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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(I) (COMM.) 23/2020, I.A. 1265/2020**
TECHNOCRATS ADVISORY SERVICES PRIVATE LIMITED
..... Petitioner
Through: Ms.Mani Gupta and Mr.Vedant
Kumar, Advs.

versus

NATIONAL HIGHWAYS & INFRASTRUCTURE
DEVELOPMENT CORPORATION LIMITED Respondent
Through: Ms.Malvika Trivedi, Mr.Kabir
Shankar Bose, Ms.Sonal Rawat,
Ms.Shivani Garg and Mr.Anil Kumar
Jha, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **29.01.2020**

1. The present petition has been filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996, with the following prayers:

“a) stay the Notice Inviting Tender ref: NHIDCL/AE/Sikkim Works/2019 dated 30.12.2019 issued by the Respondent till the conclusion of the arbitration proceedings between the parties hereto in so far as it pertains to the Sevoke-Gangtok EPC Project, Rhenok EPC Project and the Singtam-Tarku EPC Project;

b) restrain the Respondent, its directors, employees, agents and representative from asking the Petitioner to hand over all Project related documents i.e. RFI, Source Approval of materials, Approval of Plan & Profile, design and drawings of structures etc. in relation to the Contract Agreement;

c) restrain the Respondent, its directors, employees, agents and representative from taking further steps in pursuance of the Termination Notice;

d) permit the Petitioner to continue to perform its role and obligations in accordance with the Contract Agreement;

e) Ad-interim orders for prayers (a) to (d);

f) Pass such other and further order/ orders as may be deemed fit and proper in the facts and circumstances of the present case.”

2. The facts as noted from the petition are that a Letter of Award dated June 20, 2017, was issued to the petitioner by the respondent for Consultancy Services for (i) construction of 1000m length Viaduct at Rangpo between Km 51.10 to Km 53.60 on Sevoke-Gangtok Road NH-10 (Old NH- 31 A) in the state of West Bengal/Sikkim. (ii) Construction of upgradation of existing road to 2-lane with paved sholder including geometric improvement from Km 0.00 to Km 26.706 in Rhenok-Rorathang-Pakyong of NH-717 A on EPC basis under SARDP-NE Phase ‘A’ in the state of Sikkim. (iii) Construction and upgradation of 2-lane with paved shoulders including geometric improvement from Km 0.00 to Km 32.5 of (Singtam-Tarku-Rabongla-Legship-Gyalshing) of NH-510 on EPC basis under SARDP-NE phase ‘A’ in the state of Sikkim.

3. In substance, a Contract Agreement dated June 28, 2017 (‘Contract Agreement’, for short) for supervising the above-mentioned works was signed between the respondent and the petitioner and the commencement date for the project was fixed as July 03, 2017.

4. It is the case of the petitioner that a show cause notice dated May 29,

2019 ('SCN', for short) was issued by the respondent under clause 2.9.1 (d) of GCC of the Contract Agreement for termination of consultancy services for construction and upgradation of 2-lane with paved shoulders including geometric improvement from Km 0.00 to Km 16.000 of stretch Singtam-Tarku of NH-510 on EPC basis under SARDP-NE phase 'A' in the state of Sikkim.

5. The petitioner had sent a reply dated June 17, 2019 to the SCN. It is the case of the petitioner that nothing has been heard by the petitioner from the respondent on said reply to the SCN till the issuance of the termination order dated December 18, 2019 by the respondent. It is submitted by the counsel for the petitioner, relying upon clause 2.9.6 that if in the eventuality, either party disputes an event specified in clause GCC 2.9.1 or in clause GCC 2.9.2, such party may within 40 days after the receipt of notice of termination from the other party, refer the matter to arbitration pursuant to GCC 8 thereof, and the contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.

6. It is the case of the petitioner and contended by the learned counsel that the petitioner did invoke the arbitration clause and sought reference. She states that in terms of the stipulations under the GCC, termination could not have been effected and keeping in view this position, petitioner has preferred the present petition seeking stay of the termination order dated December 18, 2019, along with a prayer that the respondent should not award the contract to any third party.

