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

+ OMP (I) (COMM) 244/2020 and I.A. 9051/2020

PRAMOD KUMAR GOEL Petitioner
Through: Mr. Bhupesh Narula, Adv.

versus

DELHI DEVELOPMENT AUTHORITY & ANR
...Respondents
Through: Ms. Latika Malhotra, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (O R A L)

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16.10.2020

(Video-Conferencing)

1. This is a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), seeking certain pre-arbitral reliefs.

2. Mr. Bhupesh Narula, learned Counsel for the petitioner, restricts his prayer to permission to carry out measurements at 20 MIG House at Ashok Nagar, along Faiz Road, through an independent engineer, in the presence of the representatives of both parties.

3. It would be necessary to note, in brief, the factual matrix in which this prayer has been made. A notice inviting tenders was published by the respondent-DDA, inviting tenders for construction work in the aforesaid 20 MIG House at Ashok Nagar, along Faiz

Road. The petitioner participated, and was declared the successful tenderer. Letter of acceptance was issued to the petitioner on 10th September, 2018, followed by a formal agreement, between the petitioner and the DDA on 22nd September, 2018. The work was to commence on 5th October, 2018 and conclude by 4th April, 2020.

4. The petition alleges that, owing to acts and omissions of the respondent, various hindrances were encountered in carrying out the contracted work. The respondent, on the other hand, also alleges that the petitioner's performance was unsatisfactory.

5. Show cause notices were issued by the respondent to the petitioner on 10th October, 2019 and 13th November, 2019. On 2nd March, 2020, the Engineer-in-Charge of the respondent wrote to the petitioner, intimating the petitioner that the contract stood terminated and that the performance guarantees, submitted by the petitioner, alongwith the security deposit furnished by him, stood forfeited.

6. It is asserted, in the petition, that no measurements, of the work executed by the petitioner, had been undertaken and that his final accounts have not been settled till date. On the other hand, complains the petitioner, the respondent has invited fresh tenders for the work.

7. Disputes, thus, arose between the parties, resulting in the petitioner writing to the respondent on 6th July, 2020 and 18th August, 2020, invoking the arbitration clause, contained in the contract between them. It is an admitted position that, however, till date, no arbitrator has been appointed, to arbitrate on the disputes.

8. It is in these circumstances that the petitioner has preferred the present petition.

9. As noted above, Mr. Bhupesh Narula, learned Counsel for the petitioner submitted that he would be satisfied if this petition is disposed of with permission to have measurements, at the aforesaid site, conducted by an independent engineer, in the presence of the representatives of both parties.

10. Ms. Latika Malhotra, learned Counsel for the respondent, submits, on the other hand, that conducting of such measurements would serve no purpose, as the succeeding contractor has worked on the premises, and, therefore, the measurements taken now, may not reflect the actual work undertaken by the petitioner.

11. This is not an aspect on which I am required to adjudicate. Any claim, by the petitioner, would necessarily have to be supported by evidence regarding the work undertaken by him, which the respondent would have a right to rebut. The mere taking of measurements, therefore, cannot prejudice either party. It would be for the petitioner, thereafter, to establish, in arbitral proceedings, that these measurements represent the work undertaken by him and the respondent could always contend otherwise. The arbitrator, who would be arbitrating on the dispute, would have to decide this issue on its own merits.

12. In any event, I am of the opinion that there can be no reasonable objection to the measurements, at the site, being recorded by an independent engineer. The parties for both sides, would, needless to

say, have a right to be present at the time of recording of the measurements.

13. Accordingly, in the circumstances, this Court appoints Mr. Kamlesh Shukla, retired Assistant Engineer, CPWD (Mob: 9958779955) as an independent engineer, who would visit the aforesaid site on 5th November, 2020, at 11 a.m. The independent engineer would record all measurements, as desired by the petitioner, and copies of the report, prepared by the independent engineer, would be provided to learned counsel for both sides. Both sides would be entitled to have their representatives present during the recording of the measurements, and neither side would create any hindrance or obstruction in the way of recording of the measurements by the independent engineer. The independent engineer would be entitled to be paid a fees of ₹ 1 lakh, for undertaking the above exercise, which shall be paid by the petitioner on the occasion of recording of the measurements, subject to orders which may be passed in arbitral proceedings in that regard.

14. The respondent is also directed to ensure that the subsequent contractor is not present at the premises on the day when the recording of measurements take place.

15. Mr. Narula submits that nothing survives for adjudication in the O.M.P.

16. Accordingly, the petition as well as all applications therein stand disposed of in terms of the above directions.

17. Needless to say, this order adjudicates only on the aspect of recording of the measurements by an independent engineer, and all other reliefs that the petitioner would seek to urge would remain open, to be agitated at any appropriate stage in appropriate proceedings including before the learned arbitrator who would be appointed subsequently.

OCTOBER 16, 2020/kr

C. HARI SHANKAR, J.

