

Master Builders and anr. Vs. United States of America

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Court : Delhi

Decided On : Feb-15-1991

Reported in : 43(1991)DLT719

Judge : M.C. Jain and; Arun Kumar, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : First Appeal No. 38 of 1991

Appellant : Master Builders and anr.

Respondent : United States of America

Advocate for Pet/Ap. : M.C. Bhandare,; Bawa S.C. Singh,; A.K. Jain,;

Judgement :

M.C. Jain, J.

(1) This appeal is preferred against the order dated 7th February 1991 passed on the application filed under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for restraining the defendant by means of an ad interim injunction from resisting and obstructing the entry of the plaintiff in property No. 16. Amrita Shergill Marg. New Delhi and also restraining the defendant from entering upon the same. The learned Judge granted the plaintiff's application and the defendants were directed to remove themselves from the property in question

during the pendency of the suit and were further restrained from resisting or obstructing entry of the plaintiff of any of the officers or others all on behalf thereto. The learned Judge also gave some directions as to how the order passed on the application is to come into effect. The directions given by the learned Judge are as under :-

'(1) This order will become effective from February 18, 1991, 12.00 noon;

(2) Plaintiff will file the requisite undertaking on or before February, 16,1991;

(3) Ms. Freyan Desai, Advocate, C/o Dua & Associates, 204-206 Tolstoy House, Tolstoy Marg, New Delhi, and Mr. R.S. Sodhi, Architect, C-48, Panchsheel Enclave, New Delhi, are appointed joint Local Commissioners to respectively supervise and record the stage of construction of the property in question. The representation of the parties shall be allowed to be present at the site at the time of execution of the commission. The Local Commissioners shall also record any observation or objection as may be requested by either of the parties. They shall take video film of the property both of its exterior and interior and may also take photographs, if they so choose. No obstruction will be caused to the Local Commissioners in the discharge of their duties by any one and they shall have free access to any portion of the property. Either of the parties may submit plans of the property to the Local Commissioners in order to expedite their work. As to whether they should visit the site jointly or individually at different times shall be left to the discretion of the Local Commissioners. They shall complete their work on or before February 17, 1991.

(4) Ms. Freyan Desai, Advocate, shall further supervise the exit of the defendants into the property in question on February 18 1991 at 12.00 noon, and entry of the plaintiffs at the same time. She will report compliance to the court thereafter.

(5) The plaintiff shall be free to carry out any further construction/ improvement in the property after the order becomes operative. Each of the Local Commissioners shall be paid Rs. 10,000.00 as her/his fee in the first instance, which I have fixed tentatively, at the rate of Rs. 2000.00 per day. The fee shall be exclusive of all the expenses which the Local Commissioners might have to incur. The fee and the

expenses shall be borne by the plaintiff and will be subject to further orders of the Court. The Local Commissioners shall submit their report immediately after execution of the commission.'

(2) The necessary facts stated by the learned Judge are as follows :-

(i) 'The plaintiff is the Federal Government of the United States of America having its diplomatic mission in New Delhi. There are two defendants. First defendant is stated to be a partnership firm engaged in the business of engineering and building contracts. Second defendant is the managing partner of the first defendant. At this stage itself, it may be noted that the first defendant earlier filed a suit. Suit No. 932 of 1986, against the Government of the United States of America and their contracting officer for recovery of over Rs. 1.18 crores for the work done on property bearing No. 16, Amrita Shergill Marg. and also No. 14, Amrita Shergill Marg. The two suits have been consolidated by an order dated November 26, 1990. Since there are two cross suits, it will be appropriate to use the names of the parties instead of describing them as plaintiff and defendant, that is, the United States of America ('USA' for short) and Master Builders ('MB for short). (ii) Usa is the owner of leasehold rights in plot Nos. 14. and 16, Amrita Shergill Marg, New Delhi (henceforth to be described as Plot No. 14 or, even no. 14 and Plot No. 16, or, even No. 16). It was to construct senior officers residences on these plots and for that purpose invited tenders. The tenders of Mb was accepted, and two separate contracts for the construction of residences at No. 14 and No. 16 were entered into. The two projects and the two contracts, though separate, were, in fact, treated as one by the conduct of the parties, and it is the admitted case that there was common correspondents covering construction on both these plots. The suit filed by Usa concerns construction on plot No. 16. Cost of each project was Rs. 40,31,654.00, but Mb has contended that due to changes made by the Usa the contract price was increased to Rs. 76,25,699.05 for plot No. 14 and Rs. 76,81,406.84 for plot No. 16. (iii) The two contracts were entered into on October 5, 1979. On October 15, 1979. Usa wrote to Mb authorising Mb to undertake construction of the work as per contracts, the date October 15, 1979 being the effective date. The work on plot No. 14 was to be completed on 7.12.1980 and on plot No. 16 on 15.2.1981. Thereafter, demolition of the existing buildings on the

