

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 1st November, 2019.

+ CS(COMM) 1280/2016

KASHYAPI INFRASTRUCTURE PVT LTD Plaintiff
Through: Mr. Sanjeev Agarwal & Mr. Ekansh
Agarwal, Advocates.

Versus

**NATIONAL BUILDINGS CONSTRUCTION CORPORATION
LIMITED & ANR** Defendants
Through: Mr. Aditya Parolia & Mr. Akshay
Srivastava, Advocates for D-1 with Mr.
Anurag Singhal (Engineer Incharge).

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 16th September, 2019, the following order was passed :-

“1. The plaintiff has instituted this suit for recovery of a principal amount of Rs.3,43,43,650/- and interest till the date of institution of suit of Rs.76,74,251/- from the defendant no.1 National Building Construction Corporation (NBCC) along with pendent lite and future interest. The Commissioner of Income Tax has been impleaded as defendant No.2 though no relief has been claimed against it.

2. The suit was entertained and the defendant no.1 NBCC filed its written statement and to which replication was filed by the plaintiff.

3. The defendant no.2 Commissioner of Income Tax against which, in any case, no relief was claimed, did not appear and vide order dated 21st July, 2017 was proceeded against ex parte.

4. *On the pleadings of the plaintiff and the defendant no.1, on 21st July, 2017 the following issues were framed:-*

“i. Whether in terms of the Memorandum of Understanding between the defendant No.1 and defendant No.2, defendant No.1 is merely an executing agency and not liable to pay to the plaintiff? OPD(1)

ii. Whether the plaintiff is entitled to a decree for a sum of ₹4,20,17,901/- against the defendant No.1 along with the interest as per contract dated 3rd September, 2011? OPP.

iii. Whether amounts payable to the plaintiff for the works under the contract can be recovered from defendant No.2 directly by the plaintiff? OPD(1)

iv. Relief.”

and the parties relegated to evidence.

5. *The plaintiff examined two witnesses and the defendant no.1 examined only one witness and the evidence closed.*

6. *The suit, ripe for final hearing came up before this Court on 18th December, 2018 and on which date as well as on subsequent dates adjournments were sought on behalf of the counsel for the defendant no.1. Ultimately, the order dated 1st August, 2019 reprimanding the defendant no.1 was passed, which has resulted in the counsel for the defendant no.1 today appearing before this court.*

7. *The counsel for the defendant no.1, at the outset, states (i) that the defendant no.1, on behalf of defendant no.2, had engaged the plaintiff as a contractor for certain civil works of construction to be carried out for the defendant no.2 and the plaintiff has instituted this suit for recovery of the balance amount due with respect thereto; (ii) that the counsel for the defendant no.1 now on studying the matter has realized that the defendant no.1 was to make payments to the plaintiff only on receipt of payment from the defendant no.2; attention in this respect is invited to Clause 37.3 forming part of Clause 37 of the General Conditions of Contract between the plaintiff and the defendant no.1 and which Clause 37 is as under:-*

“37.0 PAYMENTS

37.1 The bill shall be submitted by contractor each month on or before the date fixed by the Engineer-in-Charge for all works executed in previous months. The contractor shall prepare computerized bills using the program as approved by Engineer-in-Charge as per prescribed format/pro-forma. The Contractor shall submit five numbers of hard copies and one soft copy of floppy/CD for all bills. Subject to clause 37.3 herein below, the payment due to the contractor shall be made within fifteen days of getting the measurements verified from the Engineer-in-Charge or his subordinate/representative and certification of bill by the Engineer-in-Charge

37.2 All running payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and completed and/or accepted by NBCC and shall not preclude the recovery for bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed or re-erected or be considered as an admission of the due performance of the Contract, or any part thereof, in this respect, or the accruing of any claim, nor shall it conclude, determine or affect in any way the powers of the NBCC under these conditions or any of them as to the final settlement and adjustments of the accounts or otherwise, or in any other way vary/affect the contract. The final bill shall be submitted by the contractor within three months of the completion of work, otherwise NBCC's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on contractor. Each Running Bills should be accompanied by two sets of at-least 20 (twenty) photographs as per direction of Engineer-in-charge taken from various points depicting status of work as on Report/Bill date along with Monthly Progress Report for the concerned month in the pro-forma to be

given/approved by Engineer-in-Charge. Intermittent progress Photographs as and when required shall also be provided by the Contractor at his own cost as per direction of Engineer-in-Charge. No payment of running account bill shall be released unless it is accompanied by progress photographs and Monthly Progress Report as above.

