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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 5th September, 2019

Date of decision: 22nd October, 2019

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CS (OS) 215/2019

M/S APCO-TITAN (JV) Plaintiff

Through: Mr. A. K. Ganguli, Senior Advocate
with Mr. Dharmendra Rautray, Ms.
Tara Shahani and Mr. Shivansh Jolly,
Advocates. (M: 8469999172)

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD. Defendant

Through: Ms. Maninder Acharya, ASG for
UOI.

Mr. Ramji Srinivasan, Senior
Advocate with Mr. Vikash Kumar
Jha, Mr. Karan Khanna, Mr. Nikhil
Yadav and Ms. Tishta Tandon
Advocates for Applicants
(SSTL/ITNL) (M: 9167980441)

Mr. Prasenjit Keswani, Mr. Kabir
Shankar Bose, Mr. Upmanyu Tewar
and Ms. Gumoor Kaur, Advocates for
NHIDC. (M: 9811049118)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

I.A. Nos. 5576/19, 10680/19 and 6834/19

Brief Facts

1. The present case demonstrates the difficulties plaguing construction contracts involving the development of infrastructure projects.

2. The Ministry of Road Transport and Highways (*hereinafter*, “MORTH”) is concerned with the promotion, building, maintenance and up-gradation of national highways and strategic roads, including inter-connecting roads in various parts of the country which share international boundaries with neighbouring countries.
3. MORTH had entrusted to the Border Roads Organization (*hereinafter*, “BRO”) the existing road from Km 69 to Km 81.3 on the Srinagar-Gumri road section of National Highway-1 in the State of Jammu and Kashmir and construction of a Z-Morh Tunnel including its approaches (approximately 6.5 km tunnel and 6 km approaches) (*hereinafter*, “Project”). The BRO was required to augment the said road by two-laning the same.
4. On 16th April, 2012, the BRO, through a Request for Qualification, invited bidders to submit their bids. One M/s Soma Enterprise Private Limited (*hereinafter*, “M/s Soma”) was the successful bidder who was issued a letter of award on 12th March, 2013. The bidder – M/s Soma, promoted a special purpose vehicle company called Srinagar Sonamarg Tunnelway Limited (*hereinafter*, “SSTL”) to undertake the Project.
5. On 30th April, 2013, a Concession Agreement was entered into between BRO and SSTL. This Concession Agreement was subsequently transferred from BRO to the Defendant - National Highways & Infrastructure Development Corporation Limited (*hereinafter*, “NHIDC”), a fully owned company of MORTH, on 12th November, 2014. The Project was to be executed on a design, build, finance, operate and transfer annuity basis. Despite the transfer, the terms of the Concession Agreement continued to bind the Project. The total term of the agreement was for a

period of twenty years, which included the construction period of five years. As per the Concession Agreement, NHIDC was obligated to pay the annuities.

6. SSTL appointed IL&FS Transportation Networks Limited (*hereinafter*, “ITNL”), a company with 48.99% share in SSTL, as the Engineering, Procurement and Construction Contractor (*hereinafter*, “EPC”), under an agreement dated 9th November, 2015.

7. On 5th July, 2014, i.e. prior to the EPC agreement dated 9th November, 2015, ITNL had floated a RFP for appointment of a Construction Contractor. The Plaintiff i.e., APCO-Titan (JV), submitted its offer letter on 13th December, 2014. On 9th June, 2015, i.e., even prior to the Construction Contract between the Plaintiff and ITNL dated 11th November, 2015, a letter of intent cum notice to proceed had been issued by ITNL to the Plaintiff to commence work on the Project.

8. ITNL is a group company of Infrastructure Leasing and Financial Services Limited (*hereinafter*, “IL&FS”), against whom liquidation proceedings are pending in the National Company Law Appellate Tribunal (*hereinafter*, “NCLAT”).

Plaintiff's Case

9. The Plaintiff, who was undertaking the construction, claims to have been submitting regular Running Account Bills (*hereinafter*, “RA Bill”) to ITNL. It states that it had imported specialised machinery for undertaking the tunnelling works, exclusively for the Project and the same was done with the knowledge and assistance of the Defendant i.e., NHIDC. Monthly progress reports were also being submitted by the Plaintiff to ITNL.

According to the Plaintiff, it has carried out a total value of work to the tune of approximately Rs. 261 crores, however, it has only been paid approximately a sum of Rs. 171 crores. The case of the Plaintiff is that despite the RA bills being duly certified by ITNL engineers and independent engineers, the outstanding amounts have not been paid.

