

**IN THE COMMERCIAL COURT AT CITY CIVIL COURT
AHMEDABAD**

COMMERCIAL CIVIL MISC. APPLICATION NO.20 OF 2019

Applicant: Simplex Infrastructure Ltd.
having its registered office
at 'Simplex House', 27,
Shakespeare Sarni,
Kolkata 700 017.

Versus

Respondent: RSPL Limited
having its registered office
at 119-121 (Part),
Block P & T,
Fazal Ganj, Kalpi Road,
Kanpur 208 012

And also carrying on business
from C-1/C-2, 3rd Floor,
Safal Profitaire, Corporate
Road, near Prahalladnagar
Garden, Satellite,
Ahmedabad-380 015.

Appearance:
Mr. Saurabh Soparkar, Ld. Senior Counsel with Mr. D.M. Desai,
Ld. Counsel for the applicant

Mr. Shalin Menta, Ld. Senior Counsel with Mr. Abhishek Mehta,
Ld. Counsel for the respondent

J U D G M E N T

1. The applicant has filed the present application under section 9 of the Arbitration & Conciliation Act, 1996 ('the Arbitration Act' for short), for seeking following reliefs:

a) An order of temporary injunction be passed restraining the respondent, its men, agents and servants from giving

effect and/or further effect to the purported termination notice dated 31st January, 2019 in any manner whatsoever and/r taking steps pursuant thereto;

b) An order of temporary injunction be passed restraining the respondent, its men, agents and servants from giving any effect to the letters of invocation and/or encashment of the bank guarantees dated 31st January, 2019 mentioned in paragraph 9 hereinabove;

c) A direction upon the respondent, its men, agents and servants to forthwith deposit an amount of Rs.5,48,73,513/- in a separate interest bearing details of which to be directed to be given to the applicant herein;

d) Ad interim orders in terms of prayers above;

e) Costs of and/or incidental to this application be directed to be borne by the respondent;

f) Such further or other order/orders be passed and/or direction/directions be given as to this Learned Court may deem fit and proper.

2. It is the case of the applicant that the applicant is a civil infrastructure company and is a major performer in construction business. The respondent is a company in the field of detergents and one of its popular brands is known as Ghari Detergent Powder. The respondent has floated the tender for the purpose of civil and structural works to be executed at the

respondent's chemical complex at village Kurange (Dwarka), Gujarat. The contract value of the entire project was Rs.100,99,93,682/-. The applicant was found to be the successful bidder and consequent thereto, the respondent issued the Work Order on 25th April, 2016 to the applicant. Pursuant to the Work Order, an agreement dated 25th April 2016 was also entered into between the parties and thereafter, the applicant suggested some changes in the agreement by way of its letter dated 23rd May, 2016. Such changes were substantially agreed upon by the respondent by way of its e-mail dated 23rd May, 2016. Subsequent thereto, the applicant has duly accepted the Work Order dated 25th April, 2016 by way of its letter dated 26th May, 2016. As per the agreement, the applicant has to provide three separate Bank Guarantees i.e. Performance Guarantee, Mobilization Advance Guarantee and Retention Money Guarantee. The applicant has furnished three guarantees for the aforesaid purpose. It is also the case of the applicant that right from the inception of the contract, the applicant is facing various hindrances i.e. delay in issue of structural drawings, delay due to heavy water logging at site, delay due to re-work arising from change in orientation in lime kiln structure, etc. The respondent deliberately failed and neglected to discharge its reciprocal duty and obligation under the terms of contract

agreement and tender documents. Due to the non-performance of terms and conditions under the contract agreement, the project was prolonged and the respondent acknowledged the same and duly granted the extension till 28th February, 2019. It is also the case of the applicant that suddenly on 2nd February, 2019, the respondent has invoked the bank guarantee. The applicant was also surprised to receive the letter of termination dated 31st January, 2019. The termination was not in accordance to the contract entered into between the parties as articles 17 and 21 were not complied with. Even otherwise, the termination of notice was not issued to the person as mentioned under article 10 of the contract agreement. Therefore, the termination letter dated 31st January, 2019 is absolutely illegal and against the terms of the contract. It is also the case of the applicant that out of the total work contract of Rs.85 crore, the applicant has completed the work to the tune of Rs.83.20 crores and the said work has also duly certified by the respondent in the month of January, 2019. Not only this, consequent upon termination, the respondent has also invoked the bank guarantee. Since the termination was illegal, therefore, subsequent action of invocation of bank guarantee is also illegal. It is also the case of the applicant that the applicant has filed the suit in the City Civil Court at Kolkata, West Bengal,

for seeking the relief against the invocation of Bank Guarantee and thereafter, on gaining the knowledge of termination notice, the applicant has filed the present application, for seeking the relief against the termination as well as invocation of Bank Guarantee.

