

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
23.09.2020	30.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

ORIGINAL APPLICATION Nos.256 & 257 of 2020

M/s.Shriram EPC Limited,
Represented by its
Sr.Vice President – Legal & Secretarial
Mr.R.Sridharan,
4th Floor, Sigappi Aachi Building,
18/3, Rukmani Lakshmipathi Road,
Egmore, Chennai – 600 008.

... Applicant in both
Original applications

.Vs.

Valecha Engineering Limited,
Valecha Chambers,
4th Floor, Plot No.B-6, New Link Road,
Andheri (West), Mumbai – 400 053.

... Respondent in both
Original applications

Prayer: Petitions filed under Order XIV Rule 8 of O.S. Rules read with Order 9 Arbitration and Conciliation Act, 1996 for interim injunction restraining the respondent, its director, employees or agents from in any manner affecting jeopardizing or interfering with the receipts and entitlements of the applicant from

MORTH in respect of the work that is being executed by the applicant in terms of the said agreement dated 16.02.2016 and from interfering with in any manner or disturbing the execution of the work by the applicant in terms of the agreement dated 16.02.2016 at site of NB-43 from Kanker to Bedma section in the State of Chhattisgarh and from descopeing the entire or any part of the work sub contracted to the applicant in terms of the agreement dated 16.02.2016 entered into between the applicant and the respondent pending initiation of arbitration proceedings against the respondent.

For applicant : Mr.Arvind Pandian (SC)
for Mr.V.Suresh
for M/s.Shivakumar & Suresh
For respondent : Mr.G.Kalyan Jhabakh
for M/s.Surana & Surana

COMMON ORDER

These applications have been filed for temporary injunctions to restrain respondents and their men from in any manner affecting jeopardizing or interfering with the receipts and entitlements of the applicant from MORTH in respect of the work that is being executed by the applicant in terms of the agreement dated 16.02.2016 and from interfering with in any manner or disturbing the execution of the work by the applicant as per the agreement at site

of NB-43 from Kanker to Bedma section in the State of Chhattisgarh and from descopeing the entire or any part of the work sub contracted to the applicant, pending initiation of the arbitration proceedings.

2. The brief facts leading to filing of these applications are as follows :

The applicant is a public listed company being one of the world's leading companies in Engineering Procurement and Construction and other trunked projects. The Ministry of Road Transport and Highways through Chhattisgarh PWD (MORTH) had invited tender in 2015 for the rehabilitation and up-gradation of NH-43 from Km 130.000 to KM 180.000 (Kanker to Bedma Section) for two lane with paved shoulder in the State of Chhattisgarh under NHDP – IV through Engineering, Procurement and Construction. The respondent at that time has sought EMD for the bid and also entered into a prebid arrangement that in the event the tender was awarded to the respondent, the respondent will enter into a back to back agreement for the execution of the project, as per the terms defined in the agreement. As a result of which the sub contract agreement was entered between the applicant and the respondent on 16.02.2016 besides the respondent sought permission to sub contract the work to the applicant and the same was

approved by the National Highways, Public Works Department by their letter dated 22.11.2019. The applicant, in terms of the agreement obtained bank guarantee dated 20.02.2016 for a sum of Rs.15,43,85,000/- in favour of the Chief Engineer and the same was time and again renewed by the applicant and the last renewal was on 02.07.2020 and valid till 30.06.2021. As per the agreement, the applicant had undertook to pay 2.5% on cost of gross work done for 100% work of each payment on pro rata basis including income tax to the respondent. The applicant was entrusted with 70% of the work for laying of roads and the work has been carried out substantially. The applicant has so far paid a sum of Rs.1,25,10,773/- as fee payable to the respondent in terms of the said agreement. All of a sudden, the respondent by a letter dated 04.03.2020 had requested the applicant to submit the work plan and same was furnished to the respondent. It is the contention of the applicant that the work was upto the satisfaction of the MORTH. The applicant has attended all the review meetings called by the MORTH right from the starting of the project. All of a sudden the respondent abruptly issued notice threatening the applicant that they will terminate the contract. By letter dated 09.06.2020, it was stated that they have already revoked the power of attorney given to the official of the applicant to represent the

respondent in execution of the project. Similarly by letter dated 09.06.2020, the respondent mischievously and dishonestly alleged poor workmanship for foundation works of minor bridge at chainage 154 to 155 and ch:154 + 880 based on certain alleged photographs and highhandedly threatened to descope the entire part or part of the said work. Hence, these applications have been filed for interim injunctions.

