
(2020) 12 DEL CK 0048

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 385 Of 2020

Emaar India Limited, Formerly Known As Emaar MGF Land Limited

APPELLANT

Vs

Hicon Hera Buildtech Private Limited

RESPONDENT

Date of Decision : 01-12-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 12(2), 17

Citation : (2020) 12 DEL CK 0048

Hon'ble Judges : C. Hari Shankar , J

Bench : Single Bench

Advocate : Manmeet Arora, Samapika Biswal, Harkirat Singh, Santosh Kumar

Final Decision : Disposed Of

Judgement

C. Hari Shankar, J

IA 11153/2020

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

O.M.P.(I) (COMM.) 385/2020

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Arbitration Act"), seeks certain

pre-arbitral interim reliefs. The prayer clause in the petition reads as under:

"In this view of the facts and circumstances, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:

(a) pass an order restraining the Respondent, its associates, subsidiaries and affiliates and their respective directors, officers, employees, servants

and/or agents/contractors, either individually, jointly and/or in association with

third parties and/or any third party claiming through the Respondent from:

(i) interfering with the activities of the Petitioner or its agents and/or its parent and affiliate companies, and/or its employees and contractors or any party claiming through the Petitioner, at the Project site;

(ii) removing or in any manner cause to remove any material, equipment, etc. from the Project site;

(iii) interfering in the ingress and egress of the Petitioner or its agents and/or its parent and affiliate companies, and/or its employees and contractors or any party claiming through the Petitioner in relation to the Project site;

(iv) interfering with the Petitioner or its agents and/or its parent and affiliate companies, and/or its employees and contractors or any party claiming through the Petitioner from carrying out and completing the remaining portion of the Project;

(b) pass an order appointing a local commissioner to inspect the Project site to prepare an inventory of materials, equipment, tools, plant and machinery, supported by photography/videography and to undertake joint measurement of the Works undertaken by the Respondent till date;

(c) pass ex-parte and ad-interim reliefs in terms of prayer clauses (a) to (b) above; and

(d) pass such and any other orders as this Hon'ble Court may deem just, fair and equitable.â??

2. A brief of conspectus of the controversy, as set out in the petition, and without prejudice to the right of the respondent to refute the allegations against it, may be provided thus:

(i) The controversy emanates out of two work orders, placed by the petitioner on the respondent on 18th May, 2020 and 3rd June, 2020, which would

be referred to, hereinafter, as â??the first work orderâ? and â??the second work orderâ? respectively. The first work order was for renovation of

Central Plaza, Sector 105, Mohali and the second work order was for construction of civil work and structuring work at the Community Centre at

Sector 109, Mohali.

(ii) Pursuant to the aforesaid work orders, contracts were executed, for the said works, between the petitioner and the respondent on 4th June, 2020

and 3rd June, 2020, respectively. The covenants of the said contracts, admittedly, are similar and they contained similar provisions for resolution of disputes between the parties by arbitration. By way of reference, the arbitration clause, in one of the contracts may be reproduced thus:

52. SETTLEMENT OF DISPUTES/ARBITRATION:

52.1 All disputes and differences of any kind whatsoever arising out of or in connection with this Contract as also with regard to the implementation,

meaning, interpretation or implications of the various clauses of the Contract and those of the Contract Documents or in respect of any other matter or

thing arising out of or relating to the development and construction of the Project whether during the progress of the work or after completion shall be

communicated by the Contractor in writing to the Project Manager and all possible efforts would be made by the Parties to sort out and resolve all

such matters of controversy, disputes and differences, amicably with due dispatch and effective priority. In case, the Contractor and the Project

Manager are unable to resolve such issues amicably latest within 30 working days from the date of receipt of such communication by the Project

Manager, then the Owner/Project Manager shall take their decision thereon without any undue delay and preferably within next 21 working days and

there upon they shall notify in writing such decision to the Contractor within next 15 working days.

52.2 Decisions, directions and clarifications pertaining to measurements, drawings and certificates taken by the Project Manager/Architect shall be

final and binding on the Parties. The Decisions so taken with respect to any matter the decision for which is specially provided for by these or other

special conditions to be given and made by the Project Manager with or without the concurrence of the Architect are exempted matters for the

purpose of Arbitration proceedings and shall not be set aside on account of non-observance of any formality, any omission, delay or error in

proceeding in or about the same or on any other ground or for any reason. They shall be specifically excluded from the scope of arbitration

proceedings hereinafter referred to.