37.3 It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between NBCC and the contractor, the contractor shall become entitled to payment only after NBCC has received the corresponding payment(s) from the client/Owner for the work done by the contractor. Any delay in the release of payment by the client/Owner to NBCC leading to a delay in the release the corresponding payment by NBCC to the contractor shall not entitle the contractor to any compensation/interest from NBCC.

37.4. All payments shall be released by way of e-transfer through RTGS in India directly at their Bank account by the Corporation.”

(emphasis added);

and, (iii) that the defendant no.1 has not received the payments claimed by the plaintiff from the defendant no.2 and the suit be adjourned by four weeks to enable the defendant no.1 to take up the matter with the defendant no.2.

8. I have enquired from the counsel for the defendant no.1, whether the defendant no.1 admits the principal amount of Rs.3,43,43,650/- claimed by the plaintiff in the suit to be due to the plaintiff.

9. The counsel for the defendant no.1 states that the defendant no.1 has admitted the sum to be due, in the written statement itself and today Engineer-in-Charge of the subject project, Mr. Anurag Singhal is present in the court and he also instructs that the said principal amount is due to the plaintiff.

10. I have enquired from the counsel for the defendant no.1, whether Clause 37.3 supra has been the subject matter of any adjudication. As far as the arbitration proceedings are concerned, it appears that as per dicta in **Jaiprakash Associates Ltd. (JAL) Vs. Tehri Hydro Development Corporation India Ltd. (THDC)** 2019 SCC OnLine SC 143, the Arbitrator cannot allow the claim against the defendant no.1 owing to such an agreement.

11. The counsel for the defendant no. 1 as well as the counsel for the plaintiff state that they have not checked the said aspect.

12. The counsel for the defendant no.1 has further contended that the defendant no.1 was merely an agent of the defendant no.2 and the plaintiff can seek recovery of the amounts due only from the defendant no.2, and which has not been done, and not from the defendant no.1. Attention in this regard is invited to the Agreement dated 30th March, 2011 between the defendant no.2 and the defendant no.1 in which the defendant no.2 is described as the 'Owner' and the defendant no.1 as the 'Executing Agency' and particular attention is invited to Clauses 2 to 4.19 of the said Agreement as under:-

“2.0 SCOPE OF WORK

Inviting of tenders, award of work for **“Construction of Office Building for Income Tax Office on plot A- 2 /D SECTOR – 24 at Noida (U.P.)** including Preliminary Survey, Soil Investigation, Architectural drawing and design, Supervision and monitoring of works, estimation and Bill of Quantities for civil, internal electrical, sanitary and plumbing works including the external services and area development (as per annexure attached).

3.0 GENERAL

3.1 **“EXECUTING AGENCY”** shall undertake the work as **“DEPOSIT WORK”**. The rules, regulations and procedures applicable to the Deposit Works of CPWD will be applicable to their works. However, 20% of the total project cost is required to be deposited initially by the **“OWNER”** and shall be recouped every month by the

“OWNER” on submission of monthly requirement by the “EXECUTING AGENCY” along with expenditure statement incurred in the previous month. Any money paid in advance shall be secured by an Indemnity Bond to be furnished by the “EXECUTING AGENCY” in favour of the “OWNER”.

3.2 The “OWNER” will also pay to NBCC 7% (Seven percent) of the actual cost of the project by way of its Agency Charges. the service tax as applicable shall be charged to Project cost.

3.3 The project is a fixed cost project & no cost escalation shall be permitted.

RESPONSIBILITIES OF THE “EXECUTING AGENCY”

4.0 The responsibilities of the “EXECUTING AGENCY” shall include preliminary survey, soil investigation (chargeable to the “OWNER”) and supplying all drawings, and designs, estimates and bill of quantities, details of phasing of building and rendering advice.

4.1 The “EXECUTING AGENCY” shall forthwith take possession of the site from the “OWNER” and shall nominate one responsible Engineer for execution of the project.