3. In the additional affidavit filed by the applicant, it is contended by the applicant that respondent has challenged the tripartite agreement before the Chhattisgarh High Court on the ground of alleged fraud. Whereas, before this Court on 07.08.2020, the respondent sought modification of the Order on the basis of the tripartite agreement. The above fact exposes the conduct of the respondent. Hence, it is the contention of the applicant that the sub contract of the work is 100% and no part of the work has been reserved or retained by the respondent to be allegedly executed by the respondent under the said agreement dated 16.02.2016. The main client is also aware of this fact and the applicant has provided 1005 bank guarantee to MORTH.

4.1. In the counter affidavit, it is the contention of the respondent that no injunction can be granted by a Court in a suit to an infracture project specified in the schedule. The alleged tripartite agreement is a result of fraud on the respondent. The respondent came to know about the tripartite agreement only on 08.07.2020. It is the contention of the respondent that the respondent participated in the tender bids called by the Ministry of Road Transport and Highways for the work of rehabilitation and upgradation of NH-43 from Km130.00 to Km180.00 (Kanker to Bedma Section). The applicant with an aim to foray into the infrastructure projects and with a keen interest to utilise the skill and project experience of the respondent, joined hands with the respondent to enter into the roadway projects, particularly to deal with the Indian Government infrastructure projects. As a result, the sub contract came into existence on 16.02.2016. As per the terms of the sub contract agreement, the applicant would undertake and execute and complete the project and maintain it during defects liability period and during the maintenance period in the name of the respondent on a back to back basis.

4.2. The applicant would also arrange all the required bank guarantee from its own limits and costs. All the terms and conditions of the main agreement as would be executed between MORTH and respondent would be applicable to the applicant on back to back basis. The Bank Guarantees for Performance Guarantee, mobilization advance, machinery advance, release of retention or security deposit etc will be arranged by the applicant from its own limits in the name of the respondent. The General Power of Attorney for signing the agreement will be vested into the regular representative of the respondent. The applicant would plan and complete the work in such a way so that MORTH does not levy liquidated damages under the contract and if MORTH levies any liquidated damages, the same would be recovered from the applicant by withholding equal amount from money credited in the respondent's account. The respondent would pay to applicant fees @ 2.5% on cost of Gross work done for 100% work of each payment on prorata basis. All project receipts would be deposited into the respondent escrow account to be opened at the Lakshmi Vilas Bank Limited, Chennai. If the progress of the work made by the applicant was found low in the opinion of MORTH, at any stage of work or a consistent failure is observed on the applicant's part and the same is notified by the employer to comply with agreed

programme or any activity on the applicant's part detrimental to the interest of the respondent. The respondent shall support the applicant to remedy the situation to bring the project on track and endeavor to complete the project and the entire cost shall be borne by the applicant. Any dispute arising out of or in connection with the agreement between the applicant and the respondent would be sorted out amicably first through mutual discussions. In the event of disagreement, disputes will be referred to arbitration and the arbitration will be conducted as per Arbitration and Conciliation Act, 1996 with its upto date amendment and enactment. The mode of arbitration shall be as per the arbitration clause of the main contract. The place of arbitration shall be at Chennai and work will not however be stopped during the arbitral proceedings and will be kept in full force.

