

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

Date of decision: January 16, 2015

+ **OMP NO. 66/2015**

DESIGNERS' GUILD UNITED

..... Petitioner

Through: Mr.Anil Kr. Aggarwal, Advocate
with Mr.A.B Singh and Mohd.
Imtiyaz, Advocates

versus

SIMPLEX INFRASTRUCTURE LIMITED

..... Respondent

Through: Mr.Krishna Vijay Singh,
Advocate with Mr.Rishabh Arora
and Mr.Nachiketa Goyal,
Advocates

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. In this petition under Section 9 of the Arbitration and Conciliation Act, 1996 (Act in short), the petitioner has prayed for the following reliefs:

(A) stay the operation of the impugned "termination" letter dated 29/11/2014 (Annexure P-6) of the respondent giving a reasonable opportunity to the petitioner to invoke arbitration and until such time arbitral award is pronounced; and

(B) restrain the respondent, its directors, managers, officers, agents and employees etc. from supplanting or replacing the petitioner by engaging any third party

architect or firm of architects or to continue the work already assigned to the petitioner as detailed in the work order/agreement (Annexure P-3) through any third party architect or firm of architects after supplanting the petitioner, pending determination of the rights and claims of the petitioner against the respondent through arbitration; and

(C) grant an ad interim ex parte stay in terms of the prayers at Serial A) to C) above; and

(D) Award the cost of the proceeding in favour of the petitioner against the respondent; and

(E) pass such other and further orders as may be deemed fit and proper in the fact and circumstances of the case and to meet the end of justice”.

The Facts:

2. The petitioner, which is a partnership firm provides architectural services. It is the petitioner's case that the Delhi Development Authority (DDA) had invited tenders for a mega project for construction of HIG Multistorey flats spread over an area of 8.374 hectares in Dwarka, Phase II, Delhi. The work was to be executed on turnkey i.e. Design and Built basis and included the task of providing comprehensive architectural services relating to design of buildings. The respondent desirous of submitting its bid for the said project, was required to submit architectural drawings of all floors and other details, in compliance with

the MPD-2021 norms, municipal bye-laws and other specifications. The respondent as a bidder was required to engage a structural engineer having minimum qualification M.Tech (Structures) with 15 years' experience.

3. It is the case of the petitioner that the respondent contacted it to provide the required professional service of architecture and issued a work order dated June 26, 2014, detailing the scope of work and terms and conditions of engagement, both for pre-tendering and post-tendering stage. It is the case of the petitioner, in terms of clause 7.0 of the work order dated June 26, 2014, the respondent had assured the petitioner as under:

“In the event we become successful in securing the contract, you shall be responsible for providing the complete post tendering design services for the complete project as per the requirement of the bid document & corrigendums already provided to you at the rate of Rs. 30 Per Sft. (Rupees Thirty per SFT only) for the total built up area of the project.....

The fee paid to you for the services rendered at Pre-bid stage will be adjusted against the fee payable to you for Post bid stage if the work is awarded to us by the client (M/s. DDA). The pre-tender fee including the success fee shall be adjusted from your first two invoices for the post tender services.....”.

4. It is also the case of the petitioner that the parties had agreed to make the work order/agreement, a binding contract non-terminable at the will of either of the parties. The petitioner's case is that in terms of Architects (Professional Conduct) Regulations, 1989 framed by Council of Architecture, it is mandated that Architect already engaged on a project cannot be supplanted by another Architect. It is the petitioner's case that on being assured in the aforesaid manner, the petitioner got agreed to provide its professional service for a meagre sum of Rs. 7.50 lakhs and in terms of clause 5.2, in the event of successful award of contract/project, the respondent also offered and agreed to immediately pay an additional fee of Rs. 7.50 lakhs to the petitioner, defined as 'success fee'. The petitioner's case is that it has engaged all its resources at the pre-bid stage to work out the entire lay out scheme, conceptual architect and all sort of engineering designs on most urgent basis. After being successful and after getting Letter of Intent from DDA, the respondent had paid a sum of Rs. 7.50 lakhs to the petitioner. Thereafter also, the petitioner provided post-bid services to the respondent and has also raised a bill for payment against its post-bid services and for compensation for pre-bid services. The petitioner's stand is that instead of making payment against the aforesaid bills raised by the petitioner and without making an attempt, in terms of clause 8.0 of the work

