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

% *Date of decision: July 04, 2017*

\+ O.M.P.(I) (COMM.) 131/2017

LINK ENGINEERS PRIVATE LIMITED ..... Petitioner

Through Mr.Shadan Farasat and Mr.Ahmed Said, Advs.

versus

POWER MACHINES INDIA LIMITED & ANR...... Respondent

Through Mr.Kirti Uppal, Sr.Adv. with Ms.Rupal Bhatia, Mr.Saurabh Chaturvedi, Mr.Siddhartha Chopra and Mr.Abhimanyu, Advs.for R-1

Ms.Monika Singh, Adv. For R-2

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. Present petition is filed under section 9 of the Arbitration and Conciliation Act, 1996 seeking a direction against respondent No.1 to pay to the petitioner a sum of Rs.3,30,00,000/- and USD 1,00,000/- being the admitted liabilities and to deposit the remaining sum of Rs.1 crore with the Registry of this court. Other reliefs are also sought.

2. The petitioner is said to be a company engaged in providing consultancy services to respondent No.1 with respect to Super Thermal Power Projects of respondent No.2 NTPC at Barh in Patna District in Bihar. The petitioner and respondent No.1 entered into a consultancy agreement with respect to the said power project located in the region of Barh on 30.8.2004. The respondent No.1 is said to have issued a letter of

authorization in favour of the petitioner on 17.1.2005 to collect information on their behalf. The said respondent No.1 entered into agreements with respondent No.2 NTPC for construction of Super Thermal Power Plant at Barh for three units of 660 each on 14.3.2005.

3. It is the case of the petitioner that under the consultancy agreements, payments were to be made on completion of various stages of the project as per the agreement. The respondent No.1 is said to have released payments to the petitioner of the first three stages through cheques on 2.4.2004 of Rs.85,29,525/-; on 16.4.2005 for Rs.1,65,85,187/- and on 28.4.2005 for Rs.1,61,11,325/-. Thereafter further payments as per schedule have not been released to the petitioner.

4. Various communications and reminders have been sent by the petitioner for its dues. Some of the communications said to have been sent by the respondent may be looked at. Reliance is placed on the communication received from respondent No.1 on 25.1.2007 where the respondent No.1 is said to have agreed to fulfill all their contractual commitments. Reliance is also placed on a letter dated 22.3.2007 and 24.10.2007 where respondent No.1 is said to have stated that payments for the Barh project would be made in installments till December, 2010. Similarly, reliance is also placed on communications dated 18.12.2007 and 7.4.2008 received from respondent No.1. On 23.3.2010 Mr.Andrey Lesnichuk, Director of respondent No.1 is said to have written a communication to the petitioner where he has again assured release of payments stating that a sum of Rs.3.3 crores plus 1 lac USD is payable for additional services for the Barh project. The communication further says that all the payments would be made by May 2014 at the latest.

5. It is the case of the petitioner that since 2012 they have sent repeated emails and communication to respondent No.1 with no material result. On 7.7.2016 the petitioner sent a statutory notice for winding up to respondent No.1 for the sum of Rs.4.3 crores due alongwith accumulated interest. A winding up petition is also said to have been filed on 6.9.2016 against respondent No.1 regarding another project, i.e. SIPAT Project. It is also the case of the petitioner that the annual reports for the years 2013-14 and 2014-15 of respondent No.1 show losses in both the financial years and show that the results are substantially negative. Hence, it is urged that the petitioner seeks the assistance of this court in protecting its admitted interest.

6. Respondent No.1 in its reply has pointed out that the claim of the petitioner is barred by limitation and is based on false and fabricated documents. It is also pleaded that there was failure on the part of the petitioner to provide consultancy services and yet the petitioner has raised invoices and made demand for further payments. It has been stated that letter dated 23.3.20010 which is relied upon by the petitioner is a forged and fabricated communication. The said Mr. Andrey Lesnichuk who is said to have signed the said letter was not authorized by respondent No.1 or had any relationship with respondent No.1 on March 23, 2010 to issue the said letter. He was not even a Director or employee or authorized signatory of respondent No.1. He was appointed as Additional Director for the first time on 29.6.2011 much after the alleged communication dated 23.3.2010.

7. Respondent No.2/NTPC has filed its reply. In the reply it has stated that there is no privity of contract between petitioner and respondent No.2. The said respondent No.2 admits having awarded two contracts to respondent No.1. It is stated that the contracts were to be completed by

respondent No.1 by 29.10.2014 but are yet to be completed. Subject to completion of the contracts and subject to other conditions of the contract pertaining to payment including risk and costs and necessary deductions etc. it is admitted that a sum of Rs.1,26,65,017 may be payable to respondent No.1 as on 25.4.2017.

8. I have heard learned counsel for the parties. Learned counsel for the petitioner has vehemently argued that respondent No.1 company is a subsidiary of a Russian Company and has no assets in India. In case an Award is passed in favour of the petitioner there would be no means to recover the same. Reliance is placed on accounts including schedules forming part of the accounts to submit that the net worth of respondent No.1 company has completely eroded. Reliance is also placed on various admissions to support the contention that this court should pass an interim order directing respondent No.2 not to release amounts to respondent No.1, till adjudication of the claim petition of the petitioner.

9. Learned counsel for the petitioner also relies upon judgment of this court in OMP 911/2013 dated 21.3.2014 to support his contentions. It is urged that the respondent in the present case is the same as in that case.

