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

Judgment delivered on: 04.01.2012

+ **FAO(OS) NO.2/2012**

M/S. DWARIKA PROJECTS PVT. LTD.

(formerly known as Raj & Associates Construction
Division)

..... Appellant

versus

**M/S. BHANDARI ENGINEERS & BUILDERS PVT.
LTD.**

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Sandeep Sharma

For the Respondent : None

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J (ORAL)

CM No.120/2012 (Exemption)

Allowed subject to just exceptions.

FAO(OS) NO.2/2012

1. This is a classic case where the advocate appearing for the appellant for reasons best known to him, has been unable to inform us, as to the relationship that the appellant i.e., M/s. Dwarika Projects Private Limited has with M/s. Raj & Associates Construction Division. The reason why we raised this query would become clear as we proceed further with the
FAO(OS) 2/2012

narrative. Suffice it to say, in the captioned appeal, a challenge has been laid to the judgment dated 23.11.2011 passed by the learned Single Judge in OMP No.163/2006 and an order of even date i.e., 23.11.2011 passed in OMP No.315/2003, based on which, the earlier OMP was rejected. To be noted, OMP No.163/2006 was filed evidently by the appellant.

2. In order to appreciate the scope of the challenge and the submissions made before us today, by the learned counsel for the appellant, Mr.Sandeep Sharma, one would have to advert broadly to the facts which gave rise to the award dated 10.01.2006 passed by the learned Arbitrator, and the impugned judgment of the learned Single Judge, whereby objections to the award preferred by the appellant, amongst others, were rejected. The impugned judgment of the learned Single Judge also disposed of, in addition, two petitions filed under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act).

BRIEF FACTS

3. It is averred by the appellant that two entities: one of which was a private limited company, while the other was a partnership firm, agreed to

enter into a joint venture to enable the said entity to apply to the National Highway Authority of India (in short, NHAI), for being declared eligible in respect of projects to be executed by NHAI under what was known as “Phase-II Programme of North- South and East-West Corridors Project”

4. It is important to note since the counsel was unable to tell us what was the exact legal structure of the joint venture entity, what we have been able to gather, is that, the joint venture entity was also a partnership firm, which was given the name of Maharia-Raj JV. The said joint venture entity, as indicated above, was formed by Maharia Re-surfacing and Construction Private Ltd. and M/s. Raj & Associates Construction Division.

5. It is not in dispute that eventually, the NHAI awarded a contract of “eight- laning of KM 16.500 to KM 29.295 of NH-I in the State of Delhi (known as Contract Package No.NS-18/DL)”, in favour of the joint venture entity i.e., Maharia Raj-JV. This agreement was entered on 31.05.2001, for a total price of Rs.60,68,53,375.80. The time frame provided in the agreement for execution of the work was stipulated as 24 months. It is not in dispute that the joint venture entity i.e., Maharia Raj-

JV by an agreement dated 27.05.2002 sub-contracted a part of the work pertaining to construction of “culverts, bridges and protective works”, as specified in Bill No.5 of the BOQ, forming part of a contract package valued at Rs.6,84,29,312.80. The sub-contract was given to Bhandari Engineers and Builders Pvt. Ltd. (in short BEPL), vide agreement dated 27.05.2002. It is not in dispute that NHAI’s approval qua the sub-contract was received by Maharia Raj-JV.

6. It appears that the work given to Maharia Raj-JV, under the main contract; a part of which was to be executed by the sub-contractor i.e., BEPL got delayed purportedly on account of failure of Maharia Raj-JV to hand over the site, with clearances and construction drawings, within an appropriate time frame. BEPL having executed a part of the work sub contracted to it claimed the requisite re-compense, in respect of the work executed by it, from Maharia Raj-JV. One of the grounds for seeking recompense was that, Maharia Raj-JV in turn had received payments on its behalf from NHAI. Since disputes arose on this account, the matter was referred to an Arbitral Tribunal. The Arbitral Tribunal, it appears, passed two separate awards dated 28.12.2005 and 10.01.2006 in respect of

two separate contract packages. To be noted in the present appeal, the appellant has assailed the award dated 10.01.2006.

7. In so far as award dated 10.01.2006 is concerned, Maharia Raj-JV filed its objections vide OMP No.220/2006, while the appellant (i.e., M/s. Dwarika Projects Pvt. Ltd.) curiously, filed separate objections vide OMP No.136/2006.

8. It is in this context, as indicated at the very outset by us, we had put to Mr. Sandeep Sharma as to what was the legal relationship of the appellant with M/s. Raj & Associates Construction Division which was one of the entities instrumental in forming Maharia Raj-JV. Mr. Sharma feigned complete ignorance as regards this crucial aspect.

8.1 Mr. Sharma, however, sought to argue before us only one singular point, which was that, at the time of formation of the joint venture entity i.e., Maharia Raj-JV, one of its constituent's i.e., Maharia Re-surfacing and Construction Pvt. Ltd., had authorised its Director Sh. Vinod Goel vide a resolution dated 02.09.2010 passed by its Board of Directors to further finalise the terms of a joint venture agreement with the other constituent i.e., M/s. Raj & Associates Construction Division. He further

contended that by virtue of the very same resolution of the Board of Directors, it had been resolved by Maharia Re-resurfacing and Construction Pvt. Ltd. that it would enter into a joint venture agreement in the name and style of Maharia Raj-JV solely for the purpose of participating in the pre-qualification exercise carried out by NHAI, and for submitting a joint tender for “Phase-II Programme of North-South and East-West Corridors Project of NHAI”.