4.2 The “EXECUTING AGENCY” shall execute the works at the estimated cost of Rs.24,20,00,000.00 (Rupees Twenty Four Crores twenty lakhs only) which is based on the CPWD plinth area rates of 01.10.2007 enhanced with cost index of 136 as on 01.04.2010 approved norms and as per requirement furnished by the “OWNER” for the project. This estimate shall also include agency charges payable to the “EXECUTING AGENCY”. This estimate also includes 3% contingency charges.

4.3 Tender shall be invited by the “EXECUTING AGENCY” after due publicity or through its registered contractors, who have been registered based on wide publicity and contractor shall be appointed by the “EXECUTING AGENCY” in consultation with the approval of the “OWNER”.

4.4 The “EXECUTING AGENCY” shall give periodically (but not later than once a month) copies of the expenditure certified by its representative on the project, for reimbursement of expenditure incurred from the funds advanced to the “EXECUTING AGENCY”. On completion of work, the accounts of the work shall be closed and a final statement shall be submitted for settlement, alongwith refund of excess deposit received, if any, audited by a Registered Chartered Accountant. The “OWNER”, reserves the right to get the work and payments made technically checked and audited periodically (at reasonable intervals) as well as final payment by its own officer/independent government/private agency mutually acceptable.

4.5 The payments by the “OWNER” shall be made by transfer of funds in a Bank Account to be opened in any one of the Nationalized Banks.

4.6 All designs, drawings, bills of quantities, etc. for the work shall be supplied by the “EXECUTING AGENCY” for all buildings, services and development works.

4.7 The “EXECUTING AGENCY” shall be fully responsible for the structural safety of the building against seismic forces and follow all the relevant BIS Code in this respect. Innovative methods of design of high rise structures shall have to be followed in deciding the structural frames of the building. Wind actions shall also be considered, if found necessary to conform to the requirements of B.I.S. Code.

4.8 The services of a proof consultant shall be utilized, if required, by the “OWNER” for counter checking of the design/drawings submitted by the “EXECUTING AGENCY”. The services of the proof consultant shall be arranged by the “OWNER” at their own cost.

4.9 The “EXECUTING AGENCY” will make its best endeavour to reduce the cost of construction by any change of specification, method of construction, value engineering of any innovative or economical design. Such reduction in the cost of construction shall be made with the approval of the “OWNER” without affecting/prejudicing or

endangering in any way the safety or security of the building constructed by the “EXECUTING AGENCY”.

4.10 The “EXECUTING AGENCY” shall be fully responsible for the quality and structure safety of the construction. The “EXECUTING AGENCY” shall make its contractor responsible for rectification of any defect within the warranty period, which shall be for period of 12 months from the date of handing over of any building, service or part of the project. Security Deposit of the contractor shall be refunded only after expiry of such warranty period and rectification of defects.

4.11 The “EXECUTING AGENCY” shall be also responsible for proper structure, workmanship and liability for defects of the building constructed by it for a period of twelve months from the date of handing over.

4.12 Any defects discovered and brought to the notice of the “EXECUTING AGENCY” during the period aforesaid shall be rectified by the “EXECUTING AGENCY” forthwith at its own costs and expenses. In the event of the failure on the part of the “EXECUTING AGENCY” to rectify the defects within a reasonable period, the same may without prejudice to any other rights available to it in law, be rectified by the “OWNER” for and on behalf of the “EXECUTING AGENCY” and at the cost and expenses of the “EXECUTING AGENCY”, after due notice to it.

4.13 The “OWNER” shall have the right to deduct or set off the expenses incurred by it in rectifying the defects as aforesaid from or against any amount due and payable or becoming due and payable by the “OWNER” to the “EXECUTING AGENCY” under this Agreement.

4.14 The “EXECUTING AGENCY” shall unless otherwise specified, be fully responsible for procurement of all materials and services for the construction as contemplated by this Agreement.

4.15 The “EXECUTING AGENCY” shall follow the Standard latest CPWD specifications and the latest BIS Specifications and Codes of Practices as corrected upto date of signing of this Agreement. The “EXECUTING AGENCY” shall follow the GRIHA rating system as per the

DPE Circular No.DPE/13(2)/10-Fin. Dated 11.03.10 and ensure that the building meets the requirement of at least 3 – star rating.

