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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(I) (COMM.) 115/2024 and I.A. 8534/2024, 8535/2024**

HULE CONSTRUCTIONS PVT. LTD.

..... Petitioner

Through: Mr. J.N. Singh, Mr. Jevan Patil and
Mr. Sashank Shekhar and Ms.
Sadhana Singh, Advocates (M:
9958904715).

versus

**NATIONAL HIGHWAY AUTHORITY OF INDIA
& ORS.**

..... Respondents

Through: Mr. Santosh Kumar and Mr. Nidhi
Singh Advocates, (M: 8527585997).

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% **16.04.2024**

1. This hearing has been done through hybrid mode.
2. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (*hereinafter*, '1996 Act') has been filed by the Petitioner-M/s. Hule Constructions Pvt. Ltd. seeking directions restraining the Respondent authorities-the NHAI, from encashing the performance security deposited by the Petitioner, pending the adjudication of the disputes by the Id. Arbitral Tribunal.
3. In the present petition, on 11th December, 2023, the Petitioner was awarded a contract (*hereinafter*, 'the Contract') for operating a Fee Plaza at design Km 90.300 for the use of 4 & more lane of Jagdishpur - Ayodhya Section from Design KM 47.800 to KM 108.020 of National Highway No.330-A (*hereinafter*, 'the Project') in the State of Uttar Pradesh as also



for updating maintenance of adjacent toilet blocks etc. The tender for the said Project was opened by the NHAI on 20th November, 2023 and the said Project was awarded on 11th December, 2023. A cash performance security was submitted by the Petitioner to the tune of Rs.2,18,55,000/- on 5th December, 2023. The Petitioner was handed over the Fee Plaza on 22nd December, 2023 by NHAI. However, immediately thereafter, as per the Petitioner, various events occurred which resulted in diversion of traffic and complete reduction of revenues for the Petitioner. Thus, thereafter, vide communication letter dated 26th December, 2023, the Petitioner stated that it is willing to terminate the contract, prematurely. The said communication reads as follows:

“Respected Sir,

As per above cited subject, we are taken over the Fee Plaza on dt.22-12- 2023 at 08:00 Hrs after this we found some error in assessing regarding collection of user fee is less than the estimated collection and which is beyond the control. So we are willing to premature termination of contract of the subjected work. Request, terminate our contract as per clause no.35 (5)”

4. The Petitioner also sent repeated letters for example, letter dated 3rd January, 2024, claiming that the diversion of traffic as also the strike of all India Motor Vehicle Unions constituted *force majeure* events and thus, the Petitioner was entitled to certain reliefs in view thereof.

5. However, since the NHAI did not agree to the claims to the tune of more than Rs.3.361 crores, raised by the Petitioner, it was constrained to issue notice under Clause 27(a) of the said Contract, and sought reference of disputes to arbitration vide communication dated 15th February, 2024 read with communication dated 16th March, 2024. The Petitioner also sought that



the Respondent ought not to forfeit the cash performance security deposit.

6. The present petition has then been filed seeking interim relief under Section 9 of the 1996 Act. Ld. Counsel for the Petitioner submits that in a similar matter involving the same parties in vide order dated 16th January, 2024 passed in ***Hule Constructions Private Limited v. National Highway Authority of India*** bearing no. ***OMP (I) (COMM) 17/2024***, the Court has appointed a Ld. Sole Arbitrator and has referred the matter to be considered even for interim relief before the Ld. Sole Arbitrator. Ld. Counsel for the Respondent submits that the Petitioner had breached the said Contract, and did not make the proper payments. Therefore, the Respondent is entitled to recovery of the said cash performance guarantee.

7. Heard. The Court has considered the order dated 16th January, 2024, passed by the Coordinate Bench in ***OMP (I) (COMM) 17/2024***. The Court has also reviewed the various events involving the Petitioner, his claims, and the stand of the Respondent. It is undisputed that there is an arbitration clause in the said Contract between the parties. The Arbitration Clause reads as under:-

“27. ARBITRATION & CONCILIATION:

a. All disputes/differences except those mentioned in the matters non arbitrable under Clause 26 above arising between the parties out of this contract shall be settled by way of conciliation under and in accordance with the provision of the Conciliation Policy of NHAI through CCIE (Conciliation Committee of Independent Experts). The proceedings shall be held at New Delhi or any other place as per policy of NHAI.

b. Pending resolution of any dispute pursuant to Conciliation, under all circumstances the Contractor shall continue to remit the agreed installments of money to the Authority as prescribed in this Contract



including when the dispute is about the amount to be remitted.

c. In case of non-agreement through the Conciliation, both Parties can opt for Arbitration through sole Arbitrator under and in accordance to the provisions of the Arbitration and Conciliation Act, 1996. The Sole Arbitrator shall be appointed by Chairman of the Authority.

d. The proceedings of the. Arbitration shall be held in English language and shall be held at such place as may be decided by the Chairman of the Authority or his nominee.

e. Pending resolution of any dispute pursuant to Arbitration, under all circumstances the Contractor shall continue to remit the agreed installments of money to the Authority as prescribed in this Contract including when the dispute is about the amount to be remitted.

f. The contract agreement shall be governed by and construed in accordance with the laws of India and the Courts at New Delhi shall have the exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the contract agreement.”

8. As per the said Clause, the parties had initially tried to resolve their disputes amicably but, if the same did not lead to resolution, the Id. Sole Arbitrator is to be appointed by the Chairman of the NHAI.

9. Such an appointment is no longer permissible in view of the decision of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Limited, (2020) 20 SCC 760***. Thus, an independent Arbitrator would, therefore, be required to be appointed.

10. Accordingly, **Mr. Nikhil Mehra, Advocate (M:9810776904)** is appointed as the Id. Sole Arbitrator to adjudicate upon the disputes between the parties. The Id. Arbitrator shall be paid fees in terms of the Fourth



Schedule of the 1996 Act. The venue of arbitration shall be as may be mutually discussed and agreed upon between the parties and the Id. Sole Arbitrator.

11. The Petitioner is permitted to file the present application under Section 9 of the 1996 as Section 17 application, seeking interim relief(s) before the Id. Sole Arbitrator.

12. The parties shall appear before the Id. Sole Arbitrator on 10th May, 2024.

13. The present petition is disposed of, with all pending applications, if any.

PRATHIBA M. SINGH, J

APRIL 16, 2024

mr/dn