

(2012) 07 DEL CK 0050

In the Delhi High Court

Case No : I.A. No. 1096 of 2011 in CS (OS) No. 1374 of 2009

Simpark Infrastructure Pvt. Ltd.

APPELLANT

Vs

DLF Limited and Another

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A

Citation : (2012) 131 DRJ 148

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Neeraj Kishan Kaul, Sr with Mr. S.D.Singh, Mr. Rahul Kr. Singh and Ms. Bharti Tyagi, for the Appellant; Sandeep Sethi, with Mr. Pravin Bahadur, Amit Aggarwal, Kishan Rawat, Mohit Mudgal and Mr. Rajan Narain for D-1, Ms. Madhu Tewatia, with Ms. Sidhi Arora, for D-2., for the Respondent

Judgement

Manmohan Singh, J.—By this order, I shall dispose of I.A. No. 1096/2011 filed under Order XXXIX Rule 1 & 2 Code of Civil Procedure, 1908 by the plaintiff in the instant suit seeking interim order restraining the defendants from carrying out any work at the sites in question and during the pendency of the present suit. The brief facts of the case leading upto filing of the present application can be enunciated as under:

2. The New Delhi Municipal Council (NDMC) Defendant No. 2 herein invited the bids for Public Private Partnership (PPP) Project to develop Multilevel Parking (MLPs) - cum- Commercial Complex on two locations, viz., at Baba Kharak Singh Marg, New Delhi and Sarojini Nagar Market, New Delhi on a Build, Operate and Transfer (BOT) basis. Defendant No. 1 DLF Limited submitted the bid for the project.

3. A copy of the bid submitted by the DLF is on record. Under the Head "Compliance Requirements" in Part-I (B) of the bid in Part-B the various column and the replies thereto are indicated as under:

B

Parking Technology (if automatic/ semiautomatic parking systems are offered)

Mention the category- Whether Automatic/ semiautomatic/Manual

1.

Name of the parking system

EOCSAFE

2.

Name of Technology supplier and country of Origin

Name of Technology supplier and country of Origin

3.

Number of projects of similar nature as the one proposed, and total ECS, that has been executed by the supplier India Abroad

200 nos 800 nos

4.

Number of years of operation of the technology provided

18 years

5.

If Technology provider is a foreign firm, details of the arrangements for maintenance and servicing they have in India

Simpark infrastructure of Kolkata is technology provider of ECOSAFE SYSTEM FOR SOUTH ASIA. So they will provide the maintenance and servicing.

4. Under 2 "Technology Selection in Part-I (B) of the bid the DLF submitted in April 2007 enclosed literature titled "Automatic Car Parking System"- SimPark EcoSafe Parking System, General Technical Description ACPS 01 prepared by the plaintiff. Clause-1 is the General Description and Criteria, Clause-2 is the Description of Operation, Clause-3 is the Description of Mechanical Machinery, Clause-4 sets out the LT Electrical Power Distribution, Clause-5 is AC Motor and Controls, Clause-6 is Painting, Clause-7 Operation and Maintenance, Clause-8 Safety, Clause-9 Motor Power Calculation and Clause-10 Miscellaneous. Sub-clause 10.5 states that "installing, testing and commissioning will be provided by Simpark."

5. It is stated that the acceptance or rejection of the bid of the bidders was fully dependent upon the technical competence of the bidder. The defendant No. 2 had constituted a Technical committee consisting of various eminent people of repute and knowledge from NDMC, IIT Delhi and IDFC and the decision of

accepting the bids was to be taken on recommendation of the said Committee. The said Committee, after considering all the relevant datas concluded that the technology provided by the plaintiff in collaboration with defendant No. 1 is more adequate and appropriate technology and thus approved the system provided by the plaintiff. Accordingly, defendant No. 2 also approved the bid of defendant No. 1, only for the reason that the plaintiff provided the said technology. According to the plaintiff, its technology is known as ECO-SAFE technology which originated in Netherland and was developed by the plaintiff. The plaintiff got all the rights and authority to utilize the said technology.

6. Thereafter, defendant No. 2 issued LOI dated 14th September, 2007 to the defendant No. 1 fort both the projects and then after the issues had been discussed between the plaintiff and defendant No. 1, the plaintiff made its final offer dated 8th October, 2007, being the collaborator and technology provider. In pursuance to the LOI, an agreement dated 23rd November, 2007 was executed between the defendants and the same was termed as the concession agreement. The foundation stone of the Sarojini Nagar Market project was laid on 16th December, 2007. Thereafter, an email dated 18th December, 2007 was sent by defendant No. 1 to the plaintiff regarding the negotiations relating to the offers of the projects. On 12th August, 2008, a LOI was issued by the defendant No. 1 in favour of the plaintiff for both the projects. The defendant No. 1 suggested the completion of projects by 31st December, 2009 but, the plaintiff modified the same to the effect that 4 months from handing over the site which is later and the plaintiff would require total eight months working time. The contract was concluded between the plaintiff and defendant No. 1 and the plaintiff's rights in the project were created. The defendants remained under obligations to have collaboration with the plaintiff and complete the projects in compliance of the terms and conditions of the RFP and proposals made by the defendant No. 1 and plaintiff and further on the basis of the technology, layout, designs and conceptual drawings provided and approved. However, the defendants in collusion with each other are intending to oust the plaintiff from the project and introduce a third agency for establishing both the projects. Hence, the plaintiff filed the present suit.

