

* IN THE HIGH COURT OF DELHI AT NEW DELHI
35
+ O.M.P. No. 4 of 2012

M/S SENBO ENGINEERING LIMITED. Petitioner
Through: Mr. Mukul Rohtagi and Mr. Suhail
Dutt, Sr. Advocates with Mr.
Viplav Sharma and Ms. Nilanjan
Banerjee, Advocates

Versus

DELHI METRO RAIL CORPORATION LTD. Respondent
Through: Mr. Satyavan Kudalwal, Adv. for
DMRC/Resp. No.1
Mr. Anil Sapra, Sr. Advocate with
Mr. Rakesh Malhotra, Adv. for the
Applicant/Intervenors

CORAM: JUSTICE S. MURALIDHAR

% **ORDER**
29.05.2012

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') filed by Senbo Engineering Ltd. ('Senbo') against the Delhi Metro Rail Corporation Ltd. ('DMRC') seeking certain interim reliefs in the context of the dispute between the parties arising out of a contract (BC-23) for the design and construction of underground station including stabling line at Central Secretariat and Tunnel towards Khan Market and cover method on Central Secretariat, Badarpur Corridor for which a Letter of Acceptance dated 6th August 2007 was issued by the DMRC for a contract value of Rs. 97.33 crores.

Signature Not Verified

Digitally Signed In relation to all the sub-contractors, Clause C11.1 and Clause 4.5 of
By:AMULYA O.M.P. No. 4 of 2012

Page 1 of 12

the General Conditions of the contract provided as under:-

12

“C11 – Sub-contracts

Clause 11.1 -, the terms and conditions of subcontractors and payments that have to be made to the subcontractors shall be the sole responsibility of the contractor.

Clause 4.5 – The contractors shall be responsible for observance at all subcontractors of all the provisions of the contract. The contractor shall be responsible for the acts or defaults of the subcontractor, his representatives or employees, as fully as if they were the act or defaults of the contractor, his representatives or employees and nothing contained in clause (a) of clause 4.5 shall constitute a waiver of the contractor's obligations under this contract. The contractor shall provide to the engineers of all the subcontracts including terms, conditions and pricing. The contractor shall and were to resolve all matters and payments amicably and speedy with the subcontractors.”

3. For the purposes of the present dispute the facts required to be noticed are that by letter dated 14th October 2009, Senbo requested DMRC for extra funds to cope up with the negative cash flow. It was stated in the said letter that if DMRC was able to provide Senbo with an advance of Rs. 5 crores against existing available balance bank guarantee amount for mobilization and plant and machinery advances with interest @10%, the money would be utilized for paying vendors' dues to ensure regular supply of materials by vendors and thus enhancing the work

progress. The terms and conditions suggested by Senbo in the said letter B
inter alia included the following:-

“(1) We request DMRC to pay advance of Rs.5 crores against the available bank guarantee of Rs.6.65 crores at 10% rate of interest and installments can be adjusted with R.A. bills from December 2009, onwards.

(2) To postpone the interest free advance recovery of Rs.8 crores without interest till December 2009 and this can be recovered against our pending dues which are to be assessed and released by DMRC in due course.

(3) DMRC may pay to our vendors/sub-contractors directly on our certification for fresh procurement of materials/other resources.

xxxx

(6) DMRC to make direct payments to our suppliers/vendors and sub-contractors on M/s. Senbo's certification as per their work order with us, out of our R.A. bills.

(7) Payments made by DMRC for BC-23 to vendors, suppliers and sub-contractors shall deemed to be as paid to M/s. Senbo and we will have no disputes on the same.

(8) All our old as well as any further liabilities will be dealt by us directly with vendors, suppliers and sub-contractors.”

4. By its letter dated 24th October 2009, DMRC agreed to the above conditions and in particular the following:

“(2) DMRC may start paying to the contractor's vendors directly on contractor's certification for the fresh

procurement of materials/other resources for completing the balance portion of works.

XXXXXX

(5) This process may be continued till the completion of work. At the end in the cumulative due of the contractor will be negative (outstanding balance to be recovered) which may be recovered from bank guarantees available with DMRC.

XXXXXX

(7) All the old as well as any further liabilities will be dealt by the contractor directly with vendors, supplies and sub-contractors.

(8) M/s. Senbo will indemnify DMRC against any claims or legal actions arising out of making direct payments to vendors, suppliers and sub-contractors.”