order/agreement, to amicably resolve disputes and differences, if any, on 29.11.2014, the respondent sent a letter unilaterally, terminating the engagement of the petitioner for the aforesaid project on entirely false, frivolous and baseless grounds. It is noted that the petitioner had responded to the said communication from the respondent. It is also the stand of the petitioner that respondent had formally invited the petitioner for reconciliation but had not made any sincere effort to resolve the matter. Pursuant thereto, a legal notice got issued through its counsel on 11.12.2014, which was replied to by the respondent vide letter dated 3.1.2015.

5. Learned counsel for the petitioner would submit that clause 7.0 is a negative covenant, making the agreement non-terminable. He would state that there is no stipulation to terminate or to bring a premature end to the agreement between the parties, which was a unilateral act on the part of the respondent. He would also state that, in terms of the stipulation in the Architect Act, the petitioner's service could not have been replaced by another Architect for similar services. He would refer to Clause 8 of the agreement under the heading 'Arbitration', which mandates that, in the eventuality of the disputes, the same shall be, to amicably settled by mutual dialogue. If they fail to settle, the disputes shall be referred to arbitration and during such proceedings, the

petitioner could not have stopped the work. In other words, even in disputes, the petitioner was to continue the work. He would also refer to Section 42 of the Specific Relief Act (S.R.Act, in short), to contend that this Court can grant an injunction to perform a negative agreement, which according to him, is an exception to Section 41(e) of the S.R.Act. He would rely upon the judgment of the Single Judge of this Court in *Goel Associates Vs. Shama Cooperative Group Housing Society, 2009 (113) DRJ 523* to contend that when there is no complaint in writing against the petitioner at any stage, or any time, and no deficiency in the services of the petitioner, the contract could not have been terminated.

6. On the other hand, Mr.Krishna Vijay Singh, counsel appearing for the respondent-caveator would submit that the present petition is not maintainable inasmuch as, it is the petitioner's stand itself that after the contract with the petitioner was terminated, the petitioner had appointed M/s. Jagdish Maku and A.Patwal of Development Consultants as Architect for the project. The said architect has not been impleaded as party in the present proceedings. He would further submit that the relief claimed by the petitioner would not like to be granted by this Court when under Section 14(1)(e) of the S.R.Act, the petitioner has remedy of damages, if it is found that the contract was illegally terminated. He would state that clause 7 is not a negative covenant so as to make the

contract non-terminable but it only stipulates the scope of work of the petitioner. He would rely upon the following judgments in support of his contentions:

(1) Marriott International Inc. and Ors. Vs. Ansal Hotels Ltd. and Anr., OMP No. 91/1999 decided by this Court on 13.09.1999, to contend that the Court would like to grant an injunction or an order of interim relief, so as to compel the respondent to discharge its obligation of the remaining contract with the petitioner;

(2) Rajasthan Breweries Ltd. Vs. The Stroh Brewery Co. 2000 (55) DRJ (DB), to contend that even in the absence of any specific clause authorizing or enabling either party to terminate the agreement in the event of happening of the event specified therein, which is a private commercial transaction, the same could be terminated.

(3) M/s. Classic Motors Ltd. Vs. Maruti Udyog Ltd., 1997 (40) DRJ to contend that when there is no negative covenant, the provisions of Section 42 of the Specific Relief Act, do not apply.

7. Having heard and considered the submissions made by the learned counsel for the parties, before I deal with the submissions of the counsel, I reproduce hereunder the contents of the termination letter dated 29.11.2014:

“...Based on your representations regarding the quality

of your services, experience and skills, you were engaged to provide various services in relation to the aforementioned project at the pre-tendering stage in terms of our letter Ref. No. 02/TD/WO/DESIGNERS' GUILD/001/Vol.1/44438 dated June 26, 2014.

