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

+ O.M.P.(I) (COMM.) 108/2017

ITD CEMENTATION INDIA LTD.

..... Petitioner

Through: Mr Manish Dembla, Advocate.

versus

PUBLIC WORKS DEPARTMENT

..... Respondent

Through: Mr Siddhartha Shankar Roy,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **19.04.2017**

VIBHU BAKHRU, J

1. 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) restrain the Respondent from implementing and/or enforcing or otherwise giving effect to its letters letter nos. 23(28)/CPM/F1/PWD/2016/2671 and 23(28)/CPM/F1/PWD/2017/496 dated 03.11.2016 and 27.02.2017 respectively;
- (b) restrain the Respondent from deducting any amounts from the payments due to the Petitioner or otherwise recovering any amounts in pursuance of the said letters until the eventual resolution of the dispute between the Petitioner and the Respondent;
- (c) restrain the Respondent from invoking / encashing bank guarantee Nos. 0156114IPG000095 dated August 25, 2014 and 0156114IPG000104 dated September 12, 2014 for an amount of Rs. 2,79,90,174/- (Rupees two crore seventy nine lakh ninety thousand one hundred

seventy four) each;

- (d) direct the Respondent to release payment towards the final bill of the Petitioner against submission of bank guarantee(s) for an amount Rs. 22,39,21,396/-, i.e. the liquidated damages claimed, less the amount of Rs. 5,59,80,348/- for which bank guarantees have already been furnished, on the following conditions: (i) the Petitioner will keep such bank guarantee(s) as well as the bank guarantees for an amount of Rs. 5,59,80,348/- alive and subsisting until the arbitral award is rendered and for a period of two weeks thereafter, and (ii) the Respondent will be entitled to invoke such bank guarantees only if the arbitral award is in favour of the Respondent."

2. The controversy in the present petition involves a levy of liquidated damages of ₹27,99,01,744/- by the respondent.

3. The petitioner was awarded the contract for "*Comprehensive Development of Corridor (Outer Ring Road) between Madhuban Chowk to Mukarba Chowk. SH: Construction of Elevated Road, FOB, RCC drain, Footpath, Cycle Track, Widening/Strengthening of Road, Rain Water Harvesting Scheme, Electrical Works and other Allied Works*".

4. The said works were commenced on 10.04.2013 and were to be completed on 09.04.2015. Admittedly, the project was delayed for various reasons and the petitioner sought extension of time (EOT) on multiple occasions for completion of the works and the same were granted by the respondent. Since the key milestones were not achieved within the prescribed time, the respondent withheld certain payments from the amounts due to the petitioner. It is claimed that in all, the respondent withheld a sum of ₹5,59,80,348/-, which was released to the petitioner against bank

guarantees (two in numbers, each for ₹2,79,90,174/-) valid upto 30.04.2017. It is not disputed that the project was successfully completed by 30.12.2015 and the newly constructed flyover was put to use from 04.01.2016. It was subsequently formally inaugurated on 24.01.2016.

5. The performance bank guarantee in the sum of ₹13,99,50,872/- furnished by the petitioner in terms of the contract was also released by the respondent.

6. Thereafter, the respondent issued a show cause notice on 03.11.2016 calling upon the petitioner to show cause as to why liquidated damages should not be imposed for alleged delay in completion of the works. The petitioner responded to the aforesaid show cause notice by its letter dated 07.11.2016, *inter alia*, claiming that a delay of 551 days (upto 11.10.2016) was justified. The petitioner further claimed that the works were completed on 10.09.2016. However, the petitioner's request to record the same was unjustifiably rejected.

7. The petitioner claimed that the delay in completion of the works was for several reasons including delay on account of issue of good for construction drawings; frequent changes in the drawings and instructions issued by Engineer-in-Charge; and delay on account of physical obstructions/encumbrances/utilities in project alignments. It is the petitioner's case that the delays in completion of the project are attributable to the respondent and/or for reasons beyond its control.

8. Mr Dembla, learned counsel appearing for the petitioner referred to various documents to substantiate the petitioner's claim that the petitioner was not responsible for the delays. He further contended that liquidated

damages could not be levied as the respondent had suffered no loss on account of the alleged delays.

9. He pointed out that the flyover was already in use much prior to 12.02.2016 and, therefore, any delay thereafter (which is alleged to be attributable to the petitioner) could not have resulted in any monetary loss to the respondent. He also earnestly contended that the petitioner had submitted letters from time to time seeking EOT which were allowed by the respondent. However, the letters granting EOT indicated that the EOT was provisionally granted. He submitted that the contract between the parties did not contemplate any provisional EOT and once the respondent had granted EOT, there was no question of reviewing the same.

10. Mr Siddhartha Shankar Roy, learned counsel appearing for the respondent did not dispute any of the contentions as advanced by the petitioner. He, however, submitted that the decision with regard to liquidated damages - in terms of clause 2 of the contract between the parties - was final and binding on the petitioner and thus, the respondent was entitled to recover the same.