10. Thereafter, ITNL and SSTL began facing financial difficulties and due to non-payment of their dues, the Plaintiff had to suspend work on the Project. It is the Plaintiff's case that meetings were held with ITNL between 5th January, 2019 and 8th January, 2019 wherein it was admitted by ITNL that a sum of Rs. 89,73,570,038/- is due to the Plaintiff. Thereafter, considering the financial status of ITNL/SSTL, the Plaintiff wrote letters dated 12th February, 2012 and 18th March, 2019 to the Defendant, proposing to directly undertake the outstanding works in the Project. However, the same was not acceded to.

11. Accordingly, the Plaintiff has filed the present suit seeking payment of the admitted sum i.e., a sum of Rs. 89,73,570,038/- due towards the work executed on the Project which was to the knowledge of the Defendant.

12. Mr. A.K. Ganguli, Id. Senior Counsel appearing for the Plaintiff, submits that the Government has issued an office memorandum dated 9th March, 2019 (*hereinafter*, "*memorandum*") which intends to resolve such "stuck projects". According to him, in terms of the said memorandum, since the work was executed by the Plaintiff under the approval and supervision of the Defendant - NHIDC, the Plaintiff is entitled to recover the said amount from the Defendant, especially in view of the insolvency proceedings which are now pending against IL&FS and all its group companies. The submission is that the Defendant has enjoyed the benefit of a non-gratuitous

act and even though there is no contract between the Plaintiff and the Defendant, the ultimate beneficiary of the work executed by the Plaintiff, is the Defendant. Mr. Ganguli concedes that there is no contract directly with the Defendant, however, he relies upon various documents, including e-mail correspondence, to argue that the Defendant and its officers/representatives were well aware of the works being executed by the Plaintiff. He thus submits that under Section 70 of the Indian Contract Act, 1872, the Plaintiff is entitled to receive compensation for the work it has executed, from the Defendant, if not from ITNL. He further submits that since these are infrastructure projects in which the circulation of funds is absolutely essential, the Plaintiff cannot wait indefinitely to receive the amounts due as this would result in the Plaintiff being unable to invest in future projects. The Plaintiff has, in fact, been awarded the balance work on this very project when tenders were invited in June, 2019. Ld. Sr. Counsel submits that the amounts which are due are not under dispute ought to be paid as the Defendant does not dispute that the Plaintiff is the Construction Contractor for this Project, even on NHIDC's own website. A print out dated 17th May, 2019 from NHIDC's website relating to this project is relied upon. The said print out also shows the exact status of the project.

13. Reliance is also placed on the memorandum dated 9th March, 2019 wherein a detailed scheme has been evolved for payment in case of "stuck projects". Ld. Sr. Counsel submits that the Plaintiff having executed the Project, the benefit of this memorandum ought not to be restricted to ITNL but should extend to the Plaintiff, who is the sub-contractor. To buttress the Plaintiff's case, Mr. Ganguli, Ld. Sr. Counsel relies upon the following judgments: -

- (1) *State of West Bengal v. B.K. Mondale & Sons*, AIR 1962 SC 779
- (2) *Mahanagar Telephone Nigam Ltd. v. Tata Communications Ltd.*,
[Civil Appeal No. 1766/2019, decided on 27th February, 2019]
- (3) *Pannalal v. Dy. Commissioner, Bhandara & Anr.*, (1973) 1 SCC 639

Defendant's Case

14. NHIDC - the only Defendant in the suit has filed an application under Order VII Rule 11 CPC being IA 10680/2019 seeking rejection of the Plaint, *inter alia*, on the ground that it does not disclose any cause of action. The basic contention of NHIDC is that NHIDC only has privity of contract with ITNL/SSTL and not with the Plaintiff. It is further averred that the suit is barred by the provisions of the Insolvency and Bankruptcy Code, 2016 (*hereinafter*, "IBC"), as the admitted position is that the Plaintiff's contract is with ITNL and it can recover the money only from ITNL. The Plaintiff admits that IL&FS is under insolvency proceedings and the NCLAT vide order dated 15th October, 2018 has imposed a stay on the initiation of any legal proceedings against IL&FS or any of its subsidiaries, which includes ITNL. It is submitted that the Plaintiff, by not disclosing that it has already filed an application before the NCLAT, suppressed material facts. Thus, on these grounds, the Defendant seeks rejection of the plaint. On merits, however, the Defendant has not taken any stand. On behalf of the Defendant, Mr. Prasenjit Keswani, Id. counsel, submits that the Defendant cannot be forced to pay the Plaintiff.

