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

% *Date of Judgment: 11th May, 2021*

\+ **<u>O.M.P.(I) (COMM.) 74/2020</u>**

M/S JANTA ASSOCIATES ..... Petitioner
Through Mr Vineet Bhagat and Mr Mohit Gulati, Advocates.

versus

INDIAN OIL FOUNDATION & ANR. ..... Respondents

Through Ms Priya Puri and Mr Yati Sharma, Advocates for R-1.
Mr Navin Kumar and Ms Rashmeet Kaur, Advocates for R-2.

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 A&C Act), *inter alia*, praying as under:

> "a. Ex-parte stay and set aside the Show Cause Notice dated 24.02.2020 issued by the Respondents;
>
> b. Direct the Respondents to pay the due amount of Rs.l,89,91,737/- (Rupees One Crore Eighty Nine Lakh Ninety One Thousand Seven Hundred and

Thirty Seven Only) to the Petitioner and allow the Petitioner to continue to complete the work by providing modified dam drawings;

OR, in the alternative

Direct the Respondents to secure the due amount of Rs.1,89,91,737/- (Rupees One Crore Eighty Nine Lakh Ninety One Thousand Seven Hundred and Thirty Seven Only) by way of a bank guarantee or by deposit with the Court during the pendency of the present petition and the arbitration proceedings;

c. Direct the Respondents to withdraw the Termination Notices dated 06.01.2020, 13.01.2020 and 28.01.2020, and restrain the Respondents from taking any such adverse / coercive actions against the Petitioner during the pendency of the present petition;"

2. The respondent no.2 (hereafter 'EIL') had invited e-bids for "Composite Works for Development of Infrastructure Facilities at Khajekhalan Ghat, Patna Sahib, Patna" on behalf of respondent no.1 (hereafter 'IOF'). The petitioner had submitted its bid which was accepted by the respondents and a Letter of Acceptance was issued by EIL on 13.09.2018. Thereafter, the petitioner entered into a contract with IOF (through EIL) on 10.10.2018. The petitioner states that the work front was handed over to the petitioner on 09.02.2019, after much delay.

3. It is the petitioner's case that since the work site was on a river front, the petitioner was required to construct a cofferdam to protect

the site from inflow of water. The petitioner did so as per the design provided by EIL. However, on 12.04.2019, there was heavy rainfall resulting in breach of the cofferdam. Consequently, the entire site was inundated and the petitioner had to incur substantial expenditure for clearing the site. It is the petitioner's case that it had suggested that a dam be constructed by sheet piling method. However, EIL did not accept the same and the destruction was caused due to faulty design of the cofferdam. The petitioner claims that despite the above, EIL insisted that a cofferdam be reconstructed by the petitioner. The petitioner did so but the said cofferdam was again destroyed on 04.05.2019.

4. The petitioner claims that it had submitted it Fifth RA Bill, which was revised on 27.08.2019, for a sum of ₹1,15,31,770/-. However, the same remains unpaid. The petitioner also claims that the delay in construction was caused due to various reasons attributable to the respondents. The petitioner also claims that despite the petitioner's request for a comprehensive insurance policy, the respondents had failed to accept its suggestion. In addition, the petitioner claims that there was substantial delay in handing over the above front. This also adversely affected the progress of the works and caused a major setback to the project. Further, the petitioner claims that the respondents had persistently delayed in making payments towards the work done and this resulted in the petitioner facing a severe liquidity crunch, which resulted in further delay in executing the works. The petitioner also claims that the pace of decision making

with the respondents was extremely slow. This also made it difficult to maintain the progress of works. The petitioner applied for extension of time for completion of works, however, the same has not been granted.

5. The petitioner claims that a sum of ₹1,89,91,737/- is owed by the respondents to the petitioner which includes cost and losses suffered by the petitioner due to destruction of cofferdams.