5. An indemnity bond was also furnished by Senbo to DMRC on 26th October 2009. According to Senbo, the above arrangement continued for some time. Senbo states that the entire loan amount of Rs. 5 crores was fully recovered with accrued interest by DMRC from Senbo, and therefore the said letter dated 14th October 2009 had worked itself out. Further, Senbo had by its letters dated 2nd November 2009 and 16th January 2010 notified DMRC about the practical difficulties arising out of the said direct payments for the purposes of statutory deductions. According to Senbo, it had requested DMRC by its letter dated 18th January 2010 to discontinue the arrangement whereby DMRC was

requested to issue cheques in favour of Senbo's vendors/sub-contractors. 15

By a letter dated 28th January 2010, Senbo notified DMRC about the details/particulars of its vendors/sub-contractors whose outstanding payments had been settled by Senbo.

6. Senbo states that one Mr. Rabindra Nandi, Site In-charge and Team Leader at New Delhi, played a fraud upon Senbo by colluding with the sub-contractors. It is claimed that Mr. Nandi discontinued attending the office from October 2010. Senbo claims that it was surprised to learn of three letters dated 15th November 2010, 2nd December 2010 and 27th December 2010 purportedly written by Mr. Nandi to DMRC to make payments to the labour contractors. This apparently came to light when on 28th December 2010, DMRC wrote to Senbo as under:-

“Dear Sir,

Name of Work: Contract BC-23: Design & Construction of underground station including stabling line at Central Secretariat & Tunnel towards Khan Market by Cut & Cover method on CTST-BP corridor of Delhi MRTS Project.

Sub: Payment to Labour Contractors and Vendors.

Ref: Your office letter Nos:

- i) Letter No.Nil dated 15.11.2010
- ii) Letter No.Nil dated 2.12.2010
- iii) Letter No.Nil dated 27.12.2010

Your attention is invited to your office letters referred to above (copies enclosed) related to recommendation for

16
release of payments as per list (of payments due to Labour Contractors & Vendors) by M/s. Senbo which is amounting to Rs.4,79,23,092.

You are requested to confirm that these payments are related to BC-23 project and are to be made by DMRC. Confirmation in this regard may be communicated by 5th of January 2011 failing which it will be presumed that list is correct and further necessary appropriate action shall be initiated by this office.”

7. Senbo did not reply immediately but on 27th January 2011, it wrote a detailed letter to DMRC in which it stated that the aforementioned letters purportedly written by Mr. Nandi were “false, untrue and fabricated” and that “the initiative was taken by him with ulterior motive having no bearings of reference and dispatch numbers etc. of the company”. Senbo denied having delegated any power to Mr. R. Nandi to write the aforementioned letters. In particular, it was stated as under:

“Many of the suppliers/vendors/labour contractors whose names appear in enclosed lists allegedly submitted by Mr. Nandi along with his three letters as stated above have categorically denied having requested/pressed him for payment of their dues. During the course of verification of the bills it was found that many of the bills checked and approved for payment by Mr. Nandi were found to be false and fabricated having no relation with the actual work done at BC-23 site.

17

We hereby fully disown the letters fraudulently written by Mr. R. Nandi (without any reference number and entry of dispatch number in outgoing register of the Company) to you for direct payment to the vendors, sub-contractors and labour contractor. We, therefore, request you not to act upon the contents and the direction of the letters.”

8. The immediate provocation for the present petition is a letter dated 19th December 2011 from DMRC to Senbo where it was inter alia stated that “no documentary evidence of settlement/payment to the vendors/sub-contractors has been forwarded till now.” DMRC stated that by letters dated 15th October 2011 and 30th October 2011, Senbo was asked to settle the outstanding payment of the vendors but this had not been done till then. This was followed by another letter dated 24th December 2011 in which DMRC complained the Senbo as under:-

“Your vendors/sub-contractors are regularly visiting this office and also our head office for release of their outstanding payments causing embarrassment to DMRC management. Even some of vendors and employees have gone to various Courts where DMRC is made party, is also a matter of concern and DMRC will have to make all such recoveries of legal expenses.

XXXX

In view of the above you are hereby given seven days time from the date of issue of this letter to settle all outstanding payments with your vendors/sub-contractors as indicated above and a confirmation with proof of payment and dues

18

settlement may please be provided from each vendors/sub-contractors to settle the entire issue failing which the amount of Rs.4.38 as certified will be released to such vendors/sub-contractors and adjusted accordingly at your risk and cost.”

9. Thereafter, the present petition was filed by Senbo on 2nd January 2012. When it came up for hearing on the following day i.e. 3rd January 2012, this Court passed the following order:-

“1. Mr. Rajiv Nayar learned senior counsel for the Petitioner Senbo Engineering Ltd. (‘Senbo’) points out that the Respondent Delhi Metro Rail Corporation Ltd. (‘DMRC’) has no locus to direct Senbo to release monies to its vendors/sub-contractors towards purported outstanding dues. Nor can it be as is sought to be done by DMRC’s letters dated 19th and 24th December 2011, withhold monies due to Senbo to the extent of Rs. 4.38 crores for satisfying the purported claims of the vendors/sub-contractors of Senbo. He points out that in any event, as noticed in DMRC’s letter dated 24th December 2011, some of the vendors/sub-contractors have instituted proceedings in various courts in relation to such claims and those proceedings are pending.

