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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P.(I) (COMM.) 105/2017

SOWIL LIMITED

..... Petitioner

Though: Ms. Manmeet Arora with Ms. Chand
Chopra and Ms. Pavitra Kaur, Advocates.

versus

RAIL VIKAS NIGAM LIMITED

..... Respondent

Though: Mr. Udit Seth, Advocate.

CORAM: JUSTICE S.MURALIDHAR

ORDER

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07.03.2017

IA No. 2940/2017 (for exemption)

1. Allowed subject to all just exceptions.

OMP (I) (COMM) 105/2017

2. Notice. Mr. Udit Seth, learned counsel accepts notice on behalf of the Respondent.

3. Ms. Manmeet Arora, learned counsel for the Petitioner, states that since urgent interim orders are sought she prefers to argue the petition at this stage itself without waiting for a reply from the Respondent.

4. The Petitioner, Sowil Limited, in this petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') seeks a stay of the operation of an order dated 27th February 2017 passed by the Respondent, Rail Vikas

Nigam Limited ('RVNL') whereby the Petitioner has been declared as 'poor performer' for a period of three years with effect from 23rd August 2016.

5. The background to the present petition is that a contract dated 1st May 2012 was executed between the Petitioner and RVNL for Project Management Consultancy ('PMC') services for design, supply, erection, testing and commissioning of 25 KV, 50HZ single phase, traction overhead equipment, switching stations, traction sub-stations, SCADA general electrical services works along with signalling & telecommunication work, civil engineering work, i.e., service buildings, quarters and other associated works between section Gooty (Excl) – Dharmavaram (Inc) – Yelahanka (Excl) Section (including Dharmavaram – Sri Satya Sai Prashanti Nilayam – Penukonda chord line), sidings comprising of 304 RKM/355 TKM of Guntakal Division of South Central Railway & Bangalore Division of South Western Railway. The contract, in respect of which the above PMC the awarded to the Petitioner, was to be executed by Tata Projects Limited ('TPL'). There was a project implementation unit ('PIU') of RVNL which was to oversee the implementation of the project.

6. The initial period of the PMC contract was two years. By a letter dated 14th April 2014 RVNL granted extension upto 30th September 2014 with price variation and without penalty. A controversy arose between the parties as regards the non-observance of the Cross Section Drawings ('CSD') for foundations by TPL, the Petitioner and by the officials of RVNL officials deputed for supervising the work at site. A letter was written by the Group General Manager (Electrical), RVNL to the Director Projects (DP), RVNL

on 16th August 2014 listing out what he considered to be problems in the execution of the work. *Inter alia* he pointed out the lack of support from the PMC organization, i.e., Petitioner, as per the terms of reference and non-availability of required number of supervisors with the PMC with required skills to manage all the activities. The said letter also adverted to the fact that there was no official with PMC to coordinate with the control office for booking crew and monitoring the movement of rolling stock. The letter also adverted to the non-deployment by TPL of adequate number of skilled staff for the execution of the work.

7. On 16th August 2014 a detailed investigation report was prepared by an internal team of RVNL on the status of the execution of the work. A Committee was set up by RVNL to report on the broad-gauge (BG) and meter gauge (MG) foundations. This Committee which submitted a detailed report on 14th November 2014. The conclusions in the report were as follows:

“6.0 Conclusion

This deviation in the BG and MG type of the foundations from the CSD's as noted from the test checks conducted on these type of the foundations has happened from the beginning of the project and continued to happen till the incident of falling of three in the section between Devarapalli and Hindupur stations causing uprooting of a most having BG type of foundation. At that time on detailed examination of this BG type of foundation and test checks on other BG type of foundations deviation in the BG type of foundation from CSD was noticed which was mainly non-availability of slope on the embankment side of the foundation. Similar deviation was noticed in the MG type of the foundation. This deviation could not be detected by concerned supervising officials as detailed above.

The specified practice for quality assurance in respect of OHE foundations is cube test which has been done for the entire project.

The large number of foundations of small volume varying between 2 to 3 cubic meter are spread over a large distance in such projects. Quantity of concrete in each foundation being small, the foundation is completed on the same day and entire foundation is hidden except top 10 cm. There is no practice of exposing of the hidden portion of the foundation to check the dimension/shape at a later date. The destructive tests move also not been prescribed for checking the foundations. There is also no practice of doing the destructive tests or examining the foundations by exposing them in other construction organizations of Railway executing similar works. Thus, this mistake could not be detected in higher level official inspections as only top dimensions of foundations are visible for inspection.

