

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 744 of 2015

M/s. Reliance Consultancy & Engineering Works (Pvt.) Ltd.

Versus

Civil Aviation Authority & another

Date	Order with signature of Judge
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For hearing of CMA No. 7064/2015

Date of Hearing: 04.05.2016

Plaintiff: Through Mr. Ali Almani Advocate

Defendant No.1: Through Mr. Ovais Ali Shah, Advocate

Defendant No.2: Through Mr. Danish Qazi State Counsel along
with Mr. Nayyar Ziauddin, Advocate

Muhammad Shafi Siddiqui, J.- Plaintiffs have filed this suit challenging the termination letter dated 30.4.2015 which is claimed to be malafide, arbitrary and discriminatory. It is claimed that the plaintiff has performed part of his contract and still is willing to perform, subject to defendants fulfilling their obligation and handing over the possession of the entire area. It is claimed that in pursuance of comprehensive bidding process the plaintiff was awarded work for construction of Thar Airport near Mithi district Tharparkar (hereinafter referred to as "Airport"). It is claimed that letter of acceptance was issued on 15.3.2011 by Civil Aviation Authority for a total price of the project as Rs.808,146,183. That initially maximum period of 547 days was provided subject to extension of time in accordance with law of contract. It is claimed that the plaintiff commenced work at site and after short span of time the private land owners started interfering in the work on account of non-payment by the government. It is claimed that on account of clause-42.1 of the contract the employer was bound to

handover the possession of the site for execution of work and in case of any delay, the engineer is required to determine the additional cost and extension of time. It is claimed that various meetings were held and correspondence was exchanged between them but they failed to handover complete and uninterrupted possession of the land on which the subject airport was required to be constructed. It is claimed that due to revision in design for category "c" aircrafts plaintiff was asked to carry out sand dune excavation. On account of certain additional work the plaintiff also submitted its bills which are also pending. Despite the fact that the plaintiff complied with all the additional instructions of the engineer and employer, the outstanding payments were withheld on false pretext. There was no variation in the work evaluated nor the payment was made on account of the additional work which comes to Rs.34 crores at the time of filing of the suit. It is claimed that the employer was issuing false and frivolous notices to the plaintiff without addressing the actual issue in relation to the interference by the land owners. The plaintiff earlier filed a Suit No.413/2014 in relation to the outstanding amount which was also disposed of in terms of the compromise decree. It is claimed that the instant suit is not only for performance of a contract but also the compromise decree and hence the subject contract cannot be considered as simple contract as it is coupled with the decree of the Court in the earlier proceedings. The instant suit is filed on account of the fact that on 30.4.2015 the defendants No.1 & 2 have terminated the contract on account of delay in completion of work. It is claimed that the period of construction was dependent upon the availability of land and its uninterrupted possession hence they have failed to adhere to the terms of compromise decree which is to be read along with the contract. Hence the plaintiff filed this suit on account of unlawful termination of the contract.

2. On the other hand learned Counsel for defendant No.1 argued that the subject suit is not maintainable in view of the fact that the building

contract which is a subject matter of this suit cannot be enforced under the law. It is claimed that the plaintiffs have filed earlier Suit No.413/2014 in relation to their outstanding dues which was disposed of and in terms of clause-6 of the compromise the dispute in relation to the proceedings were to be referred to two arbitrators to be appointed one by each party in consultation of defendant No.2 hence on this score the matter is not likely to be proceeded and should be referred to the arbitrators. It is claimed that in pursuance of compromise decree passed by this Court plaintiff failed to adhere to schedule-A attached to the compromise and hence on account of consistent failure to comply the instant suit is based on malafide. On such preliminary score alone such restraining orders as claimed in their application cannot be maintained. It is further claimed that insofar as the present claim of not providing the private land is concerned, that stood resolved by virtue of earlier decree passed in Suit No.413/14 and the plaintiff cannot take shelter of not providing the requisite land. This the defendant No.1 submitted without prejudice to the contention that no land as allegedly claimed by the private land owners comes in the way of the alleged construction which is to be raised on the government land.