4.3. The respondent executed the Engineering Procurement Agreement on 24.02.2016 with the Public Works Department, Government of Chhattisgarh, represented by Chief Engineer, National Highway Zone, Public Works Department, Raipur. Pursuant to the sub-contract agreement, a Special Power of Attorney dated 25th July 2019 was executed in favour of Mr.Hajee N Khader Nawaz Khan, the President of the applicant. It is the contention of the respondent

that the delay is attributed to the applicant in completing the work. As a result, MORTH vide its letter dated 13.02.2020, granted time extension for completion of the work. In the said letter it has been specifically stated that the liquidated damages would be recoverable upto 17.02.2020 and ultimately again time was extended till 07.08.2020 for completion of the work. The respondent has sent a letter dated 28.02.2020 to the applicant about the inaction and repeated failures to achieve the desired progress and requested the applicant to improve planning and the completion of works. It is the further contention of the respondent that the authority has approved the applicant as a sub contractor for 70% of the project and no where had approved direct payment to the applicant and the alleged tripartite agreement dated 02.03.2020 is a fraudulent one and entered into without the knowledge of the respondent and the power of attorney given to the applicant is also cancelled. The respondent has also filed a writ petition in the High Court of Chhattisgarh and the same was disposed of. There is no provision for direct payment to the sub contractor as per the contract dated 16.02.2016. Therefore, it is his contention that the injunction cannot be granted and prayed for dismissal of the applications.

5. The learned Senior Counsel appearing for the applicant submitted that the entire contract was run by the applicant's financial support to the respondent by way of EMD for the project and entertained public bid as a result a sub contract also came into existence between the parties. The contract makes it very clear that only @ 2.5% fee is payable to the respondent out of gross work by the respondent. The applicant has invested a huge amount and continuing the work from the very inception. The work has been carried out by the applicant to the satisfaction of the MORTH, Highways, Public Works Department of Chhattisgarh. The clause 24 of the sub contract makes it clear that even if the arbitral proceedings are pending before the arbitrator, the work shall be continued. In such view of the matter, the respondent now cannot cancel the power of attorney and restrain the applicant from completing the work. It is his further contention that the respondent having filed a writ petition before the High Court of Chhattisgarh, on 22.07.2020 challenging the tripartite agreement and has never whispered the same when the matter came before this Court on 17.08.2020. The very suppression of the above fact in fact prove the fact that the respondent has not come to the Court with clean hands. Hence, it is his contention that the contract entered between the parties and the correspondences between the parties clearly show that the applicant has to pay

only 2.25% payable to the respondent on the cost of the gross work. Infact the applicant has furnished bank guarantee for the entire work to the Department. Therefore, he has restricted to 70% alone based on the contract and the entire work cannot be stalled. Hence, submitted that interim injunction has to be granted inrespect of the entire project.

6. Whereas, the learned counsel for the respondent submitted that originally the contract was awarded to the respondent by the Chhattisgarh Highways Department by the Ministry of Road Transport, Highways Zone, Chhattisgarh, Public Works Department. Though a sub contract was entered between the parties, the main contract itself clearly indicate that in the event of sub contract, only 70% of the work can be allotted to the sub contractor and the letter of the Highways Department also shows that only 70% of the work was allotted to the applicant and the tripartite agreement also show that the contractor shall not sub contract any work more than 70%. The letters sent by the Department also indicate the same. Therefore, the applicant cannot now take advantage of the sub contract agreement to seek injunction to stall the work and just like that injunction cannot be granted to stall the infrastructure project. It is his further contention that

the work has not been completed as agreed by the applicant within the time and as a result of which, the department has issued a letter to the respondent claiming liquidated damages. Therefore, it is his contention that as the applicant has not completed the work as per the sub contract, the same resulted in dispute. Hence, prayed for dismissal of the applications.

7. Heard the learned Senior Counsel for the applicant and the learned Senior Counsel for the respondent and perused the entire materials.

8. It is not in dispute that the Ministry of Public Transport, Chhattisgarh Public Works Department has awarded a contract for the rehabilitation and up-gradation of NH-43 from Km 130.000 to KM 180.000 (Kanker to Bedma Section) to the respondent and an agreement has been entered between the respondent and the Department. Clause 3.2.1 of the agreement reads as follows :

The Contractor shall not sub-contract any works in more than 70% (seventy per cent) of the total length of the Project Highway and shall carry out Works directly under its own supervision and through its own personnel in atleast 30% (thirty per cent) of the total length of

the project Highway. Provided, However, that in respect of the Works carried out directly by the Contractor, it may enter into contracts for the supply and installation of materials, plant, equipment, road furniture, safety devices and labour, as the case may be, for such works. For the avoidance of doubt, the parties agree that the Contractor may sub-divide the aforesaid length of 30% (thirty per cent) in no more than 5 (five) sections of the Project Highway. The parties further agree that all obligations and liabilities under this agreement for the entire project Highways shall at all times remain with the Contractor. In the case of a Consortium the parties also agree that obligation of the Contractor to carry out Works directly in at least 30% (thirty per cent) of the total length of the Project Highway shall be discharged solely by the Lead Member.”

