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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 01, 2009

Date of Order: September 17, 2009

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17.09.2009

SAINATH ENTERPRISES PVT. LTD. Petitioner

Through : Ms. Neela Gokhale, Advocate with
Mr. Mayur Chaturvedi, Advocate

Versus

UNION OF INDIA & ORS. Respondents

Through: Mr. K.K.Sharma, Sr. Advocate with
Mr. Rajiv Bakshi & Mr. Mukesh Kumar, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. By this application under Section 9 of the Arbitration and Conciliation Act, the petitioner has sought following reliefs:-

“a) injunction directing the Respondents to continue to permit the petitioner to execute the project work on the same terms and conditions/or subject to any other appropriate terms and conditions and keep the letters dated 26/27-03-2009 in abeyance during the arbitral proceedings;

b) Direct the Respondents to honour the bills dated 24-03-2009 raised by the petitioner as provisional payment against the work already done and materials procured by the petitioner;

c) In the alternative that prayer (a) is not granted or not being continued in due course, permit the petitioner to take inventory of the material and resources at the sites;

d) Pass an order restraining respondents from encashing bank guarantees submitted by the petitioner in respect of, in relation to and concerning the aforementioned four contract.”

2. The brief facts relevant for purpose of deciding this petition are that the petitioner was awarded a contract for construction of dwelling units for army personnel at various sites in Pune city. This contract between the petitioner and the respondent was terminated by the respondent vide letter dated 26th March, 2009. There were 4 contracts in respect of the 4 sites and each contract had an arbitration clause.

3. It is submitted that cancellation of the contract by the respondent was contrary to the principles of natural justice and respondent could not unilaterally sit in the judgment regarding any default of the petitioner. The petitioner gave a personal representation to the respondent no. 2 on 31st March, 2009 requesting him to allow continuing to work but he was not allowed by the respondent. The petitioner submitted that since respondent was State, cancellation of contract could not be done by the respondent in an arbitrary manner and he was bound to preserve and act in accordance with principles of natural justice.

4. Referring to correspondence which took place between the parties prior to 26th March, 2009 showing that the petitioner was to complete the work by 31st March, 2009 and the authority supervising and exercising immediate control over all the 4 sites had recommended for provisional extension of the contract upto 31st March, 2009, petitioner argued that even before the expiry of this period, the contract was terminated on 26.3.09. The petitioner had invested huge amount for performance of the contract and the

petitioner shall suffer irreparable loss and injury if not allowed to continue the work. It is stated balance of convenience also lies in the favour of the petitioner since the subsequent tender called by the respondent shows that respondent was going to pay about 50 crores more to the subsequent contractor and in case the work was awarded to the subsequent contractor it would be at the risk and the cost of the petitioner and the petitioner may have to pay the difference in the cost and therefore prayer 9 is made for allowing the petition in toto.

5. It is submitted by counsel for the respondent that the 4 contracts were given to the petitioner in respect of construction of family dwelling units for army officers at 4 sites in Maharashtra; 2 in Pune and 2 in Kirkee. Date of completion for Camp site at Pune was 30th June, 2007; for Lulla Nagar site at Pune 7th July, 2006; for Aundh, Kirkee 27th June, 2006 and for BEG- Kirkee 30th June, 2006. Despite extensions granted to the petitioner, the petitioner had shown very negligible progress of the 4 works. For this reason the contracts were terminated initially on 25th September, 2008. Thereafter, at the request of petitioner, these contracts were restored and the petitioner was given time upto 31st March, 2009 to complete the projects. But despite this extension of time of about 6 months, the progress made by the petitioner was almost nil. A chart showing the total progress made so far by the petitioner was filed showing that in case of Camp (Pune) project the physical progress was 5% and the financial progress was 11.38%. In case of Lulla Nagar,

Pune, the physical progress was 5.50% and the financial progress was 6.91%. In case of Aundh, Kirkee, the physical progress was 25.215% and financial progress was 27.94% and in case of BEG-Kirkee physical progress was 19.43% and financial progress was 21.53%. It is submitted that despite revocation of the earlier cancellation and giving opportunity to the petitioner, the progress of the work was such that if the petitioner was allowed to continue with the projects, the petitioner would have taken several more years for completion of the projects and the respondent could not afford to drag the construction of the projects so long. It is submitted that the petitioner had cancelled the contract only in terms of the agreement. The agreement gave right to the petitioner to cancel the contract in case of slow progress or in case of the contractor failing to make progress as per the schedule. He relied on clause 48 of the agreement which provides as under:-

