

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

**Civil Action No. HBC 224 of 2021**

**BETWEEN:**            **AB CONSTRUCTION & CIVIL CONTRACTORS PTE LIMITED**  
a limited liability company having its registered office at Level 1 Unit  
16B Prime Plaza Complex, Nadera, Nasinu in the Republic of Fiji  
Islands.

**PLAINTIFF**

**A N D:**                **MANJOOR BEGG** of Lot 8 Bulei Road, Laucala Beach Estate,  
Nasinu

**DEFENDANT**

**Counsel**                : **Plaintiff: Mr. Vananalagi R**  
                                  : **Defendant: Mr. Pal A**

**Date of Hearing**        : **2.12.2021**

**Date of Judgment**    : **8.12.2021**

**JUDGMENT**

**INTRODUCTION**

1. This is an action filed by a legal entity engaged in construction work, who entered in to a contract with Defendant to construct a house for him on CT 26407. Plaintiff had completed work and accordingly about \$220,000 was paid out of contracted sum of \$270,000. Plaintiff had requested some additional payments for variations of costs due to increase in prices of cement and other materials. Defendant had allegedly agreed to pay \$30,000, and failure to do so, Plaintiff suspended work, till that payment was made. Then Defendant through lawyers terminated the contract. Defendant had engaged a quantity surveyor, prior to termination, to estimate the work done, but this was done without any notice to Plaintiff, and disputed work carried out. Plaintiff is seeking restraining order to stop work on site by another constructor and also seeks to assess the work completed by and independent Quantity Surveyor (QS). Already two months have passed, and Defendant wants to complete the house hence balance of convenience lies with Defendant to continue with the project. So restraining order to stop construction is not granted, but as an interim measure Quantity Surveyor can be nominated if further submission made as to a proposed Quantity Surveyor. As regards to the tools on the site, Defendant is

denying list submitted. At the time of termination Defendant had admitted tools were on site and stated an independent inventory would be taken, but strangely no such inventory submitted at the hearing. At the hearing Defendant admitted some items and they are to be returned to Plaintiff immediately on a time and date suitable to both parties and an inventory to be taken of items returned. I cannot decide disputed facts as to items left by Plaintiff.

## FACTS

2. Plaintiff and Defendant had entered in to a written agreement to construct a house on CT24607 for a sum of \$270,000.
3. The approved plans and details were given.
4. Defendant had paid Plaintiff \$220,000 for the work completed on three stages.
5. On or around 21.7.2021 Defendant had informed the Plaintiff of additional costs due to price increase on products by 12% and 20% on cement.
6. Work continued and Defendant paid money to Plaintiff till 13.9.2021 when \$50,000 paid.
7. Defendant informed Plaintiff that they will be submitting variation breakdown due to price increase.
8. On 14.10.2021 Defendant had submitted a claim for last stage payment of \$50,000 and also variation claim for \$8,457.00.
9. Plaintiff had also alleged breaches of confidentiality with third parties relating to payments and had warned them to refrain from such actions or face civil action for damages for such breaches.
10. On the same day by way of separate letter Plaintiff had suspended work due to non-compliance as to providing proposed approval for variation from main design.
11. Plaintiff also send a variation of price in terms of clause 4.0 of modification of work on 15.10.2021 for \$24,040.76.
12. On 19.10.2021 Defendant terminated contract *inter alis* for following reasons,
  - a. There was no provision in the contract to suspend work.
  - b. No basis for demand of money.
  - c. Already a sum of \$220,000 being paid at three stages.
  - d. Payment represented 81% of the contracted sum
  - e. A QS was carried out on the site and it had revealed only 55.7% work completed.

