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

+ **O.M.P.(I) (COMM.) 199/2019**

M/S UMAXE PROJECTS PRIVATE LIMITED THROUGH: ITS
DIRECTOR Petitioner

Through: Mr. Viplav Sharma, Advocate.

versus

AIR FORCE NAVAL HOUSING BOARD THROUGH: THE DIRECTOR
GENERAL & ANR. Respondents

Through: Mr. Nishant Kumar, Advocate with
Sh. S.K. Gaur, Wing Cdr.
Mr. V.K. Gupta, Advocate for
Respondent No.2.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER
% **17.07.2019**

SANJEEV NARULA, J.:

I.A. 8565/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 199/2019

Brief factual background

2. Petitioner is a construction company. Respondent No. 1 (Air Force Naval Housing Board, hereinafter "AFNHB") is a society registered under the Societies Registration Act, 1860.

3. In 2017, the Respondent No. 1 issued a Notice Inviting Tender (NIT) dated 17th October 2017 for balance of construction of all civil work, external development work, internal and external sanitary plumbing work, water distribution system drainage work, landscaping including irrigation lifts and internal electrical works at its residential complex at Meerut (hereinafter, "the Meerut project"). The Petitioner submitted its bid and was selected. Thereafter, pursuant to Letter of Acceptance ("LoA") dated 30th November 2017, the Petitioner and Respondent No 1 entered into a formal agreement dated 17th January 2018 ("the Meerut Agreement"). Clause 18 of this agreement contains the arbitration clause. As a condition for submitting the tender, execution of work under the Contract and for other collateral purposes, the Petitioner furnished following Bank Guarantees:

<u>S.No.</u>	<u>Bank Guarantee No.</u>	<u>Amount</u>	<u>Validity</u>
1.	1480042317	50,00,000	13 September 2019
2.	1480053218	57,50,160	19 June 2019
3.	1480015618	38,33,440	25 June 2019
4.	1480001319	1,00,00,000	25 July 2019
5.	14800030718	38,33,440	9 August 2019
6.	14800023518	57,50,160	11 August 2019

4. It is the case of the Petitioner that Respondent No. 1 was informed through various letters about the various difficulties it was facing in timely completion of the project and requested for extension of time and the Respondent No. 1 vide its letter dated 6th June 2019 required the Petitioner

to have the developing units in Towers 1, 6, 7 & 8 (comprising of 305 OUs) ready in all respects by 30th June 2019. It is also claimed that the Petitioner submitted two RA Bills dated 9th May 2019 and 12th June 2019 for Rs. 53.41 lacs for material advance and for Rs. 3,66,65,475.94/- respectively, the aggregate of which is more than the aggregate of above bank guarantees. Respondent No.1 claims that Petitioner has not completed the work as per the terms of the contract and has thus invoked the above noted Bank Guarantees vide invocation letter dated 13th June 2019. Petitioner aggrieved with the invocation, filed the present petition inter alia seeking orders restraining the invocation and encashment of the bank Guarantees.

5. The present petition was first listed on 17th June 2019 before the Vacation Judge. On 24th June 2019, the Court directed Respondent No. 1 to file a reply to the petition within a period of two weeks. However, till date, no reply has been filed and the Court is now proceeding to hear the matter on the merits.

6. The present petition under Section 9 of the Arbitration and Conciliation Act (hereinafter referred to as 'Act'), seeks interim reliefs as under:-

“a. allow the present application and as an interim measure, pass urgent suitable injunctive orders against the effect and operation of impugned letter dated 13.6.2019 of Respondent No.1 and thereby, restrain the said Respondent No.1, its employees, agents and all persons acting for and on its behalf from invoking/encashing subject bank guarantees (Annexure 5 Colly) as detailed in paragraph 2(ix) above and thereby, preserve the same under the authority of this Hon'ble Court pending final

outcome of the arbitration proceedings which the Petitioner hereby, undertakes to commence by issuing the Notice of the Arbitration;

b. detain, preserve and secure the amounts aggregating subject bank guarantees (Annexure 5 Colly) as detailed in paragraph 2(ix), if encashed/paid by Respondent No. 2 to Respondent No. 1 under the impugned unlawful invocation letter dated 13.6.2019 wrongly and unlawfully encashing the subject Bank Guarantees, under the authority of this Hon'ble Court;