4.16 The “EXECUTING AGENCY” shall follow its documents/Manual for inviting tenders.

4.17 The “EXECUTING AGENCY” shall give in writing the budget of the funds required in proportion to the work to be done during the next year as required by the “OWNER” from time to time. Funds requirement for next year before close of each year shall be furnished during third quarter of each financial year.

4.18 The “EXECUTING AGENCY” may supply, in a phased manner to the contractor(s) site plan, soil investigation report, layout plan, all building plans (architectural as well as structural) all services plans and any other designs and detailed drawings required for the execution of the project, as well as the specifications for all items of work, detailed description of item of work, bills of quantities along with copies of details of measurement. Four copies of the drawings/revised drawings, if any, shall be supplied and one copy of the other details and documents shall be supplied to the “OWNER”.

4.19 The “EXECUTING AGENCY” shall provide necessary assistance to the “OWNER” in arranging water, sewerage and electricity connections from the concerned authority for which it will obtain estimates from the concerned authorities. These amounts as per estimates will be deposited by the “OWNER” directly with the concerned authorities. ”

13. Per contra the counsel for the plaintiff has argued, (i) that the defendant no.1 has not paid the costs imposed on 4th April, 2019; (ii) that a reading of the entire Clause 37 of the General Conditions of Contract would show that the defendant no.1 was not responsible, only for the period of delay, but not for non-payment as is the case in the present facts; and, (iii) that vide Clause 83 as under:-

“83.0 CONTRACT COORDINATION PROCEDURES, COORDINATION MEETINGS AND PROGRESS REPORTING

The Contractor shall prepare and finalize in consultation with NBCC, a detailed contract coordination procedure within 15 days from the date of issue of Letter of Intent for the purpose of execution of the Contract.

The Contractor shall have to attend all the meetings at any place in India at his own cost with NBCC, Owners/Clients or Consultants of NBCC/Owner/Client during the currency of the Contract, as and when required and fully cooperate with such persona and agencies involved during these discussions. The Contractor shall not deal in any way directly with the Clients/Owners or Consultants of NBCC/Owner/Clients and any dealing/correspondence if required at any time with Clients/Owners/Consultants shall be through NBCC only.

During the execution of the work, Contractor shall submit at his own cost a detailed Monthly progress report to the Engineer-in-charge of NBCC by 5th of every month. The format of monthly progress report shall be as approved by Engineer-in-Charge of NBCC.”

of the General Conditions of Contract between the plaintiff and the defendant no.1, the plaintiff could not have sued or claimed the money directly from the defendant no.2.

14. The counsel for the plaintiff has also drawn attention to the letter dated 16th December, 2014 Ex.DW1/C produced by the defendant no.1, written by the defendant no.1 to the defendant no.2 and in which the defendant no.1, out of the total payment due of Rs.2420.0 lakhs, has admitted to receipt of Rs.2385.68 lakhs from the defendant no.2, leaving a balance of Rs.308.74 lakhs.

15. On enquiry, it is stated that the total amount due from the defendant no.1 to the plaintiff is of Rs.2499.88 lakhs and out of which, a sum of Rs.2100 lakhs only has been received. It is contended that even the entire amount admittedly received by the defendant no.1 from the defendant no.2 has not been released to the plaintiff and should have been released.

16. However, neither counsel has computation as to how much would be the charges of the defendant no.1 under its Agreement with the defendant no.2, on the total amount received by the defendant no.1 from the defendant no. 2.

17. I have also enquired from Mr. Anurag Singhal Engineer-in-Charge present in the court, how could the total amount claimed by the defendant no.1 to be due of Rs.2420 lakhs, be less than the total due to the plaintiff of Rs.2499.84 lakhs.

18. Mr. Anurag Singhal response is that Rs.2420 lakhs was the original sanctioned project cost but subsequently it was revised to Rs.2499 lakhs + Rs.849 lakhs, besides other charges. Attention is invited to the letter dated 19th May, 2014/2nd June, 2014 Ex.DW1/D stating the completion cost to be Rs.26,94,41,201/- inclusive of NBCC charges and admitting receipt of Rs.23,85,68,000/-

19. The counsel for the plaintiff has also argued that even the limitation for the defendant no. 1 to recover the balance amount from defendant no. 2 has expired.

20. The aforesaid shows the state of affairs which results from proper attention being not paid to the proceedings in the suit at each and every stage thereof, with issues being framed which do not reflect the controversy and evidence which was not required being led, taking up time, which was not required to be spent.