52.3 Subject as aforesaid in Clauses 52.1 and 52.2, all disputes and differences whatsoever, which shall at any time hereafter arise between the

Parties hereto, touching or concerning this Agreement or its interpretation or

effect or as to the rights, duties, obligations and liabilities of the Parties

hereto or either of them under off by virtue of this Agreement or otherwise as to any other matter in any way connected with or arising out of or in

relation to the subject matter of this Agreement shall be referred to the Arbitration in accordance with the provisions of Arbitration and Conciliation

Act, 1996.

The jurisdiction and arbitration venue shall be at Delhi. The procedure for the arbitration shall be determined by the Arbitrator. Costs of such

arbitration shall be equally shared between the Owner and the Contractor. The Parties undertake to abide and remain bound by the award of the

Arbitrator so rendered.â??

(iii) As per the judgment of the Supreme Court in Duro Felguera S.A vs. M/s. Gangavaram Port Limited (2017) 9 SCC 72,9 arbitration of the disputes

arising out of these two contracts would have to be by two arbitral proceedings, though they may be conducted by a common arbitrator. Possibly, it

would have been appropriate for the petitioner to file two separate petitions. Nevertheless, as the respondent is not joining issue on this aspect, and in

order to avoid multiplicity of litigations, I am not entering into that controversy today, and would be proceeding on the premise that this petition is

maintainable.

(iv) Instead of paraphrasing the dispute between the parties, and the dispute forming subject matter of this petition, I deem it appropriate to reproduce,

in extenso, paras 4.2 to 4.33 of the petition thus:

â??4.2. That the Petitioner issued two (2) tenders for undertaking the following works as part of its Project: (i) Renovation Works-Civil & Finishing

works of the commercial complex, viz. the Central Plaza at Sector-105, 'Mohali Hills', Mohali, SAS Nagar, Punjab (hereinafter referred to as the

Central Plaza Works"); and (ii) Construction of Civil, Structure, Finishing & MEP Work of Community Center at Sector-109, 'Mohali Hills', Mohali,

SAS Nagar, Punjab (hereinafter referred to as the ""Community Center Works"). The Central Plaza Works and the Community Center Works are

individually and collectively referred to as the ""Works"", wherever the context so requires.

4.3. That pursuant to the tenders, the Petitioner awarded the following work orders to the Respondent:

(i) Work Order no. 2064236 for carrying out the Central Plaza Works vide letter of acceptance dated 18.05.2020 (hereinafter referred to as the

Central Plaza LOA""") for an accepted contract amount of Rs. 2,78,19,500/- (Rupees Two Crores Seventy Eight Lakhs Nineteen Thousand Five

Hundred only) on fixed price remeasured contract basis, exclusive of GST and labour cess. A sum of Rs. 50,07,510/- (Rupees Fifty Lakhs Seven

Thousand Five Hundred and Ten only) towards GST (@ 18%) was to be borne by the Respondent. The labour cess was to be borne by the Petitioner,

subject to re-measurement based on actual quantity of work executed. Therefore, the total contract value was for Rs. 3,28,27,010/- (Rupees Three

Crores Twenty Eight Lakhs Twenty Seven Thousand and Ten only) inclusive of GST.

(ii) Work Order no. 2064241 for carrying out the Community Center Works vide letter of acceptance dated 03.06.2020 (hereinafter referred to as the

Community Center LOA""") for an accepted contract amount of Rs. 1,51,23,119/- (Rupees One Crore Fifty One Lakhs Twenty Three Thousand One

Hundred and Nineteen only) on fixed price re-measured contract basis, exclusive of GST and labour cess. A sum of Rs. 27,22,161/- (Rupees Twenty

Seven Lakhs Twenty Two Thousand One Hundred and Sixty One only) towards GST (@ 18%) was to be borne by the Respondent. The labour cess

was to be borne by the Petitioner, subject to re-measurement based on actual quantity of work executed. Therefore, the total contract value was for

Rs. 1,78,45,280/- (Rupees One Crore Seventy Eight Lakhs Forty Five Thousand Two Hundred and Eighty only) inclusive of GST. The Central Plaza

LOA and the Community Center LOA are individually and collectively referred to as the ""LOA"", wherever the context so requires.