c. pass mandatory injunction directing the Respondent No.1 to forthwith process and release of payments to Petitioner against its' RA Bill No. 13 dt 9.5.2019 for material advance and regular RA Bill No 13 dt 12.6.2019 as stated in paragraph 2(xiii) above which as per CI. 18.4.1 of the subject Arbitration Agreement, the Petitioner is entitled to receive for completing the 'finishing work' and handing over subject work as per Respondent 1's letter dt 6.6.2019 which now being wilfully-wrongly frustrated by Respondent No.1 vide its' impugned letter dated 13.6.2019”

7. As noted in the order dated 24th June 2019, Respondent No. 1 has encashed the six bank guarantees which are subject matter of the present petition. The prayer (a) sought in the petition, reproduced above, has thus become infructuous and this fact is not disputed by the Petitioner. Learned counsel for the Petitioner however submits that notwithstanding the encashment of the bank guarantees the present petition is maintainable as the additional reliefs i.e. Prayers (b) and (c) enumerated above still survive.

8. Learned counsel for the Petitioner has thus addressed arguments confining the scope of the present petition in respect of prayers (b) and (c), reserving his rights to challenge the invocation of the bank guarantees before the

Arbitral Tribunal. Learned counsel nevertheless submits that since the invocation of the bank guarantees is unlawful, Petitioner has a right to secure amounts of the bank guarantees in question. He submits that this can be achieved by ordering Respondent No.1 to deposit the amount of the bank guarantees in the court and further a condition be imposed that the appropriation of the amount so deposited would be subject to the outcome of the arbitration proceedings. He further submits that under Section 9 of the Act, the Court is within its power to pass such an order and at this stage, the court should be concerned with ensuring that the claim amount is secured and is preserved.

9. He also submitted that one of the bank guarantees, for an amount of Rs. 50 lacs was issued as a security towards earnest money and one other bank guarantee for Rs. 1 crore was issued towards the advances given by the Respondent against which there was no full disbursement. The remaining bank guarantees were issued towards performance of the contract. Respondent No. 1 had vide letter dated 6th June 2019, permitted the Petitioner to complete the construction of the first and the second phase of the project by 30th June 2019. However, before the expiry of the extended period, the Respondent No. 1 has unlawfully and prematurely invoked the bank guarantees. Regarding prayer (c), learned counsel relied upon Clause 18.4 of the Meerut Agreement and submitted that the Petitioner has to recover the amounts outstanding against the invoices raised by it, and Respondents should be called upon to make the payment in respect thereof.

10. Learned counsel for Respondent No.1 on the other hand, on instructions

from Wing Commander Sh. S.K. Gaur, Wing Cdr. who is present in the Court today refuted all the contentions raised by the Petitioner and argued that the Contract has been terminated vide notice dated 22nd June 2019. A copy of the termination notice was handed over in the Court along with the letter dated 15th July 2019, whereby Respondent No. 1 has appointed an Arbitrator in terms of Clause 18.2 of the Contract dated 30th November 2017. The copies of the said letters have also been provided to the learned counsel for the Petitioner and are taken on record.

11. Learned counsel for the Respondent argued that the Petitioner failed to fulfill its contractual obligations in terms of the Contract, and resultantly Respondent No. 1 was constrained to terminate the Contract. He submitted that the Contract was executed on 30th November 2017 stipulating that the work had to be completed within a period of 12 months. However, as on date only 50% of the work has been completed by the Petitioner. He further submitted that Petitioner is misleading the Court by contending that the letter dated 6th June 2019 was as an extension of the contract. He contended that the said letter was issued on the specific request of the Petitioner and cannot be construed as extension. Nonetheless, Petitioner has failed to complete the construction even by 30th June 2019. When the Project Director noted that there was no visible progress in the construction despite the extension, the Contract was terminated. He also submitted that the Respondent No. 1 has to recover an amount of Rs. 14 crores from the petitioner which includes dues towards the mobilization and material advances. He further argued that an amount of Rs. 1.53 crores released to the Petitioner for onward payment to the vendor has not been utilized for the

said purpose and as a result, the vendors who had supplied the material to the Petitioner are unpaid.

