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

+ **O.M.P.(I) (COMM.) 481/2017**

Date of decision: 22nd November, 2017

AAXIS NANO TECHNOLOGIES PVT. LTD..... Petitioner
Through Mr.Anup J. Bhambhani, Sr.
Adv. with Mr.Rajat Arora and
Mr.Jaypreet Singh, Advs.

versus

S::CAN MESSTECHNIK GMBH Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.13764/2017 (Exemption)

Allowed, subject to all just exceptions.

The application is disposed of.

O.M.P.(I) (COMM.) 481/2017

1. The petitioner has filed the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred as the 'Act') seeking interim order of stay against the termination letter dated 27.10.2017 issued by the respondent.

2. The petitioner and the respondent have been granted a contract dated 11.07.2016 by the Central Pollution Control Board (hereinafter referred as to 'CPCB') for Continuous Real Time Water Quality Monitoring Data (hereinafter referred to as the 'Principal Contract'). The parties have thereafter, entered into a "Continuous Real Time Water Quality Monitoring Data Ganga-II Co-operation Agreement" dated 31.01.2017 (hereinafter referred to as the 'Co-operation Agreement'). The Co-operation Agreement inter-alia provides for the role and responsibilities of the parties to regulate their relationship with each other in respect of the affairs and dealings with CPCB and also each other. Some of the important terms of this Agreement are reproduced herein below:

***"WHEREAS** it is understood that the parties to the Agreement are acting in the capacity of principal and there exist no relationship of master servant or principal agent or partnership between the parties herein. The Parties to this Agreement expressly do not intend hereby to form a partnership, either general or limited, under any jurisdiction's partnership law. The Parties do not intend to be partners to one another or partners as to any third Party, or create any fiduciary relationship among themselves, solely by virtue of this Agreement or by virtue of the Principal Contract. To the extent that any Party, by word or action, represents to another Person that any other Party is a partner or that the Company is a partnership, the Party making such representation shall be liable to any other Parties that incur any losses, claims, damages, liabilities, judgments, fines, obligations, expenses and liabilities of any kind or nature whatsoever (including any investigative, legal or other expenses incurred in connection with, and any amount paid in settlement of,*

any pending or threatened legal action or proceeding) arising out of or relating to such representation. Further, the relationship between the parties is of no Agency. Each Party is acting solely in its capacity of the Part and shall not act as an agent of the other Party. The relationship between the parties is principle to principle level and both the parties are responsible for carrying their part of work, as agreed in this Agreement.

WHEREAS *The Parties are entering into this Agreement to regulate their relationship with each other in respect of the affairs and their dealings with CPCB and also among each other, also the management and operations of their respective contract work and also to represent their individual responsibilities, workload, delivery and their respective revenue shares between the parties and other services being given to the CPCB subject to the terms and conditions of this Agreement which are in line with the Principal Contract, as defined hereinafter.*

WHEREAS *The relationship of the parties in this Agreement is on a principal to principal basis, in respect of the project. No relationship of agency, joint venture or partnership shall exist or shall be deemed to exist between the parties, and except as specifically provided herein, no party shall have the authority to bind other party without the latter's prior written approval.*

xxxx

4. ROLE AND RESPONSIBILITY OF PARTIES:

- 4.1 *SCAN is the lead partner, responsible for the developing and manufacturing of the monitoring equipments the data delivery system as well as the monitoring and operation strategy, and managing the water quality system operation.*
- 4.2 *SCAN being the lead partner is nominated for taking the charge, making decisions be it*

- financial and otherwise and receive instructions for and on behalf of both the parties by CPCB.*
- 4.3 *AAXIS would be responsible for instrumentation, system integration and also for the installation and operation of the water quality network in accordance to the framework and needs of the Principal Contract, and shall be in conformity accordance with the Specifications provided by SCAN.*
- 4.4 *Further, the Parties to the Agreement have distributed their roles and responsibilities in the manner as shown in the Appendix-C. The Parties understand that they shall be liable and responsible for its part of obligations. The Parties cannot be held liable and responsible for the fault of other Party. It is also understood between the Parties that whatever is not described in Appendix-C but needs to be done/delivered, is to be covered by the Party responsible for the particular activity/delivery. Subject to the other provisions of this Agreement, negotiation with CPCB shall be conducted by SCAN as the intended lead Party, but SCAN may request the participation therein from time to time of representatives from AAXIS. Such participation shall be forthcoming from AAXIS in a properly and timely fashion.*
- 4.5 *It must be ensured by each party that the terms and specifications provided under the Principal Contract remain strictly complied with. The Parties understand that if there is any addition to or any alteration in the order by the CPCB, the Parties have to settle and arrive at a written agreement/addendum about how the additional duties are to be served. The said process would be completed with the consent of both the Parties.*
- 4.6 *If there is any material breach of the terms of the Principal Contract either by CPCB or any of the*

parties herein, each of the Parties agree that they shall jointly resolve/contest with CPCB for remedying such breach under the Principal Contract.”

