

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

Judgment reserved on February 10, 2015

Judgment delivered on February 18, 2015

+ **OMP NO. 129/2015**

FORBES FACILITY SERVICES PVT. LTD.

..... Petitioner

Through: Mr.Kirti Uppal, Sr.Advocate with
Ms.Surekha Raman &
Mr.R.R.Makar, Advocates

versus

G.B. PANT HOSPITAL

..... Respondent

Through: Mr.Amit Andley, Advocate with
Mr.Arun Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present petition has been filed by the petitioner seeking the following reliefs:

*(a) pass an order staying the effect and operation of
the order bearing No.
F.58/MISC./Sanitation/GBPH/Estt./2014-15/10801
dated 12.08.2014, issued by the respondent.*

*(b) pass an order staying the effect and operation of
the order bearing No.
F.58/MISC./Sanitation/GBPH/Estt./2014-15/11623-*

11628 dated 28.08.2014, issued by the respondent.

(c) pass an order directing the respondent to release to the petitioner the amount of Rs. 3,77,19,974 as on 31.12.2014 due and payable by the respondent to the petitioner under the contract, on such terms and conditions as this Hon'ble Court may deem fit and proper;

(d) Pass an ad-interim order in terms of prayer (a) to (c) and confirm the same after notice of motion;

(e) Award to the petitioner costs of and relating to the present petition.

(f) pass such other and/further order(s) as this Court may deem fit and proper in the nature and circumstances of the case".

2. During the submissions, the learned Senior Counsel for the petitioner had in substance argued for payment of the amount due from the respondent against a bank guarantee. The facts are, that, the petitioner is involved in the provisions of facility management services including professional mechanized solutions to various industries and institutions PAN India. Pursuant to work order dated May 04, 2011, the petitioner entered into a service agreement dated May 5, 2011 for

providing hygiene specialist and hygiene supervisors' services. A corrigendum was issued on September 8, 2011, with the approval of the Director, of the respondent, whereby, it was conveyed that the sentence in the work order "*During the validity of rate contract, no upward revision of the rates shall be allowed*" must be read as "the minimum wages shall be increased by the hospital as per govt. notification during the period of contract". As per the purchase order, the rates to be paid to each of the hygiene specialist and hygiene supervisor per month was Rs. 12,630.77/- and Rs.16,396.77/- respectively. It is the case of the petitioner that the contract was acted upon by the parties and vide letter dated May 14, 2013, consented for extension of the contract for another year w.e.f. May 01, 2013 to April 30, 2014 on the existing rate, terms and conditions. It is the case of the petitioner that since June, 2013, payments to the petitioner by the respondent were being delayed without any justification and the petitioner had been making payments to employees deployed in the hospital itself but was finding very difficult to continue to do so and vide its letter dated November 26, 2013, sought release of the outstanding payments. Even though, the payments were not being made, still, the respondents had, vide letter dated April 22, 2014 extended the contract for a further period of three months till July 31 2014 or till the deployment of fresh sanitary services, whichever is

earlier.

3. The petitioner had, vide its letter dated April 25, 2014 brought to the notice of the respondent, the huge outstanding to the tune of Rs. 1,43,61,293 payable by the respondent to it and had also conveyed that the petitioner may be constrained to withdraw its services w.e.f. April 30, 2014.

4. In response to this communication, the respondent, vide its letter dated June 2, 2014, requested the petitioner not to withdraw its services. It is the case of the petitioner, that it received a letter dated June 13, 2014, informing the request of the payment of outstanding dues has been forwarded to Govt. of NCT as an objection has been raised by the CAG, advising the petitioner to continue its services to the hospital. Even thereafter, the contract was extended for a month w.e.f. August 01, 2013 to August 31, 2014. During the interregnum, the petitioner has received an order dated August 12, 2014, whereby, without specifying any reason, had treated, the corrigendum earlier issued by the respondent dated September 8, 2011 as ab-initio null and void. The petitioner vide its letter dated August 25, 2014 requested the respondent to review the order dated August 12, 2014 on the facts and grounds set out therein. The respondent, in response to the representation, of the petitioner, seeking release of the outstanding amount, informed the petitioner that as

per record, an excess payment of Rs. 2,17,30,682/- has been made and directed the petitioner to deposit the said amount with the hospital where-after, all pending and future bills would be paid regularly. It is the case of the petitioner that it had addressed a letter dated September 3, 2014, wherein, it was stated, that a further extension of the contract till October 31, 2014 is possible, only if a written communication is received from the respondent to the effect that the monthly invoices of the petitioner would be paid within three working days after the submission of the same. It is noted that the respondent, vide letter dated October 15, 2014 had agreed that w.e.f. November 1, 2014, till January 31, 2015, to extend the contract on the same terms and conditions, as contained in the previous agreement and sought the consent of the petitioner. It is noted, the petitioner had sought reconciliation of its accounts without prejudice to its stand, to which, the respondent had agreed through its communication dated October 28, 2014. Suffice to state that initially the petitioner had filed a Writ Petition No. 8990/2014, which was disposed of by this Court on December 24, 2014, observing a remedy is available to the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996.