Analysis and Findings

12. The Court has given its thoughtful consideration to the contentions raised by the parties.

13. The relief sought in the present petition having been confined only in respect to prayers (b) and (c) as noted above, has to be analyzed in light of the fact that presently Respondent No. 1 has encashed the bank guarantees and the amounts thereunder have been received. Respondent No.1 maintains that the encashment was imperative as a result of breaches on the part of the Petitioner to perform its obligations under the Contract. The question whether Respondent No. 1's action is sustainable or not, is a matter that would require evidence and trial and would be appropriately dealt with in the arbitration proceedings. Thus for now, the question before the Court is as to whether the amount in the bank guarantees should be ordered to be deposited in the Court. The answer to this question is in the negative. In the present scenario, keeping in view the nature of the proceedings, the court cannot conclusively determine whether the encashment of the bank guarantees was unlawful or contrary to the contractual rights. Giving directions to the Respondent to deposit the amount in Court would entail that the Court should form an opinion that the encashment was unlawful. This opinion even on *prima facie* basis, would require the court to embark upon deciding the contractual rights of the parties relating to due performance of the contract. The law relating to invocation of bank

guarantees is well settled and consistently the approach of the court has been of minimalistic interference, unless of course, the well known exceptions viz. egregious fraud and irretrievable injury or loss are established. Undoubtedly since the bank guarantees have been encashed, the Court is not faced with a situation to decide the question of granting a stay of invocation. Therefore, although law relating to invocation of bank guarantees may not have direct application, but the well-known principles relating thereto would still have to be borne in mind. To order the deposit of the amount under bank guarantee, by way of restitution, the Court would be required to necessarily evaluate or at least reflect on the question- whether the invocation was unlawful? Petitioner has not been able to show any fraud in relation to invocation or in establishing the Bank Guarantees. Arguments of the Petitioner have centered around the rationality behind the said action. In my opinion, the aspect of justification for invocation is linked to contractual stipulations which irrefutably lead to determination of disputed questions which is beyond the ambit of section 9 of the Act. In the present situation, I would not consider it appropriate to delve into the question of legality and validation of the action of the Respondent and in my opinion the same should be left for determination by the Arbitral Tribunal. Direction for deposit of the amount cannot be sought as an interim measure. The prayer for release of the outstanding invoices also cannot be decided in the present petition. On the one hand, Respondent No. 1 is laying a claim that it has to recover an amount of Rs. 14 crores from the Petitioner and on the other hand, Petitioner contends that its invoices are unpaid. Petitioner expects that the Court should secure the amount of its outstanding invoices only on the basis of the fact that invoices have been raised. Whether such invoices are

correct or not and whether the amount claimed thereunder is indeed outstanding actually due or not cannot be determined in the present petition. Parties have to be afforded an opportunity to prove their claims. These contentions will also have to be raised before the Arbitral Tribunal.

14. The contention of the Petitioner that while exercising the jurisdiction under Section 9, the Court is not bound to follow the principles of CPC, is not a correct position. The Supreme Court as well as this Court in several judgments has consistently held that while exercising the jurisdiction under Section 9 of the Act, the Court will be guided by the well known principles relating to grant of injunctions and interim reliefs. Reference here may be made to *Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd.* (2007) 7 SCC 125, *Modi Rubber ltd v. Guardian International Corp.* 2007 SCC OnLine Del 502, *Nimbus Communication Ltd. v. Board of Control for Cricket in India*, 2012 SCC OnLine Bom 287. The test of *prima facie* case, balance of convenience, irreparable loss has to be borne in mind before the Court can make an order in the nature of granting interim orders.

15. In the present case, the first ingredient of *prima facie* case is not satisfied for the Court to grant prayer (b) or (c). The Court is not inclined to grant any relief as sought for in the present petition. Accordingly, the same is dismissed. No order as to costs.

16. Needless to state that the opinion expressed by this Court in the present order would not be binding on the Arbitral Tribunal. The Arbitral Tribunal as and when constituted shall decide the claims and counter-claims of the

parties independently and uninfluenced by the observations made hereinabove.

SANJEEV NARULA, J

JULY 17, 2019

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