7. Learned counsel for the respondent, who has appeared on advance notice, states that the relief as prayed for by the petitioner in the petition cannot be granted for the reasons even if, without admitting, the termination

"5. It is apparent that in terms of license deed, the respondent had authority to cancel the license. Under Section 9 of the Arbitration and Conciliation Act, the Court can pass an interim order to preserve such subject matter of dispute which it considered was necessary to be preserved for adjudication of the dispute. However, an order under Section 9 of the Arbitration and Conciliation act cannot be passed by the Court directing specific performance of the contract, the breach of which is alleged by the petitioner. This Court in Excel Generators Pvt. Ltd. Vs. IJ M Corporation Berhad OM P No. 241/09 (decided on 13th May, 2009) had observed that where a contract is terminable contract and it can be foreclosed, the interim relief under Section 9 of the Arbitration and Conciliation Act cannot be granted for specific performance of the contract. In all those cases where monetary damages can compensate the breach of contract, the Court cannot insist upon the parties that the contract should be specifically performed."

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37. Reference is also required to be made to another decision of a Division Bench of this Court in Bharat Catering Corporation vs. Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) & Ors., MANU/DE/2927/2009 : 164 (2009) DLT 530 wherein the Division Bench was called upon to decide the correctness of a judgment passed by a learned Single Judge of this Court dismissing a petition under Section 9 of the Act. A contract was entered into between the parties which was ultimately cancelled due to certain disputes between the parties and this led to the filing of the petition under Section 9 of the Act wherein ex-parte order of injunction was sought staying the operation of the letter dated 06.05.2009 whereby the contract was cancelled. The learned Single Judge while dismissing the petition held as under:-

"5 the scope and ambit of Section 9 is not to restore the contract which has already been terminated. The contract between the respondent and the petitioner created a commercial relationship between the parties. The termination of contract is one of the facets of the contract and as per contract entered into between the parties, the contract could be terminated by respondent for various reasons given therein. If the petitioner is aggrieved by the act of the termination of the contract by respondent and considers that the termination was bad or illegal, the petitioner is at liberty to invoke the arbitration clause and claim damages, if any, suffered by the petitioner. The contract cannot be restored by the Court under Section 9 ..nor is it a case where the Court should interfere. In my view prima facie there is no case made out in favour of petitioners. The petitioners' conduct, as reflected from the impugned letter of termination justifies termination of the contract."

38. Upholding the order of the learned Single Judge, the Division Bench held as under:-

"17. Apart from merits, even otherwise, in our view, the scope and ambit of Section 9 do not envisage the restoration of a contract which has been terminated. The learned Single Judge, in our view, rightly held that if the petitioner is aggrieved by the letter of termination of the contract and is advised to challenge the validity thereof, the petitioner can always' invoke the arbitration 'clause to claim damages, if any, suffered by the petitioner. It is not open to this Court to restore the contract under Section 9, which is meant only for the sole purpose of preserving and maintaining the property in dispute and cannot be used to enforce specific

performance of a contract as such. A bare glance at the said Section will suffice to show that pending arbitration proceedings, the Court and the Arbitral Tribunal have been vested with the power to ensure that the subject matter of the arbitration is not alienated or frittered away"

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44. I am fortified in my view by the judgment of a Co-ordinate Bench of this Court in Jindal Steel and Power Ltd. vs. SAP India Pvt. Ltd., MANU/DE/1868/2015: 221 (2015) DLT 708 where one of the questions before the Court was whether in view of the agreement having been terminated an injunction could be granted against the operation of the termination notice. The Court held that the contract being determinable could not be enforced due to the legal bar under the SRA. It answered the question in the negative holding that no injunction on the termination order could be granted, the same having taken effect and damages was an adequate remedy."

10. In view of the above discussion, I do not see any merit in the petition. The same is dismissed. Liberty is with the petitioner to seek such remedy as is available in law.

V. KAMESWAR RAO, J

JANUARY 29, 2020/bh