5. The respondent has filed their reply to the petition, wherein, the respondent has accepted the issuance of the work order dated May 4,

2011 and has stated that, at the time of tender, the petitioner had quoted the rates of Rs.12630.77 for hygiene specialist and Rs.16396.77 for hygiene supervisor against the total cost of minimum wages, PF, machine charges and consumables used for cleaning. The aforesaid rate quoted by the petitioner have enough margin of 71% (hygiene specialist) and 117 % (hygiene supervisor) for adjustment in the eventuality of increase in wages in future. The relevant clause in the service contract dated 5.5.2011 i.e. clause 15 is stipulated as under:

“15. The. Service Provider shall abide by and comply with all the relevant laws and statutory requirements covered under Labour Act, Minimum Wages and Contract Labour (Regulation & Abolition Act 1970) EPF etc. with regard to the hygiene specialists & hygiene supervisors engaged by him for sanitation works. The minimum wages shall be increased as per government notification during the period of the contract. It will be the responsibility of the Service Provider to provide details of manpower deployed by him, in the hospital and to the Labour Deptt. Along with the photocopy of the police verification of each staff deployed by him. Being trained worker as hygiene specialists & hygiene supervisors, the person shall be equated as semi skilled worker in terms of Minimum Wages Act, 1948.”

6. However, on the representation of the petitioner dated May 25,

2011, a corrigendum was issued by the respondent , incorporating in the work order, an amendment to read *“the minimum wages shall be increased by the hospital as per govt. notification during the period of contract”* .

7. In terms of the said corrigendum, the payment of increased amounts was made to the petitioner w.e.f. May, 2011. In this manner, when the minimum wages were increased by the Govt., the petitioner not only increased the wages of both the hygiene specialist and hygiene supervisors, but, in this manner, also increased its margin of profit. The discrepancy between the rate contract and the amount paid to the petitioner was noticed upon the audit of the hospital carried out by the office of the Principal Accountant General Audit, Delhi in the year 2013, and the same was intimated to the Medical Superintendent of the respondent hospital. After consideration of the Audit report, it was decided by the respondent that only the amount as initially fixed by the rate contract would be paid to the service provider/petitioner i.e. Rs.12630.77/- to hygiene specialist and Rs.16396.77/- to the hygiene supervisor and accordingly, the excess payment made to the petitioner was adjusted w.e.f. May 2014 till October 4, 2014 to meet the recovery of the excess payment made to the petitioner. It is also their case that the increased rate is not permissible as per the terms and conditions of the

contract and the work order given to the petitioner. It is their case that an amount of Rs.2,17,30,682/- has been paid in excess to the petitioner, who was called upon to deposit the same. The respondent has also taken a stand that out of the sum of Rs.2,17,30,682/-, a sum of Rs. 1,88,54,376/- has been adjusted by the respondent and Rs.28,76,306/- remains paid in excess to the petitioner, which is liable to be claimed.

8. Mr. Kirti Uppal, learned Senior Counsel appearing for the petitioner, reiterating the facts as brought out above, would submit that the respondent, had in fact, acted upon the corrigendum dated September 8, 2011 for almost three years and have paid the petitioner a higher amount in pursuance to the notification of the appropriate Govt. notifying the minimum wages. He would state, that, the corrigendum dated September 8, 2011 was issued after the approval of the Director and a contract which has been agreed to and put into effect, cannot be nullified only on the ground of an audit objection. He would state, that, the respondent is liable to pay the increase in the minimum wages as per the notification issued by the appropriate Govt. from time to time. He would state, that, the petitioner herein, is seeking a positive direction for release of the amount due to the petitioner as per the corrigendum for the period it remains unpaid i.e. May 2014 till October 2014. He would rely upon the judgment of the Division Bench of this Court in the case of

Simplex Infrastructure Ltd. Vs. National Highways Authority of India,
FAO (OS) No. 200/2010 and connected petitions decided on January 14, 2011 in support of his contention.

