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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP 36/2016**

**GANGA CONTRACTS AND PROJECTS LTD. .... Petitioner**

Through: Mr Salar M. Khan, Mr Changel  
Khan, Mr Abhishek Kumar and Mr  
Ausaf Malik, Advocates.

versus

**INDIAN RAILWAY WELFARE ORGANISATION .... Respondent**

Through:

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER**

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**16.09.2016**

**VIBHU BAKHRU, J (ORAL)**

**IA No. 11433/2016**

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

**OMP 36/2016**

3. The petitioner has filed the present Petition under Section 9 of the Arbitration & Conciliation Act, 1996, praying as under:-

"A. Issue ex parte direction, to be confirmed after notice of motion, to the respondent to maintain status quo, in respect of the contract dated 20.07.2015, awarded to the petitioner for construction of single storied row houses including 2 Nos. Community buildings, guard room,

shops and all external services at IRWO's Rail Vihar, Kota (Rajasthan) (Agreement dated 20.07.2015).

- B. Issue ex parte direction to the respondent, to be confirmed after notice of motion, that the Bank Guarantee of Rs. 66, 69,000/-, submitted by the petitioner, shall not been cashed;
- C. Direct the respondent to attempt settlement of dispute through mutual settlement/conciliation in terms of the agreement dated 20.07.2015."

4. The petitioner, Ganga Contracts and Projects Limited, claims to be a reputed contractor and had bid for award of contract for "CONSTRUCTION OF SINGLE STOREYED ROW HOUSES INCLUDING 2 NOS COMMUNITY BUILDINGS, GUARD ROOM , SHOPS, AND ALL EXTERNAL SERVICES AT IRWO'S RAIL VIHAR, KOTA (RAJASTHAN)" (hereafter 'the Project') pursuant to bids invited by the respondent (hereafter 'IRWO').

5. The petitioner's bid was accepted and consequently IRWO entered into a contract dated 20.07.2015 (hereafter 'the Contract') for the construction of the Project. The petitioner states that right from the start its relationship with officials of IRWO was "not smooth"; the officials raised frivolous objections and made unreasonable deductions. It is stated that issues pertaining to delay and unreasonable deductions from running bills

persisted and that in turn affected the petitioner's discharge of payment obligations to its staff, workers and other suppliers.

6. The petitioner further states that an incident took place on 27.06.2015, where the Site Engineer was stopped by certain workers, who demanded to know the status of payments by IRWO to the petitioner. IRWO alleged that the Site engineer had been *gheraoed* by the petitioner's labourers. The learned counsel for the petitioner submits that the said incident was exploited by certain vested interests and the relationship between the petitioner and IRWO deteriorated considerably.

7. It is stated that thereafter, IRWO sent a letter dated 12.07.2016 alleging that the progress of works at site was slow. It is stated that the aforesaid letters were followed by letters - five in number as listed in paragraph IV (x.) of the petition - alleging that the progress of work was poor. It is petitioner's case that the said letters were not responded to on the advice of IRWO's officials.

8. Thereafter, IRWO sent a letter dated 31.08.2016, inter alia, stating that the work of the petitioner was not satisfactory and further alleging that petitioner had abandoned the work for more than two months. The letter

clearly indicated that it was a notice in terms of clause 6.3 (vi, vii & viii) and clause 6.4 on IRWO General Conditions of Contract. The petitioner was put to notice that if he did not show progress of work during the period of seven days, IRWO would terminate the contract as per conditions of the Contract.

9. The petitioner responded to the aforesaid letter on 1.9.2016 admitting the delays in execution of the work but attributed the same to heavy rains in the locality and deductions made by IRWO in the last RA (running) Bill submitted by the Petitioner. The petitioner also assured IRWO that it would speed up the progress of the works.

10. Thereafter, on 7.9.2016, IRWO sent a notice in terms of clause 6.4 of the Contract. It was alleged that the work had been stopped since 26.06.2016 and despite the notice dated 31.08.2016, the work had not commenced. IRWO disputed that there were abnormal rains in the locality, which affected the mobilisation of resources at site. The notice clearly stated that on expiry of the 48 hours, the Contract would stand rescinded with the right to IRWO to forfeit the whole security deposit and encash the performance bank guarantee in terms of clause 7.1 of the Contract. This letter was responded to by the petitioner on 10.09.2016. The petitioner stated that it had commenced work on the project site under protest and had mobilized

the labour at site.

11. Thereafter, the petitioner has communicated to the Managing Director, IRWO seeking his intervention and also for conciliation proceedings to resolve their disputes.

12. Mr Khan, the learned counsel for the petitioner submitted that the termination of the Contract was not in terms of the Contract as no attempt had been made for resolution of the disputes by conciliation proceedings as contemplated under clause 7.1 of the Contract. He contended that if *status quo* as to the Contract is not granted, the petitioner's right for resolution of its disputes by conciliation proceedings in terms of clause 7.1 of the Contract would stand frustrated. He further contended that the termination of the Contract was *malafide* and, therefore, IRWO ought to be restrained from giving effect to such termination. Lastly, he contended that in terms of clause 7.1 of the Contract, petitioner had a right for attempting resolution of the disputes by reconciliation and therefore, IRWO ought to be directed to commence such proceedings.