21. The counsel for the plaintiff, on enquiry whether the plaintiff has proved that the entire amount claimed by the plaintiff has been received by the defendant no.1 from the defendant no.2, states that the plaintiff has not, save for the letters aforesaid produced by the defendant no.1.

22. The only legal questions arising for adjudication are:

- (i) Whether in view of Clause 37.3 in the General Conditions of Contract between the plaintiff and the defendant no.1, the plaintiff, without proving the defendant no. 1 to have received the monies claimed from the defendant no.2, is not entitled to make the claim or be

entitled to a decree for recovery against the defendant no. 1?

(ii) Whether the aforesaid Clause 37.3 is void?

(iii) What is the effect, if any, of the plaintiff not seeking recovery of monies from the defendant no.2 under Sections 70 and/or under Section 226 read with Section 230 of the Contract Act since it is the defendant no.2 who is stated to be the beneficiary of the works carried out by the plaintiff?

(iv) Whether the entire monies received by the defendant no.1 from the defendant no.2 are payable to the plaintiff or the defendant no.1's liability under Clause 37.3 aforesaid is after adjusting its own charges due under its Agreement with the defendant no.1?

(v) Whether in the circumstances aforesaid, the plaintiff, even if held entitled to recover any monies from the defendant no.1 under a decree of this Court, is entitled to any interest from the defendant no.1?

(vi) Whether the bar contained in Clause 83 of the General Conditions of Contract between the plaintiff and defendant no.1 is also a bar to the plaintiff suing the defendant no.1 for recovery of its dues?

23. Since the counsels admit that they have not applied themselves to the aforesaid questions, it is deemed appropriate to grant an opportunity to the counsels to properly address on the aforesaid aspects including by reference to any precedent.

24. The counsel for the defendant no.1 states that the defendant no.1, on 20th July, 2019 has paid a sum of Rs.32,06,948/- and receipt whereof the counsel for the plaintiff admits.

25. List on 1st October, 2019.

26. Mr. Anurag Singhal Engineer-in-Charge of the project to remain present in the Court on the next date of hearing also."

2. On 1st October, 2019, adjournment was sought by the counsel for the defendant No.1 stating that Income Tax Department had to be approached for the monies claimed by the plaintiff and the hearing adjourned to today.

3. The counsel for the plaintiff and the counsel for the defendant No.1 have been heard on the legal questions framed in the order dated 16th September, 2019 aforesaid.

4. The counsel for the plaintiff has drawn attention to the entire clause 37 of the General Conditions of Contract which has been reproduced in the order dated 16th September, 2019 and has contended that Clause 37.3 thereof when read along with Clauses 37.1 and 37.2, indicates that what is provided in Clause 37.3 is only to take care of the delays in the defendant No.1 getting the monies from the defendant No.2 and does not apply to a case of no monies having been received. It is contended that going by the said Clause, the plaintiff cannot be held to be not entitled to any monies from the defendant No.1 with whom the plaintiff had entered into the Contract. It is argued that as far as the defendant No.2 is concerned, the plaintiff has no privity of contract therewith and could not have approached the defendant No.2 for payment. Attention is also drawn to the cross-examination by the plaintiff of DW-1 Anurag Singhal, the Deputy General Manager (Engg.) of the defendant No.1, recorded on 17th November, 2018, where he has *inter alia* deposed as under :-

“No legal action was taken by defendant no.1 for recovery the amounts due from defendant no.2 under the subject contract. Defendant no.1 did not issue any legal notice to defendant no.2 to make payment of the amounts due under the subject contract. I am aware about the terms and conditions of the contract between plaintiff and defendant no.1. There is no

term or condition in the contract between plaintiff and defendant no.1 authorising the plaintiff to directly seek payment of amounts due under the contract from defendant no.2. It is correct that the payments, if any, are made by defendant no.1 to the plaintiff under the subject contract and no payments are made by defendant no.2 directly to the plaintiff. It is correct that the bills in respect of the subject contract are raised by the plaintiff against defendant no.1 and not against defendant no.2.”

