

Anand and Associates Vs. Delhi Development Authority

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Court : Delhi

Decided On : Jun-02-1997

Reported in : 1997(2)ARBLR135(Delhi); 67(1997)DLT745; 1997(42)DRJ458

Judge : J.B. Goel, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rules 1 and 2

Appeal No. : Interim Application No. 346 of 1997 and Suit No. 70 of 1997

Appellant : Anand and Associates

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : Harish Malhotra,; A.K. Sood,; Namita Choudhary and;

Judgement :

J. B. Goel, J.

(1) By this order I will dispose of the plaintiff's application (I.A. No.346/97) under Order 39 Rules 1 and 2 for restraining the defendants from enforcing the recovery of security amount of Rs. 2 lacs and levy of penalty of Rs. 14,55,237.00 by withholding these amounts due and payable to the plaintiff in respect of other pending bills towards other works executed by the plaintiff.

(2) This application has been filed in a suit for declaration and injunction against the action of defendants in levying the penalty and enforcing it.

(3) Briefly the facts are that the work 'SH: Construction of peripheral storm water drains in Sector 22 relating to development of 1769.88 hectares of land at Papankala (Dwarka) Project Phase I, including alternative plots around Village Amber Hai, Bagdola and Manglapuri was awarded by defendant No. 3 to the plaintiff vide acceptance letter No. F. 55 (488)/EEWD-171, DDA/95-96/1863, dated 13.9.1995 for which a formal contract No. 9/EF/WD-7/DDA/95-96, dated 20.9.1995 was also executed between the parties. Total value of the work was Rs. 2,59,95,026.00 and the work was to be commenced by 23.9.1995 and to be completed by 22.9.1996.

(4) It appears that the drawings prepared and approved by the defendants for the work were defective in as much as levels marked thereon were not suitable to the actual site level existing at site and as such the work could not be commenced by due date. Fresh drawings were prepared and approved by the Municipal Corporation of Delhi on or about 7.2.1996. These were ready and available with the defendants on 9.2.1996 intimation of which was given to the plaintiff but these were actually collected by the plaintiff on 18.3.1996.

(5) It appears that the plaintiff did not execute sufficient quantity of work in accordance with the time schedule as stipulated in the contract and till 12.8.1996 the progress of the work was to the extent of 2% only. Non observation of this condition provided for levy of compensation under Clause 2 of the agreement by the Superintending Engineer concerned. The Superintending Engineer (defendant No.2) by means of his letter dated 12.8.1996 gave a show cause notice to the plaintiff for levying such compensation under Clause 2. It appears that no reply was submitted by the plaintiff. By another letter dated 26.8.1996 the defendant No.3 also pointed out that the work had not been carried out as per terms agreed and gave a show cause notice under Clause 3(a), (b) and (c) of agreement as to why the contract should not be terminated and action taken thereunder. This clause provided for termination of the agreement and getting the work executed from other agency at the cost of the plaintiff. Vide a letter dated 2.9.1996

defendant No. 3 extended the period for completion of the work up to 31.12.1996 but without prejudice to the rights of the Delhi Development Authority (DDA) to recover damages. It appears that no further progress in the execution of the work was made by the plaintiff and the defendant No.3 vide his letter dated 10.12.1996 rescinded the contract and informed the plaintiff that the work will be executed at their cost through another agency. Work done by the plaintiff was measured by the concerned Engineer after giving notice to the plaintiff who did not join. Defendant No.2 vide his letter dated 30.12.1996 levied compensation under Clause 2 amounting to Rs. 14,55,237.00 at the rate of 5% of the estimated cost of the work. Vide another letter dated 2.1.1997 defendant No.3 wrote to various officers of the Dda informing them to withhold the balance security amount of Rs. 2,00,000.00 (due from the plaintiff) and the aforesaid compensation amount of Rs. 14,55,237.00 from any sum payable to the plaintiff under this contract or any other contract. The plaintiff has filed the present suit seeking declaration and injunction against this action of the defendants.