9. In substance, it was argued that the joint venture entity i.e., Maharia Raj-JV was formed only for the pre-qualification exercise, and that, a further agreement had to be entered into with the other constituent of Maharia Raj-JV i.e., M/s. Raj & Associates Construction Division to take the matter further. Mr. Sharma thus argued that since no authority had been conferred on Sh. Vinod Goel to enter into a contract with NHAI, the appellant, which was purportedly the avatar of M/s. Raj & Associates Construction Division, could not be held liable qua the dues claimed by the sub-contractor i.e., BEPL. More specifically it was contended that the appellant could not be held liable for the dues claimed by BEPL either under the sub-contract dated 27.05.2002 or those which arose from the

main contract dated 31.05.2001. Mr. Sharma contended that the learned Single Judge had not addressed himself to these issues raised in the objections filed by the appellant.

10. On a perusal of the impugned judgment in particular paragraph 26 and 27, we find that the argument of lack of authority of Mr. Vinod Goel has been squarely addressed by the learned Single Judge. What was perhaps not articulated before the learned Single Judge, in our view, as it now transpires deliberately so, as to what was the legal relationship between the appellant i.e., M/s. Dwarika Projects Pvt. Ltd. and M/s. Raj & Associates Construction Division. Since this was not an issue raised, the learned Single Judge in the impugned judgment accepted the arguments made on behalf of the sub-contractor i.e., BEPL that the joint venture entity i.e., Maharia Raj-JV having successfully bid for the contract could not now through one of its JV partner's i.e., M/s. Raj & Associates Construction Division seek to disown its liability. The learned Single Judge also noted the fact, which is not disputed before us, that the appellant chose not to appear before the Arbitral Tribunal. Therefore, this submission made on behalf of the appellant was rejected.

11. Having perused the record, we are of the view that the learned Single Judge has rightly rejected OMP No.163/2006 filed by the appellant. According to us, both the objections filed by the appellant as well as the instant appeal appears to be a gross abuse of the process of court. The reasons of which are as follows :-

(i). In the cause title and memo of parties in the appeal filed before us, the appellant has been described as follows :-

“M/s. Dwarika Projects Pvt. Ltd.
Formerly known as Raj & Associates ...Appellant

Versus

M/s. Bhandari Engineers & Builders Pvt. Ltd. ...Respondent

MEMO OF PARTIES

M/s. Dwarika Projects Pvt. Ltd.
Formerly known as Raj & Associates
Construction Division,
Through its Director,
Sh. Raj Kishore Verma,
Maharia-Raj (JV),
B-7, Sector-36, Noida – UP ...Appellant

Vs.

M/s. Bhandari Engineers & Builders Pvt. Ltd.
83, Bhandari House, 91, Nehru Place,

New Delhi.

...Respondent”

12. It was not the submission of Mr. Sharma that M/s. Raj & Associates Construction Division has ceased to exist. We had specifically put to Mr. Sharma as to whether it was case of change of name, or amalgamation or takeover. Mr. Sahrma's answers seemed to suggest that none of circumstances had arisen. Therefore, the description of the appellant that it was formerly known as M/s. Raj & Associates Construction Division could not be understood. Undoubtedly, the joint venture entity i.e., Maharia Raj-JV had preferred objections under section 34 of the Act vide OMP No.220/2006, therefore, it is not understood as to how the appellant, which has been unable to explain its legal relationship with one of the constituent partners', i.e., M/s. Raj & Associates Construction Division could maintain either objections under section 34 of the Act or the present appeal. The learned Single Judge appears to have taken the cause title/memo of parties on its face value and accordingly, dealt with the submissions raised as regards the lack of authority of Mr.Vinod Goel to enter into the main contract dated 31.05.2001 or the sub-contract dated 27.05.2002. In our opinion, there is

a deliberate obfuscation of this vital fact. The inability of the counsel to assist us in this regard appears to be contrived.

13. Apart from the above, we agree with the conclusion of the learned Single Judge if, it is assumed (as the learned Judge appears to have accepted) that the appellant and M/s. Raj & Associates Construction Division is the same entity; that the sub-contractor could not have known as to what was the limitation on the authority of Mr. Vinod Goel, as it was dealing with the joint venture entity i.e., M/s. Maharia Raj-JV. The purported lack of authority, if any, fell within the domain of the “*indoor management*” of the joint venture entity i.e., M/s. Maharia Raj-JV. The joint venture entity by its very conduct demonstrated to the world at large, including the sub-contractor (i.e., BEPL) that it had the authority to execute both the main contract dated 31.01.2001 with NHAI, and the sub-contract dated 27.05.2002 with BEPL. As noted by the learned Single Judge, what makes matter worse for the appellant is that it chose not to appear before the Arbitral Tribunal. To our minds, this folly is compounded by the fact that a specific ground has been taken in the appeal that the Arbitral Tribunal ought to have perused the record on its

own and come to a conclusion in its favour. We are unable to accept the stand taken by the appellant in this regard. An Arbitrator is not blessed with prescience so as to be in a position to anticipate the submission that a litigant would make based on the documents on record. A party which chose not to appear does so at its own peril.

14. We are thus of the view that the appeal deserves to be dismissed with exemplary costs but we desist from doing so as none appears for the respondent. Before we conclude, we may place on record that no other submission was raised before us by the learned counsel for the appellant.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

JANUARY 04, 2012

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