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

+ **O.M.P.(I) (COMM.) 446/2016**

OM CONSTRUCTION COMPANY

..... Petitioner

Through: Mr Ritesh Khatri and Mr Jatin Sapra,
Advocates.

versus

JATASYA PROMOTERS PVT. LTD.

..... Respondent

Through: Mr B. P. Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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15.11.2016

IA No.14040/2016

1. Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 446/2016

2. 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) Stay the operation of the impugned notice no.NIL dated 18.10.2016 issued by the Respondent through their advocate;

(b) a local commissioner/committee of commissioner may be directed to be appointed to study and report the progress of contract of Contractor (Petitioner herein) with a view to ascertain as to what his problems are and recommend

measures to solve these problems to the extent possible even on a temporary basis pending arbitration;

- (c) meanwhile, the permissions, instructions, directions and mandate as requisite may please be issued to permit the Petitioner Concern to work in view of saving from further loss of both the parties in interest of justice; and in alternate restrain the Respondent, their men, authorised persons, assigns, agents or such other persons from interfering – while Petitioner takes back their Batching Plant, T & P, Storage Material and Labour etc. from the site;
- (d) till then stay the operation, use and utilization of the RMC Batching Plant, T & P, storage material and Labour of the Petitioner by the Respondent & restrain Respondent from selling/alienating these by any means whatsoever.”

3. The first prayer is for staying the operation of the impugned notice dated 18.10.2016. The said notice is a notice under Section 21 of the Act appointing an Arbitrator. The learned counsel for the petitioner referred to the said notice and pointed out that it is a lawyer's notice on behalf of the respondent company, *inter alia*, specifying the disputes and informing the petitioner that the respondent had appointed the Arbitrator. The learned counsel for the petitioner submits that in terms of the arbitration clause, the Arbitrator is to be appointed by the Managing Director of the respondent company and not by the respondent. In view of this submission, the learned counsel for the respondent states that without prejudice to its rights and contentions, the respondent would withdraw the aforesaid notice and take appropriate steps. In view of this statement, no further orders are required to be passed as far as the first prayer is concerned.

4. As far as the petitioner's prayer for appointing a Local Commissioner/ committee of Commissioners to study and report on the progress of the petitioner to ascertain his problems is concerned, I am not inclined to entertain the said prayer as it would be open for the petitioner to prove his case before the Arbitral Tribunal. The question of appointing a Local Commissioner to ascertain the problems does not arise as the petitioner is well within its right to articulate and substantiate the same before the Arbitrator; and there is no ground for lending any court assistance to the petitioner at this stage.

5. The third prayer, permitting the petitioner to continue with the work also cannot be granted as the contract in question is a determinable one and cannot be specifically enforced. The petitioner would be entitled to claim damages in the event it is able to substantiate its claims.

6. Insofar as the removal of RMC Batching Plant, T & P, storage material and Labour of the Petitioner is concerned, the learned counsel for the respondent states that the respondent company has no objection to the petitioner removing its material, equipment and plant from the site. He further states that the petitioner's banker had come to site to inspect the said material as the said bankers claim a lien on the said plant and equipment. However, that is a matter between the petitioner and the petitioner's bank. As far as the respondent is concerned, it shall not restrain the petitioner from removing its material/equipment at site. The petitioner would be at liberty to remove its equipment without otherwise disturbing the works and against a proper receipt.

7. Lastly, the petitioner has prayed that the amount claimed as due and payable by the petitioner be secured by way of providing a deposit. I am not inclined to grant this prayer at this stage as there is neither any averment in the petition nor any other material produced by the petitioner, which would justify any apprehension that the respondent would siphon off or in any way secret its assets so as to frustrate arbitral award that may be passed in favour of the petitioner. It is well settled that the order for securing claims by deposit of the amounts in dispute is in the nature of an order of attachment before judgment. Thus, in absence of averments/material establishing the necessary conditions, an order directing furnishing of security cannot be granted. In the present case, there is no ground made out for passing such order. (See: Raman Tech. & Process Engineering Co. and Anr. v. Solanki Traders: (2008) 2 SCC 302, Rite Approach Group Ltd. v. Rosoboronexport: 111 (2004) DLT 816, Gatx India Pvt Ltd. v. Arshiya Rail Infrastructure Limited & Anr: 216 (2015) 216 DLT 20 and Natrip Implementation Society v. IVRCL Limited: Manu/DE/2389/2016).

8. The petition is disposed of with the aforesaid observations.

9. *Dasti.*

VIBHU BAKHRU, J

NOVEMBER 15, 2016
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