(6) Case of the plaintiff is that the work could not be commenced on the stipulated date due to defective drawings. Revised drawings were approved and given to them on 18.3.1996 and in the meantime there was escalation of cost due to various factors and the plaintiff had approached the defendants for allowing escalation cost but no reply was received and secondly that the work could not be undertaken or completed due to heavy rains and other obstructions caused in the execution of the work for which defendants were responsible. The defendants have denied this. Thus both the parties blame each other for not completing the work as per agreement between the parties. The grievance of the plaintiff in the application is that the contract has been illegally terminated and the amount levied and claimed is a penalty and cannot be recovered in view of Section 74 of the Contract Act and the defendant cannot withhold any dues of the plaintiff against other contracts nor unless the compensation as damages is determined by the Court according to law and the action of the defendants is illegal and not warranted in law.

(7) On behalf of plaintiff reliance has been placed on Uttam Singh Duggal & Company v. Union of India & Ors. 1990 2 ALR 344, Maula Bux v. Union of India, :

[1970]1SCR928 , Union of India v. Raman Iron Foundry, : [1974]3SCR556 , M/s. Air Foam Industries Pvt. Ltd. v. Union of India, : AIR1973 Delhi253 , State of Orissa and Ors. v. Calcutta Company Ltd., : AIR1981 Ori206 , and State of Gujarat v. Ms.M.K. Patel & Co. & Another, : AIR1985 Guj179 and Sections 73 and 74 of the Contract Act whereas on behalf of defendants reliance has been placed on M/s. Mohan Meakin Breweries Ltd. v. Union of India & Ors., 1975 2 Del 151., M/s. H.M.Kamaluddin Ansari & Company v. Union of India & Ors., : [1983]3SCR607 , V. Narasimha Rao v. The Superintendent of Excise & Ors. Air 1974 A.P. 154

(8) The controversy centers round the scope of rights and powers emanating from Clauses 2, and 29 of the agreement between the parties in the light of Section 74 of the Indian Contract Act. Clause 2 and Clause 29 and Section 74 of the Indian Contract Act, so far as relevant read as under:

'CLAUSE2 Cessation. The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the Tenth Day after the date on which the order to commence the work is issued to contractor. 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 per cent, or such smaller amount as the Superintending Engineer, Delhi Development Authority (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 everyday that the work remains uncommenced or unfinished, after the proper dates. And further, to and ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceed, one month (save for special jobs) to complete one-eighth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, three-eighth of the work, before one half of such time has elapsed and three-fourth of the work, before three-fourth of such time has elapsed. However, for special job if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an

amount equal to one per cent or such smaller amount as the Superintending Engineer, Delhi Development Authority (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quality of work remains incomplete, provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed ten per cent, on the estimated cost of the work as shown in the tender.

THE contractor shall be required to submit a detailed program for completion of work within the stipulated period in the form of a Bar Chart, covering all major activities, to the Engineer-in-charge within 10 days from the date of award of work. Modification suggested by the Engineer-in-charge shall be ensured by the contract or that the time schedule as laid down in the aforesaid Bar Chart is adhered. To in case of any slip, the time lost will have to be made good by the contractor by speeding up the activities in such cases, he shall be bound to follow the Engineer-in-charge.

CLAUSE29 : (1) Whenever any claim or claims for payment of a sum of money arise out of or under the contract against the contractor, the Engineer-in-charge or the D.D.A. shall be entitled to with hold and also have a lien to retain such sum or sums in whole or in part from the security, if any deposited by the contractor and for the purpose aforesaid, the Engineer-in-charge or the Dda shall be entitled to with-hold the security deposit, if any furnished as the case may be; and also have a lien over the same pending finalization for adjustment of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-charge or the Dda shall be entitled to withhold and have a lien to retain to the extent 4 of such claimed amount or amounts. Referred to above, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the Engineer-in-Charge or the Dda or any contracting person through the Engineer-in-charge pending finalisation or adjudication of any such claim.