plots took place, excavation done and foundations laid and construction started. On January 12, 1983, possession of building constructed on plot No. 14 was handed over by Mb to Usa after obtaining the occupancy certificate from the New Delhi Municipal Committee ('NDMC' for short) Mb has claimed that construction on plot No. 16 was complete on January 12, 1983, but it still holds on with the possession of that buildings. (iv) Usa has complained that construction on both plots Nos. 14 and 16 was shoddy and incomplete and it, therefore, per force, terminated the contracts by its notice dated May 4, 1983, which was also on account of gross delay on the part of the Mb in not completing the works. It has said that it has made overpayments to Mb and extensive rectification of the work had to be done at No. 14. Further, with respect to plot No. 16, Usa has stated that in spite of the fact that the work done was shoddy and incomplete more payments than due had been made to Mb, but Mb was refusing to remove itself from the property. Usa said that under clause 37 of the contract between the parties, procedure for adjudication/settlement of disputes in relation to the contract in question was to be decided under the Contract Disputes Act, 1978, a law of the USA. It said that on February 7, 1984, Mb preferred its claim before the Contracting Officer under the aforesaid Act, and Usa also filed counter-claims. The Contracting Officer held that a sum of Rs. 39,60,960.63 was due from Mb to USA. Against this decision. Mb filed an appeal before the Board of Contract Appeals, the Appellate Authority, but after hearings had been held even in New Delhi, Mb by its letter dated June 21, 1985, withdrew the appeal. According to Usa the order of the Contracting Officer, therefore, became final. (v) On April 14, 1986, however, Mb filed the suit (Suit No. 932 of 1986) against the Usa for recovery of money under the two contracts. Along with the suit, Mb filed an interlocutory application (I.A. No. 2926 of 1986) seeking restraint on the Usa from entering upon the property. Then, in that suit Usa also filed interlocutory application (I.A. No. 6166 Of 1989) that injunction be granted restraining the Mb from obstructing Usa and its officers from entering upon the property No. 16. However, Mb with drew its application and the same was dismissed as withdrawn. Then, the Usa filed the present suit (Suit No. 2345 of 1990) and its application was subsequently also dismissed as withdrawn. (vi) Usa claims to be the owner of the property No. 16 about which it says there is no dispute. It says that Mb was allowed to enter upon the plot for purpose of

demolition of the existing structure thereon and for construction of a new building under the contract, and that there was no transfer of possession in favor of Mb and that possession always continued with the Usa, the lawful owner. The only license granted to Mb was to enter upon the property for the purpose of carrying out construction and it had no right to remain there, now that the contract had been terminated and its continuance to remain there was not legal. Usa says that the only question that arises for consideration is if a building contractor after termination of the contract by the owner has any right to obstruct the owner from entering into the property or claim to hold possession of the site Then, as noted above, Usa has also claimed damages from Mb at the rate of Rs. 1,30,000.00 per month. Mb has disputed the contentions raised by Usa and lays blame squarely at the doors of the USA. It has given various factors (Clauses A to M in para 10 of the written statement) which caused delay in execution of the work it has said that the contract was carried out entirely to the satisfaction of Mr. B.C. Lineberry, Project Supervisor, and foreign buildings attache, American Embassy, who was having permanent office at the site of the projects and who along with his engineer and architect used to inspect the work, done by Mb, every day, and whatever shortcomings were pointed out by the Project Officers these were attended to by MB. Mb says that project at No. 14 was complete on October 30, 1982, and possession was delivered to Usa on January 12, 1983. With regard to plot No. 16 Mb, says that project was substantially completed in all respects by March 31, 1983, except for a few minor items or touching up in the painting and polishing works and that the same could not be completed due to the gross, illegal, mala fide and wrongful detention of MB's retainage amounts as well as non-payment of running bills amounting to over Rs. 23 lakhs. Mb has given the break up Of these arrears as under : 1. Refund of reduced retainage for No. 14...Rs. 12,56,709,00 2. Refund of retain age for No. 16, and work done ... Rs. 8,04,702.00 3. Bill for purchase order...Rs. 2,37,000.00 Total...Rs. 22,98,411.00 Apart from this, Mb has claimed further charges, ft thereforee says that it has a right to retain possession of the property built on plot No. 16 as security and the guarantee for the payment of outstanding dues to it from USA. Mb has claimed lien on the property and says it has such a legal right to retain possession which is against the whole world. Lien is claimed on the property built on plot No 16 for the price of construction made on

both the plots Nos. 14 and 16. Total amount Mb claims is over Rs. 1.18 crores with interest. Mb says, the contracts had been wrongfully terminated by the Usa after the work was complete, and further that before the lien could be terminated it had to be paid its dues.'