6. The respondents dispute the assertions made by the petitioner. According to the respondents, the petitioner had failed to perform its obligations. In the aforesaid context, EIL issued a show cause notice dated 24.02.2020, *inter alia*, mentioning the following the reasons for delay in execution of the works:

- "Poor deployment of resources like Manpower, Machinery etc.
- Frequent change of Resident Engineer & non-deployment of Resident Engineer in line with "Qualification & Experience Requirement and Penalty for non- mobilisation" (Annexure - IV(a) to Special Conditions of Contract) and "Indicative Key Construction personnel" (Annexure - IV(b) to Special Conditions of Contract)
- Poor construction progress in Toilet Block & Crematorium shed due to non-completion of work & total abandoning of site from 07.08.2019.
- Poor deployment of resources for construction of coffer dam, foundations, toe wall etc. for Ghats.
- Non-mobilisation of critical bought out items like

> electrical panels, light mast, PA system, sanitary fixtures, fire extinguishers etc."

7. EIL called upon the petitioner to show cause as to why the contract be not terminated and all business dealings with the petitioner be suspended.

8. The petitioner responded to the said show cause notice. However, before the same could be considered, the petitioner approached this Court by filing the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'A&C Act').

9. Mr Bhagat, learned counsel appearing for the petitioner submitted that the respondents are required to deposit the amounts claimed by the petitioner in order to secure the petitioner with regard to its claims. He contended that the powers of this Court under Section 9(ii)(b) of the A&C Act are wide enough for such relief and the court is not necessarily bound by the provisions of Order 38 Rule 5 of the Code of Civil Procedure, 1908 (hereafter 'CPC'). He referred to the decision of the Division Bench of the Bombay Court in ***Nimbus Communications Ltd. v. Board of Control for Cricket in India: 2013 (1) Mh.L.J. 39*** in support of his contention.

10. A plain perusal of the prayers sought by the petitioner indicate that its principal prayers are twofold: (a) to stay the show cause notice dated 24.02.2020 and (b) to secure the petitioner for its claim of ₹1,89,91,737/- which the petitioner claims is owed to it for the work done and losses suffered.

11. Insofar as the first relief is concerned, this Court finds no ground to stay the show cause notice dated 24.02.2020. It is not disputed that the same is in terms of the contract between the parties. Admittedly, the contract has not been completed within the stipulated period. According to the respondents, the same is on account of various reasons, which are attributable to the petitioner. The reading of the show cause notice also indicates that the respondents are contemplating to blacklist the petitioner. It is well settled that no such order can be made without affording the person proposed to be blacklisted, a fair opportunity to meet the allegations made against it. The show cause notice intends to do that.

12. In the given circumstances, this Court finds no valid ground to interdict the respondents from considering the show cause notice and taking an informed decision with regard to the contract and on the question of blacklisting the petitioner.

13. Insofar as the second prayer regarding the direction to the respondents to deposit a sum of ₹1,89,91,737/- is concerned, it is seen that there is no averment in the petition that the respondents would not be in a position to honour the award in case the petitioner prevails in arbitration.

14. There appears to be some diversion views amongst the courts with regard to whether the court can grant relief under Section 9(ii)(b) of the A&C Act, in the nature of attachment before the award except on principles as contained under Order 38 Rule 5 CPC. However, this

Court is not required to examine the same in any detail, as in this case there is no material on record which would even remotely indicate that the respondents would not be able to pay the awarded amount if the arbitral award is entered in favour of the petitioner. There is no averment that the respondents are acting in a manner so as to frustrate the enforcement of an arbitral award that may be passed in favour of the petitioner in case the petitioner prevails in the arbitration.

15. In ***Nimbus Communications Ltd. v. Board of Control for Cricket in India & Another*** (*supra*), the Division Bench of the Bombay High Court followed an earlier decision in ***National Shipping Company of Saudi Arabia vs Sentrans Industries Limited: 2004(2) Mh.LJ 696,*** wherein the court had observed as under:-

> ".... The interim protection order contemplated under section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the Court under Section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the Court also has to keep in mind the

> drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under section 9(ii)(b)."

16. Thus, even applying the principles as mentioned in ***Nimbus Communications Ltd.*** (*supra*), there are no grounds for granting the relief as prayed for by the petitioner.

17. Undoubtedly, there are disputes between the parties that would require to be adjudicated. However, at this stage, there are no grounds to direct the respondents to secure the claim of the petitioner.

18. In view of the above, this Court finds no ground to accede to the prayers made by the petitioner.

19. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

MAY 11, 2021
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