The above clause makes it very clear that the contractor shall not allot work more than 70% to the Sub Contractor and carry out work directly atleast 30% of the total length of the Project Highway. It is also not in dispute that pursuant to the above agreement, an agreement was entered between the applicant and the respondent dated 16.02.2016, namely the sub contract agreement. In the above

agreement, it is stated as follows :

“The parties were interested in the project and had, therefore, joined to take advantage of their skill and resources and experience for the purpose of submitted the tender in the name of Valecha, and in the event of the tender being accepted by the MoRT&H, to perform the project/Contract, on the terms and conditions agreed in the said agreement.

As the letter of award has now been received from the Employer, the parties now wish to define their respective scope of work, right and obligations and establish the terms and conditions under which they will pursue and perform the project.”

Therefore, it is clear that the parties interested in the project had joined to take advantage of their skill and resources and experience for the purpose of submitting the tender in the name of Valecha. Further terms agreed between the parties show that the bank guarantee for performance guarantee, mobilization advance, machinery advance, release or retention of Security Deposit etc., will be arranged

by SEPC from its own limits in the name of Valecha. It has been clearly agreed between the parties in clause 3. Clause 10 of the agreement deals with Power of Attorney to be executed by the respondent.

9. Clause 17 of the agreement reads as follows :

SEPC will pay to Valecha fees @ 2.5% (two and half percent) on cost of Gross work done for 100 % work of each payment on pro rata basis including Income-tax, and excluding other deductible which will not include the amount towards penalty if any levied at source by the employer. The payment of each RA Bill shall be as per the sample illustration provided as annexure for clarity of both parties.”

Clause 19 reads as follows : सत्यमेव जयते

If the progress of the work made by SEPC is found slow in the opinion of the employer, at any stage of work of a consistent failure is observed on SEPC's part and the same is notified in writing by the employer to comply with the agreed programme or any activity on

SEPC's part detrimental to the interest of Valecha/employer. Valecha shall support SEPC to remedy the situation to bring the project on tract and endeavour to complete the project and the entire cost shall be borne by SEPC.”

Clause 24 reads as follows :

Any dispute arising out of or in connection with the Agreement between Valecha and SEPC will be sorted out amicably first through mutual discussions. In the event of dis-agreement, disputes will be referred to arbitration and the arbitration will be conducted as per Arbitration and Conciliation Act, 1996, with its upto date amendment and enactment. The mode of arbitration shall be as per the arbitration clause of the main contract. The place of arbitration shall be Chennai and Work will not, however, be stopped during the Arbitral proceeding and will be kept in full force.”

10. A conjoint reading of the above clause makes it very clear that the project was obtained in the name of the respondent and the bank guarantee and other advances have been arranged by the applicant and the applicant has to pay

fees at the rate of 2.5% of cost of 100% work of each payment and the respondent has also agreed to support to remedy the situation to bring the project on track and the entire cost shall be borne by the applicant. Further, as per the clause 24, any dispute arose between the parties in respect of the contract, the same shall be referred to the arbitration. However, the work shall not be stopped and work will be kept in full force during the pendency of the arbitration proceedings. The bank guarantee has also been provided by the applicant to the Chief Engineer, NH -4 for a sum of Rs.15,43,85,000/- and the bank guarantee expires on 30.06.2021. Infact, the bank guarantees were periodically extended as can be seen from the documents available in the typed set. Though the original contract between the Department and the respondent indicate that the contractor shall sub contract not more than 70% of the contract entered between the parties, the bank guarantees have been executed by applicant and the terms agreed by the parties in the sub contract indicate that the substantial investment has been made only by the applicant in favour of the Chief Engineer, National Highways Zone, Public Works Department. Further, the respondent also appears to have written a letter dated 27.08.2020 indicating that their proposal to appoint the applicant as a sub contractor for the work and sought the consent of the Department and also requested direct payment

