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

Date of decision: 15.10.2018

+ O.M.P.(I) (COMM.) 372/2018

S & P INFRASTRUCTURE DEVELOPERS (P) LTD &
ANR.

..... Petitioners

Through: Mrs. Anusuya Salwan, Ms. Shreya
Sharma, Ms. Nikita Salwan and Mr.
Raghvendra Upadhyay, Advs.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION
LTD & ANR.

..... Respondents

Through: Mr. Anupam Lal Das, Mr. Akhil
Aggarwal and Mr. Anirudh Singh,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. I have heard the arguments in the matter at great length.
2. Notice in this matter was issued on 24.9.2018, when, the following observations were made and consequent directions were issued:

“...3. I am informed by Ms. Salwan that the Joint Venture Entity i.e. M/s R.P. Infra Projects (JV), which is joint venture of petitioner no. 1 and 2 has been served with a letter dated 18.09.2018 on 22.09.2018.

4. Ms. Salwan says that the Joint Venture Entity would like to respond to the same.

5. Counsel for the respondents, who, appears on advance notice, says that they will consider the response.

6. Let the response be filed within 3 days from today.

7. The respondents will consider the response and pass an appropriate order after dealing with every aspect of the matter.

8. In view of the above, the respondents will not precipitate the matter concerning the bank guarantee till the next date of hearing.

9. Ms. Salwan, in order to protect the interest of the respondents says that she will deposit an equivalent sum i.e., Rs. 2.32 crores, with the Registry of this Court within five days from today.

9.1 The statement of both the counsel are taken on record.

10. The respondents will file its order with the Court prior to the next date of hearing....”

3. Pursuant to the directions passed by this Court, the petitioners have deposited a sum of Rs.2.32 crores with the Registry of this Court.

3.1. In view of the aforesaid, the respondents as indicated in the very same order i.e., order dated 24.9.2018, were restrained from taking precipitate action *vis-a-vis* the subject bank guarantee.

4. The subject guarantee which has been furnished by the petitioners in lieu of bid security, bears a value of Rs.2.32 crores.

5. The respondents have filed their reply which, unfortunately, as it appears, is not on record. However, a copy of the same was served on the counsel for the petitioners and was also furnished to me, in Court today.

5.1 The reply filed by the respondents shows that respondent no.1 has passed an order dated 9.10.2018.

5.2 By this order, the respondents have considered the petitioners' reply dated 29.9.2018 to respondent no.1's letter dated 18.9.2018.

6. A perusal of the record and the order dated 9.10.2018 would show that respondent no.1 is not satisfied with the response given by the petitioners.

7. Broadly, in respondent no.1's earlier letter dated 18.9.2018,

allegations were raised against the petitioners' Joint Venture partner, an entity by the name: Aarpee Infraprojects Pvt. Ltd., that it had not executed the following projects qua which experience was claimed in order to win the subject contract:

“(i) Construction of 2-Lane Tarku-Damthang-Namchi Road in Sikkim under SARDP-NE, Phase ‘A’.

(ii) Construction of 2 Lane Melli-Manpur-Namchi Road in Sikkim under SARDP-NE, Phase ‘A’ (Length 32.00 km) ”

8. Furthermore, it was also alleged by respondent no.1 that M/s. Pralay Chakraborty & Associates, Chartered Accountants, had wrongly submitted certificates with respect to financial statements for the period 2012-13 to 2016-17.

8.1 The allegation of respondent no.1 was that during the relevant period, the concerned Chartered Accountant (which was also the statutory auditor) was an entity by the name: M/s. Agarwal Priyanka and Co. and not M/s Pralay Chakraborty & Associates.

9. This apart, a perusal of the order dated 9.10.2018 would show that respondent no.1 has adverted to yet another aspect, which is, that it terminated vide communication dated 6.8.2018 another project, based on the ground that a forged experience certificate had been obtained claiming execution of works in Bhutan.

10. Insofar as the first aspect of the matter is concerned, the respondent no.1, has based its allegation upon a communication dated 22.8.2018 received from the Government of Sikkim.

