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

***Date of decision: 29.10.2024***

\+ **O.M.P.(I) (COMM.) 369/2024**

M/S INNOVATIVE FACILITY SOLUTIONS PVT LTD

.....Petitioner

Through: Mr Sujoy Datta, Mr Surekh Kant Baxy, Mr NPS Chawla, Ms Nishtha Khurana, Mr Jasjeet Singh, Mr Shubham Raghuvwanshi and Ms Aayushi Jain, Advs.

versus

M/S AFFORDABLE INFRASTRUCTURE
AND HOUSING PROJECTS PVT LTD & ANR. .....Respondents

Through: Mr Anirudh Bakhru, Mr Ayush Puri, Ms Vasundhara Bakhru, Mr Mohd. Umar and Mr Kanav Madnani, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE JASMEET SINGH**

**: JASMEET SINGH, J (*ORAL*)**

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking stay of the effect and operation of the Termination Notice dated 01.10.2024 issued by the respondent No. 1 to the petitioner.

2. The brief facts are that the petitioner is a company specialising in integrated facility management services including housekeeping, maintenance and technical support. The respondent No. 1 is in the business of providing furnished office spaces to various sub-lessees.

3. The respondent No. 1 entered into two lease deeds for two unfurnished buildings namely AIHP Towers and AIHP Horizon. The

petitioner and respondent No. 1 entered into a Service Agreement dated 30.12.2016 to provide maintenance services for AIHP Towers and AIHP Horizon. Thereafter, the said Agreement was amended and Addendum Agreement dated 18.03.2021 was executed between the parties.

4. The respondent No. 1 issued Termination Notice dated 01.10.2024 alleging service deficiencies, breach of contract, non-payment of arrears of electricity and hence terminated the Service Agreement with the petitioner and appointed respondent No. 2 as the replacement maintenance agency. With this background, the present petition has been filed seeking maintenance of *status quo*.

5. The relevant clauses in the Service Agreement dated 30.12.2016 are Clauses 5 and 6 which read as under:

> *"5. Standard of Performance: The Service Provider must ensure that all the above services are of a quality level generally provided in offices of multinational companies. Any deficiency in service level or quality reported by the Service Recipient must be rectified by the Service Provider within 3 (Three) working days.*
>
> *6. Termination: Parties will be locked in for a period of 9 years from the commencement date which is the lock in period. The Service Recipient may, terminate this contract by providing the Service Provider with thirty (30) days prior written notice only after the completion of the lock in period of 9 years."*

6. Clause 6 was modified on 18.03.2021 *vide* the Addendum Agreement and reads as under:

> *"6. TERMINATION*
>
> *6.1. The Parties hereto agree that since the Service Provider has*

*undertaken substantial capital expenditure and incurred other related expenses at the Premises to ensure uninterrupted maintenance services, the term of the Agreement shall be 9 (Nine) years commencing from 1st January 2017 ("Initial Term"), and the lock-in period shall also be 9 (Nine) years from the lease commencement date. Any termination by the Parties prior to the expiry of lock-in period shall be deemed invalid and unenforceable unless mutually agreed upon by the Parties.*

*6.2. The Parties agree that 6 (Six) months prior to the expiry of the Initial Term of this Agreement, the Parties shall engage in discussions to mutually decide the extension of this Agreement for such further period as they may deem appropriate, taking into consideration the tenure of the master lease under which the Premises is leased to the First Party. Either Party shall have the right to issue a notice to the other Party, 6 (Six) months before the expiry of the Initial Term, requesting an extension. Upon receipt of such notice, the Parties shall meet within 7 (Seven) days to deliberate and decide upon the extension of the Agreement's term for such period as may be agreed ("Extended Term").*

*6.3. The Parties further agree that in case of any dispute arising during the Initial Term, in connection with the services provided or any other terms of this Agreement shall initially be resolved through mutual discussions between the Parties. If the Parties are unable to resolve the dispute through mutual discussion, the Parties agree to resolve such dispute through arbitration, as provided under Clause 11 of this Agreement. Further, in case of*

