

* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 01.05.2012

+ **FAO(OS) 185/2011**

MUNICIPAL CORPORATION OF DELHI Appellant
Through: Ms. Mini Pushkarna, Advocate

versus

NATRAJ CONSTRUCTION COMPANY Respondent
Through: Mr. Sandeep Sharma, Ms. Alka
Srivastava and Mr. Vikas Sharma,
Advocates

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J (ORAL)

1. The appellant / MCD invited tenders for the work of providing and fixing reflective sign board on Hawaldar Abdul Hameed Marg, Shakurpur near F block Shakurpur in JJ Colony, C-29, Delhi. The work order was placed on the respondent on 31.03.2004 with the contractual amount being specified at Rs.3,16,899/-. The work was to be completed within three months and the earnest money of Rs.7550/- was deposited by the respondent with the appellant.

2. It appears that the respondent was awarded the work order for similar work in different areas including on Mah. Balmiki Marg near E Block, Shakarpur, which was in proximity to the place of the work order in question. It is the say of the respondent that at the insistence of the Local councillor, the official of the appellant directed the respondent to

put both the sign boards at Maharishi Balmiki Marg near E Block itself, resulting in change of location and even the RCC foundation made at the original place being wasted. Both these work orders are stated to have been executed. While the respondent was paid for the other work order, the payment was not made for the work order in question. The aforesaid gave rise to disputes between the parties and in view of the arbitration clause, an arbitration application no.409/2007 was filed on the original side of this court, and Mr. S.M. Chopra, Retired Additional District & Sessions Judge was appointed as the Sole Arbitrator, who made and published his award on 17.12.2008.

3. It may be noticed that the appellant failed to file any reply and even the defence of the appellant was struck out. Despite this, the claim of the respondent was rejected by the Arbitrator on the ground that in various communications addressed by the respondent, the reference to the contract was as per its original description and that prudence required that the respondent ought to have insisted for a direction in writing from the signatory of the work order or its successor.

4. The respondent aggrieved by the award filed objections under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act), which was registered as OMP 179/2009. The proceedings of 23.09.2009, before the learned Single Judge shows that the Executive Engineer was present to assist the counsel for the appellant and it was stated that the bills have not been paid since the matter was not cleared from the CBI. This was as per instructions of the Engineer-in-charge of the appellant. The Executive Engineer also stated that the matter was pending before the CBI on account of sub

standard work. Since the Executive Engineer was found to be ill-informed about the matter in issue, learned counsel for the appellant before the learned Single Judge stated that he would produce the concerned Assistant Engineer of the relevant period who had rejected the bill of the respondent on the next date of hearing. The Assistant Engineer was directed to bring the original contract showing where the work had been executed actually alongwith the photographs of the road where the work was stated to have been carried out.

5. On 23.03.2010, Mr. Kapil Kumar, Junior Engineer of the appellant was present in court and stated on the basis of the records that the respondent had executed the contract signed between the parties. Thus, there is a categorical admission of the work having been completed by the respondent; albeit at a different site. It is also important to note that the final bill was prepared by the appellant itself and the amounts payable to the respondent including refund of earnest money were reflected in the final bill. The two amounts were as claimed by the respondent towards the balance price amounting to Rs.2,93,081/- and Rs.7550/- vis-à-vis the refund of earnest money.

6. The learned Single Judge thereafter proceeded to set aside the award dated 17.12.2008, holding that the respondent was entitled to the said two amounts. This portion of the order had been passed with the consent of the appellant as is apparent from the phraseology used, which reads as under :-

“...Accordingly, with consent of respondent-MCD, the impugned Award dated 17th December, 2008 is set aside and the petitioner is held entitled to Rs.2,93,081/- on account of

work done and Rs.7550/- as refund of earnest money.

I may mention that the aforesaid two amounts are also reflected in the final bill contemporaneously prepared by the then officials of respondent-MCD.”

7. Surprisingly, the impugned order dated 23.03.2010 is sought to be assailed in the present appeal though it is a consent order. Grievance made qua the same, is that, the learned Single Judge ought not to have interfered with the award as the parameters under section 34 of the said Act were not met.

8. We put a specific query to learned counsel for the appellant as to whether the appellant had moved the learned Single Judge that no consent was given, or that the consent was by any unauthorized person. The answer to both queries is in the negative. We also put to learned counsel for the appellant as to whether any action was taken against Mr. Kapil Kumar, Junior Engineer for wrongfully giving consent in court, to which also, the answer is in the negative i.e., no action was taken against Mr. Kapil Kumar, Junior Engineer. The order dated 23.03.2010, was passed in the presence of the counsel for the appellant apart from the presence of Junior Engineer.

9. We have even perused the grounds of appeal and find that there is no challenge laid on the lines that no consent had been accorded or that the consent given was without authority. Thus, the appellant cannot assail the consent order dated 23.03.2010, in the present appeal.

