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

% *Date of Judgment: 07th January, 2021*

+ **O.M.P.(I) (COMM.) 372/2020 & I.A. 207/2021**

BEIGH CONSTRUCTION COMPANY
PRIVATE LIMITED

..... Petitioner

Through Mr Arun Kathpalia, Senior Counsel
with Mr Angad Mehta and Mr Kauser
Hussain, Advocates.

versus

VARAHA INFRA LIMITED

.....Respondent

Through Mr Rajeev Sharma, Advocate with
Mr Abhishek Birth, Ms Somya Budholia,
Mr Prateek Seth and Mr Adeem Ahmed,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through videoconferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter the Act), *inter alia*, praying as under:-

- “a) Restrain the Respondent from taking any coercive steps against the Petitioner, including terminating the Memorandum of Understanding dated 09.01.2019, till the final adjudication of the disputes by the Arbitral Tribunal.

- b) Restrain the Respondent from appropriating monies from the Project in any manner other than in the manner prescribed in Memorandum of Understanding dated 09.01.2019, till the final adjudication of the disputes by the Arbitral Tribunal.
- c) Restrain the Respondent from taking any coercive steps against the Petitioner which would adversely affect the Petitioner in undertaking its obligations and enjoying its rights under the Memorandum of Understanding dated 09.01.2019, till the final adjudication of the disputes by the Arbitral Tribunal.
- d) grant *ad-interim ex-parte* reliefs in terms of Prayers (a) to (c) above”

2. The respondent was awarded the contract for executing an Engineering, Procurement and Construction Contract for “Rehabilitation & Up-gradation to 2 Lane with Paved shoulder/4 laning configuration of Wakan Pali Khopoli Road NH-548A(SH93) connecting New NH (SH88), MPEW, AH47 (NH4) and NH66 (NH17) from KM.0/000 to 40/600 in the state of Maharashtra on Engineering, Procurement & Construction (EPC) mode” by the Maharashtra State Road Development Corporation (MSRDC). And, the said parties (respondent no.1 and MSRDC) entered into the “Engineering, Procurement and Construction Agreement” (hereafter ‘the EPC Contract’) on 07.04.2017.

3. The present petition arises out of disputes that have arisen between the parties in connection with a Memorandum of

Understanding dated 09.01.2019 (hereafter ‘the Agreement’), whereby the respondent had agreed to sub-contract the execution of the EPC Contract to the petitioner.

4. In terms of the Agreement, it was agreed that the petitioner would execute the EPC Contract and the entire amount received from the employer (MSRDC) would be deposited in an escrow account. The petitioner would be entitled to 99% of the said amounts and the respondent would be entitled to the balance 1%.

5. It is the petitioner's grievance that the terms of the Agreement are not being complied with. The petitioner claims that it has executed works for an amount of ₹39,29,44,384.07 against which a payment of ₹32,00,60,345.20 has been released by MSRDC after retaining a sum of ₹1,93,52,129.72. However, the petitioner has not received 99% of the said amounts disbursed by MSRDC. The petitioner alleges that the respondent has illegally and in breach of its obligations retained substantial portion of the same.

6. Mr Kathpalia, learned senior counsel appearing for the petitioner submitted that MSRDC is now in the process of releasing the retention money in proportion to the work completed in terms of a policy circular (Atmanirbhar Bharat: Relief for Contractors/Developers of Road Section no. Ro/MUM/GEN-Corrs/2020- 21/210 dated 08.06.2020) issued by the Ministry of Road Transport and Highways, Government of India. He submits that since the said amounts are directly relatable to

the works executed by the petitioner, directions ought to be issued to the respondent to ensure that it does not receive the said sums and makes over the said sums directly to the petitioner. He earnestly contends that the amounts received or to be received by the respondent from MSRDC are in the nature of amounts received in trust and therefore, cannot be appropriated by the respondent.

7. Mr Rajeev Sharma, learned counsel appearing for the respondent has countered the aforesaid submission. He points out that the Agreement dated 09.01.2019 was terminated on 04.10.2020 and this was also communicated to MSRDC on 06.10.2020. He referred to a letter dated 19.10.2020 sent by MSRDC, acknowledging that the sub-contract between the petitioner and the respondent stood terminated.

8. Mr Sharma referred to a letter dated 20.03.2020 issued by MSRDC alleging that the progress of the works was slow and the same was being done in a haphazard and unplanned manner. It had further cautioned the respondent to take corrective steps failing which it would withdraw the works and debar (blacklist) the respondent for a period of five years. He also referred to certain other letters written by MSRDC alleging that the progress of work was extremely slow. He referred to a letter dated 16.06.2020, whereby MSRDC had put the respondent to notice that the execution of the works would be monitored for a period of one month and if there was no improvement, the works would be withdrawn and the EPC Contract would be cancelled. By a letter dated 24.09.2020, MSRDC had indicated its 'intention to terminate' the

contract on account of slow progress of the work alleging that the respondent had not shown any will to complete the work and had failed to live up to its commitments.