This deviation in the foundations during execution has resulted mainly due to failure of PMC Organization and RVNL site supervisors to ensure adequate quality of supervision.

The foundation like B type NBC type, BG type and H8 type which can be cast in an open pit, not requiring under cutting towards track side can be considered for executing with precast arrangements.

The executing agency M/s. TPL who have the primary responsibility of executing the works as per design and have been talking about their quality culture in the organization have failed miserably in even ensuring the minimum requirement of executing the work as per dimensions given in the approved drawings not to speak of other finishing and aesthetic aspects. This has mainly happened because they have resorted to doing the important work of foundations by using sub contracted labour and also small sub-contractors without putting a sound team of competent site supervisors. As such executing agency is guilty of poor performance as far as the activity of foundation is concerned. The executing agency has accepted this mistake and till date 456 foundations have been recast out of 637.”
(emphasis supplied)

8. On the basis of the above report, on 19th March 2015 a letter was written to the Petitioner by RVNL stated that five of its supervisors having been informed responsible for “the above serious mistake in wrong casting of several foundation out of 637 foundations which had to be recast.” The letter further stated that the Competent Authority had, after going through the enquiry report, advised that the said five PMC officials should be removed forthwith due to their serious lapses.

9. The Petitioner states that it immediately complied with the above directions and removed the said officials. It is pointed out that thereafter negotiations were held between the parties regarding revision of rates. It appears that by a letter dated 20th August 2015 RVNL decided to accept the new rates for the PMC work of the Petitioner as indicated in Annexure-A enclosed with the said letter.

10. On 28th August 2015 a show-cause notice (‘SCN’) was issued by RVNL to the Petitioner wherein *inter alia* it was stated that there were several defective foundations which were cast under the supervision of PMC Supervisors; that they had not taken care to ensure the casting of foundations as per the approved drawing; that wrongly cast foundations were also not detected by the Petitioner’s experts from time to time while making the measurements and recording in the measurement book; that the Petitioner had not undertaken 25% test checks; it had simply written test checks conducted without mentioning the percentage and location. The Petitioner was called upon to show cause as to why action should not be taken to declare the Petitioner as 'poor performer'.

11. The Petitioner sent a reply to the SCN on 9th January 2016. The said reply was considered and a decision taken thereon by the Competent Authority. By a letter dated 23rd August 2016 RVNL conveyed to the Petitioner the text of the speaking order passed by the Competent Authority declaring the Petitioner as poor performer for a period of five years with immediate effect.

12. The Petitioner then filed OMP (I) (COMM) No. 354 of 2016 in this Court under Section 9 of the Act. An order was passed thereon by this Court on 7th September 2016 staying the letter dated 23rd August 2016. This was followed by another order on 18th October 2016 whereby the Court continued the interim order till such time the learned Arbitrator varied, vacated or modified the said order in an application under Section 17 of the Act.

13. Meanwhile, on 4th October 2016 the Petitioner wrote to RVNL invoking the arbitration clause seeking reference of the disputes to arbitration.

14. RVNL filed an appeal, FAO (OS) No. 110 of 2016, against both the orders dated 7th September 2016 and 18th October 2016 before the Division Bench (DB) of this Court. At the hearing on 9th November 2016 the DB noted that learned counsel for RVNL “would take instructions whether the department is prepared to withdraw the letter dated August 24, 2015 as also the order (undated at page 329 of the appeal record) on account of the *prima facie* reason found by the Court that the contentions urged by the Respondent in response to the show cause notice appear not to have been

dealt with. Needless to state in such eventuality the Respondent would be entitled to pass a reasoned order afresh.”

15. Thereafter on 16th November 2016 the DB passed the following detailed order:

“1. Taking forward towards the destination with reference to the order passed by this Court on November 09, 2016, we dispose of the appeal and the above noted Civil Miscellaneous Application passing a consent order on the terms as under:

(i) With reference to the show cause notice dated August 28, 2015, Director Projects of the Appellant shall, after according a personal hearing to the representative of the Respondent, pass a reasoned speaking order and convey the same to the Respondent by email and registered AD post.