3. Learned Counsel for the defendant No.2 also raised identical questions which touches the maintainability of the suit and has also adopted the arguments of learned Counsel for the defendant No.1.

4. Mr. Danish Qazi learned State Counsel has taken me to the various correspondence available on record which shows the slow progress throughout by the contractor. He has referred to the documents available at page 365 relevant at page 367 where the Sindh Coal Authority has shown a great concern as the question of payment to the claimants has nothing to do with the work as per contract. It is further highlighted by learned State Counsel that the scope of work to be executed on the private land which is claimed to have not been

acquired, is limited to the boundary wall, fences, lamination and guarding of fear weather strip and hence the availability of the land for the plaintiff in relation to the subject contract is immaterial since he has failed to execute the work on the land which is already available with him.

5. I have heard the learned Counsel and perused the available record. The subject matter of the suit involves is a question of law which is far more important than the questions of facts. Though the plaintiff Counsel has agitated that it is dependent upon the land to be made available for raising construction however the prime issue involved in relation to the performance of the contract which is being sought by the plaintiff is crucial. Once the plaintiff is able to cross such hurdles the questions as raised by the plaintiff would come to lights. In order to seek the enforcement of this contract some serious burden rest upon the plaintiff. In relation to enforcement of such building agreement plaintiff's Counsel has primarily relied upon few judgments.

6. In case of Shahid Mehmood reported in 1997 CLC 1936 the learned Judge of this Court held that there is no specific statutory provisions requiring the public authorities to act in good faith or to adhere the principle of natural justice. Nevertheless such duties have already been treated to adhere by public functionaries as a matter of law and the Hon'ble Supreme Court found them enforceable irrespective of the consideration that the employment was contractual and hence learned single Judge was of view that the "expression of law has been used in its broader sense." Relying on this learned Counsel for the plaintiff raised grievance that it is the utmost duty of the defendants to have provided such land which they have failed. Learned Counsel for the plaintiff in relation to the public contract has also relied upon the principle that the declaration sought was not in the nature of enforcing a contract but also to be adjudged that their services were wrongly terminated. This

declaration was claimed to have been lawfully considered by the Court and that too for the employees of statutory body. (No doubt seeking a declaration as to the wrongful termination is one thing and the restoration and setting aside of such termination letter is yet another. One can seek such declaration that he was wrongly terminated and then claim damages but as to the restoration and for setting aside termination is off course different proposition altogether. No one has objected to the claim of damages on account of alleged wrongful termination. What is being agitated is the restoration of the contract and the injunction sought through the listed application.

7. Plaintiff's contention that while the routine contractual dispute between the private parties and public functionaries are not open to the scrutiny under the constitutional jurisdiction breaches of such contract which do not entail enquiry into or examination or controversial questions of fact if committed by the government, semi government or local authorities or like controversy if involving the reliction of obligation flowing from a statute/rules of instruction could adequately be addressed for relief under that jurisdiction. However, the learned Counsel is unable to support his arguments as to which statute rules have been violated which could adequately be addressed for relief under the jurisdiction. The rule is to be plat-formed on the premises that the public functionary are obligated to have acted justly, fairly, equitably, reasonably and without any element of discrimination and within the parameters of law.

8. The crucial point that needs to be determined is whether a contract of the nature as involved in this suit could be enforced under the law. Though the learned Counsel for the plaintiff has supported his arguments through a decree obtained by them in the earlier Suit No.413/2014 which they claimed to be a super agreement by virtue of decree and hence the ordinary meaning and applicability of Sections 21