(3) Counsel for the appellant has submitted that the learned Judge did not take into consideration as to whether there was a wrongful termination of the agreement by the plaintiff and as such the plaintiff is not entitled to any equitable relief in the form of injunction. The defendant applicant had completed the building and at that stage it was wrongful on the part of the plaintiff to terminate the agreement. The appellants had the right to remain in the property, and that license could not be revoked or terminated by the plaintiff. The defendant has a large sum outstanding against the plaintiff, in respect of which a suit has already been filed by the defendant in the sum Rupees more than one crore. It is also urged on behalf of the defendants appellants that by allowing the application for grant of temporary injunction, the suit itself stood decreed. Entering into the plot in question was the relief sought by the plaintiff in the suit and that relief plaintiff has been granted on the application for grant of temporary injunction. It is also urged on behalf of the appellant that the learned Judge did not properly consider the law laid down in *Hounslow v Twickenham Garden Development Ltd.*, (1970) 3 All Er 326 where the owner was refused injunction to restrain the contractor from entering the site and *Hudson's Building Contracts*, and *Mayfield Holdings v. Moana Reef* (1973) 1 NZ LR 309, were relied upon.

(4) It may be stated that the main question for consideration before the learned Judge was as to what is the right of the building contractor to remain in the property after termination of the contract by the owner of the property. According to the plaintiff, the contractor has no right, title or interest in the property. The contractor could not hold the property or continue to remain in possession of the property against the alleged claims under the contract. The learned Judge considered the principles of law which should govern such a case and also the question as to whether the Court at an interim stage can grant such an injunction as prayed for during the pendency of the suit which virtually amount to decreeing the suit so far as handing over possession or restraining the defendant from

obstructing the entry of the plaintiff in the property is concerned. The learned Judge considered the law on these aspects in sufficient details in his lengthy judgment of 40 pages. He adverted to the relevant case law on the subject. The cases dealt with by him are ; Hounslow v. Twickenham Garden Development Ltd. (1970) 3 All Er 326 , Porter v. Hannah Builders (1969) VR 673, Mayfield Holdings v. Moana Reef (1973) NZ LR 309, Graham H Roberts Ltd. v. Maubeto investments Ltd. (1974) NZ LR 93, Dewan Chand Sabharwal v. Union of India Air 1051 P&H; 426, Dorab Cawasji Wardeen v Coomi Sorab Wadeen : [1990]1SCR332 . Southern Roadways Ltd. v. S.M. Krishnan : (1989)4SCC603a , Kailash Nath Associates v. Ram Nath 1990 (2) DL 304, Vijay Srivastava v. Mirahul Enterprises : AIR1988 Delhi140 and Chandu Lal v. M.C.D. (Full Bench) : AIR1978 Delhi174 Law Quarterly Review page 309 and Hudson's Building Contracts, Supplement to Art 712 of 10th Edition.

(5) He gave the reasons as to why he is following the view expressed in Hudson's Building Contracts and Mayfield Holdings v. Moana Reef and other cases which have been relied upon by the plaintiffs. We agree with the reasons given by the learned Single Judge.

(6) It may be stated that the defendants rights have been amply protected and the equities have been considered by the learned Judge. Counsel for the plaintiff had agreed to file an undertaking as directed by the Court. The Contractor cannot be allowed to hold on the property till his claim is decided in the suit, more particularly when the agreement has been terminated and the licenses have been revoked. After such an action on the part of the plaintiff, in our opinion, the Contractor has no right to remain in the property. Even if it is found that the termination of the agreement was wrongful, still so far as contractor' rights as such are concerned to remain in the property, there can be none. If there is wrongful termination of the contract, the appropriate remedy is an action for damages for breach of contract.

(7) To us, it appears that the main grievance of the appellant is that his suit will be a prolonged affair and that it will not be possible to get relief in the suit for a very long time. In this regard the learned counsel for the appellant submitted that the defendant/applicant would submit all his documents and the plaintiff may also

submit his documents and the parties may pray to the Court that on the basis of the documents, suit may be decided. In this connection the parties, if so advised, may move the trial judge. But so far as the present appeal is concerned, we agree with the view of the learned Single Judge. We affirm and uphold the order of the learned Judge as we do not find any good ground for interference.

(8) In the result we find no force in this appeal. It is hereby dismissed summarily.

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