IT is an agreed term of the contract that the sum, sums of money to withheld or retained under the lien referred to above, by the Engineer-in-charge or D.D.A will

be kept withheld or retained as such by the Engineer-in-charge or D.D.A. 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 and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Engineer-in-charge or the D.D.A. shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any such found payable to any partner/limited company as the case may be; whether in his individual capacity or otherwise.

(9) Clause 3 provides for termination of contract in case of breach of the terms of the contract. And Section 74 of the Contract Act reads as under:

'SECTION 74. Compensation for breach of contract where penalty stipulated for-- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

Xx x x x' (Explanations omitted)

(10) Identical Clause 2 of the agreement came for consideration before the Supreme Court in the case Vishwanath Sood v. Union of India & Anr., 1989 Sc 952. After referring to Clauses 2 and 25 the Supreme Court held that the question regarding amount of compensation payable under Clause 2 had to be decided only by the Superintending Engineer in accordance with the clause and it could not be referred for arbitration under Clause 25 and was outside the purview of the arbitration. The Supreme Court while considering the scope of Clause 2 has observed as under (in para 8):

'CLAUSE2 of the Contract makes the time specified for the performance of the contract a matter of essence and emphasises the need on the part of the Contractor to scrupulously adhere to the time schedule approved by the Engineer-in-charge. With a view to compel the Contractor to adhere to this time schedule this clause provides a kind of penalty in the form of compensation to the department for default in adhering to the time schedule. The clause envisages an amount of compensation calculated as a percentage of estimated cost of the whole work on the basis of the number of days for which the work remains uncommenced or unfinished to the prescribed extent on the relevant dates....

AS we see it Clause 2 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 contract as per the time schedule agreed to between the parties. The decision of Superintending Engineer, it seems to us, thus 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 livable under Clause 2 has to be decided only by the Superintending Engineer and no one else.'

(11) In para 10 it has further been observed as under:

'WE have already pointed out that this is a penalty clause introduced under the contract to ensure that the time schedule is strictly adhered to. It is something which the Engineer-in-charge enforces when he finds that the contractor is being recalcitrant, in order to ensure speedy and proper observance of the terms of the contract. This is not an undefined power. The amount of compensation is strictly limited to a maximum of 10% and with a wide margin of discretion to the Superintending Engineer, who might not only reduce the percentage but who, we think, can even reduce it to nil, if the circumstances so warrant. It is this power that has been kept outside the scope of arbitration'

(12) It is further observed that:

'WE would like to clarify that this decision of ours will not have any application to the claims, if any, for loss or damage, which it may be open to the Government to levy against the contractor, not in terms of Clause 2 but under the general law or under the Contract Act.'

(13) The power to levy compensation under Clause 2 thus is different from the right of the defendant to claim compensation/damages for breach of the agreement under general law or under the Contract Act. The levy of compensation in the present case under Clause 2 obviously has been made for not adhering to the time schedule as agreed therein. It is not disputed that Superintending Engineer was competent to exercise this jurisdiction under Clause 2 of the agreement and a show cause notice was also given to the plaintiff before exercising this power.