and 56 of the Specific Relief Act could not be applied in these proceedings as claimed. In support of these contentions learned Counsel has relied upon the case of Peer Dil & Others v. Dad Muhammad reported in 2009 SMCR 1268 and the case of Salika Businessmen's Association & Others v. Howrah Municipal Corporation & Others reported in 2001 Supreme Court cases 688. It indeed has an edge insofar as the vetting of the agreement is concerned but it does not only mean for the benefit of one party. This compromise decree confers certain rights and obligations on the parties and cannot be read in isolation of the responsibilities which are vested on them. The initial arguments of plaintiff that they are willing to perform their part of contract "provided" the defendant would also adhere to their commitment itself is sufficient to determine the status and enforceability of agreement. The contention that it has been considered as a super contract would take away nothing from applicability of Sections 21 and 56 of the Specific Relief Act. The super contract may have sanctity attached to it but the super contract itself cannot supersede the provisions of Sections 21 and 56 of the Specific Relief Act. The case law relied upon by the learned Counsel for the plaintiff in this regard are hence distinguishable. Insofar as the equitable remedies are concerned, as raised by the learned Counsel for the plaintiff, and has also cited the relevant extract from the principle of equitable remedies by I.C.F.SPY LLD, the equities lie in favour of those who perform equity and it cannot lie against those who were not only reluctant in the performance of their duty but are also irresponsible. The equity would also be equally applicable for the defendants who have been financing the project and waiting for the fruit since last many years. In the instant case plaintiff is seeking interim injunction in relation to a construction contract and also its termination letter which is impugned to be null and void.

9. There are some statutory constraints in the way of granting such injunctive relief such as Sections 21 and 56 of the Specific Relief Act.

The plaintiff has heavily relied upon the consent decree which has been renamed as super agreement and for the enforcement of the contract, terms of which are claimed to have partially been granted in terms of the compromise decree. The detail glance of the terms of this decree provides:

- (a) That the plaintiff shall adhere to the schedule attached to the said compromise. The schedule is attached with the compromise application at pages 1099 of Suit No.413/2014 which provides day to day schedule. It further provides that the failure to adhere such start and finishing duties shall entitle not to oblige the plaintiff to terminate the contract. The schedule is also available at page 705 of the instant suit hence there is no cavil that they have failed to respond and adhere to start and finish the duties as agreed.
- (b) The defendants were entitled to consider the failure to adhere the clause-I referred above for moving an appropriate application for the dismissal of the injunction application.
- (c) They have further been clarified that the timelines agreed in the compromise application in terms of schedule shall not be considered as formal extension of contract of the parties.
- (d) The parties further agreed that the land on which the project is to be constructed belongs to the Government of Sindh and that defendant No.2 confirms that the private land on which work is to be executed has also been acquired.
- (e) That the plaintiff is free to construct a temporary fence to enclose it.
- (f) That the defendant No.1's call on the bank guarantee in view of the above was agreed to remain suspended subject to its renewal up to 31.12.2014 which is in fact up to one month when the work was required to be completed.

- (g) That the parties agreed that they may refer their claims to arbitration.

10. The only controversy which relates to the availability of private land, though was very much available as a defence for not completing the project in the earlier round of litigation but was never made a subject matter of a "time schedule" prescribed for completing the job. In any event the plaintiff was required to complete the work on the government land and they were free to construct temporary fences to enclose it which they have failed. Though it was agreed that the decree may not be considered as a formal extension but is an extension insofar as the schedule for completing the project is concerned. This compromise decree cannot be read in isolation of the original contract as the main terms which are heart and soul of the relationship of the parties are to be governed through a contract since this decree is silent insofar as the salient features are concerned. This only enables the plaintiff to complete the project within the rescheduled time which was agreed by the parties. This compromise decree cannot be used as a shelter for an unlimited period and that too at the time when the parties have agreed to each and every terms despite serious resistance for the availability of land by the plaintiff before signing the compromise application. It now does not lie in the mouth of the plaintiff that the land is yet to be made available to the plaintiff.

11. This is to be kept in mind that I am only considering the application for interim measures and the balance of inconvenience and prima facie case and irreparable loss are vital ingredients for deciding such applications. Sections 21 and 56 of the Specific Relief Act are very essential for the consideration of a contract which relates to the construction work.

12. Section 21 (1) provides that a contract cannot be enforced when money could be termed as an adequate relief in case of its non-performance.

