

\$~56

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

+ **O.M.P.(I) (COMM.) 399/2016**

SPML INFRA LIMITED

..... Petitioner

Through: Mr Kirti Uppal, Senior Advocate with
Mr Ramesh Sinha and Mr Samrat
Sengupta, Advocates.

versus

NTPC LIMITED

..... Respondent

Through: Mr G. K. Mishra, Ms D. Priyanka and
Mr Arjandeb Mitra, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

05.10.2016

IA No.12510/2016

1. Allowed, subject to all just exceptions.
2. Applications stands disposed of.

O.M.P.(I) (COMM.) 399/2016

3. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“a) Pass an order of injunction restraining the respondent, its men, representatives and assigns from giving any effect and/or further effect to the letter dated 30th September, 2016 or any such letter of similar nature in any manner whatsoever.

- b) Pass an order of injunction restraining the respondent, its men, representatives and assigns from giving any effect and/or further effect to the letter dated 30th September, 2016 or any such letter of similar nature in any manner whatsoever.
- c) Pass an order of injunction restraining the respondent its men, agents and assigns from receiving any amount under the said bank guarantees as detailed in Paragraph 16 hereto in any manner whatsoever.
- d) Pass an order of injunction restraining the respondent its men, agents and assigns from receiving any amount under the said bank guarantees as detailed in Paragraph 16 hereto in any manner whatsoever.
- e) An order of injunction restraining the respondent, its men, agents and assigns from receiving any amount as against any letter for invocation and/or encashment and/or any letter of similar nature.
- f) An order of injunction restraining the Respondent, its men, agents and assigns from demanding and/or claiming any amount as against the bank guarantees as detailed in Paragraph 16 in any manner whatsoever.
- g) A direction be passed directing the Respondent, its men, agents and assigns to forthwith treat all the bank guarantees as detailed in paragraph 16 hereinabove as null and void and return the same to the petitioner herein”

4. Mr Uppal, learned senior counsel appearing for the petitioner stated at the outset that he is not pressing any relief relating to the bank guarantees at this stage and is limiting the present petition only for seeking an order restraining the respondent from giving effect to the letter dated 30.09.2016.

5. The controversy in the present petition arises in the following context:

5.1 The respondent had invited bids for construction work described as “Offsite Area Civil Works Package for Barh STPP (3X660MW)”. The petitioner participated in the bids invited for execution of the aforesaid works and was successful. Subsequently, on 10.08.2006, a Letter of Award (LOA) was issued in favour of the petitioner. And, thereafter, an agreement dated 18.10.2006 (hereafter ‘the contract’) was executed between the parties. In terms of paragraph 8.1 of the LOA, all the works of the subject package were to be completed within 27 calendar months from the date of issue of the LOA. Admittedly, the works have not been completed as yet. According to the petitioner, the work had been delayed due to several reasons on the part of the respondent. This is of course disputed by the respondent. According to the respondent, the petitioner had not performed the contract in terms thereof.

5.2 In the aforesaid context, the respondent issued a notice of default dated 30.09.2016 and the petitioner is seeking an order restraining the respondent from giving effect to the aforesaid notice.

6. The said notice dated 30.09.2016 indicates that the respondent had extended the tenure of the contract and it is alleged that despite its extension the petitioner had not completed the same. Further, by way of the said notice, the petitioner was asked to submit a completion program for the balance work within seven days, failing which, clause 41 of the GCC - the termination clause - would be invoked. The petitioner has serious disputes with regard to the contents of the said letter. Be that as it may, the contract in question is a determinable one and, therefore, cannot be specifically enforced. In this view, it is difficult to accept that any injunction in favour

of the petitioner can be granted restraining the respondent from terminating the contract, which is, in effect, the relief sought by the petitioner. The question whether such termination or notice of default preceding such termination is wrongful is a subject matter of dispute that would have to be adjudicated by the Arbitral Tribunal.

7. Mr Uppal, learned senior counsel appearing for the petitioner strongly relied on the decision of the Supreme Court in the case of **Hindustan Construction Contractors v. State of Maharashtra**: AIR 1979 SC 720 in support of his contention that the impugned notice dated 30.09.2016 be stayed. In my view, the aforesaid decision is of no assistance to the petitioner as the question involved in that case was whether time was the essence of the contract. The Court after considering the relevant terms of the contract and the fact that the contract contained a provision for recovery of penalty/compensation, concluded that time was not the essence and the rescission of the contract was wrongful. As stated earlier, the issue whether time is the essence of the contract or whether the notice of default or any termination that follows it is wrongful or not, is a contentious issue which would be decided by the Arbitral Tribunal. At this stage, the only question before this Court is whether any interim order is required to be passed for restraining the respondent from terminating the contract and thereby keeping the contract alive. As stated earlier, this relief cannot be granted for the reasons that the contract itself is a determinable one and in terms of Section 14(1)(d) of the Specific Relief Act, 1963, the contract is not specifically enforceable. Thus, by virtue of section 41(e) of the Specific Relief Act,

1963, an injunction “*to prevent the breach of a contract the performance of which would not be specifically enforced*” cannot be granted.

8. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

OCTOBER 05, 2016
MK