3. It is the case of the petitioner, drawing reference to the various correspondences exchanged between the respondent and the CPCB, that the respondent had a grievance against release of timely payment by CPCB and was, therefore, desirous to terminate its contract with CPCB. However, the respondent with malafide intent has now sought to terminate the Co-operation Agreement alleging breach on part of the petitioner, when there is none. It is contended that, in fact, it is the respondent who is in breach of the agreement inasmuch as, the respondent has received payment from CPCB which was to be shared between the petitioner and the respondent in ratio of 35:65, however, no payment has been made to the petitioner. Drawing reference to Clause 4.6 of the Co-operation Agreement, it is submitted that in case there is a dispute with respect to the breach of the terms of the Principal Contract between the parties, the same was to be resolved/contested with the CPCB. The default that has been alleged in the notice dated 27.10.2017, being in relation to the Principal Contract issued by the CPCB in favour of the parties, the same has to be resolved through CPCB and unilateral action of termination of the Co-operation Agreement cannot be resorted to by the respondent. It is further submitted that Clause 12.1.1 can be invoked by the respondent only in case of a material breach of the contract by the petitioner, however, as there is no breach in the present case, which would be

evident from the correspondence written by the respondent itself to the CPCB informing them of due performance of the Principal Agreement, Clause 12.1.1 of the agreement could not have been invoked.

4. Learned Senior counsel further submits that even if the said termination is to remain in operation, the respondent cannot be relieved of any of its obligations incurred prior to the said termination and the parties shall have all rights and remedy available to it in law or in equity.

5. Learned Senior counsel drawing reference to Section 9(1)(ii)(e) of the Act submits that this would be a case where it is just and convenient to at least direct the respondent not to indulge in any correspondence with CPCB unilaterally and without involvement of the petitioner.

6. I have considered the submissions of the learned Senior counsel, however, I am unable to give any relief to the petitioner based on the same. It is to be noted, that in this case there is an involvement of a third party namely CPCB. The contract executed by CPCB in favour of the petitioner and the respondent clearly makes both the parties jointly and severely liable for performance of the Principal Contract. The Co-operation Agreement is a bilateral agreement only between the petitioner and the respondent albeit in relation to performance of the Principal Contract. Any order of injunction, therefore, can have an effect on performance of either party qua the Principal Contract and equally have an effect on rights of CPCB against either party to the Co-operation Agreement. CPCB is not a

party to these proceedings and, therefore, no comment can be made on performance or non-performance of the Principal Contract by either party to these proceedings as this may have an effect on rights of CPCB.

7. Further, Clause 17 of the said Co-operation Agreement gives either party an “exit options”. Clause 17 is reproduced herein below:

“17. EXIT OPTIONS:

17.1 In case SCAN exits from the Principal Contract, the equipments brought in by SCAN shall remain available till the Principal Contract is completed. AAXIS shall pay SCAN for the value of the equipments as per the price table and depreciation computed at 10% per annum, within a period of six weeks.

17.2 In case AAXIS exits from the Principal Contract, the equipments brought in by AAXIS shall remain available till the Principal Contract is completed. SCAN shall pay AAXIS for the value of the equipments as per the price table and depreciation computed at 10% per annum, within a period of six weeks.

17.3 In case any of the party decides to continue with the Project individually, the other party shall provide all the equipments and consumables to the other party throughout the period of the Principal Contract, against the payment of fair market value to the other party.”

8. The above Clause, therefore, makes the contract determinable at will. The petitioner contends that the respondent has not invoked Clause 17 of the Co-operation Agreement but has chosen to invoke Clause 12.1.1 of the same and, therefore, the grounds of

termination/alleged breach are to be examined by this Court. In my view, for the purpose of the present application, in view of the fact that the contract itself is determinable in nature on its own terms, I need not go into the validity of the grounds for termination at this stage. This would be a matter to be adjudicated by the Arbitral Tribunal constituted by the parties and the remedy for the petitioner would be in the form of damages for any wrongful termination, if it is able to make out such a case before the Arbitral Tribunal.