“48. Cancellation of Contract in part or in full for contractor’s default:

If the contractor-

(a) makes default in commencing the Works within a reasonable time from the date of the handing over the Site, and continues in that state after a reasonable notice from P.M.; or

(b) in the opinion of the P.M. at any time, whether before or after the date or extended date for completion, makes default in proceedings with the Works with due diligence and continues in that state after a reasonable notice from P.M. or

(c) fails to comply with any of the terms and conditions of the Contract or after reasonable notice in writing with orders properly issued thereunder; or

(d) fails to complete the Works, Work order and items of Works, with individual dates for completion and clear the Site on or before the date of completion.

The Accepting Officer may without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to Government, cancel the Contract as a whole or only such Work Order(s) or items of work in default from the Contract. Whenever the Accepting Officer exercises his authority to cancel the contract as a whole or in part under this condition he may complete the Work by any means at the Contractor's risk and cost, provided always that in the event of cost of completion or after alternative arrangements have been finalized by the Government to get the Works completed, estimated cost of completion (as certified by P.M.) being less than the Contract cost the advantage shall accrue to the Government. If the cost of completion or after alternative arrangements have been finalized by the Government to get the Works completed, estimated cost of completion (as certified by P.M.) exceeds the moneys due to Contractor under this Contract, the Contractor shall either pay the excess amount ordered by P.M. or the same shall be recovered from the Contractor by other means. The Government shall also be at liberty to hold and retain in their hands materials, tackle, machinery and stores of all kinds on Site, as they may think proper and may at any time sell any of the said materials, tackle, machinery and stores and apply the proceeds of sale in or towards the satisfaction of any loss which may arise from the cancellation of the Contract as aforesaid.

The Government shall also be at liberty to use the materials, tackle, machinery and other stores on Site of the Contractor as they think proper in completing the work and the Contractors shall be allowed the necessary credit. The value of the materials and stores and the amount of credit to be allowed for tackle and machinery belonging to the Contractor and used by the Government in completing the work shall be assessed by the P.M. and the amount so assessed shall be final and binding.

In case the Government completes or decides to complete the Works or any part thereof under the provision of the Condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the Contractor under this Condition shall consist of the cost or

estimated cost (as certified by P.M.) of materials purchased or required to be purchased and/ or the labour provided or required to be provided by the Government as also the cost of the Contractor's materials used with an addition of such percentage to cover Superintendence and establishment charges as may be decided by the P.M., whose decision shall be final and binding."

6. It is submitted that in this case the total physical progress of the projects was such that there was no hope to the respondent that the petitioner would ever be able to complete the projects. He submitted that under clause 48, the Government was at liberty to use the materials, tackle, machinery and stores of all kinds at the site of the contractor. It is contended that the respondent had written many a times to the petitioner to come forward for joint measurement of the work but the petitioner had failed to come forward for joint measurement of the work. The petitioner was therefore not entitled to any of the reliefs. He also submitted that the requirement of family accommodation for army personnel was of urgent nature and respondent cannot wait in perpetuity. The officials serving the nation were required to be provided with proper accommodation in time. Their accommodation though to be completed in 2007, was nowhere near completion even on 31st March, 2009 and the total work done on 4 projects varied between 5 to 25%. This progress was made in 2 years so one can imagine how much more time might have been taken in the completion of the work by petitioner. He further submitted that in fact at the time of revocation of the contract, the petitioner had given an undertaking that the respondent may revoke the contract

and invoke the bank guarantees in case the petitioner failed to complete the construction as per programme given. The programme given by the petitioner showed that by last week of March almost entire construction should have been completed but the actual construction on the site was as above stated and therefore the petitioner now cannot come to the Court and say that the cancellation of contract was contrary to principle of natural justice. The petitioner had specifically agreed to cancellation of contract in case of progress being not as per schedule.