(14) In the two judgments of the Supreme Court, namely, Union of India v. Air Foam Industries Pvt. Ltd., : [1974]3SCR556 ; and (i) M/s. H.M.K. Ahsari & Co. v. Union of India & Ors., (ii) Shankar Vijay Saw Mills v. Union of India & Ors., : [1983]3SCR607 , the scope of Clause 18 of the General Conditions of Contract applicable to the contracts with Union of India was considered. This clause provided that whenever any claim for the payment of a sum of money arises out of or under the Contract against the Contractor, purchaser shall be entitled to recover such sum by appropriating in whole or in part the security amount deposited by the Contractor and also in case of non satisfaction of the claim by so appropriating from any sum then due or which at any time thereafter may become due to the Contractor under any contract with the Government. In the first case it was held that the claim for damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled in exercise of right conferred upon it under clause 18 to recover the amount of such claim by appropriating other sums due to the contractor, and the interim injunction was rightly issued in exercise of power under Section 4(b) of the Arbitration Act pending arbitration, restraining the appellant from doing so. This very Clause 18 again came for consideration before the Supreme Court in the second case of Shankar Vijay Saw Mills v. Union of India and Ors., and H.M.K. Ansari & Company v. Union of India & Ors., : [1983]3SCR607 . The Supreme Court disagreeing with the interpretation of

that Court made in Raman Iron Foundry case regarding the meaning of the words, 'Claim for payment of a sum of money.' It held that Clause 18 applies also in respect of claim for damages. However, it upheld the principle that a claim for damages for breach of a contract is not a claim for a sum presently due and payable and the purchaser is not entitled in exercise of right conferred upon it by Clause 18 from recovering or appropriating the amount from other dues of the Contractor. It, however, held that Clause 18 also applies to claims for damages for breach of contract and it confers ample powers upon the Union of India to withhold the amount due to the contractor and no injunction could be passed restraining it from withholding the amount.

(15) In these two judgments of Supreme Court the aforesaid Clause 18 apparently pertains to recovery of amount of damages assessed by the department on account of breach of contract whereas the scope of Clause 2 which pertains to the compensation to be levied for not adhering to the time schedule prescribed for completing the work which is different from the right of the department to claim damages for breach of the contract was not under consideration. Clause 2 of the present agreement specifically gives right to the department to levy compensation and to withhold such compensation levied from other bills of the contractor. Right to levy such compensation has been upheld in the case of Viswanath Sood (supra) under similar Clause 2. Right to withhold dues of the contractor has been upheld in the case of Shankar Vijay Saw Mills, : [1983]3SCR607 . When the department has such a right according to terms of the agreement, the plaintiff can have no grievance against enforcing of this right. There is no violation of his right which may result in any injury to him.

(16) The principle of law laid down by the Supreme Court on the basis of Section 74 of the Indian Contract Act in the case of Maula Bux v. Union of India, 1970 Sc 1955 and Fateh Chand v. Bal Kishan Dass, : [1964]1SCR515 and other authorities relied on behalf of plaintiff have no relevance in the facts of the present case. Assuming for the sake of arguments that the provisions of Section 74 of the Contract Act are attracted. Compensation livable under Clause 2 is in the nature of a penalty livable for not completing the work within the prescribed time schedule. However the actual amount of damages that may be caused for not completing the

work in time, and time being the essence of the contract, cannot be determined by the Court and in that case the defendant would be entitled to receive from the plaintiff the amount agreed in this Clause 2 or in any case unless it is shown by the plaintiff that this amount is not a reasonable compensation. No material has been placed on record for the time being to show that this amount levied under Clause 2 is unreasonable amount of compensation.

(17) Coming to the facts of the case relevant for the purpose of the present application as per the contract entered into between the parties the work was to commence on 23.9.1995 and was to be completed by 22.9.1996. It is not disputed by the defendant that the work could not commence due to defective drawings. According to the defendants defective drawings were redrawn and got approved from the Municipal Corporation of Delhi and were available by about 9.2.1996. This fact was intimated to and was known by the plaintiff but they did not collect these drawings inspire of being so asked by 9.2.1996. A reminder dated 27.2.1996 was then given to them to collect these drawings. The plaintiff actually collected the same on 18.3.1996. The defendants have placed on record copy of letter dated 27.2.1996 which reads as under:

'THIS is in reference to the discussions held in the chamber of the undersigned on 3.2.1996, when it was promised by you that you will start the work in a week's time. You have not turned up even after twenty days. The undersigned met you in the office complex at Manglapuri on 24.2.1996, when you again assured that you will collect the drawings, details for the execution of the work positively on 26.2.1996 and will start the work very next day but you again did not turn up in the divisional/sub-divisional office on 26.2.1996 too.

