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

+ **O.M.P.(I)(COMM) 159/2020 & I.A. 4824/2020**

UNI CONSTRUCTION

..... Petitioner

Through: Mr. Abhay Anturkar and Mr.
Abhikalp Pratap Singh, Advs.

versus

IRCON INTERNATIONAL LIMITED

..... Respondent

Through: Mr. Suman K. Doval, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

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16.07.2020

(Video-Conferencing)

1. The prayer clause, in this petition, preferred by the petitioner, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), reads thus:

“In the light of the facts and circumstances mentioned hereinabove, it is most respectfully prayed that this Hon’ble Court may be pleased to:

a) Pass an order/direction restraining the Respondent from invoking the bank guarantee of Rs. 7,00,000/- (Rs. Seven Lakh only);

b) Pass an order/direction restraining the Respondent from blocking the due payments of the Petitioner and awarding the balance contract out of Rs.4,70,25,482 (Rupees Four Crore Seventy Lakhs Twenty Five Thousand Four Hundred Eighty Two only) to any other contractor;

c) Pass such other and further order or direction, as may be deemed fit and proper.”

2. On 24th October, 2017, a Notice Inviting Tenders (NIT) was issued by the respondent, for “construction of depot building, service building, station building and residential building at Saphale, Palghar, Maharashtra of VAITARANA-SACHIN section in connection with construction of Western dedicated freight corridor Phase-II. The petitioner applied, in response to the aforesaid NIT on 20th November, 2017. The financial bid of the petitioner was opened on 7th December, 2017 and letter of acceptance, awarding the work contract to the petitioner, was issued on 18th January, 2018, by the respondent.

3. Clause 8.0 of the General Conditions of Contract (GCC), between the petitioner and the respondent, dealt with performance security and retention money. Sub-clauses 8.2 and 8.4(a), thereunder, read thus:

“8.2 Performance Security for Contracts valuing more than Rs. 1.00 Crore:

i) The successful bidder shall submit a Performance Guarantee (PG) in the form of irrevocable bank guarantee on the proforma annexed as Annexure-11 from any Scheduled Bank for an amount of 5% (Five percent) of the contract value. The value of PG to be submitted by the Contractor will not change for variation upto 25% (either increase or decrease). In case during the course of execution, value of contract increases by more than 25% of the original contract value, an additional Performance Guarantee amounting to 5% (five percent) for the excess value over the original contract value should be deposited by the contractor.

Alternatively, the performance security can be furnished by the Contractor in the form of Fixed Deposit Receipt (FDR) from a scheduled bank endorsed in favour of the Employer.

(ii) Performance Guarantee (PG) shall be submitted by the successful bidder after the letter of acceptance has been issued, but before signing of the agreement. The agreement should normally be signed within 28 days after the issue of LOA and the PG shall also be submitted within this time limit. This guarantee shall be initially valid upto the stipulated date of completion plus 60 days beyond that. In case, the time for completion of work gets extended; the contract or shall get the validity of PG extended to cover such extended time for completion of work plus 60 days.

iii) No payment under the contract shall be made to the Contractor before receipt of performance security.

iv) Failure of the successful tenderer to furnish the required performance security shall be a ground for the annulment of the award of the Contract and forfeiture of the Earnest Money Deposit.

8.4 Release of Performance Security:

(a) Performance Security shall be returned to the Contractor, subject to the issue of Completion Certificate by the Engineer in accordance with clause 65 of these conditions. This shall not relieve the Contractor from his obligations and liabilities, to make good any failures, defects, imperfections, shrinkages, or faults that may be detected during the defect period specified in the Contract.

4. The petition avers that, as required by the aforesaid stipulation in the GCC, two bank guarantees, covering 50% of the contract value, totalling ₹ 23,51,300/-, were submitted by the petitioner. This is factually inaccurate, as the petitioner had furnished two Term Deposits, for ₹ 16,51,300/- and ₹ 7,00,000/- respectively.

5. The petition alleges that, though the date of completion of the work, as per the contract, was 15th April, 2019, the petitioner was hindered from doing so, owing to delay, on the part of the respondent, in providing the requisite drawings. This, it is further averred, resulted in extension of the date of completion of the contract, by the respondent, to 30th June, 2020. Prior to the said date, the COVID-2019 pandemic intervened, and the country faced lockdown, from the last week of March, 2020 onwards. During the period of lockdown, avers the petition, the workforce of the petitioner returned to its villages and the contract site was declared as a containment zone in April/May, 2020. These circumstances, asserts the petition, constituted “*force majeure*” which fact was communicated by the petitioner to the respondent on 7th April, 2020.

6. On 16th June, 2020, the respondent addressed a seven days’ notice to the petitioner, invoking Clause 50 of the GCC, which sets out the circumstances in which the contract between the petitioner and the respondent could be terminated. Subject to existence of any of the said circumstances, the clause required the respondent to serve, on the petitioner, a notice of seven days, allowing the petitioner to make good its default, whereafter the respondent was entitled to terminate the contract on 48 hours’ notice.

7. The petitioner responded, to the aforesaid notice, on 19th June, 2020, relying on Clause 71 of the GCC, which was the “*force majeure*” clause.

