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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 15th May, 2018

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O.M.P. (I) (COMM) 151/2017 & IA 4108/2017

SUGAM CONSTRUCTION PVT. LTD.

..... Petitioner

Through: Mr.Raman Kapur, Sr. Adv. with
Mr.Hemant Gupta, Adv.

versus

D S C LTD & ORS.

..... Respondents

Through: Mr.Ashish Dholakia, Mr.D.Kishore
Kumar, Mr.Gautam Bajaj, Mr.Rohan Chawla,
Advs. for R-1-2
Mr.Sanjay Dewan, Ms.Palak Rohmitra, Advs. for
R-3.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner praying *inter alia* for the following reliefs:-

“i) to direct Respondents to deposit the entire claim amount of a sum of Rs.4,69,30,051/- along with 24% rate of interest as on the date of filing of the statement of claim i.e. 10.09.2013 till date (as claimed by the Petitioner herein before the Ld. Arbitral Tribunal), before the Ld. Registrar General of this Hon'ble Court.

ii) to restrain Respondent No.3 from releasing any further payments, if due to Respondent No.1/2 with respect to any Arbitral Award/contract etc. and to deposit the same before the Ld. Registrar General of this Hon'ble Court.

iii) to direct the Respondent to deposit the entire claim amount of a sum of Rs.4,69,30,051/- along with 24% rate of interest as on the date of filing of the statement of claim i.e. 10.09.2013 till date, before the Ld. Registrar General of this Hon'ble Court, to be released in favour of the successful party in accordance with the direction/ award of the Ld. Arbitral Tribunal ;

iv) to restrain/stay the Respondent No.1 and 2 not to create third party interest in any of their movable and immovable assets pending the final disposal of the claim petition before the Ld. Arbitral Tribunal, as instituted by the Petitioner herein;

v) to direct the Respondent No.1 and 2 to file an affidavit of evidence as contemplated under Order XXI Rule XXXI(2) of Code of Civil Procedure, 1908 before this Hon'ble Court in terms of directions as passed by the Ld. Arbitral Tribunal vide its order dated 19.04.2016.”

2. It is the case of the petitioner that the respondent no.1 awarded the work of construction of RCC Box Segmental Drain under Railway Track with Box Jacking Technology in favour of the petitioner vide its letter dated 11th September, 2008. As certain disputes arose in the execution of the said work, the same were referred to the Sole Arbitrator vide order dated 9th October, 2012 passed by this Court in Arbitration Petition No.385/2012. The arbitration proceedings are at its final stage where arguments have been heard and the award is awaited.

3. It is submitted by the learned senior counsel for the petitioner that when the arbitration proceedings were at its final stage, the respondent no.1 filed an application on 18th November, 2016

informing the Arbitral Tribunal that in terms of the order dated 16th December, 2011 passed by the Company Court, at the Delhi High Court, in Company Petition no.464/2011, the respondent no.1 has *inter alia* transferred the EPC Undertaking and the Power Undertaking of the respondent no.1 to respondent no.2 along with liabilities attached thereto. In the application, it was further submitted that in view of this transfer, the respondent no.2 needs to be substituted in the arbitration proceedings in place of respondent no.1, who had been inadvertently contesting the claims filed by the petitioner. Though, the Arbitrator expressed his displeasure on the application being moved at such a belated stage, as respondent no.2 had filed an affidavit stating that it fully adopts the statement of defence, affidavit of admission and denial and other proceedings/pleadings filed by respondent no.1, vide order dated 9th December, 2017 directed the respondent no.2 to also file an affidavit of its assets. At this stage, the respondent no.1 withdrew its application. Learned senior counsel for the petitioner submits that as the claim of the petitioner is in relation to the EPC Undertaking that has been transferred to the respondent no.2 along with all liabilities, respondent no.2 shall be equally bound by any Arbitral Award passed against respondent no.1. He further submits that as the Arbitrator could not have passed any order under Section 17 of the Act against the respondent no.2, the present application was necessitated.

4. On the other hand, the counsel for respondent no.2 submits that the respondent no.1 has filed an affidavit disclosing its assets before the Sole Arbitrator. There is no direction passed by the Sole

Arbitrator rejecting such affidavit or calling upon the respondent no.1 to give any further security in the matter. He submits that as respondent no.2 is not a party to the arbitration proceedings, it cannot be directed to disclose its assets.

5. I have considered the submissions made by the counsels for the parties. As noted by the Arbitrator in his order dated 7th November, 2017 (wrongly mentioned as 07.12.2015), though the relevant undertaking that is the EPC Undertaking had been transferred by the respondent no.1 in favour of the respondent no.2 way back on 16th December, 2011 under the order passed by the Company Court, this was not disclosed by respondent no.1 to the petitioner or to the Arbitral Tribunal. Taking note of such belated disclosure, the Arbitrator vide his order dated 9th December, 2017 had directed the respondent no.2 to file its affidavit of assets. This order remained uncomplied with. The respondent no.2 has admittedly taken over the liabilities as well from respondent no.1 for the EPC Undertaking transferred by respondent no.1 in its favour. This was not disclosed to the Arbitrator in time and the proceedings were allowed to be conducted by Respondent no. 1. Once the Arbitrator passed the order directing respondent no. 2 to file an affidavit disclosing its assets, respondent no. 1 withdrew its application. Clearly, the respondents are not acting in a *bona fide* manner. Therefore, I see no reason why the respondent no.2 should shy away from disclosing its assets so as to show its capability of complying with any Award that may be passed against the respondent no.1. This is fortified by the affidavit filed by respondent no.2 before the Sole Arbitrator submitting its

readiness and willingness to be substituted in place of respondent no.1 in the arbitration.

6. As far as the prayer of the petitioner seeking an order of restraint on respondent no.3 from making any payment under its different contracts with respondent no.1 is concerned, counsel for respondent no.3 submits that presently there is no such payment due and payable by respondent no.3 to the respondent no.1. He, however, admits that there is an Arbitral Award passed in favour of respondent no.1 and against respondent no.3, challenge against which is pending adjudication in a petition under Section 34 of the Act before this Court. It is directed that incase the respondent no.3 is to make any payment to the respondent no.1 in terms of the said Award, a due notice thereof shall be given to the petitioner before making such payment.

7. In view of the above, the respondent no.2 is directed to file its affidavit of asset within four weeks from today.

8. The petition is disposed of with the above directions with no order as to costs.

NAVIN CHAWLA, J

MAY 15, 2018/RN