3. The notice of the application was issued to the respondent and in pursuance thereto, the respondent put its appearance through its Learned Counsel and filed the reply vide Exh.16. In the said reply, the contentions raised by the applicant in the application, have been denied and it has been averred in the reply that the applicant has already approached the City Civil Court, Kolkata, for seeking relief in respect of the Bank Guarantee. On the same cause of action, the applicant has also approached before this Court, for seeking the relief against the invocation of Bank Guarantee as well as termination of contract. It has also been averred that the City Civil Court, Kolkata, vide its order dated 4th February, 2019 granted ex-parte ad-interim injunction in favour of the applicant. The said order was challenged by the respondent by way of Appeal from Order, being FMAT No.221 of 2019 before the Hon'ble High Court of Kolkata and the same was heard at length on 27th February, 2019, wherein the the Hon'ble High Court of Kolkata was pleased to pass a reasoned

order dated 27th February, 2019 considering the contentions and submissions of the applicant, including those raised in the present application before this Court. The Hon'ble High Court of Kolkata was pleased to set aside the order dated 4th February, 2019 and vacated the stay granted by the City Civil Court, Kolkata in favour of the applicant. It is also the case of the respondent that in anticipation of such application, whether the stay would stand vacated by the Hon'ble High Court of Kolkata, the applicant has preferred the present application, *inter-alia*, seeking stay of the invocation of bank guarantees in question and requested for urgent hearing on 27th February, 2019. It is also the case of the respondent that the applicant has concealed the material fact from this Court. It is also the case of the respondent that the contract was terminated as per the clauses of the contract and the notice of termination was served upon the applicant. The applicant is guilty of breach of contract. In brief, the respondent has averred that the present application is required to be dismissed.

4. The applicant has filed the rejoinder vide Exh.18 to the reply filed by the respondent. In the rejoinder, the applicant has denied the contentions raised by the respondent and re-asserting the averments made in the application.

5. I have heard the Learned Senior Counsels for the parties. Mr. Soparkar, Learned Senior Counsel appearing on behalf of the applicant has vehemently submitted that the notice of termination of agreement is illegal, as the respondent has not followed the clauses of the contract. Clauses 17 and 21 of the contract were not followed. Therefore, the termination of the contract is illegal.

5.1 Learned Senior Counsel for the applicant has further submitted that the notice was not issued to the authorised person as per article 10 of the agreement. The notice had to be issued to Mr. Subir Basu, but the notice was issued to Mr. Subir Goswami. Therefore, the termination of contract was not addressed to the proper person. Hence, the termination is illegal. Learned Senior Counsel for the applicant has further submitted that if certain procedure is prescribed, then that procedure has to be followed and if any other followed, then the procedure would be illegal.

5.2 In support of the contentions, Learned Senior Counsel for the applicant has relied upon the judgment of the Hon'ble Supreme Court, in the case of **Chandra Kishore Jha Vs. Mahavir Prasad and Others**, reported in (1999) 8 SCC 266 and the judgment of the Hon'ble Supreme Court, in the

case of ***J. Jayalalithaa and Others Vs. State of Karnataka and Others***, reported in ***(2014) 2 SCC 401***.

5.3 Learned Senior Counsel for the applicant has further submitted that the bank guarantee in question was not invoked in accordance to the agreement of bank guarantee. The letter of invocation has to be addressed to the Chief Manager of Canara Bank, but the said letter was addressed to the Senior Manager. Therefore, the invocation is invalid and illegal. In support of the contentions, Learned Senior Counsel for the applicant has also relied on the judgment of the Hon'ble Supreme Court, in the case of ***Hindustan Construction Co. Ltd. Vs. State of Bihar and Others***, reported in ***(1999) 8 SCC 436***.

5.4 Learned Senior Counsel for the applicant has further submitted that the proceeding before the City Civil Court, Kolkata was not based on the same cause of action. He has submitted that, that proceeding was filed against the invocation of bank guarantee, but the present proceeding has been filed, not only challenging the invocation, but also challenging the termination of agreement. Therefore, the nature of both the proceedings is different. In support of the contentions, Learned Senior Counsel for the applicant has also placed reliance on the

judgment of the Hon'ble Supreme Court, in the case of **Deva Ram and Another Vs. Ishwar Chand and Another**, reported in (1995) 6 SCC 733 and the judgment of the Hon'ble Bombay High Court, in the case of **Sonu valad Khushal Khadake Vs. Bahinibai murd Krishna and Others**, reported in 1915 SCC Online Bom 118.