(ii) Since reply to the show cause notice has already been submitted by the Respondent before the Competent Authority (Director – Projects) of the Appellant, he shall consider the same while passing the speaking order and because the policy of the Appellant permits personal hearing, would accord a hearing to the representative of the Appellant requiring date and time of hearing and the place to be conveyed to the Respondent by counsel for Appellant to counsel for the Respondent.

(iii) The notice of the date of hearing would be delivered at least three days prior to the date of the hearing.

(iv) The time and the place where hearing shall take place, shall be indicated in the notice intimating the date of hearing.

(v) Final bill submitted by the respondent with a No Claim Certificate shall be processed by the account department and other departments of the Appellant and final decision taken concerning the said bill would be conveyed to the Respondent within three weeks from today. Needless to state with reference to the interim bills cleared for

payment, reconciliation of the interim payments made would be done. If any payment is certified to be made, within a week thereafter such payments would be released to the Respondent.

(vi) Decision taken by the Competent Authority pursuant to the show cause notice dated August 28, 2015 shall not be enforced for a period of one week; to enable the respondent to avail such remedies as are available as per law.

(vii) Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 by the respondent, which is fixed for consideration before learned Single Judge on December 06, 2016, shall be got jointly deferred by the parties till aforesaid consent directions result in an order being passed and communicated to the Respondent.

2. Aforesaid consent order has been passed in presence of Mr S.K. Dhiman, ED/RVNL who in Court has instructed the learned senior counsel for the Appellant to so agree.

3. No order as to costs.

4. Dasti under the signature of the Court Master to learned counsel for parties today itself.“

16. Consequent upon the above order, the DP of RVNL gave a personal hearing to the Petitioner on 3rd January 2017. In the order dated 27th February 2017 the DP noted that the Petitioner placed before him detailed written submissions, judgments of the Courts and certain other documents in the form of a convenience file. Further written submissions were also provided by the Petitioner on 17th January 2017.

17. The order dated 27th February 2017 of the DP dealt with the three major points urged by the Petitioner, i.e., (i) discriminatory treatment (ii) double

jeopardy and (iii) delayed action. As regards (i) the Petitioner was aggrieved by the differential treatment meted out to it *vis-a-vis* TPL which was the executing agency and which was directly responsible for the casting of defective foundations and for raising fraudulent bills, inflated invoices and *vis-a-vis* RVNL officials who passed the bills till the appointment of the Petitioner as PMC. It was urged before the DP, and reiterated before this Court, that the Petitioner was only to follow the drawings brought to site by TPL. Its supervisors had no means to check the correctness of the drawings. It was urged that RVNL had singled out the Petitioner for punitive action whereas no action was taken against either TPL or the officials of RVNL.

18. As regards 'double jeopardy', the Petitioner contended that RVNL was punishing it twice: once by asking it remove its five personnel and then by barring it from participating in the tenders of RVNL by declaring it as a poor performer. On the third issue, the Petitioner's case was if indeed RVNL was dissatisfied with the performance of the Petitioner, RVNL ought not to have invited the Petitioner for discussions on continuing the project. There was also a delay in initiating action almost one year after the adoption of the alleged irregularities.

19. Before this Court it is further pointed out by Ms. Arora that the grant of extension of time for completion of the projects at enhanced rates by RVNL contradicted its impugned action of declaring the Petitioner as poor performer. She further submitted that the central point raised by the Petitioner in its reply to the SCN, which was not addressed by the DP in the impugned order dated 27th February 2017, was that the CSD drawings which

were submitted by TPL and approved by RVNL were not provided to the Petitioner in advance. According to her, the Petitioner had to supervise the casting of the foundations as per the drawings brought to the site by TPL. She pointed out that the Petitioner was not given permission to excavate the area around the foundations already cast to check if they conformed to the drawings and this was acknowledged by the Committee in its report dated 14th November 2014.