9. On the other hand, Mr. Amit Andley, learned counsel for the respondent would support the action of the respondent and would submit that in terms of the work order dated May 4, 2011, no upward revision in the rates for the hygiene specialist and hygiene supervisor could be allowed. He has also taken me through clause 15 and 48 of the contract dated 05.05.2011 to highlight the fact that it is the duty of the service provider to abide by all the relevant provisions and statutory requirement under the Labour Act, Minimum Wages Act, Contract Labour (Regulation and Abolition) Act, 1970, EPF etc. and also to highlight that if as a result of post payment audit, any overpayment is detected in respect of any work done by the agency or alleged to have done by the agency under the tender, it shall be recovered by the hospital from the service provider. He would state, on reading of both the clauses, it is clear that the responsibility of paying the minimum wages is on the petitioner and any increase in the minimum wages thereafter cannot be claimed from the respondent. Even the recovery, which is effected, is justified. It is his submission that once the terms of contract have been fixed, the Director of the hospital could not vary it. He states that,

corrigendum has the effect of increasing the rate of hygiene specialist and hygiene supervisor by an amount of Rs. 3000/- each respectively. According to him, the respondent had granted extension to the petitioner till March 31, 2015 and since November, 2014, has been paying as per the original terms and conditions. He would also submit that since the arbitration proceedings are on, the respondent is ready and willing to deposit an amount of Rs. 1,88,54,376/- with the Registrar of this Court. He would also state that, the petitioner should also be called upon to deposit an amount of Rs. 28,76,306/- which is an excess amount paid to the petitioner, and if a prayer, as prayed for in the petition is allowed, then nothing survives for being adjudicated by the learned Arbitrator. He would distinguish the judgment relied by the learned Senior Counsel for the petitioner by stating that, the facts as noted by the Division Bench, it is clear that a stipulation exist in the contract through clause No. 70 of Conditions of Particular Application (COPA), for adjustment of the contract price for any rise or fall in case of labour, equipment, plant, material and other inputs to the works, which stipulation, is not existing in the contract executed between the parties herein. In the absence of such a stipulation in the contract dated May 5, 2011, the said judgment would be not applicable.

10. Having considered the submissions made by the learned counsel

for the parties, there is no dispute that the present petition has been filed under Section 9 of the Arbitration and Conciliation Act, seeking an interim relief pending decision by the learned Arbitrator.

11. It needs to be considered whether a positive direction in the nature, asked for by the petitioner in prayer (c) can be given in the facts of this case. A perusal of the submissions made above, would reveal that the parties are at variance in their stand whether, the minimum wages as increased by the appropriate Govt. be payable over and above agreed to at the time of grant of contract and the petitioner is liable to pay back the excess amount received by it. These issues are primarily issues on merit and needs to be gone into and decided by the learned Arbitrator. Pending decision, whether in the facts of this case, this Court would be within its right to give a positive direction as sought for.

12. It is not in dispute that this Court in exercise of its power under Section 9 is within its right to grant an interim relief, which is discretionary pending adjudication by the Arbitrator. The position of law laid by the Supreme Court in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*, AIR (2007) SC 2563, it has been opined that, it would not be correct to say that power under Section 9 of the Act is totally independent of the well known principles governing the grant of interim injunction that generally governs the Courts in this

connection. The relevant para of the judgment of the Supreme Court requires reproduction

“It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of “just and convenient” while speaking of passing any interim measure of protection. The concluding words of the section, “and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the

exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.”

13. This Court noted the submission made by the counsel for the petitioner that the petitioner is ready to give a bank guarantee of the total amount as due to the petitioner is released in its favour by the Court. At the same time, the learned counsel for the respondent has vehemently argued that the past conduct of the petitioner is such that the petitioner had not extended the validity of the bank guarantee as given in terms of the Contract, it would be better instead of releasing the money against a security in the nature of a bank guarantee, the respondent itself would deposit the amount adjusted i.e. Rs.1,88,54,376/- in this Court and likewise the petitioner be also directed the amount excess paid to the petitioner and which is due to the respondent i.e. Rs.28,76,306/- be also directed to be deposited, I am of the view that to balance the equities and no prejudice is caused to either of the parties, the respondent is directed;

(i) to release an amount of Rs.1,50,00,000/- to the petitioner within three weeks subject to petitioner furnishing a bank guarantee of the said amount in favour of the respondent herein within two weeks from the

date of this order and with a further direction that the respondent would keep alive the bank guarantee till the culmination of the arbitration proceedings; (ii) The petitioner shall also furnish a bank guarantee for Rs.28,76,306/- in favour of the respondent which would be kept alive till the culmination of the arbitration proceedings. The learned Arbitrator would be at liberty to pass appropriate orders for the extension of the validity of the bank guarantees, if the situation so demand.

14. Suffice to state, the above directions shall be subject to the ultimate decision of the learned Arbitrator in the disputes pending before him.

15. Anything said in this order must not be construed as an expression on the merit of the disputes between the parties and suffice to state, the learned Arbitrator shall decide the disputes without being influenced by any observation made herein.

16. The petition is disposed of in terms of the above. No costs.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 18, 2015
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