5. It is yet further contended that Clause 37.3, if read in the manner contended by the counsel for the defendant No.1, is void for uncertainty under Section 29 of the Contract Act, 1872. With respect to the query contained in the order dated 16th September, 2019 qua Section 70 of the Contract Act, it is contended that the plaintiff was not bound to claim the monies due from the defendant No.2 owing to lack of privity with the defendant No.2. It is further contended that Section 70 would not apply in the facts, as in the present case the plaintiff has a contract with the defendant No.1 and which contract itself in Clause 83 of the General Conditions of Contract thereof provides that the plaintiff is not to contract the defendant No.2. Reliance is placed on ***State of West Bengal Vs. B.K. Mondal and Sons*** AIR 1962 SC 779 holding that in cases falling under Section 70, a person doing something for another is unable to sue for specific performance of the contract or ask for damages for breach of contract for the simple reason of lack of privity of contract; a claim under Section 70 is not on the basis of a contract and is on the basis of a person having done something for another and which has been accepted by the other. It is argued that here, since the plaintiff carried out the work, balance payments therefore are due in terms of the Contract with the defendant No.1. It is yet

further argued that the onus to prove that the defendant No.1 has not received the amounts admitted by the defendant No.1 to be due to the plaintiff, was on the defendant No.1 and the defendant No.1 has not discharged the said onus. It is contended that the defendant No.1 has still not taken any action against defendant No.2 and according to the plaintiff, the said claim by defendant No.1 against defendant No.2 would now be barred by time. It is also contended that the defendant No.1 and the signatory of the written statement filed on its behalf are also guilty of false verification of pleadings inasmuch as the defendant No.1 in para 11 of reply on merits in its written statement denied the amounts claimed by the plaintiff though the said amounts have been admitted to be due.

6. The counsel for the defendant No.1 has drawn attention to the Agreement dated 3rd September, 2011 at page 147 of Part IIIA file, to contend that defendant No.1 had entered into the Agreement with the plaintiff as the agent of the disclosed principal defendant No.2. Reliance in this regard is placed on ***Rites Ltd. Vs. Shabir Ahmed & Sons and Others*** 2010 SCC OnLine Del 463, being an objection petition under Section 34 of the Arbitration & Conciliation Act, 1996 to an arbitral award and in which judgment, the arbitral award against the petitioner Rites Ltd. was modified for the reason of the tenders having been received by the petitioner Rites Ltd. “for and on behalf of Governor of Uttar Pradesh” and holding that the petitioner Rites Ltd. was acting merely as an agent of a disclosed principal, namely, State of Uttar Pradesh.

7. Attention in this regard is also drawn to judgment dated 21st March, 2012 of this Court in OMP No.84/2006 titled ***Rites Limited Vs. Vidhyawati***

Construction Co. & Anr. and in OMP No.49/2006 titled *Vidhyawati Construction Company Vs. Rites Limited* and *Prem Nath Motors Limited Vs. Anurag Mittal* (2009) 16 SCC 274 and *Vivek Automobiles Limited Vs. Indian Inc.* (2009) 17 SCC 657.

8. On enquiry, whether in the agreement entered into by Rites Ltd. subject-matter of the judgments aforesaid also had an equivalent Clause 83 of the subject Contract, the counsel for the defendant No.1 contends that there is no such mention in the judgment and he otherwise does not know.

9. To deal with the aforesaid contentions, it is deemed appropriate to reproduce hereunder the first three paragraphs of the Agreement dated 3rd September, 2011 between the plaintiff and the defendant No.1, which are as under :-

*“This agreement made this 3rd Day of September, 2011 between the **National Buildings Construction Corporation Limited [NBCC]**, a company incorporated under the Companies Act, 1956 having its Registered Office at NBCC Bhawan, Lodhi Road, New Delhi-110003 (hereinafter referred to as the “NBCC” which expression shall include its administrators, successors, executors and assigns) of one part and **M/s Kashyapi Infrastructure Pvt. Ltd. 12/45, Vasundhra, Ghaziabad (U.P.)** (hereinafter referred to as the ‘Contractor’ which expression shall unless the context requires otherwise include its administrators, successors, executors and permitted assigns) of the other part.*

*WHEREAS, NBCC, had invited tenders as per Tender document vide NIT No. 80/2011, for “**Construction of Office Building for Income Tax Office on Plot A-2/D, Sector 24 at Noida (UP)..**” (Hereinafter referred to as the “PROJECT”) on behalf of **Commissioner of Income Tax, Ghaziabad, Under Central Board of Direct Taxes, Department of revenue Ministry of***