to the applicant and agreed that they will never raise any claim on direct payment in respect of the work. In response to the above letter, the Office of the Chief Engineer, Public Works Department, Raipur dated 22.11.2019 has stated that since the Department has approved the appointment of the sub contractor and work in 37 km (70%) of the project length out of 53.258km subject to the condition that the above sub contractor shall not be allowed to work not more than 70% of the total length of the project Highways. The tripartite agreement entered between the parties also makes it very clear that the parties agreed not to sub contract any work more than 70% of the total length of work.

11. It is to be noted that this Court has granted interim injunction to the applicant. When this matter came before this Court on 07.08.2020, the learned counsel appearing for the respondent infact pointed out the tripartite agreement and sought modification of the Order to modify the injunction in respect of the 70% of the work. It is to be noted that at the relevant point of time, the very tripartite agreement entered between the parties has been challenged by way of a writ petition in W.P.No.1767 of 2020 before the High Court of Chhattisgarh. The above the writ petition has been filed on 22.07.2020. The factum of the filing of

the writ petition challenging the tripartite agreement on the ground of alleged fraud is not even brought to the notice of this Court. However, the said tripartite agreement was relied upon by the counsel for the respondent to modify the Order of this Court on 07.08.2020.

12. Be that as it may. The fact remains that, now the dispute appears to have been arisen between parties in view of the letter of the Department while extending time for completion of the work indicating the contractual obligation to levy the liquidated damages as per clause 10.3.2 of EPC with the price adjustment as per clause 19.11 of the original contract. This letter dated 13.02.2020 appears to be trigger point for the dispute between the parties. It is to be noted that in a supplementary agreement entered between the parties, viz., there is an agreement between the parties to remedy the situation in clause 19 and in fact the parties have agreed to support to remedy the situation to complete the project. Therefore, even assuming that the dispute is due to delay on the part of the applicant and as a result, the department is now seeking enforcement of the original contractual obligation to levy the liquidated damages etc., the parties having agreed in the supplementary agreement to refer the dispute to the arbitration and having agreed

that the work shall not be stalled during the arbitral proceedings, this Court is of the view that the entire work cannot be stalled by the respondent. Though it is the contention of the respondent that the contract is governing 70% of the work and the remaining 30% of the work has to be completed only by the respondent, the fact remains that the bank guarantee has been provided by the applicant for the entire contract. In fact, the consent letter given by Department indicate that the respondent has no objection for direct payment in favour of the applicant and agreed not to raise any dispute over the direct payment also.

13. The above facts infact indicate that the entire work has been originally carried out by the applicant. Now after the dispute arise between the parties, the respondent is now taking advantage of the main clauses in the original contract namely, the ratio of 70-30% for the sub contract agreement, is now contending that at the most the applicant is entitled to only 70% of the work and not beyond that. Though there is a contract governing sub contract ratio for 70-30 ratio and it is also reflected in the tripartite agreement, this Court is of the view that the nature of the work is rehabilitation and upgradation of NH43 infrastructure development of road. Hence, the work cannot be stalled on the ground of the dispute raised

between the parties. In fact, in the very sub contract agreement, the parties have agreed not to stop the work even when the dispute is referred to the arbitrator. In such view of the matter, the respondent cannot stall the entire work in the absence of any materials to indicate that the remaining 30% of the work was actually done by them. The very sub contract and the nature of the bank guarantee provided by the applicant and the fact that the very tripartite agreement has been challenged on the ground of fraud, the respondent now cannot approbate and reprobate as to the tripartite agreement. They cannot take two different views, one before the Chhattisgarh High Court and another before this Court and that conduct also cannot be ignored altogether.