*any dispute arising during the Extended Term, which the Parties are unable to resolve through amicable discussions, within 30 days of initiating such discussions, either Party shall have the right to terminate this Agreement by giving a 90 (Ninety) days' prior written notice (commencing after the conclusion of the initial discussion period).* ***Notwithstanding the foregoing, the status quo with respect to the services, consideration, and other obligations shall be maintained during the period of mutual discussions and any subsequent arbitration proceedings, as applicable****.*

*6.4. Any termination of the Agreement shall be without prejudice to any rights or obligations accrued prior to the date of such termination."*

(emphasis supplied)

7. Hence, it is the submission of Mr Datta, learned counsel for the petitioner that in the present case, Clause 6 after the amendment under the Addendum has a positive covenant but Clause 6.3 contemplates a negative covenant and in view of the negative covenant, *status quo* must be granted to the petitioner.

8. As regards enforcement of negative covenant is concerned, Mr Bakhru, learned counsel for the respondents relies upon paragraph 64 of the judgment passed by a Coordinate Bench of this Court in ***ABP Network Private Limited v. Malika Malhotra*** 2021 SCC OnLine Del 4733 which reads as under:

*"64. The matter may be viewed from another angle as well. The contention, of Mr. Sethi, predicated on Section 42 of the Specific Relief Act, 1963 that the inability to enforce specific performance*

*of a positive covenant in a determinable contract cannot inhibit specific performance of a negative covenant, with which the positive covenant may be coupled, can apply only if the extent of "coupling", between the positive and negative covenant, is not such that enforcement of the negative covenant would indirectly result in enforcement of the positive covenant. This principle stands underscored by the following words, in para 58 of the judgment of the Supreme Court in Percept D'Mark (India) Ltd. v. Zaheer Khan:*

> *"Likewise, grant of injunction restraining the first respondent would have the effect of compelling the first respondent to be managed by the appellant, in substance in effect a decree of specific performance of an agreement of my judiciary or personal character of service, which is dependent on mutual trust, faith and confidence.""*

9. In addition, he also relies on the judgment of ***M/s. Ksheeraabd Construction Pvt. Ltd. v. National Highways and Infrastructure Development Corporation Ltd. & Anr.,*** 2023 SCC OnLine Del 3156 and more particularly paragraph 55 to state that the contract by its nature is determinable and hence damages/compensation is an adequate remedy. Paragraph 55 of the said judgment reads as under:

> *"55. On an overall conspectus of the aforesaid, this Court finds itself unable to accede to the line of reasoning as suggested in Narendra Hirawat or T.O. Abraham. Neither the precedents noticed hereinabove nor the lexicons appear to lend credence to the word determinable being read as "inherently determinable" as*

*propounded by the two decisions noticed above. Bearing in mind the above, the Court finds itself unable to hold or interpret Section 14(d) of the SRA to be confined only to those contracts where parties have the right to terminate without assigning any reason or where that power be exercisable even in the absence of an event or breach. As was held in the decisions aforenoted, the power to terminate, whether it be for cause or otherwise, based on an allegation of breach or the happening of an event, if preserved would lead to the Court recognising such a contract falling within the scope of Section 14(d) of the SRA."*

10. I have heard learned counsel for the parties.

11. This Court in somewhat identical circumstances has dealt with negative covenants in ***Eptisa Servicios De Ingeniera S.L. v. National Higways and Infrastructure Development Corporation Limited*** 2018 SCC OnLine Del 12053 and granted interim protection. Operative portion of the said judgment read as under:

*"2. The disputes between the parties are in relation to the Contract Agreement executed between the parties whereby the respondent had appointed the petitioner for rendering Consultancy Services for Authority Engineer for Project of (i) 2 Laning of existing Hunli-Anini road on EPC basis from Km 21.50 to Km 37.50 (ii) 2 laning of existing Hunli-Anini road on EPC basis from Km 37.50 to Km 53.50 and (iii) 2 laning of existing Hunli-Anini road on EPC basis from KM 53.50 to Km 92.500 in the state of Arunachal Pradesh under SARDP-NE.*

