

ORDER

AP/328/2020
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction

M/S. UNIQUE ENGINEERS PVT. LTD.
Versus
M/S. SIMPLEX INFRASTRUCTURE & ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 3rd November, 2020.

(VIA VIDEO CONFERENCE)

APPEARANCE:

Mr. Suddhasatva Banerjee, Advocate
Mr. Gopal Pahari, Advocate
Ms. Arunima Lala, Advocate
Ms. Mandeep Kaur, Advocate
...for the petitioner.
Mr. Pranit Bag, Advocate
...for the Respondents.

The Court:- The petitioner claims to be a sub contractor in a project of IIT Indore for installation, testing and commissioning of an air conditioning / heating system. The respondent No.1 was the contractor for the said project.

According to learned counsel for the petitioner, before IIT Indore terminated the project with the respondent No.1, the petitioner had completed a substantial part of the same. The petitioner now claims an outstanding amount in excess of Rs.2 crores from the respondent No.1. Learned counsel submits that the performance bank guarantee which the petitioner had to execute with the respondent No.1 had a validity date till February 2021, but the respondent invoked the bank guarantee on 29th October 2020. The bank guarantee was for an amount of Rs.1,19,70,000/-. Counsel places letters between the parties

which show the petitioner's admitted dues of Rs.2,24,24,221/-. The documents also indicate that the respondent No.1 has lost its financial capacity to pay the dues of the petitioner. A letter written by IIT Indore to the respondent No.1 on 27th November 2019 indicates that the respondent No.1 had approached IIT Indore to directly pay the dues of the petitioner. Counsel further submits that since the arbitration clause is covered by the MSME Act, 2006, the petitioner is presently exploring conciliation proceedings under Section 18 of the said Act.

Learned counsel for the respondent urges that the petition has become infructuous, since the primary prayer in the petition was for an order restraining the respondent No.1 from invoking and encashing the performance bank guarantee. Counsel submits that once the bank guarantee has been invoked, the petitioner must seek its redress elsewhere. It is also submitted that the petitioner can agitate its claims before the MSME Facilitation Council, Haryana. It is further submitted that the request of the respondent No.1 to the petitioner for extending the bank guarantee was not responded to, by reason of which the respondent No.1 was free to invoke such bank guarantee and proceeded to do so in October, 2020. Counsel for the respondent disputes the facts stated in the application.

On hearing learned counsel for the parties, this Court is of the view that while the correctness of the claim of the petitioner can be adjudicated at a later stage, the documents show the admitted amount due from the respondent to the petitioner and also the lack of the respondent's financial capacity to pay the dues of the petitioner. The petitioner is therefore entitled to a measure of protection. This Court is also of the view that when the validity of the performance bank

guarantee was till February 20, 2021, there was unjustified haste on the part of the respondent No.1 in invoking such bank guarantee in October 2020. Once the bank guarantee has been invoked of an amount in excess of Rs.1 crore, the petitioner has been left without any recourse to realise its outstanding dues. The action of the respondent in approaching IIT Indore to directly pay the petitioner further reinforces the point of the respondent's inability to give financial relief to the petitioner.

In view of the above, AP No. 328 of 2020 is disposed of with a direction on the respondent No.1 to keep the amount of Rs.1,19,70,000/- being the amount of the bank guarantee in a separate interest bearing account in a nationalised bank until the arbitration proceedings between the parties are concluded before the MSME Facilitation Council, Haryana. The interest earned from the said account will also be retained by the respondent No.1 until the arbitration is decided one way or the other. The particulars of the account, the money deposited as well as the interest earned will be intimated by the respondent No.1 to the MSME Facilitation Council, Haryana at regular intervals.

AP No.328 of 2020 is disposed of accordingly.

(MOUSHUMI BHATTACHARYA, J.)