

* **HIGH COURT OF DELHI : NEW DELHI**

+ **OMP No. 692/2008, IA No.622/09 and CCP No15/2009**

Judgment reserved on: 6th February, 2009

% Judgment decided on : 20th March, 2009

Kunj Bihari Construction Co. Pvt. Ltd. Plaintiff
Through : Mr. S.D. Singh, Adv. with Mr. Rahul K.
Singh and Mr. Bharti Tyagi, Advs.

Versus

Nidhi Builders Pvt. Ltd. & Anr. Defendant
Through: Mr. Rajeev Mehra Adv. with Mr. Arvind
Sharma, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') has been filed by the petitioner before this Court which was listed on 19th December, 2008 and on the said date, the following interim orders were passed:-

“In the meanwhile the respondents shall maintain status quo with regard to the material and the work at the construction site of Provision of Married Accommodation Project for Major (32 DUs) and Captain (10 DUs) including external allied services at R.R. Hospital, New Delhi.”

2. The controversy in the matter arises out of a contract whereby the respondents were awarded the contract by Director

General, Marketing Accounts Project (hereinafter referred to as 'employer') vide work order dated 14th May, 2005 with respect to construction of Married Accommodation Project including external allied services of R.R. Hospital, New Delhi commonly known as R.R. Hospital Project. The value of the contract was Rs.7,75,66,300/-. The project was to be completed by Respondents till 30th November, 2006 who were unable to execute the works. Admittedly, the respondents had completed and executed the 85% work to the value of Rs.6,45,84,900/- but due to the ill health of respondent No.2, the work got adversely affected and on the request of employer to make alternate arrangements, the Respondents decided to give the remaining work to the petitioner pertaining to R.R. Hospital.

3. The work order in this respect dated 28th November, 2007 was issued to the petitioner for balance/left out work. The value of the work assigned to the petitioner by respondents was of the value of Rs.1,30,00,000/-. Clause F(b) of the contract contemplates the mode of payment of the contract between the petitioner and respondents which was back to back in nature. Clause F(b)(vi) provides that :

“(vi) Rs.10 lacs (Ten Lac only) shall be paid only lump sum against all defects/all rectification all repairs etc. only confirmation of client letter. And complete works of R.R. Hospital only.”

4. A formal agreement dated 25th January, 2008 was entered into between the parties. Most of the clauses in the formal agreement were the same except the arbitration clause No.9 which provides as under :-

“In case of dispute between the First and Second Party in connection with the interpretation and application of any term, condition or otherwise, first the matter shall be resolved by mutual consultation and discussion and in case it is not possible then through arbitration to be appointed by the First Party from the panel of CPWD arbitrators.”

5. The value of the material lying on the site at the time of handing over the site to the petitioner was assessed at Rs.10 lakhs. The said amount was to be adjusted later on.

6. As per agreement, it was the petitioner's obligation to seek extension of time from the employer. However, it is not in dispute that respondents had been obtaining extension of time from the employer.

7. The petitioner has not disputed the fact that approximately 85% of the work was already completed by respondents on the date of the contract. The petitioner was to complete the remaining work left out by respondents.

8. Admittedly the 18th running bill of the Project was raised by respondents prior to 28th November, 2007 i.e. on 27th August, 2007. The cumulative value of the 18th running bill of work done by respondents was Rs.6,37,53,000/- which was passed by DG (MAP) for Rs.38,43,000/-.

9. Against the 19th RA bill raised by the petitioner on 3rd July, 2008, he has admitted having received a sum of Rs. 16,38,909/- plus TDS deducted arising out of the work by cheque dated 23rd August, 2008.

10. According to the counsel for the petitioner, the petitioner started the work in full force from day one of the work order and the extension of time was granted by employer till 14th August, 2008 for completion of the Project. The contention of the petitioner is that there has been delay on the part of the respondents on various counts viz opening of Escrow Account as well as obtaining the extension of time for work to be executed from the employer.

11. It is not in dispute between the parties that the petitioner was at the site till 15th November, 2008 and on that date according to the petitioner, the value of the material and work executed by the petitioner at site would be Rs.95,64,072.50 summary wherein is provided in Annexure P-12 of the petition as under :

“Summary

<u>“ R.R. Hospital</u>	<u>Amount (Rs.)</u>
(1) Bill due against work done	54,87,471.00
(2) Balance stock/material at site	16,28,601.50
(3) Infrastructure/machinery installed Lying at site	6,98,000.00
(4) Difference in % age of yardstick as per Stage of payment and current market Price	17,50,000.00
 TOTAL	 95,64,072.50”

12. According to the petitioner, the petitioner has only received a sum of Rs. 16,38,909/- plus TDS deducted and other taxes from the respondents. As per the petitioner, the petitioner is entitled to receive the balance amount of Rs.1,13,61,091/- from the respondents as against the total contract of Rs.1,30,00,000/- towards the work already executed during the said period. In order to justify his claim, learned counsel for

the petitioner has contended that the respondents has also sent the final 21st running bill dated 18th December, 2008 to the employer DG (MAP).