*.....*

*11. Clause 2.8, 2.9.1, 2.9.1(a) and 2.9.6 of the GCC are reproduced hereinunder:*

*.....*

*2.9.6. Disputes about Events of Termination*

*If either Party disputes whether an event specified in paragraphs (a) through (e) of Clause GC 2.9.1 or in Clause GC 2.9.2 here of has occurred, such Party may, within forty-five(45) days after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to Clause GC8 hereof and this Contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award."*

*…….*

*15. The petitioner has sought reference of such dispute to arbitration vide its notice dated 24.09.2018 that is, within the prescribed period of 45 days as mentioned in Clause 2.9.6 of the GCC. I cannot agree with the submissions of the learned senior counsel for the respondent that such 45 days period should be counted from the notice dated 19.07.2017 inasmuch as much water has flown after the said notice, with the respondent making further payments to the petitioner, including release of mobilization advance. The respondent having extended the period, the cause of action for challenging the notices did not arise to the petitioner at that stage.*

*16. As far as the submission of the learned senior counsel for the respondent relying upon the Judgment of this Court in Era Infra*

*Engineering Ltd. (supra) is concerned, Clause 2.9.6 of the GCC contains a negative covenant between the parties and restricts the termination from taking effect during the pendency of the arbitration proceedings. In view of Section 42 of the Specific Relief Act, 1963 such a negative covenant can be enforced by way of an injunction.*

*17. In view of the above, in my opinion, the petitioner has been able to make out a prima facie case in its favour and accordingly the respondent is restrained from giving effect to the Impugned Termination Notice dated 27.08.2018 during the pendency of the arbitration proceedings initiated by the petitioner by its above-mentioned notice."*

12. A Coordinate Bench of this Court in the order dated 29.04.2021 passed in O.M.P.(I)(COMM.) 148/2021 titled ***"Egis India Consulting Engineers Private Limited v. Pawan Hans Limited"*** held as under:

*"4. Clause 2.9.6 of the General Conditions of Contract (GCC), provided for termination of the contract and thereunder reads thus:*

*"2.9.6 If either party disputes whether as (sic) event specified in paragraphs (a) through (e) of clause GC 2.9.1 or in the clause GC 2.9.2 hereof has occurred, such party may, within 45 days after receipt of notice of termination from the other party, refer the matter to arbitration pursuant to clause GC 8 hereof, and this contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award."*

*.....*

*7. The petitioner also complaints that, till date, no completion certificate have been issued by the respondent, as required by the agreement, despite repeated requests, in that regard, by the petitioner, inter alia, on 4th June, 2019, 16th September, 2019 and 9th December, 2019. Ultimately, as the disputes were not getting resolved, the petitioner invoked provisions of arbitration, in the agreement, vide communication dated 18th March, 2020, followed by a reminder dated 15th March, 2021.*

*.....*

*12. Having said that, if one reads Clause 2.9.6 of the GCC carefully, it appears, prima facie, that issuance of a notice of termination does not ipso facto result in termination of the contractual relationship between the parties. The clause specifically provides that, if, within 45 days of receipt of notice of termination, the contractor refers the matter to arbitration, the contract "shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award". The parties have, therefore, ad idem, crafted a protocol in which, even after a notice of termination of the contract is issued, if the contractor refers the matter to arbitration, the termination of the contract would not take effect and would remain subject to the arbitral award which would come to be passed.*

*13. While, therefore, I am not entirely in agreement with Mr. Dewan's argument that the decision in Eptisa Servicios covers the present case, there is substance in Mr. Dewan's contention that*

*even after a notice of termination has been issued by the respondent, the contract would not stand terminated, if the petitioner seeks resolution of the disputes by arbitration. In this case, the notice of termination was issued on 13th April, 2021. The petitioner, on 27th April, 2021, disputed the validity of the letter of the termination order of the decisions to terminate the contract and also sought reference of the disputes to arbitration. Prima facie, therefore, it would appear that, in such circumstances, Clause 2.9.6 of the GCC, would apply and, pending resolution of the dispute in arbitration and subject to the result of the arbitral award, the contract would continue to subsist.*