7. On 20th August, 2009, this court passed an order restraining the defendants from using the technology provided by the plaintiff and its principal. The said order was confirmed by this court on 1st September, 2009. However, the defendants maintained that no technology was provided by the plaintiff and proceeded to raise the illegal construction of the ACPS. Considering the facts of the case, vide order dated 13th July, 2010/2nd August, 2010 this court appointed the committee comprising of experts in the field to examine as to whether the technology provided by the plaintiff was being used in the execution of the project. In its report, the said committee concluded that that the technology provided by the plaintiff has been used by the defendant No. 1 for atleast one part of the project. However, the said committee was unable to identify the quantitative value of the technological benefits derived by defendant

No. 1 from the contribution of the plaintiff as part of the total input.

8. As per defendant No. 1, that the plaintiff has foiled the present application with the intention of misreading the report of the technical committee appointed by this court. It is stated by defendant No. 1 that the actual technology of an ACPS vendor is in the manufacturing, supplying, assembling, installing, commissioning, operating and maintaining of the ACPS and the engineering drawings, machine/component specifications, software etc. in relation thereto which have not been provided by the plaintiff to defendant No. 1. The ACPS which is being fitted at the site is a "pallet" based ACPS technology being provided by the defendant No. 1's technology partner M/s PARI Ltd. and as per the report of the expert committee also as noted in para 2.2 of its main report, there are scores of suppliers for "pallet" based and "palletless" ACPS in India and abroad. PARI and plaintiff herein are two such vendors of "pallet based" ACPS. Thus, any claim of the plaintiff over "pallet based" ACPS technology is baseless. It is further stated that the defendant No. 1 has not sourced its "pallet based" ACPS technology from the plaintiff and it is executing the project by using the technology provided by PARI. Moreover, the plaintiff, admittedly does not have any patent for its alleged ACPS technology.

9. According to defendant No. 1, the civil structure works in the projects were excluded from the scope of the ACPS vendor. The design and architecture of the building was prepared by Design Plus on the basis of the "Development Control Norms" prescribed in the RFP as well as the final agreement executed between the defendant Nos. 1 and 2. The said architect was also guided by the building bye-laws. On this architectural drawing, inputs were taken from various specialized vendors/prospective vendors which included the plaintiff. The Parking Arrangement Drawing (PAD) was also prepared by the Design Plus and plaintiff was consulted on this PAD only for the reason to ensure that the plaintiff is able to fix its proposed ACPS in the said PAD. However, ultimately the ACPS was fitted by PARI.

10. The plaintiff placed on record documents showing exchange of e-mails between defendant No. 1 and the plaintiff on 12th and 19th August, 2008 as to what should constitute the terms of the contract for the technology provided by the Plaintiff to be used in executing the project of the DLF. The plaintiff also placed on record, a design review prepared by the Central Road Research Institute (CRRI) which was submitted to it on 12th January 2009 and a letter written by the CRRI regarding the investigation carried out by the CRRI of the proposed automatic car parking system at Baba Kharak Singh Marg as well as Sarojini Nagar Market and the same is at page 121 of the compilation of documents filed by the plaintiff. The said letter of the CRRI mentions that the plaintiff requested CRRI to study and provide expert opinion about the general adequacy of the proposed Automated Multilevel parking (MLP) System at Baba Kharag Singh Marg and Sarojini Nagar Market. The letter also records "it is informed that technical design of the fully automated car parking system would

be provided by M/s. SimPark Infrastructure Private Limited (Kolkata) and DLF would construct the parking complex as their partner."

11. The plaintiff and the defendant No. 1 appear to have fallen out on the payment to be made by defendant No. 1 to the plaintiff for using its technology to execute the project. The e-mail dated 1st July, 2009 sent by DLF to the plaintiff indicates that the DLF wanted the plaintiff to reduce the consideration for the MLP at Baba Kharak Singh Marg by Rs.7 crores and the one at Sarojini Nagar Market by Rs.5 crores. This was not acceptable to the plaintiff.

12. It is contended on behalf of the plaintiff that with the plaintiff and defendant No. 1 having broken off their contractual relationship, the defendant No. 1 should not continue with the execution of the project of constructing the MLPs on both locations by using the technology provided by the plaintiff and the principal in Netherlands. It is submitted that this is a technology developed by the plaintiff's Parent Company and which the plaintiff alone has been authorized to provide in India. The concern is that without the participation of the Plaintiff in the installation, testing and commissioning of the system, not only will DLF not be able to satisfactorily execute the project but it may not also satisfy the requirement of the bids. It is submitted that as long as the defendant No. 1 makes it clear that it will not use the technology of the plaintiff in the execution of the project, the plaintiff will not insist on the stay of the execution of the project itself.

