

M/S. Kapco Erectors Vs. Flex Engineering Ltd. and Another

M/S. Kapco Erectors Vs. Flex Engineering Ltd. and Another

SooperKanoon Citation : sooperkanoon.com/948003

Court : Delhi

Decided On : May-16-2012

Judge : S. Muralidhar

Appeal No. : O.M.P. 177 of 2005

Appellant : M/S. Kapco Erectors

Respondent : Flex Engineering Ltd. and Another

Advocate for Pet/Ap. : Ms. Rekha Palli

Judgement :

1. M/s Kapco Erectors has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an Award dated 28th February 2005 passed by the sole Arbitrator in the disputes between it and the Respondent No. 1 Flex Engineering Ltd. arising out of an order dated 9th February 2001 placed by the Respondent No. 1 on the Petitioner for fabrication and erection of pre-fab steel canopies at its various retail outlets.

2. In terms of the Agreement between the parties, pre-fab steel canopies were to be erected by the Petitioner at the following stations:-

(i) M/s Anupam Fuel, Meerut

(ii) M/s Bhoop Singh, Mussorie

(iii) M/s B.P. Shamli

(iv) M/s Mansrover Muzaffarnagar

(v) M/s Kundeshwari S/S Kashipur

(vi) M/s Desh Raj Ashok Kumar, Sarswa.

3. The value of the contract was Rs. 33,29,200 and the work was to be completed within a period of sixty days. The work had to be done as per the tender specifications and plans attached to the Agreement and in terms of the instructions to be given by and under the supervision of the authorized representative of Respondent No. 1 at Noida. Under Clause 10 of the Agreement the Petitioner was entitled to receive interim payment up to a maximum of 90% proportionate to the amount of the work performed, after inspection and approval by the representative of Respondent No. 1.

4. The Petitioner states that after completing 75% of the work at three sites, viz., Meerut, Mussorie and Muzaffarnagar, it raised six bills for a total sum of Rs. 15,32,133 on 31st March 2001. It is stated that Respondent No.1 paid the Petitioner a sum of Rs. 97,760 on 20th March 2001 and a further sum of Rs. 2,96,640 on 3rd April 2001. Thus the twenty-five per cent of the amount against the said bills submitted by the Petitioner had been paid by the Respondent No. 1 by 3rd April 2001 after being satisfied with the work done by the Petitioner at the aforementioned three stations.

5. The Petitioner states that it wrote a letter to the Respondent No. 1 on 10th April 2001 pointing out to the various difficulties faced by the Petitioner in carrying out the work successfully. It is stated that Respondent No. 1 neither released the balance payment nor permitted the Petitioner to complete the work. Further the specifications and drawings were changed arbitrarily as a result of which the Petitioner was unable to collect the roofing material for which the Petitioner had already paid advance. By letters dated 21st August 2001 and 27th October 2001 the Respondent No. 1 informed the Petitioner that they were trying to sort out the problems with the executives of M/s BPCL and would inform the Petitioner

thereafter. After no further payment was received, the Petitioner sent a legal notice dated 15th April 2002 in response to which the Respondent No. 1 terminated the contract. The disputes between the parties were referred to the arbitration of the sole Arbitrator.

6. Before the learned Arbitrator, the Respondent No. 1 took the plea that the work done by the Petitioner was rejected by BPCL which in turn terminated the Respondent No. 1's contract. Claiming that both contracts were on back to back basis, the Respondent No. 1 explained that as a result of the BPCL's termination of the Respondent No. 1's contract, the Petitioner's contract had to be terminated. There were six set of claims filed by the Petitioner and six counter-claims by the Respondent No.1.

7. By the impugned Award dated 28th February 2005 the learned Arbitrator held that the specifications of the work provided in the Agreement between Respondent No. 1 and BPCL and agreement between the Respondent No. 1 and the Petitioner, were the same and therefore rejection of the work by BPCL "ipso facto prove that the work performed by KAPCO was not in accordance with the specification of Agreement".

8. As regards Claim No. 1 by the Petitioner for the sum of Rs. 11,37,733 towards 75% balance amount, the learned Arbitrator awarded the Petitioner only the amount realized by the Respondent No. 1 as a result of the sale of debris at the three sites by way of scrap through which it realized Rs. 1,99,274 minus the sum of Rs. 2,250 towards the payment made to M/s Bhoop Singh on the Petitioner's account. Thus the Petitioner was awarded a sum of Rs. 1,97,024 against Claim No. 1.

