

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 76 of 2019**

**BETWEEN**

**CHARAN KATONIVERE HOLDINGS PTE LIMITED** a limited liability company  
with its registered office in Labasa.

**PLAINTIFF**

**AND**

**KARTIKA CONSTRUCTION PLUMBING SERVICES PTE LIMITED** a limited  
liability company with its registered business situated at  
Lot 4 Carpenter Street, Raiwai, Suva.

**DEFENDANT**

**Counsel** : Ms. Prasad L. for the Plaintiff  
Mr. Deo S. for the Defendant

**Date of Hearing** : 29<sup>th</sup> May, 2019

**Date of Ruling** : 28<sup>th</sup> June, 2019

# RULING

- [1] The plaintiff filed this writ of summons on 15<sup>th</sup> March, 2019 seeking the following orders:
- (i) An order that the dispute in this matter be resolved by arbitration under clause 33 of the agreement and that Mr. Joel Sahai be appointed the Arbitrator.
  - (ii) Alternatively, an order that the defendant pay the plaintiff the sum of \$2,554,028.47 for the cost of work as a result of the defendant's breach of agreement.
  - (iii) An order for damages for breach of contract.
  - (iv) An order that the defendant do pay the costs of this action.
- [2] On 08<sup>th</sup> April, 2019 the plaintiff filed a notice of motion seeking the following orders:
1. An order that the dispute in this matter between the plaintiff and the defendant be resolved by an arbitrator.
  2. An order that Mr. Joel Sahai be appointed the Arbitrator.
  3. An order that the said Arbitrator will hear the dispute and make his award.
  4. An order that each party pay the cost of the Arbitrator in equal shares.
  5. An order that the costs of this application be paid by the defendant on an indemnity basis.
- [3] At the hearing the learned counsel for the plaintiff informed court that the plaintiff only seeks an order that the dispute in this matter between the plaintiff and the defendant be resolved by an arbitrator.
- [4] The plaintiff and the defendant entered into an agreement on 12<sup>th</sup> September, 2014 for the construction of a new building and to renovate an existing building within twelve months. the plaintiff alleges that despite several assurances on several occasions the defendant failed to fulfill its obligations as per the agreement.
- [5] Clause 33 of the agreement reads as follows:

Provided always in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5)(a) of these conditions or the rights and liabilities of the parties under clause 25 or 26 of these conditions), then such dispute of difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice President for the time being of the Fiji Association of Architects.

- [6] The plaintiff's position in this matter is that the defendant failed to complete the work as agreed and on 21<sup>st</sup> November, 2016 the plaintiff through its solicitors noticed the defendant to resume work and since the defendant failed to resume work the plaintiff on 08<sup>th</sup> December, 2016 terminated the contract.
- [7] The defendant while denying this position stated that the delay was due the plaintiff's failure to pay for the work done.
- [8] The learned counsel for the defendant opposing the application of the plaintiff submitted that in view the exceptions contained in clause 33(2) the dispute cannot be referred for arbitration.
- [9] Clause 33(2) of the agreement reads as follows:

Such reference, except on article 3 of article 4 of the Articles of Agreement, or on the questions whether or not the issue of an instruction is empowered by these conditions, whether or not a certificate has been improperly withheld or is not in accordance with these conditions, shall not be open until after Practical Completion or alleged practical completion of the works or termination or alleged termination of the contractor's employment under this contract, or abandonment of the


works, unless with the written consent of the Employer or the Architect on his behalf and the Contractor.

- [10] Clause 33(1) read with clause 33(2) provides that a dispute relating to the agreement between the parties must be resolved by arbitration in the event of terminating the agreement or abandonment of works.
- [11] The learned counsel for the defendant also submitted that under clause 33(1) of the agreement any dispute must be referred for arbitration within 14 days. What clause 33(1) says is that the parties have to agree on an arbitrator within 14 days from the date of the referral for arbitration. There is nothing in clause 33(1) which says that the dispute should be referred for arbitration within 14 days from termination or abandonment of the contract.
- [12] There is no ambiguity in Clause 33(1) of the agreement. The words “**shall be and is hereby referred to the arbitration**” clearly indicate that any dispute that comes within the interpretation of clause 33 should be referred for arbitration and it is a mandatory requirement.
- [13] For the above reasons I make the following orders.

#### ORDERS

1. It is ordered that the dispute in this matter between the plaintiff and the defendant be resolved by an Arbitrator.
2. The defendant shall pay the plaintiff \$1000.00 as costs of this application.



  
Lyone Seneviratne

**JUDGE**

28<sup>th</sup> June, 2019