13. I have heard the counsel for the parties. The plaintiff claims to be entity which has provided technology transfer in the form of drawings, chart, lay out and other methodology for establishment of car parking project in association with the defendant No. 1. It is stated that the plaintiff never executed and established any car parking project due to the lack of expertise. The copies of communication exchanged between the defendant No. 1 and the plaintiff herein are also placed on record to show that the plaintiff and the defendant No. 1 were in association with each other. The said emails dated 12th and 19th August 2008 are on record wherein the parties discussed as to what should constitute the terms of the contract for the technology provided by the Plaintiff to be used in executing the project of the DLF.

14. The Plaintiff has also placed on record design a review prepared by the Central Road Research Institute (CRRI) which was submitted to it on 12th January 2009. A written letter by CRRI reflecting out the investigation carried out by the CRRI of the proposed automatic car parking system at Baba Kharak Singh Marg as well as Sarojini Nagar Market is also placed on record. This letter also records that it is informed that technical design of the fully automated car parking system would be provided by M/s. Simpark Infrastructure Private Limited (Kolkata) and DLF would construct the parking complex as their partner.

15. Plaintiff and the defendant No. 1 could not continue with the said arrangement and prior to the allotment the said project, as there was a dispute

between the plaintiff and the defendant No. 1 on the count of the payments for using its technology to execute the project. The e-mail dated 1st July, 2009 sent by DLF to the Plaintiff indicates that the DLF wanted the Plaintiff to reduce the consideration for the MLP at Baba Kharak Singh Marg by Rs.7 crores and the one at Sarojini Nagar Market by Rs.5 crores. This was not acceptable to the plaintiff.

16. After examination of the Bids, the high level committee allotted the project to defendant No. 1. The defendant No. 1 became qualified due to the entire necessary acts done by the plaintiff by providing such technology transfer. In order to safeguard the interest of the plaintiff and to prohibit that the defendant should not continue to use the technology provided by the plaintiff, the plaintiff approached this court by filing the present suit.

17. The said suit eventually came up for hearing on 20th August, 2009, when the learned single judge considering the stand of the defendant No. 1 that the said defendant No. 1 will not use the technology provided by the plaintiff but will use some other technology passed the interim order to the following effect:

Having considered the submissions of learned counsel for the parties and having examined the plaint, the applications and the documents placed on record, it appears that since both the Plaintiff and Defendant No. 1 are not at issue as regards their being at present not in any contractual relationship, there is no question of Defendant No. 1 continuing to execute the project by using the technology provided by the Plaintiff and its principal. Since Defendant No. 1 states that it is free to execute the project by using any other technology and that it does not wish to use the technology provided by the Plaintiff and its principal, there is no difficulty in restraining from Defendant No. 1 from executing the project of the two MLPs at Baba Kharak Marg and Sarojini Marg Market by using the technology provided by the Plaintiff and its principal. An ad interim injunction is accordingly issued to that effect.

18. The said order made on 20th August 2009 was made absolute on 1st September, 2009. The plaintiff thereafter complained before this court that the defendant No. 1 inspite of submitting the stand before this court that the defendants will not use the technology provided by the plaintiff, the defendants are deliberating using the same technology provided by the plaintiff and is indulging into contemptuous act. The plaintiff thus filed the contempt petition under order XXXIX Rule 2 A of Code of Civil Procedure, 1908. The plaintiff has been insisting that the defendant No. 1 is still using the technology provided by the plaintiff. The plaintiff in that light of the issue also filed IA No. 5844/2010 under order XXVI Rule 9 of Code of Civil Procedure, 1908 and also I.A. No. 12854/2009 seeking direction to the defendants to produce all the designs, drawings and layouts sanctioned building plans and all the bid documents furnished and approved by the defendant No. 2 so that the clear picture may emerge.

19. This court had also passed an order dated 4th May, 2010 and directed the

defendant No. 2 to file a report placing the complete facts before the court. Thereafter, the plaintiff further submitted that the affidavit filed by the defendants is dissatisfactory and as such this court on 13th July, 2010 passed the detailed order whereby the 3 persons committee was appointed namely Mr. K.C. Iyer, Professor, IIT Delhi, Mr. Sudipto Mukherjee, Professor, IIT Delhi and Mr. K.K. Mutreja, Engineer-in-Chief, NDMC, however, he retired therefore, in his place vide order dated 2nd August, 2010, Mr. Sunder Jethwani, Chief Engineer (Property Development), DMRC was appointed to the said Committee, who shall submit the report as per the order. The said order reads as under:

In this application notice was issued by me vide order dated 4th May, 2010. Pursuant to the notice, both defendant No. 1 and defendant No. 2/NDMC have filed their respective replies.

I have heard learned counsel for the parties in great detail. In sum and substance, the arguments of the plaintiff/applicant is that at the stage of filing of the bid for multi-level parking cum commercial complex at Baba Khadak Singh Marg, New Delhi and Sarojini Nagar, New Delhi (hereinafter referred to as the "project"), technology was provided by the plaintiff. It is the contention of the learned senior counsel for the plaintiff that these very inputs by way of technology provided by the plaintiff, were evaluated by the technical committee of defendant No. 2/NDMC at its meeting dated 13/14th July, 2009.

Based on this premise, learned senior counsel for the plaintiff submits that statement made before the court on 20th August, 2009 is falsified to the extent that: defendant No. 1 firstly, as per the conditions contained in the bid documents, could not have altered the technological inputs given by the plaintiff; and secondly, defendant No. 1, as a matter of fact, continues to use the technological inputs of the plaintiff.