9. Equally, the submission that the respondent is, in fact, in breach due to non sharing of the amount received by it from CPCB, is a ground for the Arbitral Tribunal to adjudicate and determine. The same cannot result in an injunction against operation of termination notice, especially where the contract itself is determinable in nature.

10. As noted above, the main contract in question is the contract given by the CPCB in favour of the petitioner and the respondent that cast a joint and several liability on both the parties to perform the contract. By giving an injunction against the termination of the Co-operation Agreement, the effect thereof qua third party cannot be safeguarded. In other words, by grant of injunction as prayed for, it cannot be ensured that the respondent would keep performing its obligation qua the Principal Contract as well. The consequence of non performance of Principal Contract by either of the parties has to be governed by the Principal Contract and not subsidiary contract in form of the Co-operation Agreement.

11. Clause 14 of the Co-operation Agreement is reproduced herein below:

“14. CONSEQUENCES OF TERMINATION:

14.1 Either Party cannot be held liable and responsible for the acts of other Party. The Parties shall be individually responsible for their respective acts and deeds.

14.2 If any of the party commits breach in terms of the Principal Contract, the Party committing breach shall be solely held liable. If in case any of the Party defaults in fulfilling its obligation as per the Principal Contract and the CPCB files claims against both the parties i.e (SCAN and AAXIS), the non-defaulting party i.e party which is not in breach of contractual obligations is entitled to recover the loss or damaged suffered from the party committing breach.

14.3 It is understood by the Parties that in case any of Party does not follow its responsibility though being requested in accordance with the terms of this Agreement, the other Party is permitted to get the service done or do it by itself at the risk and cost of the defaulting party without any further notice.”

12. Clause 14.2 of the Co-operation Agreement grants protection to the petitioner in form of indemnity against any claim made by the CPCB for a default committed by the respondent. The petitioner therefore, in my opinion, is adequately protected in terms of the Co-operation Agreement.

13. Reliance of the learned Senior counsel for the petitioner on Clause 4.6 of the Co-operation Agreement can be of no avail. CPCB is not a party to the Co-operation Agreement. In any case, the said Clause provides that the parties shall “jointly resolve/contest with

CPCB” for remedying the breach alleged by the CPCB. In the present case, as per the petitioner, CPCB has till date not communicated any breach of the Principal Contract and in view of the dispute between the parties herein, it cannot be ensured that they would jointly resolve/contest their disputes with CPCB, in any. The said Clause would therefore have no application to the present situation.

14. As far as the reliance of learned Senior Counsel for the petitioner on Section 9(1)(ii)(e) of the Act is concerned, it is no doubt true that the Court, under Section 9 of the Act, can pass such order of interim measure of protection as may appear to the Court to be just and convenient, equally the Court cannot ignore the provision of The Specific Relief Act, 1963 while considering such application seeking interim protection. Section 41(e) of the Specific Relief Act states that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Section 14 of the Specific Relief Act states that the contract, for non performance of which compensation in money is an adequate relief; which runs into such minute or numerous details or which is so dependent on the volition of the parties; or a contract which is in its nature determinable, cannot be specifically enforced.

15. In view of the above, Co-operation Agreement between the parties, in my opinion cannot be specifically enforced and therefore, an injunction restraining the termination thereof cannot be granted.

16. As far as the prayer restraining the respondent from addressing any correspondence to the CPCB unilaterally and without involvement of the petitioner, I may again reiterate that as far as the CPCB is

concerned, the contract is between CPCB on one side and the petitioner and the respondent jointly and severally on the other side. In that view, the respondent cannot be restrained from addressing correspondence to CPCB under the Principal Contract, with or without the involvement of the petitioner.

17. In view of the above discussion, I find no merit in the present petition. The same is accordingly dismissed with no order as to cost.

18. I may only add that my above observations and findings would not, in any manner, be binding on the Arbitral Tribunal and/or influence the adjudication of the disputes between the parties by such Arbitral Tribunal as and when constituted.

Copy of the order be given *dasti* under the signature of the Court Master.

NAVIN CHAWLA, J

NOVEMBER 22, 2017/vp