10.1 Via this communication, the Government of Sikkim informed respondent no.1 that there was no contractor engaged by them bearing the name: Aarpee Infraprojects Pvt. Ltd.

11. Mrs. Salwan on the other hand, who, appears for the petitioners says that the allegations levelled can be explained.

11.1 For this purpose, reliance has been placed by the learned counsel on the communication dated 29.9.2018 addressed to respondent no.1.

12. It is also the learned counsel's submission that when the subject bid was filed it was disclosed that Aarpee Infraprojects Pvt. Ltd. had executed the work for a Joint Venture entity by the name R.S.M. Construction.

13. The learned counsel for this purpose has relied on the documents appended at pages 73 and 75 of the reply filed on behalf of respondent no.1.

14. It is Mrs. Salwan's submission that all documents concerning the execution of work by Arpee Infraprojects Pvt. Ltd. in concert with R.S.M. Construction were placed before respondent no.1.

15. Insofar as the issuance of certificate by M/s. P. Chakraborty & Associates, Chartered Accountants is concerned, Ms. Salwan, has submitted that since the earlier Chartered Accountant i.e., M/s. Agarwal Priyanka & Co., had resigned as a statutory auditor with effect from 16.12.2017, a casual vacancy had arisen, which was filled up after consent was obtained from M/s. P. Chakraborty & Associates.

16. Mrs. Salwan has submitted that the appointment of M/s. P. Chakraborty & Associates, Chartered Accountants, as Statutory Auditor was made on 5.1.2018, post a resolution being passed at the Extraordinary General Meeting of petitioner no.1's shareholders held on 4.1.2018.

17. For this purpose, Ms. Salwan has relied upon the letter of resignation dated 15.12.2017 submitted by Priyanka Agarwal on behalf of M/s. Agarwal Priyanka and Co., the appointment letter dated 5.1.2018 issued by Aarpee Infraprojects Pvt. Ltd. to M/s. P. Chakraborty & Associates and the undated

letter of consent of M/s P. Chakraborty & Associates. Copies of these communications were handed over to me in the Court.

18. Insofar as the third aspect is concerned, which is the termination of a contract by respondent no.1 on 6.8.2018 on account of an alleged fraudulent experience input having been given by Arpee Infraprojects Pvt. Ltd., it is clear that the petitioners had information with regard to this aspect of the matter.

19. Thus, having regard to the aforesaid facts and circumstances, it was suggested to Ms. Salwan as to whether the petitioners would like to agitate their point of view before the learned Arbitrator as other ramifications may follow if a finding is returned with respect to the allegations levelled by respondent no.1, which could include blacklisting.

20. Ms. Salwan, in response, has submitted that the petitioners would like to make a representation to respondent no.1 for being allowed to continue with the execution of the subject project without the involvement of Arpee Infraprojects Pvt. Ltd.

21. Ms. Salwan further says, in order to show its *bona fide* that the petitioners will consent to an order of this Court enabling remittance of moneys in the sum of Rs.2.32 crores alongwith interest which stands deposited in this Court to respondent no.1.

22. Having regard to the aforesaid facts and circumstances, the petition is disposed of with the following directions:

- (i) A sum of Rs.2.32 crores which has been deposited before this Court alongwith the interest shall be released by the Registry in favour of respondent no.1.
- (ii) The petitioner no.1 will be at liberty to make a representation to

respondent no.1 to consider its request for allowing it to execute the subject project without the involvement of Arpee Infraprojects Pvt. Ltd.

(iii) Once, respondent no.1 receives the money, it will return the original bank guarantee in the sum of Rs.2.32 crores available with it, to petitioner no.1.

23. Furthermore, I may only indicate that insofar as petitioner no.1's request for executing the project on its own is concerned, respondent no.1 will take a decision independent of any observations made hereinabove by me.

24. In case, the representation does not receive a favourable response, the petitioners will be at liberty to take recourse to an appropriate remedy, *albeit*, in accordance with law.

25. For the purpose of good order and record, copies of documents handed over in Court by Ms. Salwan will be scanned and uploaded by the Registry.

26. *Dasti*.

RAJIV SHAKDHER, J

OCTOBER 15, 2018

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