

IN THE HIGH COURT AT CALCUTTA

ORIGINAL SIDE

COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

A.P. (COM) No. 422 of 2024

Onycon Infrastructure

Versus

Senbo Engineering Ltd.

Mr. Dhirendra Nath Sharma

Mr. Sourojit Dasgupta

Mr. Chandan Kumar Lal

.....For the petitioner.

Mr. Sujit Banerjee

Mr. Nilay Sengupta

Ms. Ananya Barik

.....For the respondent.

Mr. Arabinda Sen

Mrs. Sarda Sha

.....For the Union of India/ Railway Authority.

Hearing Concluded On : 30.08.2024

Judgment on : 03.09.2024

Krishna Rao, J.:

1. The petitioner has filed the present application under Section 9 of the Arbitration and Conciliation Act, 1996 praying for a direction upon the Northeast Frontier Railway to deposit the amount against the subject project only in the mandated bank account which has been opened at Punjab National Bank, High Court Branch at 6, Church Lane, Kolkata-700001 and allied prayers.
2. Previously, the petitioner had filed an application before this Court under Section 9 of the Arbitration and Conciliation Act, 1996, being A.P. No. 73 of 2022 with respect to certain disputes and differences which has arisen between the parties in relation to sub-contract agreement dated 11th April, 2017. The said application was disposed of by this Court by an order dated 10th March, 2022 by passing the following order:

“The disputes between the parties arise out of a sub-contract dated 11 April, 2017. Under the terms of the sub-contract the petitioner undertook to carry out and complete the balance work including, the permanent works in the construction of B.G. Railway Line Project from Jiribam Tupul (Imphal) of Northeast Frontier Railways.

The Scope of this application pertains to certain payments which are to be made by the Northeast Frontier Railway under the principal contract dated 29th April, 2015.

The petitioner apprehends that if any payment is made directly by the Northeast Frontier Railway

to the respondent, the same would be out of the hands of the petitioner and the petitioner shall have no scope for realizing the same.

It is further alleged on behalf of the petitioner that the respondents is in an impecunious condition and there are various proceedings pending before different fora. These submissions are disputed by the respondent.

In view of the aforesaid, I direct that the respective Advocates on Record of both parties namely Mr. Nilay Sengupta and Chandan Kumar Lal to jointly open a separate bank account and provide particulars thereof to the Northeast Frontier Railway Authority for making any future payment in terms of the contract.

It is made clear that any future payments made by the Northeast Frontier Railway would be paid directly to the joint account of the Advocates on Record. Any amount received would be put in short term interest bearing fixed deposit amount with a nationalized bank. The money would be kept lying to the credit of the award holder or until further orders of Court.”

3. In terms of the order passed by this Court, joint account was opened and the same was intimated to the Northeast Frontier Railway by a communication dated 4th July, 2022 and bank details were provided so as to enable the Railway Authorities to take necessary steps for making any future payments in terms of the contract.
4. In the meantime, the petitioner had also filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 being A.P. No. 180 of 2022 for appointment of Arbitrator. The said application was disposed of by this Court on 5th May, 2022 by appointing an Arbitrator to adjudicate the disputes between the parties.

5. During the pendency of the Arbitration proceeding, the parties have settled their disputes by entering into a settlement deed dated 17th October, 2023. On the basis of the settlement arrived between the parties, the Learned Sole Arbitrator has passed an award on 6th January, 2024 by making the deed of settlement as a part of the award. The petitioner had communicated the award to all concerned Railway Authorities for their information and necessary action.
6. After the award passed by the Learned Sole Arbitrator in terms of settlement entered between the parties, the petitioner came to know that the remaining payment which was overdue under the parent contract dated 29th April, 2015, the Northeast Frontier Railway is about to be released payment in favour of the principal contractor instead of depositing the said amount in the joint account opened in terms of the order passed by this Court dated 10th March, 2022, hence this application is filed.
7. The petitioner relying upon the Clause A and Clause B of the Settlement Agreement which reads as follows:

“A. SENBO shall receive 6.5% (Six and half percent) share including TDS as margin on the gross amount of all the Bills including C.C. Bills, Final Bill, PVC Bill, GST Neutralization Bill as well as on Escalation payment and payment involved in execution of additional quantities, extra item of works, substitute item of works (except refund of Security Deposit and Earnest Money which shall be entirely (1000%) Onycon’s entitlement, if any) and all payments related to this project.

B. Any amount receivable from the N F Railway against the said project shall be deposited

in the Mandated Account only and agreed proportionate share of each party will be transferred under joint signatures as per standing instruction given in the mandate.”