20. The Court has considered the above submissions. The DP has in the impugned order observed that the action taken against the Petitioner was in terms of the contract executed between the Petitioner and RVNL, which was independent of the contract between TPL and RVNL. Further, RVNL did take action against TPL by getting TPL to dismantle the wrongly cast foundations and get them reconstructed at its own cost of approximately Rs. 1.74 crores. Importantly, the DP noted the findings of the internal Committee of RVNL which affirmed that the Petitioner “had not only failed to ensure casting of foundations (75 Nos.) as per the approved CSD drawings, they, through their two supervisors have failed to record correct measurements for 141 foundations and failed, through its Project Manager to conduct 25% mandatory test checks of foundations cast as PMC was not only to check the measurements of the foundations before certifying and filing measurement book at lower level but also test check the measurements at the higher level.”

21. Ms. Arora contested the above factual findings. She contended that they were not supported by any credible material on record and that such findings

cannot form the basis to declare the Petitioner to be a poor performer, which would have adverse civil consequences inasmuch as the Petitioner would not be able to participate in the tenders of RVNL for three years but also in the tenders floated by the other public sector undertakings (PSUs) and organizations.

22. The Court is unable to accept the above submissions given the scope of the present proceedings. At this stage, while seeking interim reliefs under Section 9 of the Act, the Petitioner has to first satisfy the Court that it has a *prima facie* case in its favour. This is the second round of litigation on this aspect. In the first round the Court accepted the plea of the Petitioner that the order declaring the Petitioner as a poor performer was passed by the Competent Authority without affording the Petitioner an opportunity of being heard. That defect stood cured with a detailed hearing having been given to the Petitioner by the DP. Further, a reasoned order has been passed.

23. As far as merits of the impugned order is concerned, the Court is at this stage required to examine whether there were relevant materials available with the DP which would justify the passing of such order. The investigative report recorded that there was a failure by the Petitioner to record the correct measurements; that it failed to undertake 25% test checks etc. These may be disputed questions from the point of view of the Petitioner. However, at this stage the Court cannot possibly opine on the correctness of the said findings. That will have to await a detailed examination in the arbitral proceedings.

24. As regards the alleged discriminatory treatment meted to the Petitioner, the Court notes that the impugned order of the DP adverts to the fact that the

contract between the Petitioner and RVNL is separate from the contract RVNL has with TPL. As long as RVNL is able to point to the failure of the Petitioner to fulfil its obligation under its separate contract with RVNL, the mere fact that RVNL may not have taken action against TPL will not preclude RVNL from proceeding against the Petitioner. On the question of double jeopardy, the DP has noted that while the action regarding removal of the five officials of the Petitioner was taken under Section 3.07 (d) of the General Conditions of Contract ('GCC'), the SCN issued prior to declaring the Petitioner as a poor performer was with reference to Section 3.07 (f) of the GCC. These were separate courses of action available to RVNL.

25. As regards the extension of the PMC contract at revised rates, the Court finds plausible the explanation offered by RVNL that it had to ensure the completion of the project without loss of time and costs that might result if the Petitioner were to be replaced with another agency. Such action did not preclude RVNL from proceeding to issue an SCN to the Petitioner under Section 3.07 (f) of the GCC as regards its future dealings with the Petitioner were concerned. As regards the issue of delay, the Court is not satisfied that the impugned order calls for interference at this stage.

26. In sum, the impugned order of the DP is a reasoned one, based on relevant materials and passed after affording the Petitioner an adequate opportunity of being heard. In the circumstances, while reserving the right of the Petitioner to urge all its pleas regarding the invalidity of the said order at the appropriate stage, the Court holds that the Petitioner has failed to make out a *prima facie* case at this stage for grant of any interim relief in the

manner prayed for.

27. Ms. Arora offered that the Petitioner will not participate in the tenders floated by RVNL and will also disclose to the other entities in whose tenders it might participate about the impugned order having been passed by RVNL. She submitted that subject to the above, the impugned order dated 27th February 2017 should be stayed.

28. The Court is not persuaded to pass even the above limited interim order particularly considering the imperative need for maintenance of the highest standards in the area of work with which the Petitioner is involved.

29. The Court clarifies that the observations in this order as regards the impugned order have been made only for the limited purpose of the interim reliefs sought at this stage. The said observations shall not in any manner influence the final determination of the issue concerning the validity of the said order in the arbitral proceedings.

30. The Court is not persuaded to grant any of the interim reliefs prayed for. The petition is accordingly dismissed with no orders as to costs.

S.MURALIDHAR, J

MARCH 07, 2017

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