

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

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OMP.No.17/2009

%15.01.2009

Date of decision: 15.01.2009

**BJCL-BRITE(JV) through ITS LEAD ... Petitioner
PARTNER M/S BHOLASINGH JAIPRAKASH
CONSTRUCTION LIMITED (BJCL)**

Through: Mr Ashish Bhagat with Mr Abdhish
Chaudhary and Ms Manisha Suri,
Advocates.

Versus

**NATIONAL HIGHWAY AUTHORITY Respondent
OF INDIA (NHAI)**

Through: Mr Chetan Sharma, Sr Advocate with
Mr Ashim Bhatt and Mr Ranjit Sharma,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

RAJIV SAHAI ENDLAW, J. (ORAL)

1. The petition under Section 9 of the Arbitration Act, 1996 was got listed yesterday post lunch. Finding no case for the grant of ex parte order and on the submission of the counsel for the petitioner that if the notice for a longer date is issued, the petition would become infructuous, notice of the petition was issued to the respondent for today. The counsel for the petitioner today in the morning informed that some of the banks had, in pursuance to the invocation of the bank guarantee by the respondent No.1, already issued and delivered cheques thereunder to the respondent. It was also informed that notice of termination of contract had also been received from respondent. The senior counsel for the respondent

also confirmed the said fact and stated that he had been unable to go through the voluminous paper book in the short time and requested the matter to be taken up later in the day. It was agreed that the cheques already received by the respondent shall not be encashed till then.

2. The counsel for the parties have been heard. The petitioner in this petition has claimed three reliefs. Firstly, of a direction to the respondent to constitute Dispute Review Board (DRB) under clause 67.1 of the contract; secondly for restraining the respondent from encashing and/or receiving payments under the bank guarantees and lastly for a direction to the respondent not to terminate the contract.

3. The senior counsel for the respondent has urged that since the contract has already been terminated, the DRB also cannot be constituted. However, I do not consider it necessary to adjudicate the said aspect since in my view the relief claimed of constitution of DRB does not fall within the ambit of Section 9 of the Act.

4. As far as the third relief claimed is concerned, the senior counsel for the respondent has urged that the same has become infructuous, the notice of termination of contract having been already served on the petitioner. The counsel for the petitioner controverts, arguing that the notice is not effective as yet and termination will come into effect on 14th day from the said notice dated 13th January 2009 and as such the said relief can still be granted. A copy of the notice has been handed over in court. Clause 63.1 of the contract enables the respondent to terminate the contract in the eventualities prescribed therein, upon giving 14 days notice to the petitioner and in certain other eventuality, immediately. In my view, the 14 days time is to expel the contractor from the project site. The said time is to enable the contractor i.e., the

petitioner, to remove itself and its goods and equipment from the site, whereafter the respondent becomes entitled to expel. It cannot be said that the termination does not come into effect till expiry of 14 days.

5. The grant of interim orders by the court, in relation to arbitration proceedings, under Section 9, in my view, is to be governed by the provisions to grant of prohibitory, mandatory and other interim reliefs in the suits. Section 41(e) of the Specific Relief Act bars the grant of permanent injunction to prevent the breach of contract the performance of which would not be specifically enforced. The contract in the present case was for the construction of the balance work for 8-laning of 16.500 to 29.300 km of NH-1 in the State of Delhi. The counsel for the petitioner has also, fairly not urged that the said contract is specifically enforceable. He has, however, urged that the work is in national interest and the disputes had arisen between the respondent and the contractor earlier engaged for the said work, and the respondent took a fairly long time thereafter in assigning the work to the petitioner. It is stated that if the respondent is permitted to terminate the agreement with the petitioner also, it would not be in the interest of the work and would lead to further delays in completion of the works. It is urged that the petitioner is in a position to complete the works within the next six months provided the respondent complies with its obligations under the agreement and does not cause any hindrance as has been doing till now. It is stated that the disputes, in fact, are not between the petitioner and the respondent but of the petitioner with one particular official of the respondent and this court should intervene and refer the parties to a committee or to the mediation cell for the purpose of ensuring and in the interest of timely execution and

completion of the works. The petitioner is stated to be willing in all respects to ensure the same. It is further urged that the delays were not attributable to the petitioner but owing to running traffic, of flooding and caused by villagers and delays in obtaining change of land use. The senior counsel for the respondent has, of course, controverted the aforesaid. He has argued that it is the utter failure on the part of the petitioner to complete the work inspite of opportunities which has led to the notice of termination and there is no possibility of the petitioner completing the works and if mediation is attempted or further opportunity given to the petitioner, it would lead to further delays. Various factors in this regard have been mentioned but opportunity for filing the counter affidavit having not been granted, I do not deem it necessary to record the same. Suffice it is to state that this court at this stage is not equipped to or to go into such disputed facts. The completion of work, as per the petitioner, is still dependent upon performance of certain tasks by the respondent.

