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

\+ O.M.P.(I) (COMM.) 106/2018

AFCONS INFRASTRUCTURE LIMITED ..... Petitioner

Through: Mr Rajiv Nayar, Sr. Advocate, Mr Darpan Wadhwa, Sr. Advocate with Ms Sonali Jaitley, Mr Jaiyesh Bakshi, Mr Pallav Pandey, Mr Kshitij Parashar, Mr Shubhanshu Gupta, Mr Sharad Sharma, Mr Toyesh Tewari and Ms Manjira Dasgupta, Advocates.

versus

DELHI METRO RAIL CORPORATION LTD. & ANR. ..... Respondents

Through: Mr Manvendra Verma and Mr Ankur Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 07.03.2018

IA No.3201/2018

1. Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 106/2018

2. The petitioner has filed the present petition, *inter alia*, praying as under:-

> "A. Restrain the Respondent No.1, its principal officers, servants, agents, and any other and all others acting for and on their behalf from acting on its letters dated 20.2.2018.

B. Restrain the Respondent No.1, its principal officers, servants, and any others acting for and on their behalf from encashing the Bank Guarantee no.003GM07152720007 dated 29.9.15.

C. Direct the Respondents, its principal officers, servants, agents, and any others acting for and on their behalf to maintain status quo and refrain taking any steps pertaining to the Bank Guarantee no.003GM07152720007 dated 29.9.15."

3. The controversy involved in the present petition relates to a bank guarantee furnished by the petitioner for release of the adhoc sum of ₹5 crores.

4. Briefly stated, the controversy arises in the following context:

4.1 The petitioner has submitted bills, *inter alia,* claiming additional amount of ₹30,42,53,010/- on account of certain variation in the works. The petitioner was facing financial crisis and, therefore, it requested respondent no.1 (DMRC) to release an *ad hoc* sum of ₹18 crores against aforesaid bills subject to the adjustments being made subsequently.

4.2 Pursuant to the request made by the petitioner, DMRC released a sum of ₹5 crores, subject to the following conditions:-

"1. The above ad hoc payment will be against the 110% of Bank Guarantee (BG) of Rs.5.0 crore.

2. In case the claims are settled with value less than Rs.5 crore, the balance amount will be refunded by you with the interest rate "SBI PLR + 2%.

3. The above amount will be utilized only for this Project (CC-29)."

4.3 The petitioner accepted the said conditions and furnished a bank guarantee for a sum of ₹5.5 crores (the stay which is sought in the present petition).

4.4 The concerned officers of DMRC examined the bills in question and have accepted the same only to the extent of ₹2,42,35,244/- against the total aggregate amount of ₹30,42,53,010/-. In the circumstances, DMRC claims that it is entitled to recover the balance amount from the bank guarantees furnished by the petitioner.

5. It is apparent from the above that there is a controversy as to the amount payable to the petitioner in respect of the bills for variation in works. It is also seen that the contract between the parties provides for a conciliation procedure before the disputes can be referred to the arbitration. The learned counsel appearing for the respondents has pointed out that in terms of the conciliation procedure the petitioner has to accept one conciliator from the panel of conciliators maintained by the respondents.

6. Mr Nayar, the learned Senior Counsel appearing for the petitioner contended that in terms of their understanding the bank guarantees can be encashed only once the amount is fully settled and that would also include settlement by way of arbitration in case the disputes relating to the bills in question persist. This is contested by the learned counsel for the respondents; he states that the said payment was only made as an *ad hoc* measure pending the scrutiny of the bills in question at the material time and the same were being examined by the concerned officers of DMRC.

7. *Prima facie*, this Court is inclined to accept the contention advanced on behalf of the respondents. However, as noticed above, the contract

between the parties also provides for resolution of differences/disputes by conciliation.

8. In the given circumstances, this Court is of the view that it would be apposite that DMRC should attempt to resolve the disputes by conciliation before taking any precipitate action in respect of the bank guarantees. Mr Nayar, the learned Senior Counsel appearing for the petitioner submits that the petitioner had already invoked the conciliation proceedings by a letter dated 03.03.2018.

9. In this view, it is directed that DMRC would provide a panel of conciliators to the petitioner within a period of two days from today. The petitioner shall choose one of the conciliators from the said panel. The conciliator so appointed shall proceed with the conciliation forthwith and try to resolve the matter as far as possible before 05.04.2018. Depending on the outcome of the conciliation, DMRC would be at liberty to invoke the bank guarantees to recover the balance amount (Rs 5 crore less the amount of bill accepted) along with interest.

10. The petition is disposed of with the aforesaid observations.

11. Needless to state that all contentions of the parties are open and nothing stated in this order shall be construed as an expression of opinion on the merits of the disputes.

12. Order *dasti*.

VIBHU BAKHRU, J

MARCH 07, 2018/MK