13. Section 21(d) provides that a contract cannot be specifically enforced where it in nature is revocable. This is nobody's case that the contract and even the decree which is termed to be a super contract is not revocable. The contract even provides the remedies on account of termination. Section 56(f) of the Specific Relief Act relates to an event when an injunction can be refused i.e. an injunction application cannot be granted only to prevent a breach of contract, the performance of which would not specifically enforced under section 21 of the Act. In case of Associate Construction v. Federal Government reported as 2010 MLD 627 wherein the contracts were awarded to the plaintiff (therein) in relation to a civil work of Shell Space (OT Complex, CATH Labs) and Civil Works of Shell Space (CT Scan Room) at NIVCD, Karachi, the Court observed that the project is of crucial public importance and in view of indolent behaviour of the plaintiff (therein) the defendant was left with no choice but to terminate the contract and award it to another party.

14. In case of M/s. Tauseef Corporation v. Lahore Development Authority reported in 1999 CLC 26 the learned Division Bench of Lahore High Court observed that:

“3. We have considered the foregoing points which have been discussed in detail by the learned Single Judge in his judgment. It is true that the work on the agreement had started but admittedly the same was stopped in June, 1995. However, the appellants remained silent over stoppage of the work till the agreement was finally cancelled by the respondents on 20-2-1997 by addressing the impugned letter. In that situation, the delay on the part of the appellants would be relevant for seeking the discretionary relief under the extraordinary jurisdiction of writ petition. Even otherwise, the alleged loss suffered by the appellants due to termination of contract could be claimed in the form of damages for which a separate remedy under the normal law was available and could be invoked. In addition to that, the construction work which

is dependent on the personal volition of the parties cannot be specifically enforced in its substantive terms in case of its breach. The only remedy provided for such breach of contractual liability entailed the incident of damages falling purely within the ambit of civil action under the plenary jurisdiction of Civil Court. Lastly, the agreement itself contained a clause for arbitration whereby the differences of opinion between the parties or any dispute arising out of the impugned agreement could be referred to an arbitrator for settlement instead of bringing legal action. It is, thus, obvious that an efficacious and effective remedy was available to the appellants in the form of arbitration or civil action under the normal law. The writ jurisdiction in such a situation could not be invoked. The impugned judgment passed by the learned Single Judge being unexceptionable does not call for interference in this appeal. The same is accordingly dismissed in limine.”

15. In a number of cases involving the building construction invariably the Hon’ble superior Courts have held that termination of such contract would attract the provisions of Sections 21 and 56 of the Specific Relief Act and since the monetary compensation is an adequate relief, injunction cannot be granted. Learned Davison Bench in case of Zavar Petroleum reported in 2003 YLR 450 observed as under:-

“----I do not agree with the learned counsel, as stated above, the loss can be easily measured in terms of money. Any unauthorized expenditure in the execution of the development plan can be easily traced and, therefore, damages are an adequate substitution for it. Mere annoyance to the feelings is no ground for substantial loss 17 IC 219. No injunction can be issued to prevent the breach of a contract which cannot be ordered to be specifically enforced. See under section 21 of the Specific Relief Act, 1877, a contract will not be specifically enforced where its non-performance can be adequately compensated by award of damages. Pecuniary compensation would be adequate relief to the petitioner and in my view it would be oppressive to grant an injunction at such stage.----”

16. Similarly in the case of Union Construction Company v. Chief Engineer reported in AIR 1960 Allahabad 72 it was observed by the Indian Court as under:

“---a contract for the non-performance of which compensation in money is an adequate relief’ cannot be specifically enforced. Under the provision of section 12(c) of the same Act “when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief,” specific performance for the contract may, in the discretion of the Court be enforced. This clearly shows that the Court can exercise the discretion only in a case where pecuniary compensation would not afford adequate relief. Under cl (b) of S.21 of the Specific Relief Act a contract.

“which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms cannot be so enforced. The present contracts are building or engineering contracts. It would require technical knowledge and long experience in the line for executing the works covered by the contracts. It is thus a contract which is dependent on the personal qualifications and volition of the parties and is also of such a nature that the Court cannot enforce specific performance of its material terms. For the reason also the present agreement cannot be specifically enforced. In the case of Dewan Chand v. Union of India. AIR 1951 Punj. 420 Kapur, Ja, observed as follows:

“(21).-----In a building contract it is difficult for Courts to look after the acts and conduct of building contractor nor can it say how far he does or does not depart from the careen execution of the works which he is professing to execute and where the case is one in which the personal skill of a person is an important factor the Courts will not be able to specifically enforce it. Besides in a building contract if a contractor is lawfully dismissed he has the remedy of getting compensation by way of

damages and in such cases specific performance will not be given by Courts.”