It is a matter of concern that you have miserably failed to fulfil your part of contractual obligation not only during the pre-bid stage but at post award stage also. Over the last few months, it has become clear that your representations regarding your capability, experience, skills and services were not accurate.

We are, therefore, constrained to terminate your engagement for the project with immediate effect. The agreed compensation, if any, for the assistance provided by you till date, that is, for the pre-tendering stage, will be paid to you shortly, though we are not at all satisfied with the same.

Amongst other things, it was expressly represented by you that there will no upward variation in the quantities considered by you at the pre-bid stage from the quantities finally likely to be arrived during detailed engineering/execution (post-bid) stage. It has become apparent from our various discussions over the last few months that your estimates were inaccurate and may cause significant loss or damage to our company....”.

8. Insofar as the submission of the learned counsel for the petitioner that clause 7, being a negative covenant, the contract was non-terminable

is concerned, as reproduced above, would reveal that it only stipulates the scope of the services to be rendered by the petitioner. It no-where states that in any eventuality, the contract cannot be terminated.

9. No doubt, Section 42 of the Specific Relief Act stipulates, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do certain act, the Court can still grant an injunction to perform a negative performance. As I have already concluded above, that clause 7 does not stipulate that the contract is non-terminable, the said clause cannot be termed as a negative covenant, as sought to be urged by the learned counsel for the petitioner.

10. I agree with the learned counsel for the petitioner that the provisions of Section 42 of the Specific Relief Act do not apply, rather, Section 41(e) of the said Act, would come into play, which bars the grant of injunction to prevent a breach of contract and in such a situation, the provisions of Section 14(1)(e) of the said Act can be invoked, seeking compensation. In fact, the contract stand terminated on 29.11.2014.

11. Insofar as the submission of the learned counsel for the petitioner that in view of the provisions of the Architects Act (Professional Conduct) Regulations, 1989, more specifically, clause 2(1)(xiii), which stipulates “*not supplant or attempt to supplant another Architect*”, the

petitioner's services could not have been replaced by another architect, is concerned, the reliance placed on the said clause is clearly misplaced. The regulations govern the professional conduct of the Architects, including their inter se relationship, but, surely does bar termination of a contract between two parties, one of which, is not governed by the regulations. That cannot be a ground to seek injunction against termination, which has already come into effect.

12. Insofar as the submission of the learned counsel for the petitioner, placing reliance on clause 8 of the agreement, is concerned, suffice to state, the portion on which the learned counsel for the petitioner had relied upon, rather imposes an obligation on the petitioner, in the eventuality of differences or disputes, which would be first amicably settled by mutual dialogue or later by through Sole Arbitrator, during those proceedings, the petitioner will not stop the work. It does not necessarily mean that the respondent herein could not have terminated the contract as no such obligation is on the respondent. I reject this contention.

13. I note, for benefit, the conclusion of this Court in the case of *M/s. Classic Motors Ltd. (supra)*, wherein this Court has held as under:

“(99) Section 42 of the Specific Relief Act provides that notwithstanding anything contained in clause (e) of

Section 41, where a contract comprises of the affirmative agreement to do a certain act, coupled with a negative agreement express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

(100) In the present agreement, admittedly, there is no negative covenant and Therefore, ex facie the provisions of Section 42 of the Specific Relief Act do not apply to the facts and circumstances of the present case and reliance on the same by the learned counsel for the plaintiff, in my considered opinion, is misconceived. The provisions of Section 14 of the Specific Relief Act appear to be relevant. The provisions of Section 14(1)(a) of the Specific Relief Act require that if a breach of contract can be compensated on payment of damages the contract cannot be specifically enforced. Sub-section (b) thereof provides that where enforceability of the contract depends upon the personal qualifications or volition of the parties, the court cannot enforce specific performance of its material terms. Sub-section (c) appears to be very material and relevant on the facts and circumstances of the present case. The said provision requires that determinable contracts cannot be enforced by decree of specific performance. The provisions of sub-section (d) state that a contract,

performance of which involves the performance of a continuous duty which the court cannot supervise cannot be enforced by such a decree. On a discussion of the material terms of the clauses of the agreement it has already been held by me that the present agreement is not permanent and indeterminable in nature and Therefore, the present agreement is in its very nature determinable. Therefore, to the facts and circumstances of the case the provisions of Section 14(1)(c) appear to be applicable. Besides compensation in money in the present case could be an adequate relief in the nature of the present case and Therefore, the present contract, in my considered opinion, cannot be specifically enforced”.