2. Notice, returnable on 13th April, 2012. Dasti in addition.

3. Till the next date of hearing the DMRC is restrained from proceeding to act on its impugned letters dated 19th and 24th December, 2011 addressed to Senbo.”

✓

19

10. While DMRC filed its reply to the petition, on 10th April 2012, some of the vendors filed Interlocutory Applications seeking impleadment. IA No. 5668 of 2012 has been filed by M/s ABC Builders seeking that the order dated 3rd January 2012 should be modified to permit payments to be released to them by DMRC. IA No. 5927 of 2012 has been filed by M/s New Era Enterprises and M/s New Era Projects and IA No. 10537 of 2012 has been filed by M/s SSA Constructions and Labour Suppliers seeking similar relief.

11. The specific averments about Mr. Nandi's letters being fabricated and fraudulent and about Senbo having filed an FIR against him are contained in paras 27, 28 and 29 of the petition. In response thereto DMRC has in para 29 of its reply stated as under:-

“29. Mr. R. Nandi was deputed as Site-In-Charge and team leader by M/s Senbo Engineering for completion of the project vide letter no. SEL/DMRC/L-6/BC-23/1505 dated 28.5.2010 and further was given Power of Attorney vide letter no. SEL/DMRC/L-6/BC-23/1551 dated 10th June 2010. The POA was invoked vide their letter No. SEL/DMRC/BC-23/2011/060 dated 25.1.2011. As such any action/correspondence made by Mr. R. Nandi on behalf of M/s Senbo during the period shall stand valid so far as BC-23 project is concerned. For any dereliction of responsibilities etc., it is M/s Senbo's internal matter and has nothing to do with DMRC.”

✓

20

12. In other words, DMRC is unable to inform this Court what action it took after receiving the letter dated 27th January 2011 from Senbo which categorically stated that letters written by Mr. Nandi were fabricated and could not be acted upon. Once, DMRC itself had a doubt about the payments required to be made to vendors and Senbo clarified by its letter dated 27th January 2011 that DMRC should not act on the letters of Mr. Nandi, there was no justification in DMRC insisting on Senbo making payments to sub-contractors. DMRC also could not have continued to make payments thereafter directly to the sub-contractors/vendors. *Prima facie*, there appears to be no subsisting agreement between Senbo and DMRC whereby DMRC could make payments directly to the vendors/sub-contractors. Even while the said arrangement continued, the making of such payments was conditional upon certification by Senbo. No certification of payments to vendors/sub-contractors has been shown to have been issued by Senbo subsequent to 28th December 2010. With DMRC itself having a doubt whether it should act on Mr. Nandi's aforementioned three letters, and with Senbo unambiguously terming those letters as 'fabricated', DMRC cannot insist on continuation of such arrangement.

13. As far as the parties seeking impleadment are concerned, Mr. Anil Sapra, learned Senior counsel appearing on their behalf submits that the orders of the Court dated 3rd January 2012 were adversely affecting the

O.M.P. No. 4 of 2012 *Page 10 of 12*

21
sub-contractors/vendors and therefore, they should be impleaded in the present petition and heard in the matter. He relied upon the decision of the Single Judge of this Court in ***CREF Finance Limited Vs. Puri Construction Ltd. 2000 (3) Arb. L.R 331 (Delhi)***.

14. The facts in the aforementioned decision are clearly distinguishable. As far as the present case is concerned, the sub-contractors/vendors are not parties to the arbitration agreement between Senbo and DMRC. There is no case made out by them for getting impleaded in the petition under Section 9 of the Act. While this Court does not propose to make any order as regards payments already released to these Applicants, if any, by DMRC, it cannot in the present proceedings grant the prayer by these Applicants for a direction to DMRC to continue to make payments to them under the earlier arrangement brought about by the letters dated 14th and 24th October 2009, which arrangement *prima facie* appears not to have continued. The Applicants in I.A. Nos. 5668, 5927 and 10537 of 2012 are at liberty to file substantive suits to recover the moneys claimed by them in accordance with law. It is clarified that the order passed by this Court on 3rd January 2012 or this order will not come in the way of these Applicants pursuing their remedies in accordance with law.

15. For the aforementioned reasons, the order dated 3rd January 2012 is continued till such time the Arbitral Tribunal disposes of any application

that may be filed under Section 17 of the Act in accordance with law. This is however conditional upon Senbo initiating steps to seek the appointment of an Arbitral Tribunal within four weeks from today, failing which the said order dated 3rd January 2012 would cease to operate at the expiry of four weeks from today.

16. The petition and applications are disposed of in the above terms with no order as to costs.



S. MURALIDHAR, J

MAY 29, 2012
sd