Learned Senior Counsel for the applicant has submitted that since the termination of the agreement is against articles 17 and 21 of the contract and the notice of termination was not issued as per article 10 of the agreement, the action of the respondent is illegal and the applicant is entitled for the interim measures as claimed in the application.

6. On the other hand, Mr. Shalin Mehta, Learned Senior Counsel appearing on behalf of the respondent has vehemently submitted that the present application is the abuse of process of law. The applicant has already filed the proceeding before the City Civil Court, Kolkata for challenging the invocation of bank guarantee. The applicant was granted interim relief by the City Civil Court, Kolkata. The said order was challenged by the respondent before the Hon'ble High Court of Kolkata and on 27th February, 2019, the Hon'ble High Court of Kolkata has vacated the stay. Therefore, the applicant has filed the

present application before this Court, on 26th February, 2019 and the said application was listed on 27th February, 2019 and notice was issued on 28th February, 2019. The present proceeding is in the abuse of process of law. Learned Senior Counsel for the respondent has further submitted that the applicant is guilty of concealment of material fact. Learned Senior Counsel for the respondent has further submitted that the contract was terminated in accordance to articles 17 and 21 of the agreement. The respondent has issued notice dated 17th May, 2018, thereby granting more than seven days time. Therefore, the plea of the applicant that the termination is illegal, is not sustainable.

6.1 Learned Senior Counsel for the respondent has further submitted that the agreement of guarantee is the independent and separate agreement. The bank guarantee is unconditional and the applicant has not made out any case for stay of the encashment. The bank guarantee was issued by the bank. Therefore, the letter of invocation served upon the bank through its Senior Manager is valid. The ratio of the judgment relied upon by the Learned Senior Counsel for the applicant, is not applicable in this regard.

6.2 Learned Senior Counsel for the respondent

has further submitted that the letter of termination was issued to Mr. S.K. Goswami who is the General Manager of the project. Therefore, the notice was issued in accordance to article 10 of the contract. Therefore, it cannot be held that the notice was invalid.

6.3 Learned Senior Counsel for the respondent has further submitted that the applicant has not made out any case for seeking interim measures under section 9 of the Arbitration Act. Therefore, the present application deserves to be rejected.

7. In rebuttal, Learned Senior Counsel appearing on behalf of the applicant has submitted that the present proceeding is not in the abuse of the process of law. The bank guarantee was issued by the Canara Bank at Kolkata. Therefore, the applicant has chosen the jurisdiction of Kolkata Court to challenge the invocation of bank guarantee. He has further submitted that as per the agreement, the parties have approached the jurisdiction of Ahmedabad Court. In the present application, the applicant has also challenged the termination of contract, and therefore, this Court has jurisdiction and the cause of action for the proceeding before the City Civil Court, Kolkata and the proceeding before this Court is different. Learned Senior

Counsel for the applicant has further submitted that there is no suppression of material fact. The suppression of fact which is necessary to adjudicate the matter is material and the applicant has not suppressed the material facts from the Court. Learned Senior Counsel for the applicant has further submitted that the notice dated 17th May, 2018 cannot be treated as the notice under articles 17 and 21 of the contract. Therefore, the termination of the agreement is invalid. Learned Senior Counsel for the applicant has further submitted that the applicant has *prima-facie* case in its favour. He has further submitted that the balance of convenience also lies in favour of the applicant and in if the interim measure is not granted to the applicant, the applicant would suffer irreparable loss. Therefore, the present application deserves to be allowed.

8. I have considered the submissions of the Learned Senior Counsels for the parties. As far as the submission of the Learned Senior Counsel for the applicant regarding legality of notice of termination dated 31st January, 2019 is concerned, article 17 of the agreement deals with the contractor's default Owner to take over. As per article 17 if the contractor fails or neglects to execute the works with all due diligence and expedition, or shall refuse or