Stand of UOI

15. Considering that the Defendant has acknowledged on its website that the Plaintiff had undertaken work on the Project, this Court had issued notice to Id. ASG, Ms. Maninder Acharya, to take instructions on whether the Plaintiff would get benefit of the memorandum dated 9th March, 2019. The Id. ASG has reverted with instructions and submits that as per the memorandum, payment can only be made to the actual contractor or the concessionaire and not to the sub-contractor. She thus submits that the Plaintiff, having no contractual relationship with the Defendant, would not be entitled to the benefit of the memorandum.

Impleadment Application by SSTL and ITNL

16. During the pendency of the present suit, an application under Order I Rule 10 CPC was filed by SSTL and ITNL seeking impleadment in the present suit as Defendant Nos. 2 and 3. The applicants submit that a moratorium is operating, staying the initiation of any proceedings against IL&FS and its subsidiaries, including ITNL. While the Union of India's request for a moratorium was initially rejected by the National Company Law Tribunal (*hereinafter*, "NCLT"), on appeal, the NCLAT, vide order dated 15th October, 2018, granted a stay on the institution or continuation of any suit or other proceeding by any party against IL&FS and its subsidiaries. The stand of the applicants is that a Group Level Resolution Process is currently being undertaken by the new Board of Directors of IL&FS, which has been constituted as per the order of the NCLT dated 1st October, 2018. IL&FS and all its group companies are now under the management of the new board, which is managing the day to day affairs of all the group

companies.

17. It is further pleaded that a demand notice dated 6th February, 2019 was served by the Plaintiff on ITNL under Section 8 of the IBC seeking payment of the debt. Thereafter, the Plaintiff moved an application before the NCLAT for impleadment in Company Appeal Nos. 346 of 2018 and 347 of 2018, for the unpaid RA bills. However, due to the stay order dated 15th October, 2018, the Plaintiff could not pursue its claims. Thus, the Plaintiff could not institute recovery proceedings against either ITNL or SSTL. It is submitted that ITNL has now been categorised as a 'Red Entity'.

18. On merits, it is urged on behalf of ITNL/SSTL that the work in the Project had been suspended due to non availability of funds and the valuation of the work done is currently under way. SSTL had already applied for closure of the project on 26th March, 2019. Thus, as the Plaintiff already approached the NCLAT and is conscious of the steps being taken in the insolvency proceedings, the present suit cannot be maintained. In any case, privity being with the applicants, they are liable to be impleaded.

19. Mr. Ramji Srinivasan, Id. Sr. Counsel appearing for the applicants, submits that upon the value of work done being ascertained, the payments have to be received by the applicants and not directly by the Plaintiff. The Plaintiff cannot by-pass the insolvency proceedings by filing the present civil suit. Id. Sr. Counsel thus submits that either the suit be dismissed and the Plaintiff be directed to approach the NCLAT or the applicants be impleaded. He relies upon the judgment of the Hon'ble Supreme Court in ***Essar Oil Ltd. v. Hindustan Shipyard Ltd., (2015) 10 SCC 642*** to argue that since there is no privity of contract between the Plaintiff and the Defendant, the Plaintiff cannot hold up any payments which the applicants are entitled

to receive. The only remedy available to the Plaintiff is to get itself impleaded in the insolvency proceedings pending against ITNL.

20. It is further contended that the work has been executed by the Plaintiff under the direct supervision of ITNL. In fact, the applicants assisted the Plaintiff in co-ordinating with various authorities and obtaining exemptions, including tax exemptions. The applicants also assisted the Plaintiff in ensuring deployment of security forces for getting the work executed. Further, since the construction contract was on a back-to-back basis, both the Concession Agreement and the EPC contract had to be complied with. Thus, the Plaintiff's work had to be ultimately accepted by ITNL. The principle of Section 70, it is submitted, would not apply contrary to the express terms of a contract.

21. Reliance is also placed on *Food Corporation of India & Ors. v. Vikas Majdoor Kamdar Sahkari Mandli Ltd., (2007) 13 SCC 544* to argue that the principle of *quantum meruit*, on which Section 70 is based, does not apply when there is a specific agreement in operation. In the present case, since there is a valid agreement between the Plaintiff and ITNL, Section 70 does not come into operation.