9. As regards Claim No. 2 for a sum of Rs. 8,86,590 towards payment of remaining bills, the learned Arbitrator rejected the claim stating that the mere submission of bills is no criteria for allowing the claim. Claim No. 3 for a sum of Rs. 16,83,328 towards damages; Claim No. 4 for a sum of Rs. 3,50,000 towards value of tools, machines etc. lying at site; Claim No. 5 for a sum of Rs 4,85,838 towards interest @ 18% per annum and Claim No. 6 for a sum of Rs. 11,000 towards costs, were all rejected.

10. As regards the counter-claims of the Respondent No. 1, it was held that under Counter-Claim No. 3, it was entitled to recover the entire sum of Rs. 3,98,867 given as advance to the Petitioner. The learned Arbitrator held that the Petitioner was liable to pay the Respondent No. 1 a sum of Rs. 2,01,843 together with interest at 12% per annum from the date of the Award till the date of realization.

11. This Court has heard the submissions of Ms. Rekha Palli, learned counsel for the Petitioner. Despite a pass over none appeared for the Respondent No.1. Accordingly, this Court has examined the reply filed by the Respondent No.1.

12. It is submitted by Ms. Palli that the date of the Agreement between the Respondent No.1 and BPCL was 10th January 2001 whereas the Agreement between the Petitioner and the Respondent No.1 was 9th February 2001. Yet there was no mention in the Agreement between the Petitioner and the Respondent No.1 of there being an earlier agreement between the Respondent No.1 and BPCL.

13. Indeed the Agreement dated 9th February 2001 between the parties nowhere indicates that it was an agreement on a back-to-back basis with an earlier agreement between Respondent No.1 and BPCL.

14. The case of the Respondent No.1 before the Arbitrator and in its reply before this Court is that in a handwritten quotation letter dated 30th January 2001 the Petitioner had itself mentioned that the contract was for "supply and erection of Pre-fabricated canopy including design and drawing for Meerut Territory - BPCL". In a subsequent letter of 6th February 2001 also in the subject matter the same words were mentioned.

15. On the other hand, it is seen from the Agreement dated 10th January 2001 between the Respondent No.1 and BPCL that in terms of Clause 13 the Respondent was prohibited from subletting the work to any other third party without the written permission of BPCL. Despite there being no permission given by BPCL, Respondent No.1 had sublet the work to the Petitioner by the Agreement dated 9th February 2001. The Petitioner was never informed that the work was to be performed to the satisfaction of BPCL. There is nothing to this

effect indicated in the Agreement between the parties or in any other contemporaneous document. The conclusion of the learned Arbitrator to the contrary overlooks the express provisions of the Agreement dated 9th February 2001 between the Petitioner and the Respondent No.1. The express terms of the Agreement between the parties had to govern the contract. The impugned Award to the extent it holds that the two contracts, i.e., the Agreement dated 6th February 2001 between the Petitioner and the Respondent No. 1 and the Agreement dated 10th January 2001 between the Respondent and BPCL were on back to back basis, is not supported by the express terms of the Agreement between the parties. Consequently it is held the impugned Award is violative of Section 28(3) of the Act and cannot be sustained in law.

16. This Court is also unable to sustain the impugned Award to the extent it requires the Petitioner to refund to Respondent No.1 the sum of Rs.2,01,843 being the advance paid to the Petitioner. If indeed the work performed by the Petitioner was not satisfactory, Respondent No.1 would not have released 25% of the amount covered by the six bills raised by the Petitioner by 3rd April 2001.

17. Consequently, the impugned Award dated 28th February 2005 to the extent it rejects the Petitioner's claims, and allows Counter Claim No.3 of Respondent No.1 together with post-Award interest is hereby set aside. The impugned Award is upheld only to the extent it requires Respondent No.1 to pay the Petitioner Rs. 1,97,024 against Claim No. 1 together with post- Award interest at 12% per annum from the date of the Award till the date of payment.

18. The petition is disposed of in the above terms with no orders as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com