13. Learned counsel for the petitioner has submitted that in view of the above said facts and circumstances, the respondents may deduct some reasonable amount for the work if done by the respondents after leaving the site by the petitioner on 15th November, 2008.

14. In support of his contention, the petitioner has relied upon the letter dated 16th June, 2008 written by respondents to the employer wherein an admission was made by respondents that infrastructure lying at the work site was not less than Rs.3 crores and manpower at site was more than 250 workers and the petitioner's work was stated to be satisfactory at the site. It was also stated in this letter by respondents that there was no possibility of the petitioner/contractor running away without completion of the work. The contention of the petitioner is that in view of the admission made by respondents to the employer, in the abovesaid letter, it is apparent that when there exists material costing such a huge amount, it must have been used by the petitioner in the Project. Hence, the petitioner is entitled to the said amount.

15. On the other hand, the Respondents have denied that the petitioner has performed any work at the site. It is submitted that if any work was performed by the petitioner it was negligible, as appeared from the various complaints of no work/slow work by the employer to respondents. As regards the letter dated 16th June, 2008 by the petitioner, the respondents have stated that the said letter was written by respondents to the employer only at the instance of the petitioner to seek

extension of time from the employer. During that time, there were cordial relations between the petitioner and Respondents, therefore, in order to present a good picture of the petitioner, the said letter was written. According to Respondents, the statement made in the said letter is not an admission.

16. The respondents further stated that the alleged final bill dated 15th November, 2008 raised by the petitioner was not received by respondents as it was purportedly sent by petitioner only by UPC on 2nd December, 2008. The respondents submit that earlier running bills were sent by the petitioner directly to employer but the alleged final bill dated 15th November, 2008 has been raised upon Respondents. Therefore, it creates doubt about the service of letter by the petitioners as one day earlier i.e. on 14th November, 2008 the petitioner had sent a letter to the respondents wherein the petitioner had, inter-alia, made the following statement:-

“We are indeed indebted to you, Sir, for helping us and our company M/s. Kunj Behari Construction Co. Pvt. Ltd. from financial and liquidity crunch although your firm had been very helpful to us in order to enable us to complete the work entrusted to our company but due to financial constraints and financial mismanagement of our company we could not complete the work within the stipulated time of two months. Our intention is to complete the work earlier but not later than 10th December, 2008. and we also hereby give an irrevocable undertaking that the said work shall be completed by 10th December, 2008. In case we fail to complete the said work by the said date the agreement for the work as well as for the work of Kabul Line work will stand automatically terminated without any further reference to us and we shall be liable to pay damages as per the terms and conditions of the agreement and all decisions taken by you in the matter shall be final

and binding on us.”

17. On the same day i.e. on 14th November, 2008, another handwritten letter was issued by Mr. Dinesh Sharma, Managing Director of the petitioner company to the respondent No.2 to the following effect:-

“I Dinesh Sharma, Managing Director, Kunj Behari Construction Co. Pvt. Ltd. by passing a resolution has terminated Mr. Navin Kumar Jain and his wife Ms. Shikha Jain from their services of monitoring the R.R. Hospital Project and Kabul Line works on behalf of our company and I shall submit a copy of resolution to this effect of our company within 4 or 5 days.”

18. Learned counsel for the respondents states that after the receipt of the notice from the employer from time to time, the petitioner were informed in this regard. The managing director of the petitioner company vide his letter dated 14.11.2008 again gave irrevocable undertaking to complete the entire balance work by 10.12.2008.

19. On 15th November, 2008 the respondents wrote a letter to the petitioner acknowledging the letter dated 14th November, 2008 accepting the proposal to make payment for the material procured if any after 15th November, 2008 in order to complete the work and clearly indicated to the petitioner that in case the work is not completed by the petitioner by 10th December, 2008 as promised in its letter, the agreement of both the works i.e. R.R. Hospital and Kabul Line Project dated 25th January, 2008 will stand automatically terminated without making any further reference.

20. The respondents further submit that the entire payment

against the work done by the petitioner has already been made. The material, equipment and machine lying at the site belong to the respondents. The respondents have stated that a sum of Rs.23,15,043/- were paid by the respondent by way of cheque and Rs.8,70,127/- were paid by cash to different suppliers, labourers and other expenses spent by the respondents. The respondents in support of his submission has filed evidence as annexure R-27 along with the reply.