13. I have heard the learned counsel for the petitioner.

14. It is apparent from the above narrated facts that there are disputes

between the parties as regards the progress of the work. It is IRWO's stand - as evident from its letters as referred above - that the Petitioner's progress of the work was poor and therefore, the IRWO had proceeded to terminate the Contract. Admittedly, several letters written by IRWO pointing out that the petitioner's work was not measuring up to the progress required, were not responded to. The disputes as to whether the petitioner had justifiable reasons for delay in execution of the works and whether the termination was wrongful are matter of disputes which would require to be adjudicated. At this stage, it is difficult to take a *prima facie* view that the termination of Contract was wrongful.

15. What the petitioner essentially wants is an order directing IRWO to continue with the Contract. It is difficult to understand as to how such relief can be granted.

16. Furthermore, the Contract is a determinable one and, therefore, by virtue of Section 14 of the Specific Relief Act, 1963, the Contract is not specifically enforceable. In the circumstances, an order injuncting IRWO from giving effect to its termination cannot be granted.

17. The contention that the IRWO has not followed the procedure for

termination in as much as it has not resorted to conciliation procedure prior to termination of the Contract, in terms of clause 7.1.1 of the Contract, is also without merit. Clause 7.1.1 of the Contract is set out below:

“7.1.1 Conciliation

7.1.1.1 It is a term of this contract that Arbitration of disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes through mutual settlement / conciliation within a period of thirty (30) days.

7.1.1.2. If the Contractor is not satisfied with the settlement by the IRWO on any matter in question, disputes or differences, the Contractor may refer to the Managing Director of IRWO in writing to settle such disputes or differences through conciliation provided that demand for conciliation shall specify the matters, which are in question or subject of the disputes or differences as also the amount of claim, item wise. Only such disputes or differences in respect of which the demand has been made, together with counter claim of IRWO shall be referred to Conciliator as the case may be and other matters shall not be included in the reference.

7.1.1.3. Managing Director of IRWO may himself act as a Sole Conciliator or May decides to appoint another person as Conciliator as the case may be.

7.1.1.4. If one or more Conciliator(s) appointed as above refuses to act or a bitrarily withdraw from his office as Conciliator or vacates his/their office or offices or is/are unable or unwilling to perform his functions as

Conciliator(s) for any reasons, whatsoever or dies or in the opinion of Managing Director, IRWO fails to act without undue delay, the Managing Director IRWO shall appoint new Conciliator(s) in his/their place. Such reconstituted tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous Conciliator(s).

7.1.1.5. The demand for conciliation is subject to Arbitration and Conciliation Act, 1996 and the rules there under and any statutory modification thereof shall apply to the Conciliation proceedings under this clauses”

18. As is apparent from the above, clause 7.1.1 provides that the parties must, in the first instance, make an attempt to settle the disputes by mutual settlement/conciliation before proceeding to refer the disputes for arbitration; this is a part of dispute resolution mechanism agreed to between the parties. The said clause does not preclude IRWO from terminating the contract in terms thereof, without referring the disputes to conciliation.

19. In so far as the relief of injuncting encashment of the performance bank guarantee is concerned, the correspondence on record indicates that it is an admitted position that the performance of the work was slow; the disputes essentially relate to whether the work suffered on account of wrongful deduction from the running bills or on account of *force majeure* events. The said dispute cannot be examined in the present proceedings. The

law as relating to interdicting invocation of bank guarantees is now well settled.

20. In **Larsen & Toubro Limited v Maharashtra State Electricity Board and Others**: (1995) 6 SCC 68, the Supreme Court referred to the earlier decision in **Svenska Handelsbanken v. M/s. Indian Charge Chrome and others**: (1994) 1 SCC 502 and held as under:-

“5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank v Bank of India, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd., General Electric Technical Services Co. Inc v Punj Sons (P) Ltd.* and the decision of the Court of Appeal in England in *Elian and Rabbath v Matsas and Matsas* and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* AIR 1994 SC 626, laid down the law thus:

“...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms...

...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice

between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.’’’

21. The petitioner has also prayed that IRWO be directed to attempt settlement of dispute through mutual settlement/conciliation in terms of the Contract. Clearly, the petitioner would be entitled to insist that parties make an attempt to mutually settle the disputes as agreed under the Contract. The parties have agreed that arbitration would not be commenced unless a demand is made by the parties to settle the disputes through mutual settlement/conciliation within a period of 30 days. The petitioner has, by a letter dated 12.09.2016, called upon the Managing Director of IRWO to act as a sole conciliator or to appoint any other person for the conciliation proceedings.

22. In the circumstances the Managing Director of IRWO is directed to ensure that a fair attempt is made to settle the disputes by mutual settlement/conciliation within the specified period of 30 days as agreed under the Contract.

23. The present petition is disposed of with the aforesaid observation.

24. Order *Dasti* under the signature of Court Master.

**VIBHU BAKHRU, J**

**SEPTEMBER 16, 2016**

pkv