9. He submits that since the execution of the works was sub-contracted to the petitioner, it was responsible for not performing the works, as was agreed. He further submitted that prior to the parties entering into the Agreement, the respondent had entered into a sub-contract with one M/s Monica Constrotech Private Limited. The said sub-contract was terminated, however, there were some disputes with the said sub-contractor. Accordingly, the petitioner and the respondent had entered into a tripartite agreement with M/s Monica Constrotech Private Limited – Supplementary Memorandum of Understanding dated 25.02.2019 – whereby the parties had undertaken certain obligations towards M/s Monica Constrotech Private Limited. He states that disputes have arisen regarding performance of the said obligations as well. He further submitted that the petitioner had used the machinery of M/s Monica Constrotech Private Limited, however, had failed to pay its dues.

10. Mr Kathpalia countered the submissions. He clarified that the petitioner was seeking its share (99%) of the disbursements made by MSRDC for works executed after 09.01.2019 and not prior to the said date. He further contended that although MSRDC had issued letters alleging slow progress, the respondent had contested the same and according to it the said allegations were untrue.

11. I have heard the learned counsel appearing for the parties.

12. At the outset, it is relevant to note that although the present petition was moved on 20.11.2020, the petitioner has not taken any steps for constitution of the Arbitral Tribunal. Admittedly, the petitioner has, as yet, not issued any letter invoking the arbitration clause under the Agreement (the Memorandum of Understanding dated 09.01.2020).

13. The contention that the amount received by the respondent from MSRDC is in the nature of a trust for and on behalf of the petitioner, is unpersuasive. It is clear that the Agreement is a commercial agreement between the petitioner and the respondent. Indisputably, in terms of the Agreement, the respondent was obliged to deposit the amounts received from MSRDC in respect of the works executed by the petitioner in the specified account and make over 99% of the said amount to the petitioner. The petitioner, essentially, claims that the respondent has failed and neglected to perform its contractual obligations. However, according to the respondent, the petitioner has failed to satisfactorily execute the works sub-contracted to it.

14. The reply filed by the respondent is not on record but it is apparent that there are disputes between the parties with regard to the amounts payable by the respondent to the petitioner.

15. In the circumstances, the petitioner's prayer seeking an order restraining the respondent from appropriating any amount received

from MSRDC, essentially, amounts to seeking a directions to secure the amounts claimed as due and payable by the respondent. It is well settled that orders for interim measures of protection under Section 9 of the Act cannot be passed ignoring the well settled principles as are applicable for exercising the analogous power conferred under Order XXXIX Rules 1 and 2 and Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (CPC). [See *Adhunik Steels Ltd vs Orissa Manganese and Minerals (P) Ltd.*: (2007) 7 SCC 125, *Nimbus Communications Limited v Board of Control for Cricket in India*: 2014 (4) Arb LR 113, and *C V Rao and Krishnapatnam Port Company Limited, China Investments Private Limited v. Strategic Port Investments KPC Ltd.* 218 (2015) DLT 200 (DB)]

16. As noticed above, the petitioner essentially seeks an order under Section 9(1)(ii)(b) of the Act to secure the amounts, which it asserts are owed to it. This is, plainly, seeking an order in the nature of attachment before judgement. Therefore, the principles as applicable under Order XXXVIII Rule 5 of the CPC would guide the grant of such relief. [see: *Rite Approach Group Ltd. vs Rosoboron Export*: 111 (2004) DLT 816, *Global Company v M/s National Fertilizers Limited*: AIR 1998 Delhi 397, *Gatx India Pvt Ltd v Arshiya Rail Infrastructure Limited & Anr*: 216 (2015) 216 DLT 20 and *Natrip Implementation Society v. IVRCL Limited*: Arb. A. (Comm.) 21/2016 decided on 31.08.2016]

19. In *Raman Tech & Process Engineering Co. and Anr. v. Solanki Traders*: (2008) 2 SCC 302, the Supreme Court had explained the twin

conditions that are required to be satisfied before issuing any directions in terms of Order XXXVIII Rule 5 of the CPC. First, that the plaintiff must establish a strong *prima facie* case; and second, that the court is *prima facie* satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that may be passed. The relevant extract of the said decision is set out below:-

“4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words "to obstruct or delay the execution of any decree that may be passed against him" in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a *prima facie* case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a *prima facie* case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a *prima facie* case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the

defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a *prima facie* case.”

[underlined for emphasis]

17. However, it is seen that the present petition does not contain any averments to the effect that the respondent is acting in the manner so as to frustrate an award that may be made by made in favour of the petitioner. There are neither any averments to the said effect nor any material placed on record that would, *prima facie*, satisfy the Court in this regard.

18. Notwithstanding the above, Mr Kathpalia has earnestly contended that the respondent is acting in a manner to frustrate any claim that may be made by the petitioner by ensuring that it denudes itself for substance. He also states that there is material available to establish the same. Be that as it may, no averments have been made in the present petition to the aforesaid effect. More importantly, since no material has been placed on record that would satisfy this Court that the respondent is acting in a premeditated manner to defeat the recovery of any amount that may be awarded in favour of the petitioner, this Court does not consider it apposite to accede to the prayer made in this regard.

19. Insofar as the prayer for restraining the respondent from terminating the Agreement is concerned, the respondent has already terminated the same and thus, the said prayer does not survive. In any

view, the Agreement is determinable and therefore, it would not be apposite to pass any order restraining the respondent from terminating the Agreement in view of Section 14(d) of the Specific Relief Act, 1963.

20. In view of the above, the present petition is dismissed. It is, however, clarified that this order would not preclude the petitioner from moving an appropriate application before the Arbitral Tribunal, if so advised.

JANUARY 7, 2021

pkv

VIBHU BAKHRU, J

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