4.4. That the LOA comprised of the enclosures viz. Appendix A (Acceptance Statement), Appendix B (Specific Clarifications, Terms & Conditions)

and four (4) volumes of contract documents being the Notice Inviting Tender, General Conditions of the Contract (hereinafter referred to as the

GCC""), the Special Conditions of the Contract (hereinafter referred to as the ""SCC""), the Preamble to Bill of Quantities and Priced Bill of Quantities

(hereinafter referred to as the ""BOQ""), the Technical Specifications, other specifications such as Health, Safety & Environment (HSE) Specifications,

Quality Specifications, Precautions of COVID-19, etc. The terms and conditions of the LOA and the enclosures, i.e. GCC, SCC, etc. in respect of the

Central Plaza Works and the Community Center Works are *pari materia*.

4.5. That subsequent to the issuance of the LOA, the Petitioner and the Respondent executed the following contracts: (i) Contract dated 04.06.2020

setting out the terms and conditions for execution and completion of the Central Plaza Works (hereinafter collectively referred to as the ""Central Plaza

Contract""); and (ii) Contract dated 03.06.2020 setting out the terms and conditions for execution and completion of the Community Center Works

(hereinafter collectively referred to as the ""Community Center Contract"). The Central Plaza Contract and the Community Center Contract are

individually and collectively referred to as the ""Contract"", wherever the context so requires. The LOA, GCC, SCC & Schedule of Fiscal Aspects,

Technical Specifications, etc. form part of the Contract.

4.6. That in terms of the Central Plaza LOA, the Respondent was under an obligation to commence the Central Plaza Works within ten (10) days

from the date of the Central Plaza LOA (""Central Plaza Commencement Date""). The Respondent was further under an obligation to complete the

Central Plaza Works within eight (8) months from the Central Plaza Commencement Date. Therefore, the Respondent was required to commence the

Central Plaza Works by 28.05.2020 and the scheduled date of completion was 27.01.2021.

4.7. That in terms of the Community Center LOA, the Respondent was under an obligation to commence the Community Center Works within seven

(7) days from the date of the Community Center LOA (""Community Center Commencement Date""). The Respondent was further under an obligation

to complete the Community Center Works within five (5) months from the Community Center Commencement Date. Therefore, the Respondent was

required to commence the Community Center Works by 10.06.2020 and the scheduled date of completion was 09.11.2020.

4.8. That in terms of Clause 36.1 of the GCC, it was specifically provided that time is the essence of the Contract. The timeline was fixed being

cognizant and conscious of the present COVID-19 pandemic and the partial lock-down restrictions in force in the state, and accepted by the

Respondent without any demur. A separate annexure providing for COVID-19 Precautionary Measures was also issued along with the LOA. It was

also specifically provided in Clause 22 of Appendix B to the LOA that the

Respondent shall strictly follow the norms issued from time to time under the COVID -19 guidelines of MHA (Ministry of Home Affairs) and local District Administration and that nothing extra shall be payable on this account.

4.9. That in terms of Clause 4.2 of the GCC, the Petitioner made available to the Respondent, access to the Project site for the purpose of carrying out the Works, on award of the Contract to the Respondent.

4.10. That in terms of the LOA, the Respondent was required to submit evidence of the insurance policies and detailed construction programme within fourteen (14) days from the date of issue of the LOA, and a detailed milestone chart along with billing schedule for the contract duration within seven

(7) days from the date of issue of the LOA. This is also reflected in Clause 25 of the GCC, which required the Respondent to additionally submit a manpower schedule, plant & equipment schedule, materials schedule, etc.

4.11. That the Respondent was also required to submit quality and safety procedure to the Project Manager for approval as per Clause 15 of

Appendix B to the LOA. This is also reflected in Clause 13 of the SCC, which required the Respondent to additionally depute a Quality Assurance and Quality Control technical team, including a quality team headed by an experienced quality engineer and a safety team headed by an experienced

safety engineer, for the purpose of establishing and implementation of an effective quality control system at the site. The Respondent was also

required to submit an organization chart showing deployment of such engineers at the site for review and approval of the Petitioner.

