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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **EFA(OS) (COMM) 11/2019 & C.M.APPLNs.33412-13/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Ms. Perna Priyadarshini and Mr.
Somay Kapoor, Advocates

versus

M/S SBG & CO

..... Respondent

Through: Mr. Shiv Charan and Mr. Imran Khan,
Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **26.07.2019**

1. The appellant/Judgement Debtor, National Highways Authority of India (for short 'NHAI') is aggrieved by an order dated 03.05.2019 passed by the learned Single Judge in an execution petition (OMP (ENF)(COMM) 1/2019) filed by the respondent/Decree Holder seeking execution of the Arbitral Award dated 07.06.2018, whereunder it has been directed to pay to the respondent, a sum of Rs.2,24,51,969/- alongwith interest at the rate of 27% *per annum* with monthly payments commencing from 21.07.2016. The appellant/J.D has also challenged the order dated 12.07.2019 passed by the learned Single Judge directing the presence of the General Manager, NHAI in view of non-compliance of the order dated 03.05.2019.

2. There were some disputes between the parties in respect of delay in payment of the bills raised by the respondent/D.H on the appellant/J.D for

services rendered by it under the contract executed between the parties. Under the contract, the respondent/D.H. was required to oversee the collections at 11 Toll Plazas. The appellant/J.D. raised a grievance that the respondent/D.H. had failed to carry out continuous observations of the assignment given to it in respect of the 11 Toll Plazas and there was a delay in furnishing the reports by it due to which the payments of invoices raised on the appellant/J.D. had also got delayed. The appellant/J.D. had cleared invoices raised by the respondent/D.H. only to the tune of Rs.20,18,650/-.

3. Aggrieved by the delayed clearance of the invoices, the respondent/D.H. invoked the conciliation proceedings postulated under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'MSMED Act'). Since the conciliation proceedings did not succeed, the powers vested in the Micro and Small Enterprises Facilitation Council (in short 'Council') were invoked under Section 18 (3) of the MSMED Act and the disputes between the parties were referred for adjudication to the Delhi Arbitration Centre (for short 'DAC'). Pursuant thereto, the Sole Arbitrator rendered the Award dated 07.06.2018.

4. It is an admitted position that the appellant/J.D. has elected not to assail the Arbitral Award by invoking the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 (in short A&C Act). As a result, the said Award has attained finality. Only, thereafter did the respondent/D.H. file OMP (ENF) (COMM) 1/2019 for seeking enforcement of the Award. In its reply to the said petition, the appellant/J.D. raised objections to the Award claiming *inter alia* that in view of the arbitration agreement governing the parties, the reference of the dispute to the DAC, in exercise of the powers vested in the Council under Section 18 (3) of the MSMED Act

was impermissible.

5. The above said challenge has been repelled in the impugned judgment. The learned Single Judge has referred to a judgment dated 06.08.2018 rendered by the Division Bench of the Bombay High Court WPC (C) 5459/2015 entitled “Gujarat State Petronet Ltd. v. Micro and Small Enterprises Facilitation Council” wherein it has been observed that despite a separate arbitration agreement governing the parties, the Council had the jurisdiction to entertain a Reference under the A&C Act by exercising its powers under Section 18(3) of MSMED Act and proceed to refer a matter to arbitration as it was one of the two options available to it under the MSMED Act.

6. Consequently, the plea taken by the appellant/J.D. in opposition to the Enforcement Petition filed by respondent/D.H. was rightly rejected. Thereafter, a direction was issued to the appellant/J.D. to deposit the up-to-date awarded amount in terms of para 20 of the impugned judgment. The time-line provided to the appellant/J.D. to make the payment was two weeks reckoned from 03.05.2019, which period expired on 17.05.2019. On 12.07.2019, noting that the directions contained in the order dated 03.05.2019, had not been complied with by the appellant/Judgment Debtor, the learned Single Judge directed the presence of the General Manager, NHAI on 19.07.2019.

7. On enquiring as to whether the General Manager (Commercial Operations), NHAI had presented himself in Court on 19.07.2019, learned counsel for the respondent submits that instead of being candid enough to state before the learned Single Judge that NHAI had given instructions to its counsel to prefer an appeal against the impugned judgment, the officer who

appeared in court, offered an excuse for the absence of the Member (Finance), stated to be the 'competent person', on the ground that he was abroad and would be returning to India on 22.07.2019. The General Manager (Commercial Operations), NHAI went on to state before the learned Single Judge that due compliances of the directions issued by the Court would be made. It is noteworthy that the affidavit filed with the present appeal dated 15.07.2019, is of the very same officer, who had appeared before the learned Single Judge on 19.07.2019, but he failed to reveal that an appeal had already been preferred against the order dated 03.05.2019.

8. We are informed that the enforcement petition filed by the respondent/D.H. is listed before the Single Judge today. Learned counsel for the appellant/J.D. states on instructions that an officer is coming to Court with a demand draft for the amount to be paid to the other side in terms of the impugned order.

9. If the appellant/J.D has already decided to accept the impugned order dated 9.07.2019, it was only proper for the learned counsel not to have pressed the present appeal and invite an order on merits. Taking note of the manner in which the appellant/J.D. has tried to act in an evasive manner before the learned Single Judge, we are compelled to observe that it does not behove a Public Sector Undertaking to adopt such underhand tactics. NHAI ought to have been honest enough to have stated before for the learned Single Judge on 19.07.2019 that they had taken steps to file an appeal against the impugned order. The appellant/J.D. has been equally guarded before us. Only on enquiring about what had transpired before the learned Single Judge on 19.07.2019, has the learned counsel for the appellant/J.D.

volunteered that NHAI has agreed to make the payment of the amount as directed on 03.05.2019 and that a draft for the said amount payable to the respondent has been prepared for being handing over before the learned Single Judge today.

10. In view of the aforesaid facts and circumstances, the appeal is dismissed as meritless along with the pending application with the costs of Rs.10,000/- imposed on the appellant/J.D. to be paid to the respondent/Decree Holder alongwith the amount directed to be paid in terms of the impugned order.

HIMA KOHLI, J

ASHA MENON, J

JULY 26, 2019
s/pragya