neglect to comply with any orders given to him in writing by the engineer or owner's representative in connection with the work, the engineer/owner's representative may give notice in writing to the contractor to make such failure. If the contractor fails to comply with, in that event, owner shall have the free use of all the contractor's equipment and other things that may be at any time on the site. It is the say of the Learned Senior Counsel for the respondent that the respondent has issued letter dated 17th May, 2018. Perusal of letter dated 17th May, 2018 transpires that the said letter was addressed to Mr. Subir Goswami and in the last line of the said letter, it is stated that this letter may please be treated as cautionary notice of termination of the contract. The said letter was replied by the applicant vide letter dated 23rd May, 2018, wherein, the explanation was furnished. The respondent has terminated the contract vide letter dated 31st January, 2009. It is the say of the Learned Senior Counsel on behalf of the applicant that the contract was not terminated in accordance to the clause 21 of the contract. Perusal of letter dated 31st January, 2019 clearly transpires that the agreement dated 25th April, 2016 has been terminated by the respondent, whether the termination is valid or the termination has been taken place by following articles 17 and 21 of the contract. This is

required to be seen by the Learned Arbitrator at appropriate stage and since the agreement has already been terminated, this Court cannot grant the relief of mandatory injunction under section 9 of the Arbitration Act. This issue is to be decided by the Learned Arbitrator and if this issue is decided in section 9 application, then nothing will be left to be decided by the Learned Arbitrator. Therefore, the contention whether the agreement has been terminated validly, or not, is to be seen by the Learned Arbitrator.

9. So far as the contention of the Learned Senior Counsel for the applicant that the letter of termination was not addressed to the person mentioned under article 10 of the agreement is concerned, it is to be noted that perusal of communication between the parties shows that the letter of termination was addressed to Mr. Subir Goswami. Article 10 of the contract is reproduced hereinbelow:

Written Notice

All notices given under the Contract Documents shall be in writing and shall be deemed to have been properly served if delivered as follows:

M/s RSPL Limited, a registered offices at P.No.119, 120, 121 Block P&T, Fazalganj Kalpi Road, Kanpur-208012 (UP).

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*Corporate Office C/1-C/2, 3rd Floor, Safal
Profitaire Corporate Road, Prahaladnagar,
Ahmedabad-380015*

*Attention of Mr. Tej Malhotra,
With a copy to: Jacobs Engineering India
Private Limited*

Attention Mr. Pankaj Thakar

(a) If to the Contractor:

*M/s. Simplex Infrastructure Limited.
Vaikunth, 2nd Floor, 82-83, Nehru Palace, New
Delhi-110019*

Attn: Mr. Subir Basu

*or to such other address or addressee as any
party entitled to receive notice hereunder
shall designate to all other parties in the
manner provided herein for the service of
notice.*

The perusal of this article clearly transpires that the notice has to be issued to the applicant with kind attention of **Mr. Subir Basu or such other address or addressee**. The expression of words "such other address or addressee" have a lot of scope to include the other person in place of Mr. Subir Basu. Perusal of the communication between the parties transpires that the letter dated 17th May, 2018 issued by the respondent, addressed to the applicant with kind attention of Mr. Subir Goswami. The applicant has also written a letter dated 1st August, 2016 duly signed by Mr. S.K. Goswami, General Manager. When Mr. S.K.

Goswami is communicating with the respondent on behalf of the respondent, then the respondent cannot be permitted to say that Mr. Subir Goswami was not authorised person or the letter of termination was not addressed to the person as mentioned under article. Article 10 itself permits that the letter has to be addressed to the applicant with the attention of Mr. Subir Basu or such other addressee. Therefore, the letter of termination issued to the applicant with the kind attention of Mr. Subir Goswami has been addressed as per article 10 of the agreement and the contention of Learned Senior Counsel for the applicant, is not sustainable. At this stage, it would be profitable to refer the judgment of the Hon'ble Supreme Court, in the case of **Chandra Kishore Jha (supra)**, wherein, the Hon'ble Supreme Court has held that if statute provides for a things to be done in a particular manner, then it has to be done in that manner and in no other manner. Similarly, in the case of **J. Jayalalithaa and Others (supra)**, the Hon'ble Supreme Court, in paragraph No.35 held that its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it is necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as

well not have been enacted. In my considered view, the ratio of these two judgments are not applicable in the present facts and circumstances of the case. The contract cannot be read as a statute.

10. So far as the contention of the Learned Senior Counsel for the applicant regarding invocation of bank guarantee is concerned, the applicant has placed the bank guarantee at page No.288 of the paper-book. Last paragraph of the Bank Guarantee is as under:-

"All claims under this guarantee must be presented to our branch at 21, Camac Street, Prime Corporate Branch, Kolkata-700016-India marked for the attention of Chief Manager."