4.12. That in terms of Clause 11.1 of the GCC, the Respondent was also required to submit the proposed site organization chart for approval of the

Project Manager of the Petitioner within fifteen (15) days of the receipt of LOA. Further, in terms of Clause 11.2 of the GCC, the Respondent was

also required to submit a final complete list of its manpower, plant & machinery for the approval of the Project Manager. The Respondent was

required to mobilise the necessary resources, manpower, plant and machinery at its own cost, for completion of the Works. The Respondent was

further under an obligation to augment the manpower, plant and machinery without any extra cost whenever required or so directed by the Petitioner

in order to conform to the approved construction programme for achievement of

the timelines.

4.13. That Clause 4 of Appendix B to the LOA provided for payment of mobilization advance of 5% of the accepted contract sum less any provisional sums, against submission of an irrevocable bank guarantee from a scheduled/nationalized bank, valid till completion of the Works.

4.14. That in terms of Clause 5 of Appendix B to the LOA, the Petitioner was entitled to retain in cash @ 5% of the total Work Order amount from the first two running account (RA) bills, towards performance guarantee. Further, in terms of Clause 6 of Appendix B to the LOA, the Petitioner was entitled to retain 5% of invoice/ RA bill amount as security for guaranteeing the quality of the works.

4.15. That the Respondent failed to mobilize its resources at the Project site, within the timeline under the Contract. This was despite the Petitioner having provided the Respondent with space for labour hutments in Sector 109, Mohali, Punjab at the request of the Respondent for the purpose of housing of its manpower to comply with the orders of the Ministry of Home Affairs (MHA) dated 15.04.2020 and 01.05.2020, which permitted construction of works, where workers are available on the site and no workers are required to be brought in from outside (in situ construction). These restrictions were removed by the subsequent MHA orders dated 17.05.2020 and 30.05.2020. In the MHA order dated 30.05.2020, the restrictions on inter-state travel were also removed.

4.16. That the Petitioner by its email dated 28.05.2020, directed the Respondent to mobilize its manpower and commence the painting and repair work for the Central Plaza Works forthwith. The Petitioner also directed the Respondent to submit the work schedule in accordance with the Contract. Similarly, the Good For Construction (GFC) drawings for the Community Center Works were provided by the Petitioner to the Respondent on 03.06.2020 and the Respondent was requested to submit the work schedule and commence work in accordance with the Contract.

4.17. That the Respondent however failed to mobilize its manpower and resources as directed by the Petitioner. The Respondent deployed only a few manpower and resources after 10.06.2020. However, this was not adequate, and no effective work was being carried out at the Project site. The Respondent also failed to submit the work schedule for the Central Plaza Works,

as directed by the Petitioner. The Respondent had further failed to submit the requisite organization charts and manpower, material, plant & equipment schedules for the Central Plaza Works and the Community Center Works in terms of its obligations under the LOA, Clause 11 and Clause 25 of the GCC. The Petitioner once again by its emails dated 16.06.2020, 22.06.2020, 25.06.2020, 03.07.2020, 06.07.2020, 08.07.2020 and 09.07.2020 directed the Respondent to deploy the requisite manpower and resources at the Project site to execute the Works. The Petitioner also directed the Respondent to submit the work schedule for completion of the Central Plaza Work and the revised work schedule for completion of the Community Center Works. Further, it was observed that the Respondent was not following the quality systems and safety protocols, as put to the Respondent's notice by the emails dated 03.07.2020, 18.07.2020, 21.07.2020 and 25.07.2020.

4.18. That it is pertinent to mention that although the Contract provided for payment of a mobilization advance (5% of Contract value), the same was subject to the Respondent furnishing a bank guarantee of the equivalent amount (as provided in Clause 21 of the SCC). The Respondent failed to furnish the requisite bank guarantee as per the terms of the Contract.

4.19. That it is pertinent to mention that as per the Contract (Clause 29 of the SCC), water and electricity for the purpose of the Project was required to be arranged by the Respondent at its own cost and expense. However, the Respondent failed to arrange for a water source and electricity connection in respect of the Central Plaza Works. The Petitioner extended all necessary co-operation in this regard and arranged for the same on behalf of the Respondent. The Respondent had arranged for water source and electricity connection in respect of the Community Center Works. The Respondent is liable to pay the electricity and water bills directly to the Government for the Community Center Works, and indemnify the Petitioner in case of any default on its part.

4.20. That for the Central Plaza Works, the Respondent increased its manpower to 20 persons in the month of July, 2020. However, this was still short of the requisite manpower of 70+ persons so as to ensure completion within the agreed timeline. The Respondent submitted its work schedule for completion of the Works belatedly, on 28.07.2020. As per the work schedule submitted by the Respondent, it undertook to complete the Works by

December, 2020.

