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

+ OMP (I)(COMM) 264/2020, IAs 7717/2020 & 7718/2020

SARASWATI CONSTRUCTION CO.

..... Petitioner

Through: Mr. Saurabh Soparkar, Sr. Adv. with
Mr. Monish Panda, Mr. Parth
Contractor & Mr. Kshitiz Arya, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Respondent

Through: Mr. Ankur Mittal, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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04.09.2020

IA 7717/2020 (by petitioner seeking exemption from filing the certified copy of the orders / legible / dim/ typed copies of annexures)

For the reasons stated in the application, the same is allowed and petitioner is exempted from filing the certified copy of the orders / legible / dim/ typed copies of annexures. Application is disposed of.

IA 7718/2020 (by petitioner seeking permission for filing lengthy synopsis and list of dates)

For the reasons stated in the application, the same is allowed and petitioner is permitted to file lengthy synopsis and list of dates. Application is disposed of.

OMP (I)(COMM) 264/2020

1. The present petition has been filed with the following prayers:-
 - a) *This Hon'ble Court may be pleased to allow the present Application preferred under Section 9 of the Arbitration and Conciliation Act, 1996;*
 - b) *This Hon'ble Court until such time that the Arbitral Tribunal is constituted and until further orders are passed by the Arbitral Tribunal, be pleased to preserve the Contract Agreement and grant stay on the Termination of the Contract terminated vide Termination Notice dated 23.07.2020;*
 - c) *This Hon'ble Court be further pleased to restrain the Respondents from proceeding further with the bidding process initiated pursuant to the Notice Inviting Tender dated 24.08.2020 in relation to the Project or appointing any Contractor, for carrying out any work in relation to the Construction of 6 Lane Elevated Structure at Gondal Chokdi at Ch. Km 175.000 on existing 4 Lane Jetpur-Gondal-Rajkot Section from Km 117.600 to Km 185.000 on NH-27;*
 - d) *For such other and further reliefs, which this Hon'ble Court may in the present fact matrix deem fit and proper;*
 - e) *For costs of this application;*
 - f) *Pass any other orders which this Hon'ble Court may deem fit in the facts and circumstances of the present case."*
2. In substance, the present petition has been filed under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act of 1996' in short) seeking interim measures of protection of preserving the contract agreement which has been terminated vide termination notice dated July 23, 2020 and

restraining the respondent-NHAI from proceeding with the bidding process initiated through the Notice Inviting Tender dated August 24, 2020 or allotting any work to any other contractor.

3. The brief facts as noted from the petition are, that the petitioner entered into the EPC Contract Agreement dated December 14, 2018 for the construction of 6 lane elevated structure at Gondal Chokdi at Ch. Km 175.000 on existing 4 lane Jetpur-Gondal-Rajkot Section from Km 117.600 to Km 185.000 on NH-27.

4. It is the case of the petitioner and so contended by Mr. Saurabh Soparkar, learned Sr. Counsel appearing for the petitioner that with a view to perform the contract, petitioner had in accordance with the terms of the Contract, submitted the designs and drawings for approval but the Authority Engineer appointed by respondent without any application of mind, continuously suggested to the petitioner to prepare the designs and drawings in accordance with Schedule B, and chose not to approve the designs and drawings submitted by the petitioner, even though the same were independently reviewed and approved by Indian Institute of Technology, Mumbai. It is also the case of the petitioner that requisite permission from the State Government i.e. permission from Collector, Rajkot was only granted on April 28, 2020 to the NHAI, prior to which, construction in pursuit of performance of the contract could not have been undertaken.

5. The further submission made by Mr. Soparkar is that during the subsistence of Contract Agreement between the parties, the respondent commissioned a Detailed Feasibility Study of six laning of existing four lane Jetpur-Gondal-Rajkot section on BOT Basis. In pursuance of implementing this new scheme, the respondent created a situation where by the

performance of the contract by the respondent was rendered impossible by *inter alia* arbitrary rejection of drawings and designs and thereafter, terminated the Contract between the parties under the pretext that the petitioner has failed to adhere to milestones under the Contract and have invoked the Performance Bank Guarantee. In support of his submission, he has drawn my attention to some documents annexed along with the petition. In the end, he states that the petitioner believes that the respondent is in the process of appointing a new contractor after the illegal termination of the petitioner's Contract, which will lead to effectively defeating the petitioner's claim before the Tribunal to set aside the illegal termination notice dated July 23, 2020. As such, the petitioner has no other option but to approach this Court by way of present petition.

6. On the other hand, Mr. Ankur Mittal, Advocate appearing for NHAI would contest the submissions made by Mr. Soparkar by contending that it is a clear case where the petitioner has not adhered to the timelines as contemplated under the contract. He states out of the total work, only 5% has been completed by the petitioner. In substance, he justifies the impugned action.

7. Having heard the learned counsel for the parties, there is no dispute that the contract has been terminated on July 23, 2020. Pursuant thereto, the respondent has also issued NIT calling bids for appointment of a new contractor. If that be so, the termination notice dated July 23, 2020 has already come into effect and cannot be stayed at this point of time. That apart, I am of the view that the relief as prayed for, cannot be granted in view of a newly introduced Section 20A of the Specific Relief Act, 1963, which is reproduced as under:-

“20A. Special provisions for contract relating to infrastructure project.—(1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.

Explanation.—For the purposes of this section, section 20B and clause (ha) of section 41, the expression “infrastructure project” means the category of projects and infrastructure Sub-Sectors specified in the Schedule.

(2) The Central Government may, depending upon the requirement for development of infrastructure projects, and if it considers necessary or expedient to do so, by notification in the Official Gazette, amend the Schedule relating to any Category of projects or Infrastructure Sub-Sectors.

(3) Every notification issued under this Act by the Central Government shall be laid, as soon as may be after it is issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that

any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.”

8. Any order passed by this Court shall have an effect on the completion of the project, which in my opinion is not in the public interest. Further, there is no dispute that the petitioner has invoked the arbitration. On a pointed query to Mr. Soparkar, he said that the claim before the learned Arbitrator shall also be with regard to termination, alternatively for damages. If that be so, the termination having come into effect, the remedy for the petitioner is only to seek adjudication through arbitration. If the petitioner succeeds in establishing its case before the learned Arbitrator, it can always be compensated for damages, which would be an adequate relief.

9. Insofar as the other relief sought for by the petitioner for restraining the respondent from proceeding ahead with the bidding process pursuant to NIT dated August 24, 2020 is concerned, the said NIT has been issued pursuant to termination of the contract and, rightly so, as a new contractor has to be appointed for carrying out the work. Such an action cannot be faulted.

10. At this stage, I may refer to the judgment of the Supreme Court in the case of ***CCE vs. Dunlop India Ltd., (1985) 1 SCC 260***, wherein it was held that an interim order should not be granted without considering the balance of convenience, the public interest involved and the financial impact of an interim order.

11. Similarly, the Supreme Court in the case of ***Ramnik Lal N. Bhutta vs. State of Maharashtra (1997) 1 SCC 134*** has also stated that the grant of stay only when there is an overwhelming public interest in granting stay as against public detriment, which may be caused by granting a stay.

12. In this case, no such submission has been made by Mr. Soparkar. As the work is related to construction of a highway, it is in public interest that such a work is completed at the earliest.

13. In view of my above discussion, I do not see any merit in the present petition. The same is dismissed. Suffice to state this Court has not expressed itself on the merits of the dispute between the parties.

V. KAMESWAR RAO, J

SEPTEMBER 04, 2020/ak