*14. In view thereof, I am of the opinion that the petitioner has made out a case for grant of ad interim relief.*

*.....*

*17. Till the next date of hearing, there shall be ad interim stay on operation of the impugned termination notice dated 13th April, 2021. The respondent shall stand restrained from acting on the basis of the said notice, including, inter alia, by way of invocation of the bank guarantees furnished by the petitioner."*

13. Clause 6.3 of the Agreement is somewhat identical. The parties by mutual consent have agreed to the fact that if there are any disputes between the parties, the same shall be resolved through mutual discussions and if the parties are unable to resolve their disputes through mutual discussion, they would resort to arbitration. However, during arbitration process, the parties are to maintain *status quo* with respect to services, consideration and other obligations.

14. The aspect of coupling wherein the enforcement of negative covenant would indirectly result in enforcement of the positive covenant will not be applicable in the present case as this scenario has duly been envisaged in the Agreement. Parties agreed to the mechanism of resolving their disputes through arbitration but during the arbitration process, they agreed to maintain *"status quo with respect to services, consideration and other obligations"*. Primacy is to be accorded to the Agreement between the parties. I am also of the view that the enforcement of the negative covenant is not leading to enforcement of the positive covenant as the *status quo* is only till the time the arbitral tribunal decides the disputed question of whether the termination is valid/invalid. Under Section 9 of the Arbitration & Conciliation Act, 1996, this Court is only preserving the subject matter of the arbitral dispute.

15. As regards damages being adequate compensation, the same also would not apply as the petitioner in the present case is not seeking specific performance of the contract but is only seeking enforcement of the negative covenant.

16. The last aspect is regarding the proviso to Section 42 of the Specific Relief Act, 1963. It is stated by the learned counsel for the respondents that the petitioner was in breach of Clause 5 of the Agreement whereby it was required to maintain good quality services.

17. The fact that numerous complaints were received by the respondent is a dispute which will be adjudicated by the arbitral tribunal. It is stated by Mr Datta, learned counsel for the petitioner that the petitioner has already invoked the arbitration clause and has sought appointment of an arbitrator.

18. Lastly, the petitioner argues that the new Specific Relief Act would be

applicable to the facts of the present case.

19. I am unable to agree. Admittedly, the first Agreement between the parties is dated 30.12.2016. The Hon'ble Supreme Court in ***Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.,*** (2023) 1 SCC 355 has clearly held that the 2018 amendment to the Specific Relief Act is prospective in nature. The relevant paragraphs read as under:

> *"53. Under the pre-amended Specific Relief Act, one of the major considerations for grant of specific performance was the adequacy of damages under Section 14(1)(a). However, this consideration has now been completely done away with, in order to provide better compensation to the aggrieved party in the form of specific performance.*
>
> *54. Having come to the conclusion that the 2018 Amendment was not a mere procedural enactment, rather it had substantive principles built into its working, this Court cannot hold that such amendments would apply retrospectively."*

20. Hence, an agreement executed in 2016 cannot be within the ambit or purview of the amended Specific Relief Act (effective from 01.10.2018).

21. It is argued that without a *prima facie* finding on breach, no interim order can be passed. The issues of breach are to be adjudicated by the arbitrator. However, the mechanism in case of allegations of breach has been dealt with in Clause 6.3 of the Agreement.

22. For the said reasons, I am satisfied that there is a negative covenant which needs to be complied with. The parties are directed to maintain *status quo* with regard to the Service Agreement read with the Addendum Agreement till the process is adjudicated by the learned Arbitrator or till the

expiry of 9 years commencing from 01.01.2017 (i.e. term of the Agreement).

23. The issue that the Addendum is a forged document and not signed by respondent No. 1 will be adjudicated by the arbitrator.

24. The petition is disposed of accordingly.

25. Copy of this order be given *dasti* under the signatures of Court Master.

**JASMEET SINGH, J**

**OCTOBER 29, 2024**

sr *Click here to check corrigendum, if any*