In the reply, Ms Tewatia appearing for defendant No. 2 has stated that there is no proprietary right in the plaintiff, perse, in the technology related to automated lifts used in car parks; however, what is perhaps peculiar to the plaintiff is the usage of the technology referred to as "pallet". A reference has been made to its reply to demonstrate that defendant No. 2 is using a similar technology of a company, by the name of, Precision Automation and Robotics India Ltd.(in short "Pari") provided by defendant No. 1 for construction of its project. The technology of the said company, "Pari", according to Ms Tewatia is referred to as "chess".

I may only point out that there is no reference to "chess" technology evidently used by "Pari" in the reply filed on behalf of defendant No. 2. This submission has been made by Ms. Tewatia orally, on instructions. Mr. Tikku, the learned senior counsel who appears for defendant No. 1 has assiduously taken me through documents which, according to him, the plaintiff had supplied, at point in time, when the relationship between the two was good. It is Mr. Tikku's contention that a perusal of the documents by itself, would show that the stand

of the plaintiff that, detailed design and drawings had been supplied to defendant No. 1 is inaccurate. Mr. Tikku, therefore, asserts that arguments made today, by the plaintiff, are a repetition of what was stated in court on 20.08.2009. It is his case before me (as it was on 20.08.2009) that technology in the form of design and drawings was not provided by the plaintiff.

Having heard learned counsel for the parties, I am of the view that since it is a purely technical issue, this matter can be best resolved by a committee comprising of experts in the field. Counsels for parties have fairly conceded on instructions that a smaller group of persons, from amongst those who formed the erstwhile Technical Evaluation Committee, which had evaluated the bids, would be in the best position to examine the matter. Accordingly, Mr. K.C. Iyer, Professor, IIT Delhi, Mr. Sudipto Mukherjee, Professor, IIT Delhi and Mr. K. K. Mutreja, Engineer-in-Chief, NDMC; shall constitute a three member committee. The said Committee shall examine as to whether the technology which is being used presently, in executing the project, is the one, (if at all) provided by the plaintiff. On this aspect of the matter all parties shall assist the Committee. Defendant No. 2/NDMC shall, in particular, provide all such documents and information which may be sought by the Committee for the purposes of determination of the issue at hand. It is made clear that the documents which will be placed before the committee shall include, the documents filed at the stage of bid, as well as the earlier report submitted by the then Technical Evaluation Committee. The committee shall also, be handed over documents, which the plaintiff has filed in this court, (i.e., those appended at pages 61 to 87 of the document file). The committee shall submit its report, preferably within a period of six weeks from today.

Mr. Kaul submits that the plaintiff shall bear the fees which may be fixed by the court for execution of the commission. Accordingly, it is directed that each committee member shall be paid a fee of Rs 50,000/- for their efforts.

Application is disposed of.

IA No. 12854/2009

In view of the orders passed in the captioned application, learned senior counsel for the plaintiff does not press the present application.

Application is dismissed as withdrawn.

20. The said three persons Committee wherein Mr. Mutreja was replaced by Mr. Sundar Jethwani has filed its report dated 9th October, 2010. The findings arrived by the said report reads as under:

"Conclusion of the Committee

6.1 On comparison of the final architectural drawings submitted by NDMC and DLF being used for execution now and the inputs provided by Simpark (ref sub para 5.9 (f) above), it is observed that there is substantial similarity between the

inputs provided by Simpark in the preparation of layout/architectural drawings and the one that is being followed now for execution. For any functional requirement, if ten different architects would develop ten different concepts or schemes including deciding on the number of floors for system, isolating commercial area from parking area, or provision of setbacks around the building, etc. and no two concepts or schemes are generally expected to match as much as it is observed in the present case.

6.2 It is also noted from the sub para 5.9 (b), (c) and (d) above that as per the original understanding between DLF and Simpark that the entire mechanical parking system with its electronics and electrical alongwith spares and maintenance for 12 months would be in the scope of Simpark and thus Simpark would be responsible for Supply, Installation, Testing and Commissioning of Automatic Car Parking System including lifts, Software and Hardware, Electronic, Electrical works including CCTV and training of staff for operation and maintenance; only civil and structural work are excluded from the scope of Simpark.

6.3 It was confirmed by Simpark during the meeting on 09.09.2010 that there was no exchange of drawings or documents related to mechanical system as brought out in para 6.2 above.

6.4 It has already been brought out in para 2.3 above, any parking system would consist of several interdisciplinary subsystems such as preparation of system layout drawings conforming to required standards and tender mandate (ref sub-para 2.3 (a) and (b)), getting their approval from appropriate authorities (ref para 5.4), and selection, supply, assembly and/or installation of mechanical and electrical/electrical sub-systems (ref sub-para 2.3 (c), (d) and (e)). From the examination of several documents and discussions held it is also concluded DLF has not been the beneficiary of the total technology of car parking system from Simpark, but a beneficiary of technology of at least for one part of the project, developing the Parking Arrangement.