4.21. That for the Community Center Works, the Respondent increased its manpower to 16 persons in the month of August, 2020. However, this was still short of the requisite manpower of 45+ persons so as to ensure completion within the agreed timeline. The Respondent was once again requested to submit a revised completion schedule as to how it planned to achieve completion of the balance works within the timeline, as agreed in the original work schedule discussed in the Minutes of Meeting dated 08.06.2020 between the parties. The Respondent was also warned that the Petitioner would not be liable to grant any extension of time for the Respondent's failure to achieve the milestones/targeted schedule and was put to notice regarding award of the balance works to another vendor at the risk and cost of the Respondent, and imposition of penalty by the Petitioner. The Respondent however failed to provide any revised completion schedule to the Petitioner.

4.22. That the progress of work by the Respondent was inordinately slow on account of the Respondent's failure to deploy adequate manpower on the site, shortage of materials, etc. It is pertinent to mention that the Respondent had also failed to submit the requisite organization charts and manpower, material, plant & equipment schedules in terms of its obligations under the LOA, Clause 11 and Clause 25 of the GCC. The Respondent also failed to deploy the safety and quality manpower and timely submit the safety/ quality plan in terms of Clause 13 of the SCC, and failed to timely comply with the quality systems and safety protocols in breach of the HSE Specifications and the Quality Specifications.

4.23. That there was no improvement in the work of the Respondent despite repeated advises, follow-ups and reminders from the Petitioner. The progress of work was extremely slow. The Respondent failed to procure the requisite manpower and necessary materials for the Project, as directed by the Petitioner. The workmanship of the Respondent was also poor. The Petitioner issued repeated warnings and reminders to the Respondent in this regard including emails dated 05.08.2020, 13.08.2020, 28.08.2020, 09.09.2020, 14.09.2020 and 28.09.2020. However, the Respondent was unresponsive and did not adhere to the instructions of the Petitioner.

4.24. That it is pertinent to mention that as per Clause 25.3 of the GCC, the Respondent was required to throughout the Contract period submit to the

Project Manager of the Petitioner, daily site reports showing the record of the site progress, number of employees on the site, number of manpower, plant & machinery at the site, events influencing the progress of work, etc. Further, as per Clause 25.6 of the GCC, the Respondent was required to submit monthly progress reports to the Project Manager of the Petitioner to illustrate the progress of work. The Respondent has failed to submit any of these reports to the Project Manager of the Petitioner.

4.25. That the Respondent was required to submit the RA Bills on a monthly basis as per Clause 31.2 of the GCC. Therefore, the Respondent was required to at least carry out Central Plaza Works of Rs. 351akhs (approximately) in one month so as to complete the work in 8 months. However, the first RA Bill raised by the Respondent was only on 16.09.2020 (4 months after award of the Contract). Further, the progress made by the Respondent between 10.06.2020 to 31.08.2020 in financial terms was only Rs. 9,87,873/- (i.e. 3.55% of the total work), as is evident from the Certificate of Payment dated 25.09.2020 in respect of the 1st RA Bill.

4.26. That the Respondent was required to at least carry out Community Center Works of Rs. 30 lakhs (approximately) in one month so as to complete the work in 5 months. However, the first RA Bill raised by the Respondent was only on 26.08.2020 (2 months after award of the Contract).

Further, the progress made by the Respondent between 15.06.2020 to 31.07.2020 in financial terms was only Rs. 11,26,853/- (i.e. 7.45% of the total work), as is evident from the Certificate of Payment dated 31.08.2020 in respect of the 1st RA Bill. The progress made by the Respondent till

31.08.2020 in financial terms was only Rs. 33,10,847/- (i.e. 21.89% of the total work), as is evident from the Certificate of Payment dated 23.09.2020

in respect of the 2nd RA Bill (Ad hoc) raised on 19.09.2020. The Petitioner has extended all necessary financial assistance and co-operation to the

Respondent. The Petitioner had supplied the Respondent with reinforcement steel on returnable basis at the request of the Respondent, despite the

procurement being in the scope of the Respondent (as per Clause 23 of the GCC). The Petitioner had also released a secured advance of Rs.