22. Further, the amount claimed by the Plaintiff is also disputed. According to the applicants, the amount payable is not Rs. 89 crores, as has been claimed, but far lesser i.e., to the tune of approximately Rs. 56 crores.

Analysis and Findings

23. The present suit is purely based on Section 70 of the Indian Contract Act, 1872. A claim for compensation has been raised against NHIDC on the ground that work has been executed by the Plaintiff, as part of the Project,

which has been acknowledged by NHIDC, and since ITNL/SSTL are under liquidation, the Plaintiff ought to be compensated directly by NHIDC.

24. The undisputed fact is that the Plaintiff does not have any privity with NHIDC. The question is whether NHIDC, by acknowledging the Plaintiff as the Sub-Contractor in the project and corresponding with the Plaintiff, has an obligation to compensate the Plaintiff directly for the work done, especially in view of the subsisting agreement between the Plaintiff and ITNL dated 11th November, 2015.

25. The remedy sought by the Plaintiff in this suit, though quite creative, would not be maintainable inasmuch as the agreement between the Plaintiff and ITNL is subsisting and has not been terminated. The Plaintiff has executed the works for ITNL, even though NHIDC may have indirectly benefited from the same. The contracts may be back-to-back in nature, but the Plaintiff cannot by-pass its existing contractual relationship with ITNL. As held by the Hon'ble Supreme Court in ***Food Corporation of India & Ors. (supra)*** and ***Mahanagar Telephone Nigam Ltd. v. Tata Communications Ltd., [Civil Appeal No. 1766/2019, decided on 27th February, 2019]***, Section 70 falls in that Chapter of the Indian Contract Act, 1872 which deals with relationships which *resemble contracts*. In that sense, the provision belongs to the category of *quasi* contracts and restitution. Such a remedy is unusual and cannot be permitted to be invoked in the present case as the conditions for such a claim to be made, as laid down by the Hon'ble Supreme Court in ***State of West Bengal v. B.K. Mondal & Sons, AIR 1962 SC 779***, have not been satisfied. The Hon'ble Supreme Court, observed therein as under:

“14. It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under Section 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse, for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but, if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and Section 70 can be invoked. Section 70 occurs in Chapter V which deals with certain relations resembling those created by contract. In

other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble these created by contract. That being so, reverting to the facts of the present case once again, after the respondent constructed the warehouse it would not be open to the respondent to compel the appellant to accept it because what the respondent has done is not in pursuance of the terms of any valid contract and the respondent in making the construction took the risk of the rejection of the work by the appellant. Therefore, in cases falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by Section 70."

26. The first and foremost condition is that something should have been done by the Plaintiff to the Defendant or delivered by the Plaintiff to the Defendant. Here, the work is done and delivered by the Plaintiff not to the Defendant but under a contractual agreement, to ITNL, though in turn the work may have been delivered by ITNL to NHIDC, through SSTL. Thus,

the fundamental condition under Section 70 is itself not satisfied. Even though NHIDC may have benefitted from the work executed by the Plaintiff, NHIDC cannot be forced to break its contract with SSTL/ITNL and make any payment directly to the Plaintiff. This would, in effect, constitute breach of contract by NHIDC, which is outside the ambit of Section 70. The said provision does not contemplate the leap between the sub-contractor and NHIDC- bypassing ITNL, in order to create an obligation on NHIDC to pay. If the main contract between the Plaintiff and the ITNL was not alive and valid or was terminate, then the Plaintiff may have had an arguable case, if it had directly delivered the works to NHIDC. That is clearly not the position.

27. In this factual background, there is no doubt that ITNL and SSTL would be proper and necessary parties to the present suit inasmuch as the entire Project has been executed by the Plaintiff under a contract with ITNL/SSTL. Hence, I.A. No. 6834/2019 is liable to be allowed and is accordingly allowed.

28. As per the affidavit of Mr. Mohan Kumar Kolli, the authorized representative of the Plaintiff, the admitted position is that ITNL - a subsidiary of IL&FS, with whom the Plaintiff has an agreement, is under insolvency proceedings. This is clear from a reading of paragraph 2 of the Affidavit, which is extracted herein below: -

“I state that the proceedings against Infrastructure Leasing and Financial Services Limited ('IL&FS') group companies were pending prior to filing of the present suit. Union of India in a petition preferred before the National Company Law Tribunal, Mumbai ('NCLT') under Sections 241 and 242 of the Companies Act, 2013 sought a moratorium against

initiation of any legal proceeding against IL&FS and its subsidiaries, which was rejected by the NCLT vide its Order dated 12.10.2018. Copy of the Order dated 12.10.2018 is being enclosed herewith. Union of India and IL&FS appealed against the said Order before the appellate tribunal, i.e. National Company Law Appellate Tribunal ('NCLAT') seeking a moratorium on initiation of all proceedings against IL&FS and its subsidiaries, which was granted by the NCLAT vide its Order dated 15.10.2018.”