The letter of invocation of the bank guarantee dated 31st January, 2019 transpires that the said letter was addressed to the bank through Senior Manager. The bank guarantee was issued by the Canara Bank, Prime Corporate Branch, Camac Street, Kolkata-700016. Merely, the letter of invocation of bank guarantee was marked to the Senior Manager does not make any difference for the reasons, suppose at the time of issuance of bank guarantee, the branch was headed by the Chief Manager, but after issuance of bank guarantee, if the branch is upgraded by posting the Assistant General Manager in place of

Chief Manager or degraded by posting Senior Manager in place of Chief Manager, then the very purpose of the issuance of guarantee would be defeated and the person in whose favour the bank guarantee was issued would not be in a position to encash the bank guarantee. Therefore, the submission of the Learned Senior Counsel for the applicant, is not sustainable.

I have also considered the judgment relied upon by the Learned Senior Counsel for the applicant, in the case of **Hindustan Construction Co. Ltd. (supra)**, wherein as per contract between Hindustan Construction Co. Ltd. and State of Bihar, the Chief Engineer was authorised to invoke the bank guarantee, but the bank guarantee was invoked by the Executive Engineer, in that circumstances, the Hon'ble Supreme Court held that the invocation was invalid. But the reverse ratio of this judgment is not applicable. In the present case, the bank guarantee was invoked by the competent person and letter of invocation was sent to the bank. Merely the letter was addressed to the Senior Manager in place of Chief Manager does not make any difference, as the bank was bound to honour the bank guarantee. Therefore, the ratio of this judgment is not applicable in the present facts and circumstances of the case.

11. So far as the contention of the Learned

Senior Counsel for the respondent that the present application is in the abuse of process of law is concerned, it is to be noted that it is the admitted case of the parties that prior to filing of the present application under section 9 of the Arbitration Act, the applicant herein has filed the suit in the City Civil Court, Kolkata, for seeking relief against the invocation of bank guarantee. The applicant was granted ad-interim injunction. The said order was challenged in the appeal before the Hon'ble High Court of Kolkata. In the said appeal, the order passed by the learned trial court was set aside on merits. The applicant has pursued the matter before the Court at Kolkata and the Hon'ble High Court on merits. The applicant was not granted the relief against the invocation of bank guarantee. In the present case, apart from relief against the invocation of bank guarantee, the applicant has also added the relief against the termination of the contract. Merely adding one more relief against the termination of contract, does not give the right to the applicant to seek the same relief against the invocation of bank guarantee in the present proceedings.

12. As far as the relief in respect of the invocation of bank guarantee is concerned, the applicant exhausted the cause of action in respect of the bank guarantee. Hence, the present

application in respect of invocation of bank guarantee is the abuse of process of law and the contention of the Learned Senior Counsel for the respondent, is partly sustainable. I have considered the judgment of the Hon'ble Supreme Court, in the case of **Deva Ram and Another (supra)** and the judgment of the Hon'ble Bomabay High Court, in the case of **Sonu valad Khushal Khadake (supra)**. The ratio of these two judgments are not applicable in the present facts and circumstances of the case, as the cause of action in respect of the invocation of bank guarantee is the same as the cause of action before the City Civil Court, Kolkata.

13. It is settled proposition of law that section 9 of the Arbitration Act is governed by the provisions of Order XXXIX of the Code of Civil Procedure, 1908 and the provisions of the Specific Relief Act, 1963. So far as the relief in respect of the termination of the contract is concerned, the contract has already been terminated. Under section 9 of the Arbitration Act, the Court cannot grant the relief of mandatory injunction, thereby declaring that the termination of contract is illegal. So far as the relief in respect of the invocation of bank guarantee is concerned, it is settled proposition of law that the stay against the bank guarantee can be granted by the Court only in exceptional

circumstances i.e. when the fraud has taken place in issuance of the bank guarantee or when the guarantee is conditional or when there is a special equity in favour of the applicant or the applicant would suffer irretrievable injury. In the present case, the applicant has miserably failed to establish all these grounds. Therefore, the present application is required to be dismissed and accordingly, I pass the following order:-

O R D E R

1. The present application is hereby dismissed.
2. No orders as to cost.
3. It is hereby made clear that the observations made in this judgment are of preliminary nature and the same shall not be binding in the arbitration proceedings and any other proceedings.

Pronounced in the open Court on this 2nd day of April, 2019.

Ahmedabad.

(Moolchand Tyagi)

Judge

Commercial Court

Unique ID Code No.GJ01043