8. Following thereupon, the petitioner has moved the present petition, under Section 9 of the 1996 Act, stating that the petitioner apprehended invocation, by the respondent, of the bank guarantee (actually the term deposit) of ₹ 7 lakhs furnished by the petitioner.

9. The petition draws attention to the fact that Clause 73 of the GCC, between the petitioner and the respondent, provided for resolution of disputes by arbitration.

10. On the last date of hearing, Mr. Suman Doval, learned counsel for respondent, submitted that this petition was liable to be dismissed on the ground of suppression of fact, inasmuch as the petitioner has failed to disclose the fact that, prior to the completion of work, the petitioner had, *suo motu* and without any notice to the respondent, encashed the term deposit of ₹ 16,51,300/-, in stark violation of the terms of the GCC, and had concealed the said fact from this Court in the present petition.

11. Mr. Anturkar, learned counsel for the petitioner, had, thereupon, sought time to take instructions and file an affidavit in this regard.

12. An affidavit has, thereafter, been filed by the petitioner, in which it acknowledged thus:

“I. That I had liquidated the Bank Guarantee of Rs.16,51,300 because at that time I was handling three contracts for the Respondent Company and the Respondent were, holding bills for all three contracts. Due to this I was

not in a position of clearing the bill of the vendors and they were creating pressure on me.

II. Due to this urgent need of funds, I requested the Respondent Company to clear the payment for work done but they did not clear the bill. I called them daily, sent messages and emails to clear my bills but they did not clear the bills. Due to the pressure created by vendors and unresponsive attitude of the Respondent Company in respect of clearance of payment of work done, I was forced to liquidate the FD to clear payments of the vendors.”

13. It is clear that there is a conscious suppression, from the petition, of the fact that, even prior to the completion of work and in obvious violation of the terms of the contract, the term deposit of ₹ 16,51,300/- which covered almost 75% of the performance security required to be provided by the petitioner in terms of Clause 8.1 of the GCC, had been liquidated by the petitioner. This fact has studiously been suppressed in the petition, which, nonchalantly, refers only to the term deposit of ₹ 7 lakhs.

14. Even in the affidavit, filed in terms of the directions of this Court, dated 6th July, 2020, the date of encashment of the aforesaid term deposit of ₹ 16,51,300/-, is not forthcoming.

15. Mr. Doval submits that his client had come to know of his clandestine act, on the part of the petitioner, only when on 29th June, 2020, the respondent had approached the Bank to encash the term deposits, upon which the Bank informed the respondent that the term deposit of ₹ 16,51,300/- stood encashed, by the petitioner, on 22nd August, 2019.

16. Interlocutory relief, be it relatable to Section 9 of the 1996 Act, Order XXXIX of the Code of Civil Procedure, 1908, or for that matter, Article 226 of the Constitution of India, is fundamentally discretionary in nature. Invocation of the discretionary jurisdiction of a court necessarily requires, as a condition precedent, the applicant invoking the jurisdiction to be candid, and to make a clean breast of its affairs; to approach the Court, as it were, “with clean hands”. Suppression of material facts, from the Court, has, classically, been held to constitute fraud, in this oft-quoted aphorism from *S. P. Chengalvaraya Naidu v. Jagannath*¹:

“A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

Suppression of material fact, and invocation of the discretionary and equitable jurisdiction of the court, are strange bedfellows.

17. In view thereof, I had queried of Mr. Anturkar, learned counsel for the petitioner, as to whether his client sought to press this petition, or would take his chance before the arbitrator. Mr. Anturkar, on instructions, submits that his client desires that an order on merits be passed by this Court, and that his client was unwilling to withdraw the petition.

¹ (1994) 1 SCC 1

18. The facts, stated hereinabove are, even by themselves, sufficient to disentitle the petitioner to any discretionary relief, under Section 9 of the 1996 Act.

19. That apart, having unjustly, and in stark violation of the terms of the contract with the respondent, encashed the term deposit of ₹ 16,51,300/-, even before the work had been completed, the petitioner cannot seek an injunction, against the respondent, against encashment of the sole remaining term deposit receipt of ₹ 7 lakhs.

20. The circumstances in which interim relief can be granted, under Section 9 of the 1996 Act, are, it is trite, analogous to those which apply to under Order XXXIX of the Code of Civil Procedure, 1908 (“the CPC”). Relief in such case can be granted only if the considerations of a *prima facie* case, balance of convenience, and irreparable loss, are cumulatively made out.

21. Irrespective of the question of the *prima facie* merits of the case of the petitioner against the respondent – which appropriately would have to be examined by the arbitrator – it cannot be said that the considerations of balance of convenience and irreparable loss would justify injuncting the respondent, at this stage, from encashing the term deposit of ₹ 7 lakhs, furnished by the petitioner as security, pending performance of the contract.

22. On a conspectus of the facts, I am of the opinion that the petitioner is not entitled to any relief.

23. The petition is, accordingly, dismissed, with no order as to costs.

24. I.A. 4824/2020 also stands disposed of.

C. HARI SHANKAR, J.

JULY 16, 2020

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