21. It is also contended by the respondents in para 10 of the reply that the entire balance work has almost been completed by the respondents as it is established from the fact that the respondent has submitted its 21st and final bill for the balance work on 18th December, 2008.

22. The respondents have specifically denied that the petitioner has executed any work worth Rs.54,87,475/- and have further denied that the petitioner has purchased any material worth Rs.16,28,601/- and infrastructure, machinery etc. as depicted in the bill sent by the petitioner to the respondents on 15th November 2008.

23. Further, the contention of respondents is that the petitioner has concealed various material facts and documents from this Court while filing the present petition. The details of the same are given as under:-

- i) The petitioner has made a wrong statement in the petition that the Escrow account was not opened by respondents.
- ii) The petitioner has not filed the letter dated 27th June, 2008 and undertaking dated 1st July, 2008 to complete the work by 14th August, 2008 and further

did not plead the letter dated 14th October, 2008 and similarly not pleaded his two letters dated 14th November, 2008 as well as letter dated 15th November, 2008 and various incorrect statements have been made in the petition.

- (iii) Correct copy of the agreement dated 25.1.2008 has also not been filed by the petitioner.

24. In view of concealment of facts, the learned counsel for the respondents contends that the petition filed by the petitioner is liable to be dismissed as the petitioner has not come before this court with clean hands. Various decisions have been referred by the learned counsel for the respondents on this point. He argues that the entire issue is as to whether the petitioner is entitled to any amount for the work done by him during the period mentioned earlier which has to be decided by the arbitrator and in case the petitioner succeeds, he can be compensated in terms of damages as per settled law. As the petitioner has to establish his case before the arbitrator about the work done by him, granting of any relief at this stage would amount to granting the relief to the petitioner without the matter being considered on merit.

25. It is not in dispute that the agreement between the parties has been terminated. The parties are also disputing about the material, equipment and machinery lying at the site. During the hearing of this petition on 27th January, 2009, this Court, with the consent of the parties, appointed a Local Commissioner to verify the latest position about the construction of the project in question and execution of the work done at the site. The learned Local commissioner in paras 7 to 10 of his report gave full details about the present state of construction and execution of the work done at the site after 19th December, 2008 and the

details of the equipment and worth of material lying at the site.

26. The petitioner has filed contempt petition being CCP No.15/2009 on the ground that the respondents have disobeyed the interim orders of this Court granted on 19th December, 2008 as appears from the documents filed by the respondents themselves. Learned counsel for the petitioner has referred the report of local commissioner in support of his submissions.

27. I have heard learned counsel for the parties for considerable time and perused the pleadings and documents of the parties. Considering the rival contentions of the learned counsels for both parties, I am of the view that the sole dispute is as to whether the termination of sub contract agreement by the respondents was justified or not and whether the said action of termination was taken by the respondents as per the sub contract agreement amongst the parties validly or not. Such a dispute has to be adjudicated by the arbitrator in terms and conditions of the said agreement. This court, therefore, is of the opinion that it is not prudent to decide this question at this stage as, it may prejudice either of the parties in view of the allegations and counter allegations raised by them.

28. Thus, the only question left for consideration of this court is as to whether it is a fit case where the interim order granted by this court on 19th December, 2008 is to continue or not and whether the petitioner is entitled to any other relief in order to secure the interest of the petitioner at this stage, as the main dispute which has arisen is yet to be adjudicated upon by the arbitrator.

29. There is no consensus between the parties as far as appointment of arbitrator is concerned. The petitioner has relied upon the arbitration clause (16) mentioned in the Work Order dated 28th November, 2007. On the other hand, the respondents by letter dated 30th December, 2008 have already invoked the arbitration under clause 9 of the formal agreement dated 25th January, 2008. As per statement made by the parties, so far none of the party has filed an application under Section 11 of the Act. At this stage, the question arises as to what relief can be granted to the petitioner in its application under section 9 of the Arbitration & Conciliation Act, 1996.

30. The law relating to grant of injunction in exercise of power under Section 9 of the Act in the commercial contract has been discussed by this Court in the case of **Techno Construction and Anr. Vs. Kunj Vihar Co-operative Group Housing Society Ltd., 2005 (81) DRJ 233** wherein it was held as under:

“9. Law with regard to grant of interim injunction while exercising jurisdiction under section [9](#) of the Arbitration and Conciliation Act, 1996 is well settled. The protection under this section can be granted only when prima facie case, balance of conveniences and irreparable loss and injury is made out. The first question requiring consideration is, whether the contract for construction of building can be ordered to be specifically enforced? Section [14\(1\)\(a\)](#) of the Specific Relief Act, 1963 provides that a contract for non-performance, of which compensation in money is adequate relief, cannot be specifically enforced. In a suit for enforcement of contract for construction of a building, the party seeking specific performance of the contract has to satisfy three conditions, contained in proviso to clause (c) of sub-section (3) of Section [14](#). These are (i) the building or other work is described in the contract in sufficiently precise terms to enable the

court to determine the exact nature of the building or work. (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed. In short, before a construction contract can be ordered to be enforced, it has to be held that compensation in money is not the adequate relief. It cannot be disputed that where a contract which cannot be enforced by a decree for specific performance, the same cannot be negatively enforced by issue of an injunction.”