14. At any event, without going to the merits of the dispute, the parties, infact have not disputed the nature of the work allotted by the Chhattisgarh Public Works Department to the respondent and the sub contract entered between the respondent and the applicant makes it clear that the financial support has been given by the applicant from the very inception and infact the bank guarantees also have been provided by the applicant. Infact, the Department has also approved 70% of the work to be carried out by the applicant and such approval is purely

based on the contractual provisions. Whether the respondent is continuing the remaining 30% of the work, there is no materials placed on record. Though there are communications between the Department and the respondent as to the completion of the work, such communications alone cannot be a decisive factor to hold that the respondent has completed the work or commenced the work in respect of 30%. In such case, they ought to have produced some materials or they ought to have given security or performance guarantee for such work. However, there are no materials available in this regard. Therefore, as long as the parties have agreed to refer the dispute and agreed not to stall the work during the arbitration proceedings and substantial work has been entrusted to applicant, the respondent cannot stop the applicant.

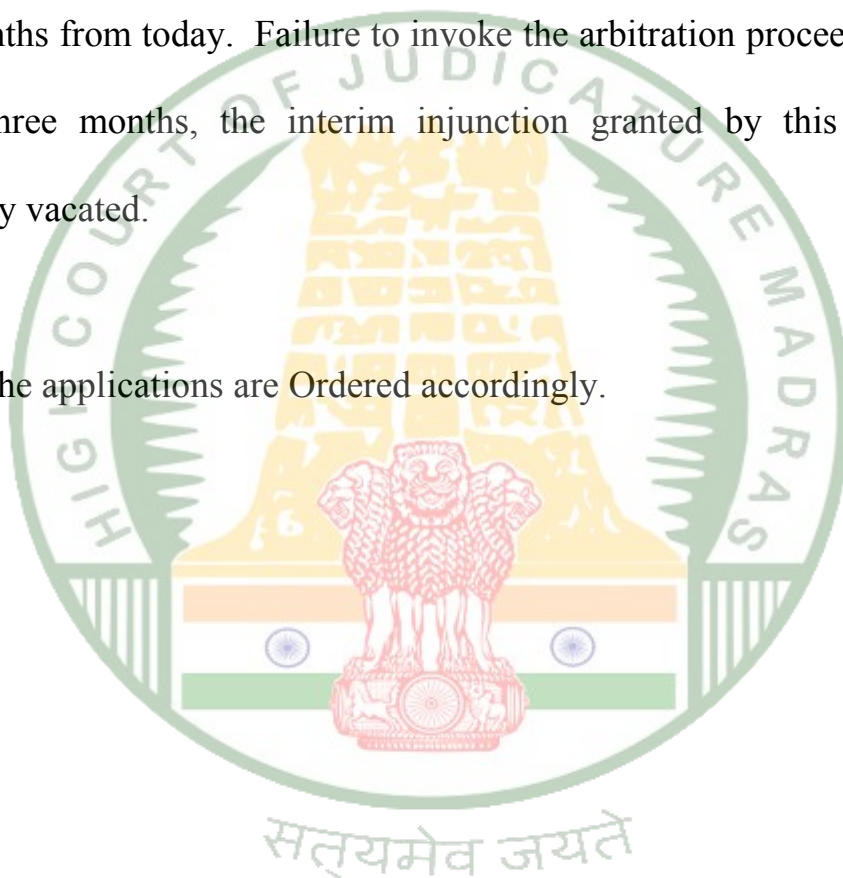
15. Having regard to the fact that the bank guarantees have been given by the applicant and as there are positive averments in the application, this Court hold that the applicant has made out a prima facie case and considering the fact that a letter has been sent by the Department to the respondent indicating the levy of liquidated damages and the respondent approaching the Court to cancel the tripartite agreement, it appears that there is bonafide dispute between the parties

and also having regard of the fact that the balance of convenience is in favour of the applicant and if interim injunction is not granted, the applicant would be put to irreparable loss and injury. Therefore, the interim injunction as prayed for is Ordered. It is for the applicant to invoke arbitration proceedings within the period of three months from today. Failure to invoke the arbitration proceedings within a period of three months, the interim injunction granted by this Court stands automatically vacated.

16. The applications are Ordered accordingly.

30.09.2020

vrc



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N. SATHISH KUMAR, J.
VRC



Order in:

Original Application Nos.256 & 257 of 2020

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30.09.2020