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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: August 19, 2009
Date of Order: September 08, 2009

+OMP 330/2009

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M/s Jialall Kishorilall Pvt. Ltd.
Through: Mr. D. Moitra, Advocate

08.09.2009
...Petitioner

Versus

Municipal Corporation of Delhi
Through: Ms. Mini Pushkarna, Advocate

...Respondent

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. The petitioner approached this Court on receipt of letter dated 28th May, 2009 from respondent rescinding the contract between petitioner and respondent for construction of commercial *Nalla* at Gautam Nagar behind Indian Oil Building with a prayer that the Court should stay the operation of the letter and permit the petitioner to complete the work by August, 2009.

2. When notice of petition was served upon respondent, respondent took a plea that there was no arbitration agreement between the parties and the petition was not maintainable while petitioner took the stand that there exists an arbitration agreement inter se parties. Both parties were asked to file their respective affidavits with supporting documents.

3. A perusal of documents would show that the standard contract Performa, which is supplied to all the contractors, contained an arbitration

clause. However, this arbitration clause was scored off in the original contract available with the respondent. The petitioner contended that this scoring off was done later on. The petitioner had signed on each page of the contract at the bottom and there were no specific signature of the petitioner at the arbitration clause having been scored off. Respondent argued that the Commissioner of MCD vide its office order dated 11th December 2006 had ordered that the arbitration clause in various contracts forms being adopted by MCD should be deleted with immediate effect. Pursuant to this office order, the arbitration clause of this agreement between the parties dated 12th December 2007 was also deleted and the contractor was very well aware of this fact. The affidavit of Superintending Engineer filed on behalf of respondent stated that at the time when tenders were opened he was present and when the work was awarded in favour of contractor, the agreement was signed in his office and the arbitration clause was specifically scored off and the signatures of the contractor at the bottom of scored off clause were obtained in token of its scoring. However, the counter affidavit filed by the contractor (the petitioner herein) is contrary to the assertions made by the Superintending Engineer and it is asserted that the signatures of petitioner were affixed on the contract prior to the deletion of the arbitration clause and the clause was deleted later on.

4. In my view, this controversy is unnecessary for disposal of this petition. Even if it is presumed that there was an arbitration clause, the relief sought by the petitioner by way of present petition cannot be granted. The petitioner has sought cancellation of the contract done by respondent be stayed under Section 9 of Arbitration & Conciliation Act, 1996.

5. This Court in *Lt. Col. (ret'd). K.S. Ahluwalia v. Indraprastha Gat Ltd.* 2009

3 *Arbitration Law Reporter* 186(Delhi) observed that where a contract between the parties stands terminated, the same cannot be kept alive by virtue of Section 9 of Arbitration & Conciliation Act, 1996. It was not within the jurisdiction of the Court to renew a contract between the parties or to extend the contract between the parties. If a contract was a terminable contract and has been terminated by a party, the opposite party has a claim to the damages suffered by it and the same can be considered by the arbitrator only. This Court in *M/s Excel Generators Pvt. Ltd. v. IJM Corporation Berhad* OMP 241 of 2009 decided on 13th May 2009 had also observed that where a contract is terminated or foreclosed interim relief under Section 9 cannot be granted for specific performance of such a contract. In all those cases where monetary damages can compensate the breach of the contract, the Court cannot insist upon a party that the contract should be specifically performed. Termination of a contract is one of the facets of commercial law and if a party is agitated that the contract was wrongly terminated, the remedy lies in claiming damages. The party cannot insist upon that the contract should be specifically performed.

6. In view of my foregoing discussion, I find that the present application/petition made by petitioner seeking a relief to the effect that termination of the contract should be stayed and he be permitted to specifically perform the contract, is not maintainable and is liable to be dismissed. The petition is hereby dismissed. However, the order passed by this Court is without prejudice to the rights and contentions of MCD about non existence of the arbitration clause.

September 08, 2009
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SHIV NARAYAN DHINGRA J.