29. The fact that the claim of the Plaintiff is against ITNL is clear from the demand notice issued by the Plaintiff on 6th February, 2019. The said demand notice is reproduced below:-

“To,
IL&FS TRANSPORTATION NETWORKS LIMITED

Registered office at:
C-22, G Block, Bandar Kurla Complex,
Bandar (E), Mumbai – 400051

From,
M/S APCO-TITAN (JV)
Registered office at:
APCO House
B-9, Vibhuti Khand, Gomti Hagar
Lucknow, Uttar Pradesh – 226016

Subject: Demand notice/invoice demanding payment in respect of unpaid operational debt due from **IL&FS TRANSPORTATION NETWORKS LIMITED (the “EPC Contractor”** for Construction of Z-Morh Tunnel including approaches on NH-1 but excluding E&M works (Sinatra-Sonamarg-Gumri Road) in the State of J&K, as per Agreement dated: 11.11.2015) under Section 8 of the Insolvency and Bankruptcy Code, 2016

Madam/Sir,

In accordance with Section 8 of the Insolvency and Bankruptcy Code 2016, we, M/S APCO-TITAN (JV), without foregoing and without prejudice to the legal rights and remedies available to us, hereby serve upon you the Demand Notice along with the documents attached herewith.

...

30. The Plaintiff had, prior to the filing of the present suit, in fact, filed an application before the NCLAT seeking impleadment. In the said application, the Plaintiff has admitted that its contract was with ITNL. Due to continuing defaults by ITNL, the Plaintiff had to suspend work. Immediate relief was sought by the Plaintiff with respect to the outstanding dues through a demand notice dated 6th February, 2019 addressed to ITNL. There is an arbitration clause in the contract between ITNL and the Plaintiff which the Plaintiff was unable to pursue in view of the moratorium order dated 15th October, 2018. ITNL has now been classified as a 'Red Entity' which cannot secure its financial creditors. The said impleadment application was withdrawn vide order dated 12th July, 2019.

31. The NCLAT's order dated 15th October, 2018 is clear in its terms. The relevant portion of the same reads as under:-

“ ...

Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

(i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against 'IL&FS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and

(ii) Any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the assets of 'IL&FS' and its 348 group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by 'IL&FS' and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.

(iv) Suspension of temporarily the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the 'IL&FS' and its 348 group companies by any party or person or Bank or Company, etc. as of the date of first default.

(v) Any and all banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the 'IL&FS' and its 348 group companies.

The interim order will continue until further orders and not be applicable to any petition under Article 226 of the Constitution of India before any Hon'ble High Court or under any jurisdiction of the Hon'ble Supreme Court."

32. It is not disputed that the above order continues to operate and apply even *qua* ITNL. The primary dispute and claim for recovery being against

ITNL/SSTL, in view of the order dated 15th October, 2018 of the NCLAT, the present suit would not be maintainable. The claims of the Plaintiff would lie only against the parties with whom it has privity i.e., ITNL/SSTL. No direct claims would be maintainable against NHIDC. In view of the above, the Defendant's application under Order VII Rule 11 CPC is liable to be allowed. Ordered accordingly. The Plaintiff is, however, permitted to approach the NCLAT and avail of all legal remedies available to it in accordance with law. The Plaintiff is given a period of four weeks to approach the NCLAT. When the suit was initially listed, this court had passed the following order on 10th May, 2019:

“3. The NHIDC has submitted before this court that as per the concessionaire agreement, no payments are being made at the moment to Srinagar Sonamarg Tunnelway Limited ('SSTL'), in respect of this project being executed by the Plaintiff as a sub-contractor. In modification of the previous order, it is directed that NHIDC would seek leave of this court before making any payments to either SSTL and ITNL in respect of this project.”

The interim order dated 10th May, 2019 shall continue. The same shall be subject to such order(s) as may be passed by the NCLAT. Accordingly, IA 5576/19, praying for the direction that the Defendant not disburse any amounts in favour of SSTL or ITNL until the disposal of the present application and the suit filed by the Plaintiff, is disposed of.