6. The fact remains that there are serious disputes and differences between the parties and it does not appear that there is possibility of mediation or conciliation, when the counsel for the respondent upon instructions has communicated that the respondent knowing the past conduct of the petitioner is not willing for the same. In my opinion no purpose would be served in giving an opportunity to the respondent to file a counter affidavit or a reply to the petition. In my view, owing to the bar contained in Section 41(e), the interim measure of restraining termination of contract which is not specifically enforceable cannot be granted. The Apex Court in **Cotton Corporation of India Ltd v United Industrial Bank** AIR 1983 SC 1272 has held that when the relief of permanent injunction

cannot be granted owing to bar in Specific Relief Act, the question of granting interim relief does not arise.

7. The only other relief remaining is of the stay of the encashment of the bank guarantees or of receiving payments thereunder. The bank guarantees are of two kinds i.e., performance bank guarantees and bank guarantees against retention money. The bank guarantees are unconditional, whereunder the bank which had furnished the guarantees at the instance of the petitioner in favour of the respondent had agreed to make payments to the respondent thereunder upon the respondent's first written demand and without any cavil or argument and without the respondent being required to prove or to show grounds or reasons for the demand for the sum specified therein.

8. The petition does not even plead fraud in the obtaining of the bank guarantees of the nature on which ground alone it has been held that the courts can intervene in the encashment of the bank guarantees.

9. A faint attempt was made to urge that where cheques have already been issued, the relief sought is of restraining encashment thereof and the principles of injunction relating to bank guarantees shall not apply. The argument does not even deserve a discussion and is rejected.

10. It is the case of the petitioner that the encashment of the bank guarantees is malafide. It is averred that the respondent spurred into invoking the said bank guarantees immediately on receiving notice of stay by this court of encashment of the bank guarantees for Rs 3 crores against mobilization advance. It is further argued that the petitioner has already applied to the respondent for constitution

of DRB and it is the DRB which is to make efforts for settlement of disputes which have arisen between the parties and till then the bank guarantees cannot be encashed. It is next contended that if the stay of the bank guarantee is given, the respondent shall not suffer adversely in as much as the respondent has provided in the contract that if the encashment of the bank guarantee is interfered with by the court, the respondent would be liable for interest for the delay at 12% per annum. It is also contended that the delays in execution of the work have been occasioned by the respondent or for the reasons attributable to the respondent. It is urged that the said delays on the part of the respondent are admitted in the termination notice even. It is further urged that the earlier contractor had obtained a stay from this court and of which the petitioner was not informed and therefore a fraud was committed by the petitioner in obtaining the bank guarantees from the respondent. The counsel for the petitioner had also argued that the action of the respondent is malafide, the respondent had forwarded to the petitioner a supplementary agreement as signed by the respondent with Nagarjuna Construction company and which is contrary to the existing contract between the parties. It was urged that the respondent has invoked the bank guarantee to coerce the petitioner into signing the said supplementary agreement. It is also argued that the retention money bank guarantees cannot be invoked because the question of appropriating retention money would arise only after the specified period.

11. The aforesaid averments again are controverted by the senior counsel for the respondent. It is argued that the contract commenced from 29th December, 2005 and was to be completed within 18 months and which time was of the essence of the

agreement. It is further argued that the petitioner was granted extension of time without any damages from 28th June, 2007 to 24th July, 2008 and thereafter till 31st December, 2008 with liquidated damages.

12. The documents filed disclose that the various aspects of the project were fully in the know of the petitioner. Whether the delay is attributable to the respondent or not has to be determined in the arbitration proceedings between the parties. The petitioner at the time of taking the work was aware of and/or was expected to be aware of nature thereof. The petitioner knew of disputes of respondent with earlier contractor. The petitioner raised various queries before executing the agreement and which were answered by the respondent. No case of fraud of the egregious nature so as to vitiate the underlying transaction is made out. Disputes of such nature are there in all cases of bank guarantee and have not been held sufficient to grant injunction.

13. As aforesaid the contract being of a nature not specifically enforceable if the respondent is found to be in the wrong, the petitioner would be entitled to damages from the respondent. At this stage, the bank guarantees being unconditional and the Apex Court having deprecated the practice of the courts interfering in the bank guarantees in spite of the law having been laid down repeatedly by the Apex Court with respect thereto, no case for interference in the bank guarantees is made out. The clause of the contract regarding the constitution of the DRB and/or regarding payment of interest for delay in payment of bank guarantee would not justify this court in interfering with the bank guarantees. Similarly, merely because the DRB has not been constituted would not entitle the petitioner to have the stay of the termination or of bank guarantees. If the intent had

been that till the DRB is constituted and/or is in session, the parties would not take action which they were otherwise entitled to take under the agreement, the contract would have so provided.

14. The retention money was to be retained by the respondent out of payments made to the petitioner under the contract. Only as a facility to the petitioner, it was permitted to furnish bank guarantee against the same. The petitioner thus is not entitled to restrain the respondent under the bank guarantee receiving the said money. Moreover the terms of the bank guarantee, which alone are to be seen at this stage, do not merit the submission of petitioner.

15. I therefore do not find any merit in the petition. The same is dismissed. The respondent shall be entitled to encash the cheques which on the suggestion of the court were ordered to be not encashed till now.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 15, 2009
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