3,00,120/- (less deduction) to the Respondent for procurement of MS structural steel at the request of the Respondent, on 21.09.2020. Further, at the

request of the Respondent, an ad hoc amount of 70% of the 2nd RA Bill i.e.

17,27,539/- (less deduction) was released by the Petitioner to the

Respondent immediately, on 12.10.2020 to facilitate the cash flow of the Respondent.

4.27. That the issues of slow progress of the Works were brought to the notice of the Respondent by the Petitioner for necessary action. The

Respondent also gave assurances that it would augment the manpower, and its resources. However, the progress of work by the Respondent did not

improve despite several warnings in this regard from the Petitioner including by the emails dated 14.09.2020, 30.09.2020, 07.10.2020, 08.10.2020,

12.10.2020, 15.10.2020, 18.10.2020 and 19.10.2020.

4.28. That the Respondent miserably failed to adhere to the construction milestones, and there was no realistic possibility of completion of the Works

by the agreed timelines. The Works involve performance of a continuous duty by the Respondent. The Petitioner has repeatedly urged the Respondent

to take remedial steps in this regard. However, the Respondent has paid no heed to the instructions of the Petitioner. The Respondent is admittedly in

breach of the Contract by failing to complete the Project within the agreed timelines. Till date, only 10% approximately (in terms of financial progress)

of the Central Plaza Works has been completed by the Respondent. Further, the Respondent has completed only 28.89% approximately (in terms of

financial progress) of the Community Center Works till date. The Petitioner is also filing along with the present Petition the charts showing the actual

work done and the balance work remaining in respect of the Contract.

4.29. That in the aforesaid circumstances, the Petitioner was constrained to issue Termination Notices dated 19.10.2020 in terms of the Contract,

including but not limited to Clause 49.3 of the GCC, terminating the Contract, and called upon the Respondent to inter alia vacate the Project site,

handover all the equipment, materials, and other things supplied by the Petitioner for carrying out the Works, and deliver to the Petitioner, all

information, data, drawings and documents being property of the Petitioner. The Petitioner was well within its rights under the Contract, to terminate

the Contract. The Contract is determinable in nature and stands terminated. Further, the Petitioner was also entitled to, as per Clause 16 of Appendix

A to the LOA, to appoint a new agency for completion of the Works, in the event the work progress is not satisfactory as per the agreed project

milestones chart.

4.30. That the Petitioner has made repeated requests to the Respondent to submit the full and final bill under the Contract as per the work completed

till date along with final measurements, which are evident from the emails dated 21.10.2020, 23.10.2020, 26.10.2020 and 30.10.2020. However, the

Respondent has till date not submitted the full and final bill to the Petitioner. It is pertinent to mention that the Petitioner has on 02.11.2020 already

made the certified payment of Rs. 4,20,809/- (after making deductions towards inter alia the performance guarantee and security deposit) against the

1st RA Bill raised by the Respondent for the Central Plaza Works. Further, the Petitioner has made a certified payment of Rs. 4,04,503/- (after

making deductions towards inter alia the performance guarantee and security deposit) against the 1st RA Bill and an ad hoc payment of Rs.

17,27,539/- (after making deductions) against the 2nd RA Bill (Ad hoc) raised by the Respondent for the Community Center Works. No other RA

Bills have been raised by the Respondent.

4.31. That it is also pertinent to mention that the workmen of the Respondent have also written to the Petitioner vide letter dated 23.10.2020, stating

that the Respondent has not been releasing payments to them. The Petitioner put this to the notice of the Respondent vide email dated 30.10.2020 and

requested it to resolve the issue of payments. Further, the Petitioner had also started receiving calls from the vendors of the Respondent in October,

2020 regarding failure of the Respondent to clear outstanding payments to the vendors. On one instance, the Project staff of the Petitioner had

received a call from the local Police Station regarding a complaint made by the labour of the Respondent regarding pending payments to them.

4.32. That the Respondent has issued its Replies dated 30.10.2020 to the Termination Notices, wherein it has submitted that the termination may be

recalled or cancelled and that it may be allowed to continue the work. The averments made in the Replies are false, baseless and misconceived. The

Respondent has simultaneously issued Notices dated 30.10.2020 for appointment of an arbitrator, wherein it has unilaterally proposed three (3) names

which is not in terms of the Contract, and are illegal and defective. The Petitioner has issued its Replies dated 21.11.2020 to the said Notices dated

30.10.2020 for appointment of an arbitrator. The contents of the same may be

read herein.