6.5 Transfer of technology upto and only upto the PAD from Simpark to DLF is discerned by the committee. The committee is however, unable to identify established practices for apportioning quantitative value of the technological benefits derived by DLF from the contribution of Simpark as part of total technological input.

21. One of the member namely, Mr. Sunder Jethwani has also submitted explanatory note. The relevant extract of note reads as under :

All this, which constitutes "Technology" in the context of ACP System too, has undisputedly not been transferred/provided by SIMPARK. On the contrary, the present Technology supplier is engaging all these processes, utilizing technology resources at his end, in his own unique way for manufacturing/assembling/ installing/ integrating and commissioning the ACPs. As compared to transferring information/knowledge, the technology in the instant case, is considered involved

in making the things happen.

Technology is applied science, it is thus considered that the "technology" being used presently in executing the project, is not the one provided by the plaintiff/ is not SIMPARK technology for Automated Car Parking (pallet based or puzzle) System (ACPS).

22. Though, thereafter clarification on explanatory note is also filed, issued by Prof. K.C. Iyer and Prof. S. Mukherjee which reads as under :

2.0 On reading of the explanatory note it was found that the "explanatory note" is not in consonance with the twelve-page report (main report) submitted by the Committee and hence the following clarification to the "five-page explanatory note by Mr. Sunder Jethwani" is being issued.

2.1 While the Committee members during deliberations had looked into various aspects of technological details of the car parking system, and arrived at one final conclusion, Mr. Sunder Jethwani had desired to submit as explanation of the procedure followed in procurement of parking technology in DMRC. A handwritten document prepared by him in this regard, was discussed by the Committee.

2.2 The majority opinion within the Committee felt this as superfluous, as relevant details of technology have already been described in the para 2.3 of the main report and his personal experience was not directly relevant to the parking project referred to the Committee. Hence it was not included in the report. However, the Committee allowed him to submit his account of his experiences to the Court along with the report.

2.3 The "explanatory note" submitted by Mr. Jethwani was not made available prior to submission and hence has not been reviewed by the Committee.

2.4 A reading of the "explanatory note" made available to other members of the Committee on 21st October, 2010, has sections which are at variance with the contents agreed to during deliberations of the Committee.

3.0 Therefore, it is submitted that the Hon"ble Court may consider the "explanatory note" submitted by Mr. Jethwani as an independent note written in his personal capacity without reference to the Committee.

23. The plaintiff on the basis of the findings of the said report again filed the application which is I.A. No. 1096/2011 seeking the prohibitory orders restraining the defendants from continuing with the said project, though during the course of hearing of the interim application, it was admitted that construction of work at the sites in question is already complete and multilevel parking at both locations is under operation.

24. It is stated by the plaintiff that the mere perusal of the report would reveal that it was the plaintiff that had provided the technology to the defendant No. 1 which is pallet type and the same is being misused by the defendant No. 1 and

thus the defendant No. 1 ought to be restrained immediately from doing the same.

25. Mr. Neeraj Kishan Kaul, learned Senior counsel for the plaintiff has made his submissions in support of the present application which can be outlined to the following effect:

a) Firstly, Mr. Kaul, learned senior counsel relied upon the para 2.1, 2.3 (a) to (e), 5.6, 5.7 and, 5.10 along with the para 6.1 of the report and urged before this court that the technology used by the defendant No. 1 is the same what has been supplied by the plaintiff. Thus, this court should intervene and should immediately prohibit the continuation of the said project.

b) Secondly, Mr. Kaul argued that the defendant No. 1 is also making incorrect and false statements before this court. The said report would reveal that the defendant's stand before this court on 20th August 2009 stands falsified and thus, the defendants are guilty of contempt of court as the defendant No. 1 despite making the categorical statement that the defendant No. 1 shall not use the said technology supplied by the plaintiff has used the same.

c) Mr. Kaul submitted that the defendant No. 1 and 2 are colluding with each other, the terms of the bid agreement would reveal that the defendant No. 1 could not have altered the technology at all. Thus, the defendants have used the same very technology by only taking the name of PARI. The said entity PARI has no experience in executing and establishing the parking system. Thus, the defendants are still misusing the technology of the plaintiff.

d) Mr. Kaul argued that the committee report as such has to be seen that the explanatory note of Mr. Sundar Jethwani is immaterial as the same is not part of the report. It is argued that the said explanatory note written by Mr. Jethwani was not supplied to the committee members and the said clarification is filed later on. Thus, the said note cannot be relied upon by the defendants to escape the liability of contempt as well as to contend that the technology is different.

e) Mr. Kaul, argued that the stand of the defendant No. 2 being an instrumentality of the state urging that the said technology as approved has been supplied by the entity which is PARI is not correct. This is due to the reason that by virtue of the terms of the agreements, the defendant No. 1 could not have altered the technology, thus, the said stand of the defendant No. 2 is taken in order to harbor the guilt of the defendant No. 1. Thus, it is also stated that the defendant No. 2 did not carry out any technical audit upon PARI and thus is clear that the technology as the same was made available to them has been used for the project.

f) Mr. Kaul argued that the letters filed on record especially letter dated 17th July, 2009 and letter dated 10th September, 2009 would further make it clear that PARI could not have provided the technology to the defendants.

g) Mr. Kaul argued that the defendants are guilty of inequitable conduct and as

such have no right to claim equity. A person who seeks equity must do equity. The said solemn principle has not been followed by the defendants as it is clear that the defendants are taking stands contradictory to RFP as well as the other agreements where under no alteration was permissible of the technology. Now, therefore, it does not lie in the mouth of the defendants to claim equity, wastage of public money as well as public interest in order to support or justify their stand. If the erection is illegal in law, the same can be ordered to be demolished.

