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

Date of Decision: 03.10.2018

+ O.M.P.(I) (COMM.) 198/2018

NIRMAL BOT LTD.

..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Adv. with
Mr. Sanjeev Seshadari,
Mr. Rishi Agrawala,
Mr. Pranjit Bhattacharya &
Ms. Shruti Arora, Adv.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent

Through: Ms. Gunjan Sinha Jain with
Ms. Soumya Priyadarshinee, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition in which the following substantive prayer is sought:-

“(i) Restrain the Respondent from recovering / making any deductions from the 17th Contractual Annuity Payment of Rs.28,30,00,000 or Petitioner's Escrow Account towards alleged damages or any other amount, during the pendency of the dispute before the Ld. Arbitral Tribunal;”

2. Briefly, the record of the case shows that the captioned petition came to be filed in the background of following facts and circumstances.

2.1 The petitioner entered into a Concession Agreement (in short ‘C.A.’) dated 04.05.2007 with the respondent. The C.A. required the petitioner to

design, construct, develop, finance, operate and maintain National Highway No.7 (KM-278 to KM-308) located in the State of Andhra Pradesh in the North-South Corridor NHDH Phase-II (hereinafter referred to as 'Project').

2.2. The petitioner was issued a provisional certificate of completion by the respondent on 22.07.2009. Under the C.A., according to the petitioner, maintenance obligation accrued upon it after completion of a period of five years. In pursuance of the same, the petitioner, apparently, submitted plans for the maintenance operation between February-April, 2014. The petitioner states that the maintenance work commenced in July, 2014. It is also the petitioner's case that the respondent accepted the renewal operations plan vide its letter dated 05.04.2014.

2.3 Apparently, there was delay in carrying out maintenance operation which, according to the petitioner, was beyond its control. This fact was indicated by the petitioner to the respondent on 07.04.2015.

2.4 The respondent, however, called upon the petitioner to pay liquidated damages under Clause 18.13 of the CA. The respondent demanded from the petitioner a sum of Rs.10,55,39,148/-. As indicated above, this amount was demanded by the respondent for alleged delay in completion of the renewal of the wearing surface of the road pavement made, in pursuance to Clauses 18.12 and 18.13 of the C.A.

2.5. On 23.1.2017, the petitioner submitted a detailed justification qua the demand raised by the respondent.

3. In view of the aforesaid circumstances, the petitioner, apparently, also issued a notice under Clause 39.1(a) of the C.A.

3.1 Furthermore, a claim for reimbursement of expenses was also made by the petitioner in the sum of Rs.41.38 crores. This notice is dated

24.8.2017.

3.2. The respondent, however, rejected the demand for reimbursement of the expenses made by the petitioner on 3.10.2017.

4. In terms of the provisions of Clause 39.1(b) of the C.A., as required, the petitioner also proposed amicable settlement of the *inter se* disputes.

5. The aforesaid was followed by issuance of a notice of arbitration dated 12.1.2018.

6. The position which obtains today is that both the petitioner as well as the respondent have appointed their respective nominee Arbitrators.

7. On the previous date i.e. 10.09.2018, I had asked counsel for the respondent to obtain instructions qua the appointment of the Presiding Arbitrator. This direction was issued with the view that if the Arbitral Tribunal was constituted, the captioned dispute could be dealt with by the Arbitral Tribunal.

7.1. However, counsel for the parties mutually agree that this aspect could be left to the nominee Arbitrators, as insofar as the constitution of the Arbitrator Agreement is concerned, the onus, presently, is on the nominee Arbitrators.

7.2 Accordingly, the nominee Arbitrators are directed to appoint the Presiding Arbitrator within one week of the receipt of the copy of the order.

8. The other issue which has come before this Court and which is principally required to be adjudicated upon by way of the instant petition is that the respondent has chosen to retain a sum of Rs.7,12,07,270/- from the 17th Annuity payment which is payable to the petitioner. Against this annuity the petitioner is to receive a sum of Rs.23,80,00,000/-.

9. This Court on being approached by the petitioner vide order dated

02.05.2018 directed the respondent to deposit the money with the Registry of this Court.

9.1 I have been informed by Ms. Jain, counsel for the respondent, that the direction issued by the Court has been complied with.

10 A perusal of order dated 02.05.2018 would show that on that date the respondent in defence of its action of retaining the aforementioned sum had relied upon Clause 6.4(b) of the C.A..

10.1 Ms. Jain, learned counsel for the respondent, has once again defended the retention of the sum of Rs.7,12,07,270/- by placing reliance on Clause 6.4(b) of C.A. In addition thereto, today, Ms. Jain also relies upon Clause 6.2 of the C.A.

11. According to me, neither the provisions of Clause 6.2 nor that of Clause 6.4(b) of the C.A. would justify the retention of the amount by the respondent.

11.1 Clause 6.2 provides for payment of bonus annuity or reduction in annuity qua the concession which is based on the formula given in Clause 6.2(c). Working of the formula is dependent on the ascertainment of 'X' factor which is determined by the Independent Consultant (in short 'I.C.'). I.C. is required to determine the aggregate number of days of delays, if any, caused in the execution the concerned project.

12. Mr. Krishnan, learned senior counsel, on behalf of the petitioner has drawn my attention to letters dated 07.03.2018 and 24.04.2018. These letters have been addressed by the I.C. to the respondent.

12.1 In the first letter, the I.C. has, undoubtedly, quantified the damages that the petitioner, according to him, was required to pay. The I.C. has pegged the damages to a sum of Rs.7,12,07,270/-. However, as correctly

pointed out by Mr. Krishnan, the I.C. has thereafter clarified in the subsequent letter that the said amount cannot be retained under Clause 6.4 of the C.A.

12.2 Thus, having regard to the aforesaid, it is quite clear that, at this stage, the respondent cannot retain the money.

13. Ms. Jain, learned counsel for the respondent, states that if the money is released the respondent will have no security. Ms. Jain's contention is that the financial health of the petitioner company is tenuous.

14. Mr. Krishnan, on the other hand, states that he does not agree with the assertion made by the respondent with regard to the financial health of the petitioner and in order to allay apprehension of the respondent has offered to furnish a bank guarantee for an equivalent sum.

15. Accordingly, the petition is disposed of with the direction that the Registry will have the sum of Rs.7,12,07,270/- along with accrued interest deposited in the Escrow Account No.004103000025869.

15.1. The counsel for the parties will assist the Registry in that behalf.

16. Needless to say that any observation made hereinabove will not come in the way of final determination of disputes obtaining between the parties.

RAJIV SHAKDHER, J

OCTOBER 03, 2018

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