I respectfully agree with the observations made above. A similar view was taken in the case of Ramchandra Ganesh v. Ramchandra Kondaji, ILR 22 Bom. 40.

(22). It cannot be denied that the petitioner can be compensated in money for the non-performance of the contract in the present case. The petitioner had taken the contracts with a view to make profit. It was interested in the contracts only with a view to earn money and it should not matter to the petitioner if it obtains that money by way of damages by filing a suit for the same instead of earning it as profit after completing the contract. To me therefore, it appears that in the circumstances of the present case compensation in money can be an adequate relief to the petitioner. The privy Council in the case of Rami Patel v. Rao Kishore Singh, AIR 1929 PC 190 observed as follows:

“In view of the finding that compensation in money is an adequate relief to the plaintiff and in view of the express provisions contained in sections 12(c) and 21(a) their Lordships are of opinion that a decree for specific performance of the contract should not be made.”

17. In case of M.A. Naser Hussain Chairman reported in PLD 1965 SC 83 the Hon’ble Supreme Court went on to observe that the entering contract for execution of work upon the land of another are mere license to enter upon the site land necessary to execute the work. Such license is revocable by the employer at any time. The Hon’ble Supreme Court further observed that no injunction can be issued against the owner at the instance of building contract. The remedy is only held to be damages. Likewise the learned Counsel for the plaintiff has argued that in absence of any statutory provision protecting the servant it is not

possible in law to grant him a decree against unwilling master that he is still servant. A servant cannot force upon his master when the master is entitled to say that he is prepared to pay damages for breach of contract of service but will not accept services of the servant. By applying the same principle the master cannot be granted an injunction in relation to employment of an employee that he would continue to serve him and an injunctive relief of the same nature reciprocally cannot be given to the employee against his master. Reliance is placed on PLD 1961 SC 581 and 2013 SCMR 120. Statutory employment is distinguished from simple private employment as prior has a statutory backing. The relevant paragraph of the *of Federation of Pakistan v. Muhammad Azam Chattha* reported in 2013 SCMR 120 is reproduced below:

“----in view of the doctrine of master and servant, the contract of service cannot be specifically enforced, however, in the event of arbitrary dismissal or unwarranted termination of employment, an employee is entitled to sue for damages equal to wages, allowances and other benefits, which would have been otherwise due and payable under the contract of employment. In the case of Pakistan Red Crescent Society and another v. Syed Nazir Gillani (PLD 2005 SC 806) it has been held that an employee of a corporation, in the absence of violation of law or any statutory rule, cannot press into service the Constitutional or civil jurisdiction for seeking relief of reinstatement in service and can only claim damages against his wrongful dismissal or termination.---“

18. Insofar as the judgment of Shahid Mehmood reported as 1997 CLC 1936 is concerned the principle which is provided by the learned Judge in relation to an employment contract are that in view of the law declared in PLD 1988 SC 84 it is not possible for the plaintiff to seek declaration as to his legal character when the terms of his employment are governed by a contract and not statutory rules. Nevertheless if an obligation i.e. to be enforceable under the law is cast on the defendant, he would be still entitled for the relief of permanent injunction. This

judgment is distinguished in the sense that such employment terms are required to be governed and enforceable under law. Nevertheless when conditions of an employment were only found to be protected by law or rules having the force of law in that case the relief in the constitutional jurisdiction as well as in original civil jurisdiction has been found to be permissible. The judgment in the case of Shahid Mehmood relates to the employment agreement and in this regard it was observed that insofar as such contract are concerned if the terms are such that can be enforced under the law such as in the case of corporations having statutory rules or the rules having force of law, can be enforced to regulate the relationship but not in relation to the case in hand.

19. Since the provisions of Sections 21 and 56 of the Specific Relief Act itself bars the performance of such contract which are revocable in nature and in relation to which the compensation of money is an adequate relief, such agreement do not have force of law for its implementation and performance. Hence the application is dismissed.

Judge