26. By making the aforementioned submissions, it has been argued by Mr. Kaul, that this court should immediately pass the restrained orders in terms of I.A. No. 1096/2011 and also order the necessary demolition of the said erection as the same is being illegal as the Court is not powerless of comply its own order.

27. Per contra Mr. Sandeep Sethi, learned senior counsel for the defendant No. 1 and Ms. Tewatia, learned counsel for the defendant No. 2 have made their submissions which can be outlined in the following manner:

a) Firstly, learned counsel argued that the plaintiff does not have any patent for the ACPS technology in India and there are other vendors who are using the technologies of the similar kinds which is also finding mention under para 2.2 of the report submitted by the experts.

b) It is argued that an automated car parking system is an intricate mechanical parking system which is automated with the help of several devices functioning simultaneously. No drawings or documents in relation to this mechanical car parking system, hardware, algorithm, integration of mechanical. Electrical and automation were exchanged between the plaintiff and the defendant.

c) Learned counsel for the defendants have further argued that ACPS vendors had to bear number of responsibilities like supply, installation of lifts, testing and commissioning of the ACPS software and hardware and other activities which are not provided by the plaintiffs at all. Thus, the by not doing these acts, it cannot be said that the plaintiffs have actually indulged into the technology transfer to that of the defendants.

d) Learned counsel further argued that the architectural works are not the part of the technical parking system. The same has been undertaken by the architects duly appointed by the defendants. The counsel explained the entire process of architectural structure by stating as under:

? The design and architecture of the building was prepared by Design plus on the basis of the Development control norms prescribed in the RFP as well as the final agreement executed between DLF and NDMC.

? Inputs were also taken on this architectural drawing from various specialized vendors/ prospective vendors such as air conditioning, DG sets, lifts etc.

? Parking Arrangement drawing (PAD) in the present case was also prepared by the Architect Design plus on the basis of the size and shape of the building, along

with the "parking guidelines" stipulated in the clause 4 of schedule 1 of the RFP document itself. The said clause gives the fixed design parameters of the parking area.

Thus, the same again reflects that the overall parking structure and erection is distinct from that of what the plaintiff alleges.

e) Learned counsel for the defendants argued that there are differences and material changes in PAD which ultimately has been fitted by PARI, the same also finds mention in Technical committee report. The plaintiff being one of the prospective vendors cannot seek injunction only basis of few inputs provided by it. There are material changes which make the entire project independent work of its own.

f) Learned counsel relied upon the explanatory note which is appended to the report to contend that the technology being used by the defendant No. 1 is not the one supplied by the plaintiff. Thus, the said view is also in consonance with the stand taken by the defendants earlier that the technology has not been supplied by the defendant.

g) Learned counsel for the defendant argued that the project is near to completion and the said project of automated parking system is aimed at preventing the problem of parking which is in public interest. Thus, there is an outweighing public interest which compels that this court should not stop the said project from functioning. Learned counsel relied upon the judgment of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, which holds that the public projects should not be enjoined on account of dispute between the private parties.

h) Learned counsel for the defendant No. 2 submitted additionally that there is no privity of contract between NDMC and the plaintiff and thus the allegation of the plaintiff are baseless.

h) Learned counsel for NDMC reiterated that the defendant No. 1 has assured the defendant No. 2 that the said defendant is no using ECO SAFE technology but the using the technology provided by PARI which is an another service provider.

By making the aforementioned submissions, learned counsel for the defendants submitted that the application filed by the defendant is therefore liable to be dismissed as prayer made in the application has become infructuous, as both locations are complete and the said car parking is being used by the public.

28. I have gone through the application, reply filed by the parties, documents filed by the parties on record and also perused the three persons committee report filed on record. I have given my consideration to the submissions advanced by the parties at the bar. I shall now proceed to deal with the submissions made by the parties one by one.

29. Firstly, I think it is appropriate to understand as a matter of backdrop as to

what necessitated this court to appoint the three persons committee report. This will enable this court to answer the submissions of the parties as to whether the findings of the committee report have actually narrowed down the scope of controversy or there are further factual enquiries left over prior to coming to the positive finding that the defendants are using the plaintiff's supplied technology.

30. Let me thus first state the backdrop to the appointment of the committee by analyzing the order dated 13th July, 2010. On the bare reading of the order dated 13th July, 2010, it is clear that the said order was passed by the learned single judge when on the facts before the court, it was not easy to ascertain as to whether the plaintiff's claim that it has supplied the technology to the defendant No. 1 as inputs in the form of drawings, lay out etc are correct or not.

