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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.238 OF 2019
WITH
NOTICE OF MOTION NO.368 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO.238 OF 2019

Sinew Developers Pvt. Ltd. ...Petitioner
V/s.
POSCO Engineering & Construction India Pvt. Ltd. ...Respondent

Mr.Virag Tulzapurkar, Senior Counsel with Ms.Sowmya Srikrishna, Mr.Aditya Shiralkar, Mr.Gurav Gopal, Ms.Manki Grewl, Mr.Shlok Bolar and Ms.Heena Goradia I/b M/s.Wadia Ghandy & Co. for the Petitioner.

Mr.Soli Cooper, Senior Counsel with Ms.Shruti Sabarwal, Ms.Atika Vaz I/b M/s.Shardul Amarchand Mangaldas & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 21ST JUNE, 2019.

P.C. :-

1. The petitioner has impugned an arbitral award dated 13th June, 2018 allowing some of the claims made by the respondent and rejecting the counter claims made by the petitioner. The impugned award is challenged on various grounds. Mr.Tulzapurkar, learned senior counsel appearing for the petitioner however, urged one of the ground at this stage for the purpose of admission of the petition

and for interim relief.

2. It is the case of the petitioner that the petitioner had terminated the contract awarded to the respondent on 10th March, 2016. The respondent had suppressed the fact from the petitioner and from the learned arbitrator that the respondent had given the contract to the sub-contractor which was awarded to the respondent by the petitioner on back to back basis to M/s. Empathy Infra & Engineering Pvt. Ltd. It is also the case of the petitioner that the respondent suppressed the fact that the respondent had terminated the said sub-contract with M/s. Empathy Infra & Engineering Pvt. Ltd. on 17th May, 2016. It is the case of the petitioner that these facts were suppressed even during the course of cross-examination by the respondent before the learned arbitrator. It is also the case of the petitioner that the petitioner came to know subsequently that the respondent had filed Arbitration Petition No.88 of 2018 against the said sub-contractor in the Punjab & Haryana High Court under section 11 of the Arbitration & Conciliation Act, 1996 for appointment of an arbitrator. These facts are also suppressed according to the petitioner by the respondent from the petitioner as well as from the learned arbitrator.

3. Mr. Tulzapurkar, learned senior counsel invited my attention to some of the correspondence exchanged between the

respondent and its sub-contractor and would submit that the grounds of termination of the contract awarded to the respondent by the petitioner and the termination of the sub-contract awarded by the respondent to M/s. Empathy Infra & Engineering Pvt. Ltd. were the same. If these facts would have been brought to the notice of the petitioner and the learned arbitrator by the respondent, the learned arbitrator would not have declared the termination of the contract by the petitioner of the respondent illegal and would not have rejected the counter claim made by the petitioner. In support of this submission, he invited my attention to some part of the cross-examination of the respondent's witness before the learned arbitrator and would submit that the said witness did not disclose the termination of sub-contract.

4. The learned senior counsel also invited my attention to some of the findings rendered by the learned arbitrator on the issue of validity of termination notice issued by the petitioner. He submits that the respondent had committed fraud upon the petitioner and also upon the learned arbitrator by suppressing about the execution of the sub-contract to M/s. Empathy Infra & Engineering Pvt. Ltd. and also filing of the arbitration application under section 11 of the Arbitration & Conciliation Act, 1996 against the said sub-contractor before the Punjab & Haryana High Court which facts were relevant and had

nexus with the facts constituting an award, the award deserves to be set aside on this ground alone. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Venture Global Engineering vs. Satyam Computer Services Limited & Anr., (2010) SCC 660** and in particular paragraphs 32, and 36 to 45. He also placed reliance on the judgment of the Supreme Court in case of **A.V. Papayya Sastry & Ors. vs. Govt. of A.P. & Ors., (2007) 4 SCC 221** in support of his submission.

5. Mr. Cooper, learned senior counsel for the respondent on the other hand submits that the dispute between the respondent and its sub-contractor had no bearing on the subject matter of the arbitral proceedings filed by his client against the petitioner. He submits that even though the respondent had made certain allegations against its sub-contractor about the breaches committed by the sub-contractor of its obligations under the sub-contract entered into between the respondent and the said sub-contractor, the fact remains that the respondent had carried out the work and thus the breaches committed, if any, by the sub-contractor would not have any bearing on the issue of wrongful limitation of contract by the petitioner. He submits that the learned arbitrator has rendered a finding on this issue in favour of the respondent and against the petitioner that the termination effected by the petitioner was bad in

law and illegal and had rightly set aside the termination of contract and awarded various claims and damages.

6. Upon raising a query by this Court, learned senior counsel pointed out that the said arbitration application filed by his client before the Punjab & Haryana High Court for appointment of an arbitrator against the sub-contractor is still pending.

7. It is submitted by the learned senior counsel that the respondent was the fifth contractor of the petitioner. Earlier four contractors of the petitioner were also not paid by the petitioner. He submits that no case of unconditional stay is made out by the petitioner.

8. It is now placed on record that the respondent had terminated the sub-contract awarded to M/s. Empathy Infra & Engineering Pvt. Ltd. The respondent have also filed an arbitration application under section 11 of the Arbitration & Conciliation Act, 1996 *inter-alia* praying for an appointment of an arbitrator arising out of the sub-contract entered into between the respondent and its sub-contractor. The said application is still pending.

9. A perusal of the award indicates that the learned arbitrator in paragraph 20.86 of the impugned award has rendered a finding that though there were certain issues between the respondent and its sub-contractor that evidently had nothing to do with this case nor

had any bearing on the present case. Learned arbitrator has also held that there is nothing on record to show that the respondent had given the contract to the sub-contractor awarded to the respondent by the petitioner on back to back basis to M/s. Empathy Infra & Engineering Pvt. Ltd. In my *prima-facie* view, these findings are perverse.

10. A perusal of the breaches alleged by the petitioner against the respondent in the notice of termination and in the notice of termination issued by the respondent to its sub-contractor *prima-facie* indicates that the breaches alleged by the petitioner against the respondent and by the respondent against its sub-contractor are almost identical. The respondent however did not inform the petitioner as well as the learned arbitrator that the contract awarded to the sub-contractor was already terminated on the ground of the breaches alleged in the notice of termination. In my *prima-facie* view, these facts certainly were relevant and had nexus with the findings on termination of contract rendered in the impugned award in favour of the respondent and against the petitioner.

11. In my *prima-facie* view, there is no substance in the submission made by Mr.Cooper, learned senior counsel for the respondent that though the respondent was complaining of various breaches against the sub-contractor the work was carried out by the

respondent. A perusal of the record indicates that the termination of sub-contract by the respondent was on 17th May, 2016, whereas the contract awarded to the respondent was already terminated by the petitioner on 10th March, 2016. In my *prima-facie* view the judgment of the Supreme Court in case of **Venture Global Engineering** (supra) would assist the case of the petitioner.

12. For the reasons recorded aforesaid, I pass the following order :-

- a). Admit. Mr.Cooper, learned senior counsel for the respondent waives service.
- b). Insofar as the application for stay filed by the petitioner is concerned, for the reasons recorded aforesaid, I am inclined to grant unconditional stay of the impugned award in favour of the applicant / petitioner.
- c). The impugned award is accordingly stayed without imposition of any condition.
- d). Hearing of the petition is expedited.
- e). The Notice of Motion No.368 of 2019 is allowed on aforesaid terms. No order as to costs.

(R.D. DHANUKA, J.)