- f. Demand for \$30,000 not justified as above.
13. In the same letter Plaintiff was informed to
    - a. Cease all works
    - b. Access is denied.
    - c. Any attempt to access will be considered as criminal act.
    - d. Construction material and properties on site will be assessed by independent bailiff.
  14. Defendant in the affidavit in opposition stated that he in occupation of part of the building and trying to finish it as soon as possible before cyclone season start as the completion date of contract was 20.12.2021

## ANALYSIS

15. Plaintiff had issued a letter suspending work on the site for payment on 14.10.2021. This was for alleged noncompliance on the part of Defendant. It referred to a letter dated 10.7.2021 (which was not annexed) which had a heading 'Change in Building Layout'.
16. Defendant denied any request for change in structure, yet Plaintiff was not able to produce their own communication they have referred in the latter of 14.10.2021. I cannot decide disputed facts at this juncture on affidavits.
17. There is a serious question to be tried at the hearing as to the validity of the termination of the contract and cost of the construction completed when Plaintiff stopped work by letter of 14.10.2021.
18. Upon the receipt of that letter Defendant had given notice of termination of contract and had barred entering the site with their goods and materials on site.
19. Plaintiff filed this action on 3.11.2021 and Defendant 9.11.2021 had also filed a civil action against Plaintiff on same facts.
20. This writ and application for injunction were served on Defendant on 19.11.2021.
21. Plaintiff is seeking restraining order to stop work on the site till an independent QS is appointed by court.
22. Defendant had already obtained QS before termination of contract, but this was not done with the concurrence of Plaintiff which leaves the report of QS disputed. There was no communication that informed Plaintiff that work they completed will be assessed by an independent QS.
23. As the contract was not terminated, inter alia based on report of QS it was prudent for

Defendant to notify Defendant, but this was not done. Now the Plaintiff is seeking a report from independent QS. So the request for report of QS is justified, but unfortunately Plaintiff wants the court to find an independent QS, which the court is unable to do without any details as to prospective experts in the field.

24. This selection can be done depending on competencies of the experts in the field and their fees, availability etc. So further submission needed for this selection.
25. Plaintiff wants the court to appoint a QS as an independent assessor. This cannot be done as court does not have list of QS and their suitability. This could have done by Plaintiff, but had not done so. This does not prevent me ordering each party to submit their desired independent QS and any objection to each other's nominees if no agreement cannot be reached on this issue.
26. Report of QS is requested by Plaintiff but since it is court appointed expert report any objections to selection needs to be addressed.
27. On the balance of convenience since the project was to be completed by 20.12.2021 and cyclone season had approached work stoppage at this point is not justified. Already two months had lapsed from termination of contract. So if the work is stopped at this stage there can be irreparable loss to the Defendant and may result some damages from severe weather condition that is approaching. I cannot see any reason why I need to stop work that had continued for more than two months from termination, unless good reasons are given and there is no such evidence before me.
28. Plaintiff had given a detailed description of items left on site. Defendant had denied this but had not taken any steps to resolve this issue by informing the court of the items left on the site. Defendant on its termination of contract had indicated some independent bailiff would be engaged to obtain items on site. This again was to be done in the absence of Plaintiff and this items were not submitted to court.
29. As there are disputes as to the items on site, I cannot state as to what was remaining on site at the time of termination. Hence an order is made for Defendant to immediately return all the items allegedly left by Plaintiff when they suspended work.
30. Plaintiff and Defendant were directed to facilitate this process forthwith. They can jointly meet at a convenient time for this purpose and prepare inventory of items that were returned to Plaintiff by Defendant.

## **CONCLUSION**

31. There is a serious question to be tried as to the work completed when the Defendant terminated construction contract. On the balance of convenience it is not justified to grant restraining order to stop construction of building as already two months have passed and

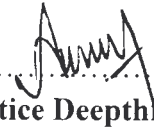
severe weather conditions prone in this time of year. Defendant is ordered to hand over all the plant and equipment that were left by Plaintiff on the site on or around 19.10.2021. The application to appoint a suitable QS is allowed, but this can be done when sufficient material is before the court to assess suitability of independent QS.

## FINAL ORDERS

- a. Restraining order to stop construction is refused.
- b. Request to appoint a suitable Quantity Surveyor is granted, but the appointment will be done upon submission of names and qualifications of prospective experts as QS
- c. Equipment left by Plaintiff on the site to be handed over by Defendant, forthwith.
- d. No costs.
- e. Matter to be mention on 17.12.2021 for submission relating to prospective QS.

Dated at Suva this 8<sup>th</sup> day of December, 2021.



  
.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**