14. Insofar as the submission of the learned counsel for the petitioner that in the absence of a clause for termination, the respondent could not have terminated the contract, is concerned, suffice to state that in *Rajasthan Breweries Ltd. (supra)*, this Court has held as under:

“Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad

in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.

Consequently, there being no merit in the appeal, the same is dismissed”.

15. Similarly, in the case of *Marriott International Inc. and others (supra)*, this Court, considering the issue that whether the respondents were guilty of breach of contract and in the facts and circumstances of the case, whether respondents could be restrained by way of injunction or order of interim relief from carrying on their further arrangement with ITC, was of the following view:

“110. I am also of the considered opinion that even if the learned arbitrators ultimately arrive at the conclusion that the respondents are guilty of the breach of contract, than also the petitioners can be adequately compensated in terms of money.

111. The petitioners have not made out a case for the grant of interim relief, at this stage, Therefore, in this view of the matter it is not necessary to decide the pleas and objections of the respondents.

XXX XXX XXX

113. According to Section 14(1) of the Specific Relief Act, 1963 it is clear that the contract in following categories cannot be specifically enforced. The Section 14(1) reads as under:

- a) a contract for the non-performance of which compensation in money is an adequate relief;*
- b) a contract which runs into such minute or numerous details or which is so dependant on the personal qualifications or violation of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;*
- c) a contract which is in its nature determinable;*
- d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.*

114. Apart from 14(1)(a) of the Specific Relief Act,

the petitioners are not entitled to any interim relief because of the embargo of Section 14(1)(b) also. The agreements between the parties runs into such minute and numerous details which are so dependant on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce its specific performance of its material terms. The petitioners are not entitled to any interim relief because the contract, the performance of which involves the performance of a continuous duty which the court would find it difficult to supervise”.

16. I find, even the judgment relied upon by the learned counsel for the petitioner would not be of any help to the petitioner inasmuch as this Court, in the said case, was considering the application filed under Sections 30 and 33 of the Arbitration Act, 1940, challenging the award of the Sole Arbitrator, wherein, in para 10, the learned Judge, agreed with the contention of the counsel for the respondent that if a party's right has been violated, the said party is entitled to compensation so as to place him in the same position so far as the money can do. The relevant para 10 is reproduced as under:

“10. I am also in agreement with Mr. Bhatia's argument that if a party's rights had been violated, said

party is entitled to compensation so as to place him in the same position so far as money can do, as if party's rights had been observed. A Division Bench of this Court in Bhatia Nidhi Ltd. Vs. Union of India Ltd. & Ors. reported in 26 (1984) DLT (SN) 21, has held as under:-

"the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. (Victoria Laundry (Windsor) Ltd. v. Newman Industries (1949) 2 KB 528 at p 539 per Asquith LJ). In actions for breach of contract, the object is to put the plaintiff in the position he would have been in if the contract had been satisfactorily performed."

The conclusion of the learned Judge that the termination of the Architect in the said case was wrongful on the merit of the case with which, I am not concerned in these proceedings.

17. Further, the reliefs as prayed for, cannot be granted as the respondent has awarded the contract to a new party and third party rights have intervened. The said party, admittedly, is not before this Court.

18. In view of the above, the petitioner is not entitled to any reliefs. The petition is dismissed. Anything said in this judgment must not be construed as an expression on merit of the Termination Letter dated

29.11.2014.

19. No costs.

(V.KAMESWAR RAO)
JUDGE

JANUARY 16, 2015
akb