4.33. That the Respondent has till date not handed over the equipment, materials, information, data, drawings, etc., to the Petitioner, and its manpower

is still present on the Project site. The Petitioner has also engaged a third-party agency/contractor to carry out/ complete the balance scope of Central

Plaza Works. The Petitioner apprehends that the Respondent will not remove itself from the Project site and will obstruct the carrying out of the

balance scope of Works of the Project and/or remove material, equipment, etc. from the Project site and also create hindrance in the peaceful

completion of the Works of the Project and disrupt the peaceful carrying out of the Works. In terms of Clause 23.2.8 of the GCC, all the materials at

the Project site are the property of the Petitioner and the Respondent does not have right or claim whatsoever on the materials lying at the Project

site. Further, the construction of the Community Center is a mandatory requirement of the Greater Mohali Area Development Authority (GMADA),

Punjab, without the completion of which, the Petitioner will be unable to apply for the full occupancy certificate in respect of the entire Project. The

Petitioner is required to complete the Community Center to meet the mandatory requirement of the statutory authority.â??

(v) In the above circumstances, the petitioner asserts that an arbitrable dispute has arisen between the parties. It is urged that by failing to mobilize its

manpower in a timely and orderly manner, deploy adequate manpower as per instructions of the petitioner, failure to procure requisite materials, lack

of planning, and other such infractions, the respondent has breached the contract with the petitioner. Additionally, it is alleged, in the petition, that the

respondent has failed to adhere to the covenants of the LOA and Clause 25 of the contract. Despite the scheduled time for completion of contract

having expired long back, the contract is nowhere near completion. In these circumstances, the petitioner seeks to justify its decision to terminate the

contract.

(vi) The only averments in the petition, justifying invocation of the extraordinary jurisdiction vested in this Court to grant pre-arbitral interim protection

under Section 9 of the 1996 Arbitration Act, are to be found in paras 9 and 10 of the petition, which read thus:

â??9. That irreparable injury will be caused to the Petitioner in case the reliefs as

prayed for in this Petition are not granted in its favour which cannot be adequately compensated by way of damages.

10. That the balance of convenience is also in favour of the Petitioner. The Petitioner will face grave prejudice if the present reliefs are not granted.

The work at the Project site has been stopped by the Respondent since October, 2020 and no Works has been carried out at the Project site. The

balance works of the Project can commence only once the Respondent vacates the Project site.â??

(vii) Ms. Manmeet Arora also draws attention, in this context, to para 6 of the petition, which reads thus:

â??6. That the Respondent has already issued notices for appointment of arbitrator, seeking referral of the disputes to arbitration, and the Petitioner

has replied to the same. Accordingly, till such time that an Arbitral Tribunal is constituted, the Respondent must necessarily be restrained from

entering the Project site or interfering with the activities of the Petitioner at the Project site, removing any material and equipment, tools, plant &

machinery from the Project site. The Petitioner also apprehends and reasonably believes that the Respondent will remove all the material, equipment,

etc. at the Project site, thereby depriving the Petitioner of the use of the same as well as disrupt or obstruct the Petitioner, its employees, contractors,

and agents etc. from entering/exiting the Project site and/or undertaking thereon the required activities for completion of the Project and/or procuring

completion thereof through any other third party agency/contractor.â??

3. I have already taken a view, in *Avantha Holdings Limited v. Vistra ITCL India Ltd* MANU/DE/1548/2020 and *CRSC Research and Design*

Institute Group Co. Ltd v. Dedicated Freight Corridor Corporation of India Ltd MANU/DE/1803/2020, based on earlier precedents of the Supreme

Court, that Section 9 of the 1996 Act is not to be routinely invoked. Besides to the consideration of a prima facie case, balance of convenience and

irreparable loss, a Section 9 petitioner would also have to convince the Court that the situation, in which it is placed, is so emergent, as would not brook

the delay which would be occasioned in the petitioner initiating the arbitral process and moving the arbitrator under Section 17 of the 1996 Act. Else, in

my opinion, Section 9 would be infringing the jurisdiction of the Arbitral Tribunal, under Section 17 of the 1996 Act. I have emphasized, in this context,

the fact that the 1996 Act is an Act which is intended to foster arbitration, and confer power and jurisdiction on Arbitral Tribunals, and not an Act

which is intended to principally confer jurisdiction on civil courts. The authority and power vested in civil courts, to pass orders under the 1996 Act,

has, therefore, to be treated as ancillary and in furtherance of the arbitral process, i.e., the initiation and continuance of arbitral process, culminating in an award.