10. Learned senior counsel appearing for respondent No.1 has vehemently argued that the petitioner has filed forged documents and cannot seek relief from this court. It is reiterated that the communication dated 23.3.2010 which is said to have been signed by one Mr. Andrey Lesnichuk, Director of Power Machines is forged. Further, the said Mr. Andrey Lesnichuk, was not authorized to even sign the said documents. It has also been urged that Performance Acceptance Certificate in terms of the agreement between the parties has also not been filed by the petitioner and no dues are payable. It

has also been stressed that the claim of the petitioner is barred by limitation. Reliance is placed on the averments in the petition to show that the claim is barred by limitation.

11. A perusal of the documents and admissions relied upon by the petitioner make it quite clear that the claim of the petitioner is highly belated. The agreement between parties is dated 30.8.2004. In the course of arguments learned counsel for the petitioner has accepted that the dues which are now claimed became payable to the petitioner on 25.10.2007. The last alleged acknowledgement of dues has been made by respondent No.1 on 23.3.2010. Ten years after the amount allegedly became payable and seven years after the alleged acknowledgement of debt the petitioner has chosen to file the present petition under Section 9 of the Act seeking directions to protect its alleged claims.

12. The only explanation for this alleged delay is that as per communication dated 23.3.2010, respondent No.1 had promised to pay all dues by May 2014. Hence, it is stated that the petitioner was hoping that respondent No.1 would fulfill its promise and was waiting for the same. The explanation for this long delay in approaching the court inspires no confidence. Reference in this regard may be had to the judgment of the Supreme Court in the case of ***Zenit Mataplast P.Ltd vs State Of Maharashtra & Ors, (2009) 10 SCC 388/(MANU/SC/1626/2009)*** wherein it was held as follows:

> "32. ……………………………………The delay in approaching the Court is of course a good ground for refusal of interim relief, but in exceptional circumstances, where the case of a party is based on fundamental rights guaranteed under the Constitution and there is an apprehension that suit property may be developed in a manner that it acquires irretrievable situation,

> the Court may grant relief even at a belated stage provided the court is satisfied that the applicant has not been negligent in pursuing the case."

13. In my opinion, the fact that the petition is highly belated is itself sufficient ground to disallow the present injunction application filed by the petitioner.

14. I may also note that the fact whether the claim of the petitioner is within limitation is also a contentious matter that will require evidence. The cause of action para as reproduced in the petition reads as follows:-

> "14.That the cause of action to file the present Petition has arisen in favour of the Petitioner and against the Respondents on all such dates when Respondents breached the Contract and did not pay the outstanding amount in accordance with the agreement and the cause of action is continuing to favour the Petitioner and against the Respondents as the Respondent No. 1 has not yet paid the outstanding dues."

15. A reading of this plea does not show how the claim of the petitioner is within limitation. The entire case of the petitioner on limitation hinges on the alleged document dated 23.3.2010. In the said communication respondent No.1 is said to have acknowledged that it would pay the outstanding dues of petitioner by May 2014. Hence, the contention of the petitioner is that this acknowledgment extends the limitation period for the recovery of dues of the petitioner in view of Section 18 of the Limitation Act. It is urged that vide the said communication respondent No.1 had promised that the dues would be cleared by May, 2014. Hence, the cause of action arises on May 2014 for the petitioner to seek recovery of its dues.

Respondent No.1 has vehemently denied the authenticity and validity of this communication dated 23.3.2010. It has been pointed out that the said

Mr.Andrey Lesnichuk, was not authorized to sign this document. In fact he has joined the company only in 2011 whereas the document is purportedly signed in March 2010 when he was not authorized to sign. The respondents have stated that Mr.Andrey Lesnichuk was appointed as an Additional Director of respondent No.1 for the first time on 29.06.2011 and the Managing Director on 29.07.2011. Respondent No.1 has placed on record the relevant form filed with the Registrar of Companies to the above effect. A copy of Form-32 has been placed on record showing Mr.Andrey Lesnichuk was appointed as an Additional Director w.e.f. 29.06.2011. A copy of Form- 32 is also filed showing Mr.Andrey Lesnichuk was appointed as Managing Director w.e.f. 29.07.2011.

16. Given averment made by respondent No.1 and the documents placed on record regarding Mr.Andrey Lesnichuk, the authenticity of the document relied upon by the petitioner, namely letter dated 23.03.2010 can be gone into only after the parties have led evidence in the matter. It would not be appropriate to further comment on the said document as it is the fulcrum of the case of the petitioner.

17. The reliance of learned counsel for the petitioner on the judgment of this court in OMP 911/2013 titled Indwell Constructions Pvt. Ltd. vs. Power Machines (India) Ltd. & Ors. is misplaced. The facts of the judgment would show that the facts of that case were entirely different. On the facts of that case the court had come to the conclusion that prima facie the respondent is shifting its stand and does not have any intention to make the payment. The said judgment does not support the case of the petitioner.

18. In my opinion, there is an undue delay in approaching this court by the petitioner. The petitioner has not received payment for the last 10 years i.e.

since 2007 when the payment become due. In view of the lapse of the time, I do not see any ground made out by the petitioner for passing any interim order in its favour. The present petition is dismissed. I may, however, add that any observations or comments made in the present order shall not in any manner prejudice the petitioner in any proceedings that he may commence for recovery of its alleged dues.

(JAYANT NATH)
JUDGE

JULY 04, 2017/n/v