design, in the presence of one representative each of both the appellant and the respondent.

b. This exercise shall be carried on in the presence of Local Commissioner, Sh. Subhash Oberoi, Ch. No. A-32, Connaught Circus, New Delhi-01, Phone No. 23327907, 23389690.

c. This exercise shall be completed within a period of three weeks from the date it commences and the date of exercise has to commence not later than a period of one week from today.

d. Both the Counsel suggested that the fee for the Local Commissioner be fixed at Rs. 1,00,000/- (Rs. One Lakh only), to be shared equally by both the parties. It is so directed.

9. Mr. Malhotra, the learned Senior Counsel appearing on behalf of the respondent has handed over in court to the learned Counsel for the appellant, what according to him are the measurements recorded by the respondent on site. The Compact Disc (CD) of the video recording of work prepared by the respondent shall be handed over to the learned Counsel for the appellant not later than 9th May, 2009.

10. Mr. Malhotra also states that till the period of three weeks, he shall not ask his present contractor to engage in or commence any construction activity in the disputed property.

11. The appeal stands disposed of accordingly. Dasti under the signatures of the Court Master.

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