7. Counsel for the petitioner relied on ***Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.*** 2007 (7) SCC 125 to argue that this Court had power to issue an injunction in the nature of Specific Performance of the Contract. In ***Adhunik steels (Supra)*** Supreme Court observed as under:

“16 Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are decree of specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be “an Act to define and amend the law relating to certain kinds of specific reliefs”. Specific relief is relief in specie. It is remedy which aims at the exact fulfillment of an obligation. According to Dr. Banerjee in his Tagore Law Lectures on Specific Relief, the remedy for the non-performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence,

a part of the law or procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in Part III of the Specific Relief Act, Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause(e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

17. In *Nepa Ltd. v. Manoj Kumar Agrawal* a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the act for interim protection, the provisions of the Specific Relief Act of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the Court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunctions is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief act and the law bearing on the subject. Under Section 28 of the Act of 1996, even the Arbitral Tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in

India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim reliefs.

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case."

8. Counsel for the respondent relied upon AIR 2000 Delhi 161 and also took support from ***Adhunik Steels (Supra)*** to argue that it was not a case where Court should stay/restore the contract which was cancelled by the respondent and prevent the respondent giving contract to another contractor.

9. It is not a case where the contract was terminated during the initial period of working of the contract. In this case, extensions were granted to the petitioner during the continuation of the contract on representations made by the petitioner that he would complete the contract within extended period. At the time when last extension was granted, the petitioner had represented to the respondent that it would complete the projects by 31st March, and in case the work was not done within the extended period contract may be cancelled. Prior to this, the respondent had written several letters to the petitioner about the slow progress of the contract. It hardly matters whether the contract was cancelled on 26th March, 2009 or the period of contract was not extended beyond 31st March, 2009. The plea that the petitioner had extension upto 31st March, 2009 and therefore the contract could not have been cancelled upto 31st March, 2009 has therefore no force.

10. I consider that looking into the entire facts it is not a case where Court should restrain the respondent from proceedings further with the work with the help of other contractor and force the respondent to continue to work with the petitioner. The relations between the contracting parties ought to be governed by the

contract between the parties. Where a contract is terminable for the reasons given in the contract, a party has a right to terminate the contract. The termination of contract was lawful or unlawful, is a dispute to be raised before the Arbitrator. The Court under Section 9 cannot compel an employer to continue to work with the contractor whose work has not been satisfactory and who has not been able to complete even 30% of the work within stipulated as well as extended period. It may be that under certain situations the Court has power to direct specific performance, but the present case is not the one, where Court should direct specific performance. It is a case where substantial amount of work is yet to be done and within the extended period, the petitioner failed to complete even 30% of the work. I therefore find no force in the prayer made by the petitioner that the respondent should be directed to allow the petitioner to execute the project. The other prayer made is that the respondent should be directed to honour the bills and be directed to make professional payment against the work already done. I consider that this does not fall within the scope of Section 9. While entertaining an application under Section 9 of Arbitration and Conciliation Act, the Court cannot consider what are the justified bills and what are unjustified bills of a party and order the other party to make payments against the bills. This job is to be done by the Arbitrator after considering the merits of the case of the parties. The petitioner would be at liberty to ask the Arbitrator for passing an interim award in respect of the work already done. But the Court cannot give direction under Section 9 to the respondent to make

payments of the bills. Prayer C is for permitting the petitioner to make inventory of the material. The respondent has taken stand that the respondent had been writing to the petitioner to come and take joint measurements and prepare inventory of the material. The petitioner is permitted to make an inventory of material and resources lying at site. The petitioner is also given liberty to participate in the joint measurements of the work if he so desires. The other prayer is regarding restraining the respondent from encashing bank guarantees. I consider that the Court cannot allow this prayer. Looking at the facts that the petitioner has failed to even do 30% of the work, it cannot be said that the petitioner has even a good prima facie case. The Arbitrator can decide on merits whether the encashment of the bank guarantees was lawful or unlawful and in case it is found that the bank guarantees were unlawfully encashed by the respondent, the Arbitrator can always pass an award in respect of the bank guarantees amount along with interest thereon.

11. The petition is disposed of allowing prayer C of the application. Rests of the prayers of the application are hereby rejected.

September 17, 2009
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SHIV NARAYAN DHINGRA J.