10. We may usefully refer to the observation of the Supreme Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr., (1982) 2*

SCC 463 in this behalf while dealing with the issue of express concessions made in the High Court. It was sought to be portrayed in that case that the concession was wrongly recorded, being contrary to written submissions filed in the High Court. Despite this, the Supreme Court refused to accept such a plea. The Supreme court observed that it would not launch an enquiry into what transpired in the High Court. It was observed in paras 4 to 9 of the said judgment as under :-

“4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. “Judgments cannot be treated as mere counters in the game of litigation.” (*Per Lord Atkinson in Somasundaram Chetty V. Subramanian Chetty, AIR 1926 PC 136 : 99 IC 742*). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly

recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (*Per Lord Buckmaster in Madhu Sudan Chowdhri V. Chandrabati Chowdhraia, AIR 1917 PC 30 : 42 IC 527*). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In *R v. Mellor* [(1858) 7 Cox 454: 6 WR 322: 169 ER 1084] Martin, B. was reported to have said:

“We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.”

6. In *King-Emperor v. Barendra Kumar Ghose* (28 Cal WN 170: AIR 1924 Cal 257: 38Cal LJ 411: 25 CrL. LJ 817). Page, J. said:

“... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented; much less is it to be exposed to animadversion.”

7. In *Sarat Chandra Maiti v. Bibhabati Debi* (34 Cal LJ 302 : AIR 1921 Cal 584: 66 IC 433). Sir Asutosh Mookerjee explained what had to be done:

“... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment...”

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else.

9. On the invitation of Mr Sen, we have also perused the written submissions made by him before the High Court. We have two comments to make : First, oral submissions do not always conform to written submissions. In the course of argument, counsel, often, wisely and fairly, make concessions which may not find a place in the written submissions. Discussion draws out many a concession. Second, there are some significant sentences in the written submissions which probabalise the concession. They are : “If in the existing case, the entire Council of Ministers becomes interested in the use of the statutory power one way or the other, the doctrine of necessity will fill up the gap by enabling the Governor by dispensing with the advice of His Council of Ministers and take a decision of his own on the merits of the case. Such a discretion of the Governor must be implied as inherent in his constitutional powers.... The doctrine of necessity will supply the necessary power to the Governor to act without the advice of the Council of Ministers in such a case where the entire Council of Ministers is biased. In fact, it will be contrary to the Constitution and the principles of democratic Government which it enshrines if the Governor was obliged not to act and to decline to perform his statutory duties because his Ministers had become involved personally. For the interest of democratic Government and its functioning, the Governor

must act in such a case on his own. Otherwise, he will become an instrument for serving the personal and selfish interest of his Ministers.” We wish to say no more. As we said, we cannot and we will not embark upon an enquiry. We will go by the Judges' record.”

11. What would be the approach of the Supreme Court vis-à-vis the High Court would equally apply to the approach adopted by us qua proceedings before the learned Single Judge. The appellant failed to approach the learned Single Judge stating that the consent was wrongly recorded. It was never urged that the consent was wrongly given. It is not even a ground taken in the appeal. In such a situation, the appellant cannot be permitted to urge that we should once again look into the merits of the controversy despite consent order, specially, as it is based on a categorical concession arising from the fact that the work under the contract had been executed and the final bill prepared by the appellant qua the work, and the work having been completed at a different site as per the oral instructions issued to the respondent. In the proceedings before the arbitrator the defence of the appellant was struck off, and thus even if the merits are examined, the allegation of oral instructions by the appellant to shift the site remained unrebutted and ought not to have been disbelieved.

12. We may note that in terms of the impugned order, the appellant was directed to pay the amount alongwith simple interest @ 9% p.a. from the date of award till date of payment within six months from the date of the order, failing which the interest rate applicable would be 12% p.a. The amounts were not so paid. The amounts were directed to be paid in this court in terms of order dated 16.08.2011, as a condition

for stay of execution proceedings. We may note that the appeal itself was filed with delay of 334 days, which was finally condoned on 21.11.2011, subject to the condition that the decretal amount deposited in this court be released to the respondent on furnishing personal bond for restitution to the satisfaction of the Registrar of this court. The respondent moved CM No.22733/2011, seeking withdrawal of the amount and the orders on the same have been passed only on 12.04.2012. We are informed that the amount is yet to be released.

13. In view of the aforesaid and given the fact that the respondent has not had the benefit of the decree, we clarify that the deposit of the amount was for the purpose of obtaining stay from this court against execution proceedings and cannot be said to be a tender towards the satisfaction of the decree in view of the Division Bench judgment of this court in *Engineering Projects (India) Ltd. Vs. Arvind Construction Company Ltd.,(2009) 111 DRJ 364*. The amount be now released unconditionally to the respondent and, it will be open to the respondent to take out execution proceedings for the balance amount, if any.

14. We thus find no merit in the appeal. The appeal is accordingly dismissed with cost of Rs.7500/-

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

MAY 1, 2012

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