‘Stuck Projects’

33. The response of the Government in respect of the interpretation of “*stuck projects*”, as per the memorandum dated 9th March, 2019, is that a sub-contractor is not entitled to payment. Only the

Concessionaire/Contractor can be paid. The scheme for resolution of stuck projects, attached to the memorandum dated 9th March, 2019, reads as under:-

“ ...

(i) Stuck Projects awarded under EPC Mode:

The projects awarded under the EPC mode, which qualify as Stuck Projects, recourse may be taken to fore-closure of the EPC Agreement vide a Supplementary Agreement mutually agreed and executed between the Parties. The Authority would pay for the executed/completed work in terms of milestone payment criteria set forth in Schedule-H of the Agreement in the manner laid down in the concerned Agreement. As regards the executed work not meeting the aforementioned milestone payment criteria but determined to be usable by the Authority, payment for such work will be made as per the amount assessed by the Authority.

(ii) Stuck Projects awarded under BOT Mode

For the BOT Concession Agreements, qualifying as Stuck Projects and not having attained the PCOD/ COD (Provisional Commercial Operation Date/ Commercial Operation Date): The Concession Agreement may be fore-closed vide a Supplementary Agreement, mutually agreed and executed between the Parties.

The Authority would pay, as full and final settlement, an amount limited to the lower of the: (a) the value of work done; or (b) 90% of Debt Due. In case the investment made by the Concessionaire is not covered under the definition of 'Debt Due', the payment may be restricted to the value of work done and assessed. The amount to be paid in the manner laid down in the concerned Concession Agreement.

(iii) Stuck Projects awarded on Item rate basis:

For the Item Rate Contracts qualifying as Stuck Projects: Authority to pay to the Contractor, as full

and final settlement, towards prolongation cost and/or idling costs, an amount calculated according to the damages mechanism provided under the concerned contract document.

(iv) General Recommendation

For all the other projects not included within the purview of these Guiding Principles, the provisions of the respective Agreement (EPC/Concession/Item Rate), mutually binding between the Parties be applied and followed.”

34. The above scheme does not take into consideration the fact situation as has arisen in the present case, wherein the main contractor is undergoing insolvency proceedings, is unable to pay the sub-contractor and there also appears to be no hope for the Plaintiff - sub-contractor to receive even the acknowledged amounts in the immediate future.

35. The Government ought to take a pragmatic view in such matters. The present case involves an infrastructure project, that too in the State of Jammu and Kashmir. The Plaintiff has not only executed the Project as a sub-contractor but has also been awarded the remaining unfinished part of the Project. The non-payment of its dues would have a direct impact on its cash flow and could also result in delays in the newly awarded Project.

36. This dispute highlights the quagmire in which construction contracts are embroiled. While the office memorandum dated 9th March, 2019 does partially intend to solve this problem, considering that there are a large number of sub-contractors who may be awaiting payments, the Government ought to evolve a mechanism for making payments on a case to case basis, especially in those cases where the contractor is in financial difficulty or is undergoing insolvency proceedings etc. A re-think is required to address such situations in order to resolve disputes between contractors and sub-

contractors, if the intention is to ensure that infrastructure projects are not impeded and are smoothly implemented. Accordingly, it is directed that a meeting be held between the Secretary, MORTH, representatives of the Plaintiff and the newly impleaded Defendants, to attempt a resolution of the payments to the sub-contractor. The meeting shall be held on or before 15th November 2019 and the decision taken shall be communicated to the Plaintiff. The time of four weeks given to the Plaintiff to approach NCLAT, shall run from 25th November 2019, by which time the proposal for resolution, if any, shall be communicated and delivered to the Plaintiff.

37. It shall further be open to the Government to consider if the office memorandum relating to 'Stuck Projects' ought to be re-visited and suitably amended to resolve disputes such as those that have arisen in the present case. A copy of this order be sent by the Registry to Ms. Maninder Acharya, Id. ASG, for ensuring that the same is sent to the relevant authorities. In addition, let a copy of this order be sent by the Registry of this Court to Mr. Sanjeev Ranjan, Secretary (RT&H), Ministry of Road Transport and Highways (M: 23714104, Email: Secy-road@nic.in).

38. Accordingly, the suit and all pending applications are disposed of in the above terms. Decree sheet be drawn. No order as to costs.

PRATHIBA M. SINGH
JUDGE

OCTOBER 22, 2019

MR