8. The contention of the petitioner is that the mandated account refers in Clause B is the account jointly opened by the Advocates-on-record of both the parties and the Northeast Frontier Railway in terms of the order passed by this Court dated 10th March, 2022, is required to transfer the amount in the said account.
9. Learned Counsel for the respondent submits that pursuant to Clause B of the Award, the parties have decided to bring the sale proceeds in the mandated account, in the same manner, as it used to come before the Arbitration proceeding. He submits that the order dated 10th March, 2022, is merged with the award and question of going back to the said order does not arise.
10. The respondent says that the bills were raised by the petitioner on behalf of the respondent and the Northeast Frontier Railway makes payment including the GST amount, the liability of GST amount remains with the respondent as the bills are raised in the name of the respondent though the actual work was executed by the petitioner and full responsibility of payment of GST lies with the petitioner only. He submits that if total amount including GST is transferred in the joint account of the Advocates-on-record of both the parties, it would be difficult for the Advocates to make payments correctly to the parties after complying with the GST formalities and to satisfy the GST liability.

- 11.** Learned Counsel for the Northeast Frontier Railway submitted that it is not possible for the Railway to disburse the amount in the joint account of the Advocates-on-record of the parties as the Advocates-on-record have no GST Registration.
- 12.** Learned Counsel for the respondent relied upon Clause 6 of the Sub-Contract Agreement dated 11th April, 2017, entered between the petitioner and the respondent wherein the terms of payment has been prescribed and submitted that in the terms of settlement, the mandated account is referred to Clause 6 of the Agreement dated 11th April, 2017.
- 13.** The petitioner has filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 being A.P. No. 73 of 2022 prior to commencement of the Arbitration proceeding between the parties. During the pendency of the arbitration proceeding, both parties have entered into settlement on 17th October, 2023. The Learned Sole Arbitrator on the basis of settlement entered between the parties passed an award by making the terms of settlement as part of the Award.
- 14.** Now the petitioner has filed the present application under Section 9 of the Arbitration and Conciliation Act, 1996 for implementation of order dated 10th March, 2022 passed in A.P. No. 73 of 2022 under Section 9 of the Act of 1996.

- 15.** The petitioner relied upon Clauses A and B of the Settlement Agreement prays for direction upon the Northeast Frontier Railway to deposit the amount in the joint account of the Learned Advocates-on-record in terms of order dated 10th March, 2022. Clause B of the Settlement Agreement speaks about mandated account. The Railway has stated that the joint account open by the Learned Advocates-on-record of both the parties having no GST number and it is not possible to deduct GST and other taxes which will invite future complication.
- 16.** In the Agreement entered between the petitioner and the respondent dated 11th April, 2017, provides the terms of payment wherein all the process for depositing of amount and deduction of taxes have been provided which reads as follows:

“6. TERMS OF PAYMENT

SENBO alongwith ONYCON shall open and operate and Escrow Account in the name of ‘Senbo Engineering Limited’ with a reputed bank for the project works into which all the project related progressive monthly payments and such other payments from the Client shall be deposited. Until the formalities of opening the Escrow Account as referred above, SENBO shall immediately open a current (escrow) account with Indian Overseas Bank, International Business Branch, 2 Wood Street, Kolkata, which will be operated jointly by the representatives of SENBO and ONYCON as fully described hereinafter to immediately transfer the balance amount after TDS to ONYCON after retaining its 6.5% (six and a half percent) margin including TDS on the gross bill amount of all payments including escalation payment and payment involved in execution of additional quantities, extra item of works, substitute item of works, if any, as the case may be and all payments received from the Client related to this

project – but excluding of payments related to security deposit/retention money, if any. ONYCON shall be entitled to receive 100% payment related to security deposit/retention money from the Client subject to fulfilment of the agreement in this respect as per para 8. ONYCON shall forward the copy of the CC Bills approved by the Client duly authenticated by authorized official of ONYCON reflecting gross amount as well as net amount of each bills to SENBO. All transactions in the current (escrow) account as above shall be operated jointly by anyone nominated by SENBO with such persons as nominated by ONYCON. The current (escrow) account shall remain operational till release of full security deposit by the Client.”

- 17.** Taking into consideration of the above, this Court hold that the mandated account describes in Clause B of the Settlement Agreement to that of Clause 6 of the Agreement dated 11th April, 2017.
- 18.** The petitioner has made an averment in the present application that the petitioner came to know that remaining payment which was overdue under the parent contract dated 29th April, 2015, entered between the respondent and the Northeast Frontier Railway is about to release by the Railway but no such document is forthcoming to corroborate the contention of the petitioner. On the other hand, the only contention raised by the Railways that the Railways is facing difficulties to deposit the amount in the joint account of the Learned Advocates-on-record of the parties as they have not having GST registration.
- 19.** This Court finds that as per Clause 6 of the Agreement dated 11th April, 2017, it is categorically mentioned that the petitioner and the

respondent shall open and operate an Escrow Account in the name of “Senbo Engineering Limited’ which will be operated jointly by both the parties, thus the parties can act in terms of consent award by taking into consideration of the Clause 6 of the Agreement dated 11th April, 2017 as mandated account.

20. In view of the above, no further order can be passed in the present application.

21. A.P. (Com) No. 422 of 2024 is disposed of.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)