31. This is due to the reason that the plaintiff continued to insist that the defendants are using the technology provided by the plaintiff. On the other hand, the defendant's counsel equally refuted the contention that the work in question which is being carried on is totally different technology wise and the said technology is not the same what has been provided by the plaintiff. It was also the argument that there was no exchange of any drawings etc with the plaintiff. It was also the argument that the defendant No. 1 is taking the assistance from PARI as a vendor and not from the plaintiff which is a different technology. In this backdrop, when the court was not able to determine as to whether the plaintiff had actually provided the said technology which the defendants have been using, the court appointed a committee to do such factual enquiry with the scope that the said Committee shall examine as to whether the technology which is being used presently, in executing the project, is the one, (if at all) provided by the plaintiff.

32. Given this backdrop, the court appointed three persons committee to do such factual enquiry so that that the clear picture may emerge before the court in relation to the fact as to whether the technology which is being used presently is the one provided by the plaintiff.

33. Let me now see as to what are the findings of the committee. The findings of the committee have been mentioned in para 21 of the judgment.

34. Upon meaningful reading of the findings of the said committee report, there are some facts which come to the light which are highlighted as under:-

a) That the committee gives a finding that there is a kind of substantial similarity between the projects contemplated by the plaintiff in the form of drawings, layout etc. and the one which has been executed by the defendant in para 6.1 of the committee report.

b) In para 6.3 the committee however records a finding that there was no exchange of drawings, layout and other things between the plaintiff and the defendant No. 1. Committee also arrived at the finding that the defendant No. 1 was only the beneficiary of the plaintiff's inputs in the said technology as one

part of the entire project and the defendant No. 1 has not been the beneficiary of the entire technology transfer involved in the project.

Given the aforementioned discernible position emerging from the findings of the committee report upon meaningful reading of the said findings, it is clear that though the committee report observes that there is similarity between the plaintiff's inputs and drawings and other material vis-à-vis defendant's execution of the work. However, the said finding is immediately qualified by the fact that the defendant No. 1 was not the beneficiary of the entire project on the basis of technology transfer supplied by the plaintiff. Thus, the scope of enquiry for which the committee was appointed by the court as to whether the technology used at present is the one supplied by the plaintiff has been answered by the committee by finding that there is a similarity between the inputs and technology used but the defendant No. 1 is not the beneficiary of the entire inputs and only part of the project which is a parking arrangement.

35. A conjoint reading of a committee report findings would show that on the one hand the committee is finding the similarity between the technology transfer and the execution of projects but on the other hand recording the finding that there was no exchange of drawings layout design between the plaintiff and defendant No. 1 and also giving the finding that the defendant No. 1 is not the beneficiary of the entire technology transfer or the inputs provided by the plaintiff the defendant is only the beneficiary of part of the technology which has been provided by the plaintiff. Collective reading of the said findings leave room for further factual enquires to be undertaken by the court before arriving at the positive finding that the defendants are using the plaintiff's technology on the basis of technology transfer.

36. Thus, some new facts have emerged which are that the plaintiffs participation of giving inputs is confined to part of the project. Thus, the new dimension is given that there is an entire project as a whole and there is part of the project for which the plaintiff has supplied the inputs in the form of drawings, lay out etc. In the light of the said findings, Following are factual enquiries which are still required to be answered as a condition precedent to arrive at the finding that the defendant No. 1 is using the technology supplied by the plaintiff:

a) What is the role of the said part of the project in the entire project? (The said role of the accessible technology and the positive finding relating to the same will enable the court to discern properly and find out similarities in the part which is accessible vis-à-vis the defendant's project and find out the extent of dissimilarities with the residual part?

b) Whether the project seen as a whole can be said to be based on the plaintiff's technology transfer when there is a finding that the defendant No. 1 is not beneficiary of the entire project?

c) Whether the other parts in the project also involve the same kind of inputs, drawings, layout or creativity etc?

d) In the affirmative, if the said hard work, skill and creativity or the inputs are clubbed with the said part of which the defendant No. 1 is beneficiary, will it constitute the independent work of its own or will it still be called as the one based on the plaintiff's inputs and drawings?.

e) Whether the similarities occurring in the project work / technology transfer undertaken by the plaintiff and the execution of the project are incidental or the one which are imitation of the plaintiff work? (This is due to the reason that the committee report itself records that defendant No. 1 is not the beneficiary of entire set of technology and also there was no exchange of drawings between the parties.)

f) Whether such similarities occurring in the two competing projects are commonplace in the industry as that will lead to a situation whether the similarities will be called incidental in nature and not the one which is imitating anyone's work? (this is essential due to the reason that the plaintiff claims the technology transfer on the basis of document and not claiming any patent or authorship for which the originality of the work is essential. For testing the originality and invention, the said technology must be exclusive and not commonplace).

g) Whether the plaintiff is the author and owner of the said technology transfer in the form of drawings layout etc. The said aspect needs consideration as the mere possession of some technology does not vest any rights to a person unless the said work is an original work emanating from the author or owner. If the answer to the factual enquiry at point (f) would come wherein it is found that the said drawings and the technology though not patented by anyone but is common place in the industry then it is difficult to visualize as to how the same can be appropriated by a single proprietor like the plaintiff and becomes actionable solely on the count of similarities which are available in the industries by virtue of presence of other vendors. Thus, the title aspect also needs consideration.

