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

+ **O.M.P.(I) (COMM.) 493/2017**

Date of decision: 28th November, 2017

MBL INFRASTRUCTURES LTD. Petitioner
Through Mrs.Anusuya Salwan,
Mrs.Renuka Arora and
Ms.Nikita Salwan, Advs.

versus

UNION OF INDIA Respondent
Through Mr.Ramesh Singh, Standing
counsel with Mr.Sandeepana
Pathak, Adv.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

IA No.13917/2017 (Exemption)

Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 493/2017

1. This petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking an interim order restraining the respondent to act on its letter dated 31.10.2017 by which the respondent has sought to levy liquidated damages of Rs.3,18,69,940/- upon the petitioner under

Clause 2 of the agreement for 130 days purported delay in completion of the project by the petitioner upto 31.03.2017.

2. It is the case of the petitioner that it has been allotted the work of “Construction of Residential Complex for Judicial Staff at Sector-19, Dwarka, New Delhi” under an agreement dated 07.11.2014 (hereinafter referred to as the Agreement). Stipulated date of start of construction was 08.10.2014 and the construction had to be completed by 07.04.2016. Drawing reference to the letter dated 01.02.2016 of the respondent, learned counsel for the petitioner submits that even as on that date, the respondent was not in a position to supply all the drawings that were required for the purpose of making the construction in terms of the agreement. She further submits that the petitioner, alleging default on part of the respondent, has been seeking extension of time for completion of the project and such extension has been granted in favour of the petitioner; the last extension being upto 30.09.2017. She further draws my attention to the drawing register to contend that drawings have been issued to the petitioner as late as 26.10.2017 and therefore, no default for completion of the project can be attributed to the petitioner and equally no liquidated damages can be claimed from the petitioner for such alleged default. Learned counsel for the petitioner, relying upon the judgment of Supreme Court in *M/s J.G. Engineers Pvt Ltd v. Union of India*, AIR 2011 SC 2477; *Bharat Sanchar Nigam Ltd. v. Motorola India Pvt Ltd.*, (2009) 2 SCC 337; *Vishal Engineers & Builders v. Indian Oil Corporation Ltd.*, Manu/DE/6829/2011 and *S.P. Virmani & Sons Pvt.Ltd. v. OTC Exchange of India*, Manu/DE/3394/2017, submits that the respondent

cannot unilaterally decide to levy liquidated damages; the question whether there was a delay in execution of the work and if so at whose account such delay was caused are the matters to be adjudicated by the arbitrator. It is further submitted that before the arbitrator the respondent also has to prove that it has suffered losses before it can claim such Liquidated Damages.

3. On the other hand, learned counsel for the respondent submits that in the petition no submission has been made with respect to intent to invoke arbitration. He submits that in absence of such averment, the present petition itself would not be maintainable. Further, relying upon Clauses 5.2 and 5.4 of the agreement, he submits that the causes for the delay have been examined by the “Engineer-in-Charge and these are binding on the petitioner. He further submits that Engineer-in-Charge has attributed 138 days’ delay on part of the petitioner. At this prima facie stage, such findings cannot be ignored. He further submits that proceedings under the Insolvency and Bankruptcy Code 2016 have been initiated against the petitioner by the creditors. He further submits that the security deposit and the performance bank guarantee that have been given under the agreement were in addition to the right of the respondent under Clause 29 of the agreement to exercise a lien on all amounts payable under this agreement.

4. I have considered the submissions made by the learned counsels for the parties. In my view the fact as to who is responsible for the delay in completion of the work is a matter to be adjudicated by the arbitrator. At this stage, this Court cannot examine this fact and pronounce a judgment over the same; only prima facie view has to be

taken. While it is true that the petitioner, claiming reference to various letters written by it and the drawing register, has submitted that delay were attributable to the respondent, the respondent has countered the same by relying upon the certificate of Engineer-in-Charge whose decision, under the agreement, was agreed to be binding on the parties. In that view of the matter, equity has to be balanced between the parties at this stage.

5. In *M/s J.G. Engineers Pvt Ltd.(supra)* Supreme Court was concerned with the question whether the dispute as to who is responsible for the delay in execution of the work was arbitrable. It is a case dealing with challenge to the Award passed by the Arbitrator and therefore, would not be applicable to the fact of the present case, which is still to go for arbitration.

6. In *Bharat Sanchar Nigam Ltd.(supra)* the challenge was to the decision of the High Court appointing an arbitrator to adjudicate the disputes, including one of levy of liquidated damages. It was contended by the Appellant therein that levy of liquidated damages was an “excepted matter”. This plea of the Appellate was rejected by the Supreme Court. As noted above, the present is not a case of seeking invocation but of grant of appropriate interim relief under Section 9 of the Act.

7. *Vishal Engineers & Builders (supra)* was again a case of challenge to the Arbitral Award and of the application of Section 74 of the Contract Act to the demand of liquidated damages.

8. *S.P.Virmani & Sons Pvt. Ltd.(supra)* was again a case dealing with application of Sections 73 and 74 of the Contract Act.

9. As observed above, these are matters to be decided by the Arbitrator upon considering the evidence led by the parties before such Arbitral Tribunal.

10. Reliance of the petitioner on the letters granting extension of time for completion of the project cannot be of much assistance to the petitioner at this stage because by these letters, the respondent has expressly reserved the right to recover liquidated damages, in the following words:

“without prejudice to the right of the Government to recover liquidated damages in accordance with the provision of clause 2 of the said agreement.”

11. In ***ITD Cementation India Ltd. v. Public Works Department***, Manu/DE/1090/2017 this Court, in almost identical situation, had directed the respondent therein to make all payment due to the petitioner therein without deducting or adjusting liquidated damages, subject to the petitioner furnishing an unconditional bank guarantee for an amount equal to the liquidated damages as claimed by the respondent therein.

12. In my view, the above course adopted by this Court in ***ITD Cementation India Ltd.(supra)*** is most appropriate in the facts of the present case. Accordingly, I pass an interim order directing the respondent to make all the payment due to the petitioner without deducting or adjusting liquidated damages levied in terms of the impugned communication dated 31.10.2017, subject to the petitioner furnishing an unconditional bank guarantee for an amount equivalent to the liquidated damages of Rs.3,18,69,940/-. It is further directed

that, in the event it is found in the arbitration that the liquidated damages as claimed by the respondent were payable, respondent would also be entitled to recover the same with interest. At the same time, if it is found that the liquidated damages were wrongly levied on the petitioner, it is open to the Arbitrator to award such damages to the petitioner including the cost or charges that petitioner may have incurred for arranging for such bank guarantee.

13. The respondent would be entitled to invoke the said bank guarantee only subject to the outcome of the arbitral proceedings. Unless the present order is modified or vacated by the Arbitral Tribunal, the bank guarantee shall be kept alive by the petitioner.

14. As the petitioner is yet to invoke the arbitration agreement between the parties, it is directed that the present order shall remain in operation only for a period of 90 days from today within which the petitioner must invoke the arbitration agreement. Either party would be free to seek any modification or vacation of the present order before Arbitral Tribunal.

15. 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.

16. The present petition is allowed in the above terms.

NAVIN CHAWLA, J

NOVEMBER 28, 2017/vp