

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

+ **O.M.P. No.281/2008**

Date of decision : March 19, 2010

M/S LARSEN & TOUBRO LTD & ORS

... Petitioners.

Through: Mr. Sumit Bansal, Mr. Ateev Mathur and
Mr. Manish Paliwal, Advocates,

VERSUS

NATIONAL HIGHWAYS AUTHORITY OF INDIA

....Respondent

Through: Mr. Sandeep Sethi, Sr. Advocate with
Ms. Padma Priya, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

% **JUDGMENT(ORAL)**

VALMIKI J. MEHTA, J

1. The petitioner is the contractor and the respondent is the owner for the work of road construction awarded to the petitioner by the respondent. The

petitioner claimed certain payments on the basis of interpretation of certain clauses of the Contract in its favour.

2. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996, in which the following reliefs have been sought:-

- “a) Pass an ad interim ex-parte injunction restraining the Respondent from withholding/recovering the amount of Rs.4,11,72,228/- (Rupees Four Crores Eleven Lakhs Seventy Two Thousand Two Hundred and Twenty Eight only) from the future bills including the retention payment due and/or the pre-Final/Final Bill amounts which are payable by the Respondent to the Applicant No.3; and
- b) Direct the Respondent to make the payment of the retention money of Rs.250,260,000- (Rupees Twenty Five Crores Two Lakhs Sixty Thousand Only in accordance with the terms of the contract; and
- c) granting such other or future ex-parte ad-interim injunction as this Hon’ble Court deems fit and proper in the facts and circumstances of the present case; and
- d) Confirm the orders passed in terms of prayer (a) (b) and (c) herein above after issuing the notice to the respondent; and
- e) Any such orders which may be deemed proper may also be passed in favour of the applicant.

It is prayed accordingly.”

3. In sum and substance, the relief in fact which is prayed for is that the respondent should be mandated by an injunction to make payment to the petitioner. This issue in this regard is with respect to prayer (a) in which

injunction is asked for restraining the respondent from withholding/recovering the amount of Rs.4,11,72,228/-.

4. I have recently in a case of the respondent itself, had an occasion to consider similar prayers, and which have been so considered in OMP 484/2009 decided on 4.3.2010 titled as ***Simplex Infrastructures Ltd. Vs. National Highways Authority of India***. Paras 9 and 10 of the said judgment are relevant and they read as under:-

“9. The Supreme Court, in the case of ***Union of India Vs. Raman Iron Foundary (1974) 2 SCC 231*** (a bench of two judges) passed an interim injunction, under Section 41 of the erstwhile Arbitration Act, 1940, the effect of which was that the respondent therein was in effect directed to make payment to the petitioner. This legal position as laid down in this judgment of the Supreme Court was specifically overruled by a three Judge Bench of the Supreme Court in the case reported as ***H.M.Kamluddin Ansari Vs. Union of India AIR 1984 SC 29***. The Supreme Court specifically overruling the ratio of ***Raman Iron Foundary (supra)*** has held that no injunction can be granted the effect of which is to direct payment to the petitioner. The decision of ***H.M.Kamluddin Ansari’s*** case has been also followed by the Supreme Court in ***M/s Sant Ram & Co. Vs. State of Rajasthan & ors, AIR 1997 SC 2557***. The following paragraph of the judgment in H.M.Kamluddin Ansari is relevant and reproduced below.

“We are clearly of the view that an injunction order restraining respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay amount to the contractor-appellants. Such an order was clearly beyond the purview of cl. (b) of S.41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Cl. 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no

injunction order could be passed restraining the Union of India from withholding the amount.”

10. It is therefore quite clear that no injunction can be granted the effect of which is a mandatory injunction directing payment. I may refer to Section 41(h) of the Specific Relief Act which states that no injunction can be granted where an equal efficacious relief can be obtained by the petitioner. When effectively what is sought is a money decree, then, by virtue of Section 41(h), no interim injunction can be granted because the petitioner has to seek and succeed in getting a money decree/award for its claims. In my opinion, grant of an injunction as prayed for by the petitioner would be wholly and completely misconceived because the effect of the injunction order would be that the petitioner’s interpretation as on date should necessarily be taken as correct, although, substantive proceedings to determine the same in arbitration have yet to take place. The further effect of the injunction would be that although no substantive proceedings have started the petitioner’s presumption is to be given effect that there is an executable Award in its favour accepting its interpretation of Clause 70.3 viz the effect is that the Award has become final by dismissal of the objections to the Award and there is to take place enforcement and execution of the Award under Section 36 of the Act. In my opinion, the present is a classic case of putting the cart before the horse. Surely, the horse is to precede the cart i.e. an Award giving the benefit of money decree must necessarily precede the cart of any legal proceedings seeking benefit of an executable Award.

Another aspect which is necessary to mention is that the right to withhold amounts is independent of a Contractual Clause entitling the same i.e a withholding can take place under a common law right although there is no Contractual Clause entitling the withholding. In view of the above discussion, it is also not possible to accept the argument of the counsel for the petitioner that the case of ***M.H.Kamaluddin Ansari*** is distinguishable on facts, because the clear ratio and mandate of that judgment is that by an injunction payment cannot be ordered to be made to a person.”

5. The present case is therefore fully covered by the ratio of the judgment in ***Simplex Infrastructures Ltd.***’s case (supra). The present petition therefore is also to be dismissed so far as prayer (a) in this petition is concerned.

So far as prayer (b) is concerned, the counsel for the respondent states that the petitioner has secured the payment received by it of Rs.25,02,60,000/- by means of bank guarantees and the respondent does not seek to appropriate and withhold any amounts under this head because they are already secured by bank guarantees. No orders therefore are required so far as relief (b) is concerned.

6. With the aforesaid observations, the present petition is dismissed leaving the parties to bear their own costs.

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7. Since the petition has been dismissed, this application does not survive and is disposed of as such.

VALMIKI J. MEHTA, J

March 19, 2010

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