37. All these are relevant facts which have been emerged as a consequence to the committee report as the committee came to the conclusion that the defendant has been only beneficiary of the part of the project. In the light of the same, till the time the said factual finding enquiry of the all the facts stated above is conducted, it is not feasible to arrive at the positive finding that the defendant No. 1 is/had been using the technology based on the inputs of the plaintiff and also that the defendant No. 1 is in violation of the order passed on 20th August, 2009.

38. It is noteworthy that the said facts stated above are also disputed facts and not admitted ones as the defendants are arguing that there is sufficient level of skill, creativity, labour and work exercised post such benefit which might have enured to the defendant through plaintiff (though they are disputing so that too) in the form of drawings created by architects, inputs by other persons working which make the work or project as a whole independent one. Thus, the said facts

till the time conclusively established in the trial cannot be assumed in favour of the plaintiff on a priori basis.

39. Let me now examine the submissions of learned counsel for the plaintiff:

a) Learned counsel for the plaintiff referred to some paragraphs of the report wherein the recordings are made about the similarities between the plaintiff inputs and the defendant project and urged that this court should proceed to prohibit the project. The said submission cannot be accepted as the court at this stage is not concerned with what is emerged out of selective reading of the report but is concerned with the findings of the committee report. The collective reading of the findings reveal that the similarities are found but it is equally stated that the defendant is not the beneficiary of the entire technology. All this would lead to further fact finding and till the time, the same is determined in trial, it would not be wise to come to such positive finding on the basis of the recordings of the report.

b) Learned counsel argued that this court should not concern itself with the explanatory note of the report. This court has not given the findings on the basis of the explanatory note but on the basis of the findings of the committee which have surfaced some new facts and factual enquiries.

c) Learned counsel for the plaintiff argued that the defendants could not have altered the technology due to the covenants entered and thus the defendants stand before this court is belied. This is again an assumption of the facts. There can be an another possibility that once the defendants are faced with the complaint of the plaintiff in the form of the present suit, there may be certain measures which might have adopted further to change the technology and in that event it might have resulted in to something distinct technology. Whether it is breach or not is between the parties to the covenant and the same by itself cannot be a conclusive determination that the defendants' technology is the same as that of the plaintiff.

d) Learned counsel for the plaintiff argued that this court should hold the defendant guilty of contempt. I find that at this stage when the facts are not conclusively established before the court, the defendants cannot be said to be guilty of contempt of court's order.

40. The learned counsel for the plaintiff has disputed the fact that in this interim application being I.A. No. 1096/2011, the plaintiff sought the relief restraining the defendants from carrying on any work on the sites in question, though the construction at both the locations is already complete and they are under operation. He submits that the Court is not powerless to pass the appropriate orders against the defendants to restore the status-quo ante.

41. For the reasons stated in paras-34 to 37 of my order, I am afraid to accept the submission of the learned counsel for the plaintiff. No doubt, in the present case, when the interim order dated 20th August, 2009 was passed whereby

defendant No. 1 was allowed to proceed with the project but without using the technology provided by the plaintiff. The said order was also confirmed at later stage. But, the further orders are not warranted till the time facts are conclusively established in trial.

42. It is well settled law that the contempt jurisdiction is exercised in order to preserve the majesty of the superior court. The said proceedings are quasi criminal in nature and must be established on the principle of beyond reasonable doubt. In the event that there are inconclusive facts which are resulting into two views, one in favour of the petitioner and another in favour of the contemnor. The contempt cannot be said to be made out. Therefore, it is very difficult at this stage to assess as to whether defendants are guilty of contempt or not. The said aspect of the matter is also kept pending and the same would be considered after trial.

43. It becomes doubtful as to whether the execution of the work conducted by the defendant at this stage as an independent work or as an imitated work till the time the said factual enquiries are established during the course of the trial.

44. Accordingly, the plaintiff's application being I.A. No. 1096/2011 cannot be allowed for the grant of injunction restoring thereby status-quo ante as the committee report findings leaves a room for further fact finding in order to come to positive finding that the project of the defendants is based on the plaintiff's technology transfer as the committee report only talks about the part of the project and that leaves so many questions open ended and disputed between the parties.

45. The balance of convenience shall also does not lie in favour of the plaintiff as the plaintiff can be compensated in terms of money for the loss of technology transfer if any but the defendant would much more inconvenienced if the project which has already been completed and erected be directed to demolished on premature basis without conclusive finding of the facts. The irreparable loss shall equally ensue to defendants than to plaintiff.

46. Under these circumstances, the contention of the plaintiff cannot be accepted that the appropriate order be passed to restore the status-quo ante. However, this Court is of the view that the contentions raised by the parties have to be considered after the trial of the suit. Accordingly, the present application is disposed of with the following directions:- (a) The trial of the suit is expedited. The evidence of the parties shall be recorded by a retired Additional District Judge after framing of issues.

(b) Defendant No. 1 shall produce a separate statement of account with regard to the two projects as well as all requisite documents of these impugned projects within the period of six weeks by way of affidavit.

(c) As regards the contempt application, the same shall be taken up at the final stage of the suit.

The findings given herein are tentative which shall not have bearing in any manner when the matter would be considered by the Court after the trial.
CS(OS) No. 1374/2009

List on 10th September, 2012.