Finance (Govt. of India) (Hereinafter referred to as the “OWNER”)

AND whereas M/s Kashyapi Infrastructure Pvt. Ltd. 12/45, Vasundhra, Ghaziabad (U.P.) has also submitted the above referred tender and NBCC has accepted their aforesaid tender and is awarding the contract for “Construction of Office Building for Income Tax Office on Plot A-2/D, Sector 24 at Noida (UP)..” on the terms and conditions contained in its Letter of Award No. NBCC/ED-RBG (E&I)/ITO /Noida/2011/3412 dated 1st August, 2011 and the documents referred to therein, which have been unequivocally accepted by M/s Kashyapi Infrastructure Pvt. Ltd., vide their acceptance given on our letter of award resulting into contract.”

10. It is evident from a reading of the aforesaid that the Agreement in the present case was entered into by the defendant No.1 in its own name and on its own behalf, with the plaintiff and the defendant No.1 is not found to have entered into the Agreement with the plaintiff in the name of the President of India or the Commissioner of Income-Tax, as the case was in the judgment cited by the counsel for the defendant No.1. Merely because one of the two contracting parties in the contract discloses that it was entering into the agreement for the benefit of another person, would not make such other person a party to the contract, more so when the contract contains a clause as Clause 83, as reproduced in the order dated 16th September, 2019. The said Clause is indicative of the defendant No.1, under its Agreement with the defendant No.2, dealing with the plaintiff in its own right, holding in its own right lien over the amounts due to the plaintiff. Not only so, the defendant No.1, in Clause 84 aforesaid of the Standard Form of Agreement which the successful bidder i.e. the plaintiff was made to sign, also provided

that the Agreement to be entered into by the plaintiff was with the defendant No.1 and not with the President of India or with the Commissioner of Income-Tax.

11. Though, the counsel for the defendant No.1 has also drawn attention to the Agreement dated 30th March, 2011 entered into by the defendant No.1 with the defendant No.2 (on page 1 part III B file) but therefrom also is unable to point out any clause authorising the defendant No.1 to enter into agreements for the subject works, for and on behalf of the President of India. It was for this reason only that the recital of the Agreement entered into by the defendant No.1 with the plaintiff is different from that of the Agreement entered into by Rites Ltd. in the cases cited by the counsel for the defendant No.1.

12. The counsel for the defendant No.1 has today also drawn attention to Clauses 6.5 and 6.6 of the Agreement dated 30th March, 2011 entered into between the defendants No.1 & 2 and substantial portions of which have already been reproduced in the order dated 16th September, 2019 and which provide for the compensation levied by the defendant No.1 on the plaintiff, for any breach by the plaintiff of the terms of the Agreement, being passed on to the 'OWNER' described in the said Agreement as the 'President of India acting through the Commissioner of Income-Tax' and the cost of the arbitration award related to the Agreement/court decree and/or the cost payable as a result of direction/order of any court attributed to the OWNER in respect of the work done or to be done under the contract to be paid to the OWNER. However, the same also, in my view, will not absolve the defendant No.1 of liability to the plaintiff. Moreover, it is not the case that

the Agreement dated 30th March, 2011 between the defendants No.1 and 2 was disclosed by the defendant No.1 to the plaintiff at the time of the defendant No.1 entering into the Agreement with the plaintiff. Significantly the Agreement between the two defendants also provides for arbitration, only between the two defendants, and does not cover the plaintiff and there is no arbitration clause in the Agreement between the defendant No.1 and the plaintiff. If the defendant No.1 was entering into the contract with the plaintiff for and on behalf of defendant No.2, the agreement would have provided for arbitration of disputes arising from the contract in accordance with the agreement between the two defendants.

13. Though the counsel for the defendant No.1 has also drawn attention to a letter dated 1st August, 2011 of the defendant No.1 to the plaintiff to show that the same was for 'Construction of Office Building for Income-Tax Office' but the same would also, for the reasons already given, not absolve the defendant No.1 of the liability and make the Income-Tax Officer liable for the work which the defendant No.1 awarded to the plaintiff.