31. In the case of **B.S.M. Contractors Pvt. Ltd. vs. Rajasthan State Bridge & Construction Corpn. Ltd. & Anr., AIR1999 Delhi 117** it was held as under :

“9. On a consideration of the facts and circumstances of the case, I am of the opinion that a building contract of the instant nature cannot be specifically enforced by granting interim relief under Section 9 of the Act. If there is a breach of such a contract, the appropriate remedy is to compensate the party damnified in damages. That apart, the granting of an injunction in favour of the petitioner will further delay the construction work considered very urgent by the respondent No.3. Thus, the balance of convenience also swings against the grant of injunction sought by the petitioner.”

32. From the above discussion, it becomes clear that where contract is not specifically enforceable as per the clauses stipulated under Section 14 of the Specific Relief Act, 1963, the interim order in the form of injunction qua contract cannot be passed enforcing negatively. In the present case also, the contract being the construction contract relates to disputes between the parties about the payment of

amount, material lying at the site, machinery and equipment. The same can be enforced and compensated in terms of monetary relief as at this stage there are allegations made by the parties against each other and some of them are of serious nature.

33. Any order or interim relief in the form of status quo or injunction granted cannot be continued as it will further delay the completion of the project in question causing irreparable harm to the employer who is not concerned with the present controversy between the parties.

34. Taking into account the overall situation and circumstances of the present case, the status quo order dated 19th December 2008 about the work of construction and material is vacated on the condition that the defendants shall furnish a security in the sum of Rs.40 lakhs by way of bank draft within three weeks from today. The said sum be deposited with the Registrar General of this court. The said deposit shall be kept in a fixed Deposit initially for a period of one year subject to the renewal of the same from time to time. This condition is imposed as an interim measure without any prejudice to the rights and contentions of the parties. This amount has been determined by this court in order to secure the interest of the petitioner considering the fact that in case the petitioner ultimately succeeds before the Arbitral Tribunal and any amount is found due, the same may be paid to the petitioner from the said security amount deposited by the respondents. The reasons for arriving at this figure fixed by this court are given as under:-

- a) The total value of the work assigned to the petitioner by the respondents was Rs.1,30,00,000/- plus Rs.10 lakhs paid by the respondent as lumpsum amount against the defects/rectifications/repairs of the work of R.R. Hospital as per the work order dated 28th November 2007. Admittedly the petitioner has only received Rs.16,32,909/- plus TDS arising out of the work and other taxes. The said payment was received by the petitioner by cheque dated 23rd August 2008.
- b) It is the admitted case of the parties that the petitioner was at the site of R.R. Hospital till 15th November 2008 and he had sent summary details/bill due against the work done and balance stock/material at site which are more than seventy lac according to the petitioner although the respondent has specifically denied the same.
- c) The respondents have contended in Para 9 of the reply that subsequent to 15th November 2008 they have paid an amount of Rs.23,15,043/- by way of cheque and Rs.8,70,127/- by cash to the different suppliers and labourers of the petitioner.
- d) As per Para 10 of the reply, the respondents have admitted that the work was almost complete and the respondents had sent 21st running bill on 18th December, 2008 to the employer and as per statement amount due to the contractor comes to Rs.1,47,20,192/-.

35. Nevertheless, both the parties are entitled to raise their respective claims/adjustment of the pending bills and other issues related to the matter before the Arbitrator at the appropriate stage.

36. On deposit of the said amount, the respondents are free to execute the remaining work, if any, still to be completed by themselves or through any contractor. A separate statement of account in this regard shall be maintained by the respondents and shall be produced before the learned arbitrator when he is appointed by this court.

37. The application for vacation of ex parte orders is accordingly disposed of. As regards the contempt petition is concerned, the same is disposed of without going into the merits of the case. The arbitrator when appointed shall be within his rights and powers to go into the entire gamut of the disputes and effectively adjudicate upon the disputes between the parties.

38. It is made clear that the observations made in this order are tentative and will not bind the Arbitral Tribunal. The parties are left to bear their own costs.

MANMOHAN SINGH, J

MARCH 20, 2009
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