4. On this issue, Ms. Manmeet Arora, learned counsel for the petitioner very fairly submits that she is willing to agitate prayer (a) in this petition

before the Arbitral Tribunal, for which purpose, both learned counsel, ad idem, submit that they would be agreeable to this Court appointing an

arbitrator, as there is no possibility of an amicable resolution of the disputes, and the parties are not able to arrive at a common name, to arbitrate

thereon. However, Ms. Manmeet Arora submits that prayer (b) in the petition is urgent, as, consequent to the termination of the contract with the

respondent, the petitioner has engaged another contractor, and does not want any controversy to remain regarding the exact work undertaken by the

petitioner and undertaken by the subsequent contractor. As such, she exhorts the Court to pass an order appointing a Local Commissioner to inspect

the project site and prepare an inventory of the materials, equipments, tools, plant and machinery, in which exercise the petitioner and the respondent

would also be permitted to be involved.

5. Mr. Santosh Kumar, learned counsel for the respondent has no objection to this request.

6. In view thereof, this Court disposes of the present petition with the following directions:

(i) Qua prayer (a) in the petition, the petitioner is relegated to the arbitral process, in view of the submissions made, ad idem, by the learned counsel for

both parties, this Court appoints Mr. Pradeep Chaddah, District and Sessions Judge (Retd.), [Contact No.9910384665/011-47019297] as the sole

arbitrator, to arbitrate on the disputes between the parties.

(ii) In this exercise, the recitals of facts, hereinabove, should not be treated as an expression of opinion by the Court regarding the allegations of the

petitioner, and would not inhibit the respondent from denying the allegations or setting up its defence in response thereto.

(iii) The learned sole arbitrator would arbitrate on the disputes in accordance with the provisions of the 1996 Act and after giving due opportunities to

both sides.

(iv) The learned sole arbitrator would also furnish the requisite disclosure under Section 12(2) of the 1996 Arbitration Act, within two weeks of

entering on the reference.

(v) The learned sole arbitrator would be entitled to fees, in accordance with the 4th Schedule to the 1996 Arbitration Act.

(vi) The respondent would also be at liberty to agitate any counterclaims, as it may so choose, before the learned sole arbitrator, in accordance with

law.

(vii) Apropos prayer (b), this Court appoints Mr. Suman Jain, Advocate (mobile 9216255775), who practices in Chandigarh, as the Local

Commissioner, to visit the aforesaid sites and prepare an inventory of the materials, equipments, tools, plant and machinery and undertake

measurements, as requested by the representatives of both parties. In case the parties so request, the Local Commissioner would also be at liberty to

take photography and videography of the premises.

(viii) The report of the Local Commissioner, accompanied by any photography and videography, taken by the Local Commissioner, would be placed on

record, in these proceedings, and copies thereof would be furnished to the learned counsel for both the parties by email.

(ix) This Court is not expressing any opinion regarding the value of the work or the measurements taken by the Local Commissioner or whether they

represent the actual work undertaken by the contractor. This would be aspect which the parties would have to agitate before the learned sole

arbitrator, who would take an informed decision thereon, in accordance with law.

(x) The Local Commissioner would be entitled to fees of Rs. 2 lakhs, @ Rs. 1 lakh for each of the sites which the Local Commissioner would have to

visit, which would be borne equally by both parties and would be paid to the Local Commissioner by crossed cheque/demand draft, prior to execution

of the commission.

(xi) A convenient date and time for execution of the commission would be finalized by the parties in consultation with the Local Commissioner.

7. The petitioner is at liberty to move the learned sole arbitrator by filing an appropriate application under Section 17 of the 1996 Arbitration Act,

raising issues agitated in the present petition with appropriate prayers. Any such application, as and when moved, would be decided by the learned sole

arbitrator, in accordance with law.

8. This petition stands disposed of in the above terms with no order as to costs.

9. The Registry is directed to e-mail, to the learned Local Commissioner, a copy of this order, after telephonically ascertaining his e-mail id. Copies of

this order would also be e-mailed to learned Counsel for the parties at their respective e-mail ids.