11. I have heard the learned counsel for the parties.

12. There is no dispute that the project has been successfully completed. According to the respondent, the project was completed on 30.09.2016; however, the petitioner claims that the project was completed on 10.09.2016. It is also not in dispute that the flyover in question is in use since 04.01.2016.

13. Admittedly, the petitioner had requested for EOT on several occasions

which were provisionally granted. In this regard, it is necessary to refer to the relevant clauses being 5.2 and 5.3 and 5.4 of the contract which read as under:-

"5.2 If the work(s) be delayed by:-

- i) force majeure, or
- (ii) abnormally bad weather, or
- (iii) serious loss or damage by fire, or
- (iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or
- (v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or
- (vi) non-availability of stores, which are the responsibility of Government to supply or
- (vii) non-availability or break down of tools and Plant to be supplied or supplied by Government or
- (viii) any other cause which, in the absolute discretion of the Engineer-in-Charge is beyond the Contractor's control.

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the authority as indicated in Schedule 'F' but shall nevertheless use constantly his best endeavors to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

5.3 Request for re-scheduling of Mile stones and extension of time, to be eligible for consideration, shall be made by the contractor in writing within fourteen days of the

happening of the event causing delay on the prescribed form to the authority as indicated in Schedule 'F'. The contractor may also, if practicable indicate in such a request the period for which extension is desired.

5.4 In any such case the authority as indicated in Schedule 'F' may give a fair and reasonable extension of time and re-schedule the milestones for completion of work. Such extension shall be communicated to the Contractor by the authority as indicating in Schedule 'F' in writing, within three months of the date of receipt of such request. Non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the authority as indicated in schedule 'F' and this shall be binding on the contractor."

14. It is apparent from the above that the petitioner would be entitled to EOT in the event the works were delayed for any of the reasons as specified in clause 5.2 above. In terms of clause 5.4, it was incumbent upon the respondent to communicate the EOT within three months of receipt of such request. The fact that EOT was granted to the petitioner *prima facie* indicates that such extensions were "fair and reasonable" and in terms of clause 5.4 of the contract.

15. In terms of clause 2 of the contract, the petitioner would be liable to pay compensation at the rate of 1.5% per month for the period of delay. However, this is plainly contingent on the petitioner being found to be responsible for the delay in the project. There is also much merit in the contention that such liquidated damages would be payable only if the respondent is able to establish that it has suffered some loss. In **Vishal Engineers & Builders v. Indian Oil Corporation Limited: 2012 (1) Arb.LR 253 (Delhi)**, a Division Bench of this Court had referred to several decisions and explained that it is not open for a party to claim that it is

"entitled to liquidated damages without, at least, proving a semblance of loss."

16. The aforesaid issues are only contentious issues and it is not necessary at this stage to adjudicate the same. However, the correspondence exchanged between the parties *prima facie* indicates that the delay in execution of the project was for reasons beyond the control of the petitioner. It is also seen from the letter dated 27.02.2017 that although the Chief Project Manager, Flyover - I, of the respondent has held that the petitioner is responsible for a delay of 231 days after 12.02.2016; the break-up of the detailed analysis of the same was not provided.

17. The petitioner has contended that the project was completed and the petitioner has to make payment to various persons/entities involved in the project. Withholding amounts on account of alleged liquidated damages would severely prejudice the petitioner.

18. In the circumstances, this Court is satisfied that the petitioner has established a *prima facie* case that it would not be liable to pay liquidated damages as contemplated under clause 2 of the contract. This Court also finds that it would be manifestly unfair if the respondent is permitted to recover the entire amount of liquidated damages without final adjudication with respect to various contentious issues; more so, because the project was completed more than a year ago and has been in use since.

19. Undisputedly, Section 9 of the Act is widely worded and enables this Court to order such measures of interim protection as may appear to be just and convenient including restraining the respondent from deducting any sums on account of claims for liquidated damages from the admitted

amounts payable to the petitioner (See: *Simplex Infrastructures Limited v National Highways Authority of India*: 177 (2011) DLT 248).

20. In the given circumstances, the ends of justice would be met if the respondent is directed to make all payments due to the petitioner without deducting or adjusting any liquidated damages, subject to the petitioner furnishing an unconditional bank guarantee for an amount equal to the liquidated damages as claimed by the respondent (that is, ₹27,99,01,744/-). Further, in the event it is found that liquidated damages as claimed by the respondent are payable, the respondent would also be entitled to recover the same with interest.

21. The respondent would be entitled to invoke the said bank guarantee subject to the outcome of the arbitral proceedings. The respondent is further directed to clear all dues of the petitioner within a period of two weeks of the aforesaid bank guarantee being furnished, without making any deduction on account of compensation under clause 2 of the contract.

22. The petition along with any pending application is disposed of.

VIBHU BAKHRU, J

APRIL 19, 2017
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