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

+ **O.M.P.(I) (COMM.) 279/2017**

ITD CEMENTATION INDIA LTD.

..... Petitioner

Through Mr.Sandeep Sethi, Sr.Adv. with
Mr.Krishna Vijay Singh and Mr.Shidant Kaushik,
Adv.

versus

PUBLIC WORKS DEPARTMENT GOVT. OF NCT DELHI

..... Respondent

Through Mr.Siddhartha Shankar Ray, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **26.07.2017**

1. Present petition is filed under section 9 of the Arbitration and Conciliation Act, 1996 seeking to direct the respondent to release the alleged liquidated damages of Rs.11,08,68,659/- to the petitioner against submission of Bank Guarantee of an equivalent amount. The bid of the petitioner was accepted for Comprehensive Development of a Corridor at the Outer Ring Road between Mangolpuri to Madhuban Chowk. As per the respondent the said work was completed by the petitioner on 4.8.2016 whereas the scheduled date of completion was 9.4.2015. The respondents have now communicated to the petitioner on 17.11.2016 that the petitioner is responsible for a delay of 78 days subsequent to 18.5.2016 on account of which the petitioner was held liable to pay a sum of Rs.11,08,68,659/-.

2. I have heard learned senior counsel for the petitioner and learned counsel appearing for the respondents. Learned senior counsel for the petitioner has relied upon the order of this court dated 14.04.2017 in OMP(I) (Comm.)108/2017 pertaining to the same parties where it is urged

that under similar facts this court had restrained the respondent from deducting liquidated damages subject to the petitioner furnishing a bank guarantee. It is urged that the Division Bench subsequently has upheld the order, subject to liberty granted to the respondent to seek modification or variation of the said order before the learned Arbitrator. He submits that even in the present case a prima facie case is made out in favour of the petitioner.

Learned counsel for the respondent has vehemently stated that these issues being raised by the petitioner regarding the liability to pay on account of delay will have to be adjudicated upon by the learned Arbitral Tribunal and it is not for this court to adjudicate upon the same.

3. A perusal of order of this court dated 19.4.2017 in OMP (I) (COMM) 108/2017 would reveal that this court had on the facts of the case come to a prima facie conclusion that the petitioner therein was not liable to pay liquidated damages. The court held that it would be manifestly unfair if the respondent therein is permitted to recover the entire amount of liquidated damages without final adjudication. Accordingly, the said order was passed.

4. The facts of this case are that the flyover was scheduled to be completed on 9.4.2015. As per respondents the flyover was completed on 4.8.2016. The petitioners refute the date of completion stated by the respondents. It is urged that the flyover was actually completed on 21.12.2015. It is admitted fact that the Chief Minister inaugurated the flyover on 17.1.2016 though as per the respondent the entire work was not completed till then. It is further submitted that the flyover became operational from the date of the inauguration.

5. A perusal of the communication dated 17.11.2016 issued by the

respondent would show that they have noted the calculations of the petitioner stating there was justifiable hindrance of 519 days. The letter accepts that the actual delay was of 483 days. The communication further comes to a conclusion that the petitioner is responsible for delay of 78 days after 18.5.2016, namely, after 17.1.2016 when the flyover was inaugurated and is said to have come into use.

6. In my opinion, the above facts show that once the flyover has become functional, this fact would have a strong bearing on the claim of the respondent for liquidated damages i.e. whether they suffered any damages whatsoever on account of the fact that the flyover was functioning. Accordingly, in my opinion, in the facts of the case the petitioner has made out a prima facie case. Following the order of this court in OMP (I) (Comm.)No.108/2017, the respondents are restrained from deducting/withholding any amount on account of liquidated damages subject to the petitioner furnishing an appropriate bank guarantee to the respondents. The said payment shall be released by the respondent on furnishing of an appropriate bank guarantee by the petitioner. The bank guarantee shall be kept alive during pendency of the interim order.

7. Learned counsel for the respondent states that the respondent would soon constitute the arbitral tribunal. Once the arbitral tribunal is constituted, liberty is granted to the respondents to apply to the Tribunal as per law for appropriate modification or variation or recall of the present interim order as per law. Petition stands disposed of. All pending applications, if any, also stand disposed of.

JAYANT NATH, J

JULY 26, 2017/n