14. The counsel for the defendant No.1 in the same vein has also drawn attention to Page 33 of Part III A file being the Memorandum attached to the Form of Tender issued by the defendant No.1 as proof to show that the same also discloses Central Board of Direct Taxes as the Client/Owner but again to no avail. Rather in the present case, the document dated 3rd June, 2011 at page 11 of Part III A file being a Notice inviting tender also shows the tender to have been invited by the defendant No.1 in its own name and not for and on behalf of the President of India, Commissioner of Income-Tax or Central Board of Direct Taxes. Thus, merely because the plaintiff was

aware that the contract which the defendant No.1 was entering into with the plaintiff was for construction of a building, not for own use of defendant No.1 but for the Income-Tax Office, would still not make the defendant No.1 a non-party to the contract with the plaintiff.

15. The counsel for the defendant No.1, with respect to Clause 83 in the General Conditions of Contract has contended that the same also provides that the plaintiff was to attend all meetings including the meetings with the Owner/Client i.e. Income-Tax Office. However, in my view, the said imposition on the plaintiff would not come in the way of the plaintiff suing the defendant No.1 for its dues and which are not in dispute.

16. Though the plaintiff has impleaded Commissioner of Income-Tax as defendant No.2 but has not sought any recovery of money from the defendant No.2.

17. The counsel for the defendant No.1 has also argued that Clause 83 is not a bar to the plaintiff suing the defendant No.2.

18. Having found the defendant No.1 to be not absolved from the liability for the undisputed dues under the Agreement with the plaintiff, for the reason of defendant No.1 having entered into the contract on principal to principal basis and not as an agent, it cannot be said that the defendant No.1 merely for the reason of having disclosed the person on whose behalf it was getting the work done from the plaintiff, would be absolved from the liability under the Agreement.

19. Clause 4.14 of the Agreement dated 30th March, 2011 between the two defendants and which has been reproduced in the order dated 16th September, 2019, also shows that it was the defendant No.1 who was

responsible for procurement of all materials and services for the construction, as distinct from procuring materials and services on behalf of the defendant No.2.

20. On enquiry it is also told that tax on payments made by defendant No.2 to defendant No.1 was deducted by defendant No.2 in the name of defendant No.1 and tax on payments made by defendant No.1 to the plaintiff was deducted by the defendant No.1 in its own name. The same also shows the nature of the Agreement between the plaintiff and the defendant No.1 and the Agreement between the two defendants.

21. No merit is thus found in the defence of the defendant No.1 to the suit.

22. I have given an opportunity to the counsels to address on the aspect of interest. The counsel for the defendant No.1 has merely stated that interest was agreed in Clause 37.3 to be not paid.

23. However, I tend to agree with the counsel for the plaintiff in this respect and it cannot be said that the defendant No.1, which has withheld the admitted dues of the plaintiff, not only till the institution of the suit but even after the institution of the suit and not taken any action for recovery of the monies from the defendant No.2, can be said to be not liable for interest under the said Clause. The clause to that effect would be against public policy and void.

24. The plaintiff thus, is found entitled to recovery of principal amount of Rs.3,43,43,650/- from the defendant No.1. The plaintiff has claimed interest on the said amount from 23rd May, 2015, being the date of the Completion Certificate.

25. However, I find the claim for interest @ 15% per annum to be excessive; though the counsel for the plaintiff contends that the plaintiff was paying interest at the said rate to the Banks but there is no evidence to the said effect.

26. In the facts and circumstances, it is deemed appropriate to award a pre-suit interest to the plaintiff @ 9% per annum; *pendente lite* interest @ 7% per annum; future interest for a period of three months from this decree also @ 7% per annum and the future interest beyond three months herefrom @ 15% per annum.

27. A decree is accordingly passed, in favour of the plaintiff and against the defendant No.1, of recovery of the principal amount of Rs.3,43,43,650/- with pre-suit interest @ 9% per annum, *pendente lite* interest @ 7% per annum; future interest for a period of three months from this decree also @ 7% per annum and future interest beyond three months herefrom @ 15% per annum.

28. The plaintiff shall also be entitled to costs of the suit with professional fee and miscellaneous expenses computed at Rs.2.5 lacs.

29. The amounts stated to have been paid by the defendant No.1 to the plaintiff during the pendency of the suit shall be deducted from the decretal amount.

30. Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 01, 2019/‘AA’

(corrected & released on 13th November, 2019)