IT is regretted to mention that you have not started the work as on date for the reasons known to you. Please note that the delay in executing the work is entirely on your part and the department is not responsible for the same.

YOU are once again advised to start the work immediately otherwise action will be taken under the relevant clauses of the agreement.'

THIS letter appears to have been sent by registered AD. Nothing has been placed on record to dispute the facts alleged in this letter. In letter dated 7.6.1996 defendant No.3 had informed the plaintiff that progress of the work was very slow and hardly 2% of the work had been completed by that time. And the plaintiff was asked to submit the programme for completing work within a week's time so that the progress of the work could be monitored. Defendant No.2 also vide his letter dated 11.6.1996 asked the plaintiff to complete the work within stipulated time otherwise action under Clause 2 would be taken. No reply appears to have been sent by the plaintiff to these letters when vide letter dated 12.8.1996 defendant No.2 (Superintending Engineer) asked the plaintiff to show cause within a fortnight as to why compensation could not be levied under Clause 2. Another show cause notice dated 26.8.1996 was sent by the Executive Engineer under Clause 3 as to why agreement should not be rescinded on account of the breach of the Contract. However, vide letter dated 2.9.1996 defendant No.3 extended the time for completing the work up to 31.12.1996 but without prejudice to their right to recover damages in accordance with the agreement. It is not the case of the plaintiff that they did any work thereafter or the work was completed to the extent prescribed in Clause 2 during the period of about 8 months after drawings were available and the contract was terminated.

(18) Apparently power under Clause 2 is given to the Superintending Engineer to see that public works are executed in accordance with the terms and conditions of the contract and progress of the work is achieved as agreed in this clause but the work done by the plaintiff was nowhere near the prescribed target as during the period of about 8 months only 2 to 3% of the work was completed.

(19) PRIMA-FACIE on the material on record it is clear that the plaintiff has not completed the work according to the terms agreed in the agreement and there is a breach of Clause 2 of the agreement on their part.

(20) Clause 2 of the agreement provides for levy of liquidated damages for not achieving the prescribed target. The total compensation that could be awarded was 10% whereas in the present case only 5% compensation has been levied after giving a show cause notice. In the circumstances, it cannot be said that either

the defendant is not within his right or thereby the plaintiff would suffer any legal injury. As already noticed right of the department to withhold the amount due from other bills has been upheld by the Supreme Court also.

(21) The relief of injunction is a discretionary relief and the party who seeks aid of the Court for injunction has to satisfy that the act complained of is in violation of his right. The Supreme Court in *Shiv Kumar Chadha v. Municipal Corporation of Delhi & Ors.*, : [1993]3SCR522 had laid down the following principles to be observed for grant of injunction :

'A party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the Court and such discretion is to be exercised in favor of the plaintiff only if it is proved to the satisfaction of the Court that until the defendant is restrained by an order of injunction irreparable loss or damages will be caused to the plaintiff during the pendency of the suit.....

THE Court grants such relief according to the legal principles *ex-debito justitiae*. Before any such order is passed the Court must be satisfied that a strong *prima-facie* case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favor and refusal of injunction would cause irreparable injury to him.....

THE Court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.'

(22) The plaintiff has not adhered to the time schedule and failed in achieving the target in the progress of the work inspite of warnings given by the defendants and thereby they have committed breach of contract to the prejudice of public interest. None of the three conditions for grant of injunction, namely, (1) *Prima facie* case; (2) balance of convenience, and (3) irreparable loss or injury, in the facts and circumstances have been fulfilled.

(23) For these reasons I do not find any merit in this application and the same is hereby dismissed.

(24) NOTHING stated herein will be taken as expression of opinion on the merit of the suit.

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