

CASE NO.:
Arbitration Petition 18 of 2007

PETITIONER:
Shristi Infrastructure Development Corporation Ltd

RESPONDENT:
Sunway Construction SDN BHD

DATE OF JUDGMENT: 12/03/2007

BENCH:
Lokeshwar Singh Panta

JUDGMENT:
JUDGMENT

O R D E R
ARBITRATION APPLICATION [C] NO. 18 OF 2007

1. This is an application under Section 11(6) read with Section 11(12) of the Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the Act') and relates to a dispute under an agreement between a foreign company and an Indian company. The application is filed by an Indian company against the foreign company seeking reference of the disputes to an arbitrator. The claim of the petitioner is that the respondent-company is liable to pay the petitioner a sum of Rs.98,72,68,531.00 as per Annexure P/1 with interest at the rate of 21% per annum; the petitioner is entitled to interest pendente lite and future interest on the amount claimed from the date of the petitioner invoking arbitration till the date of decree by a Competent Forum at 21% per annum and cost of arbitration from the respondent-company.

2. The relevant facts set out in the petition by the petitioner are as follows:-

The petitioner is a public limited company incorporated under the Indian Companies Act, 1956 having its registered office at New Delhi. The respondent-company is registered and incorporated in Malaysia as per Malaysian Laws and it has its principal place of business at Level 8, Mentara Sunway, Jalan Lagoon Timur, Bandor Sunway, 46150 Petaling Jaya, Selangor Darul Ehsan, Malaysia. It has its office at New Delhi and it is carrying contract work for constructing, rehabilitation and up-gradation of NH-25 to Four Lane configuration in the State of Uttar Pradesh, being a part of East West Corridor Project (EWC Project) on the terms and conditions contained in the Letter of Acceptance dated 30th June, 2005 issued by the National Highway Authority of India (NHAI). The said Project is funded by International Lending Agency and is being executed with funds from Asian Development Bank.

3. On 19.11.2005, the petitioner entered into a contract with the respondent-company for construction of one-third portion of the above-mentioned stretch of the NH from 143.6 Kms to 170 Kms. The total value of this sub-contract is to the tune of Rs.134,37,91,938/-. Three separate agreements were entered into between the parties herein on 22.12.2005. On 29.11.2005, the petitioner furnished Performance Bank Guarantee to the respondent-company in the sum of Rs.6,71,89,597/- which was valid till 30.04.2009. The petitioner also furnished mobilization advance Bank

Guarantee to the respondent-company in the sum of Rs.6,71,89,597/- on 16.12.2005, which was valid till 30.04.2009. In December 2005, the petitioner mobilized its resources to commence the work at site. It is stated that on 04.03.2006, the respondent-company belatedly released Rs.6,09,72,130/- as mobilization advance to the petitioner. Apart from the financial crunch, the petitioner faced several difficulties and hindrances in the execution of the contract which was duly intimated to the respondent-company, but to no avail.

4. On 03.01.2007, the petitioner filed a petition under Section 9 of the Act in the High Court of Calcutta seeking direction to restrain the respondent-company from encashing the bank guarantee tendered by the petitioner and further not to supplement the petitioner with any other contractor which was later on dismissed as withdrawn. The petitioner stated that on 20.03.2007, a meeting was held between the respondent-company and NHAI where the respondent-company has acknowledged such difficulties being faced by the petitioner at the site. On 12.04.2007, second meeting was convened between the respondent-company and NHAI where again the NHAI was informed by the respondent-company about the lack of funds and other problems being faced at site. On 28.04.2007, the respondent-company threatened to terminate the Work Order allegedly as per Clause 14 of the Agreement dated 19.11.2005. On 03.05.2007, the petitioner sent reply to the letter refuting the allegations levelled by the respondent-company and apprising it of the ground realities as admitted by respondent-company before NHAI in meetings held on 20.03.2007 and 12.04.2007 respectively. The petitioner filed another petition on 25.05.2007 under Section 9 of the Act in the High Court of Calcutta praying inter alia that the respondent-company be restrained from terminating the contract without paying the outstanding dues of the petitioner and further restraining the respondent-company from encashing the bank guarantees. On 30.05.2007, an agreement was signed between the parties pursuant to the meetings dated 08.05.2007, 19.05.2007, 22.05.2007 and 28.05.2007 in a meeting held at Malaysia and in India for resolving the disputes wherein the respondent-company agreed to make payment for the work done by the petitioner, i.e. both certified and uncertified as well as to take over site establishment and material of petitioner at actual cost and the parties jointly agreed to pursue the claims with NHAI. It is stated that this was not honoured by the respondent-company resulting in failure of amicable settlement process. On 16.06.2007, the respondent-company arbitrarily terminated the contract without paying the withheld outstanding dues to the petitioner. The respondent-company further threatened to enter upon the work site within 14 days. On 20.06.2007, the High Court of Calcutta dismissed the Arbitration Petition No.186 of 2007 of the petitioner and declined any relief to the petitioner on the ground that bank guarantee is irrevocable.

5. In June 2007, the petitioner filed an application under Section 9 of the Act in the High Court of Delhi for restraining the respondent-company from acting in pursuance or giving effect to letter of termination dated 16th June, 2007 and from utilizing any proceeds and/or monies received from invocation of bank guarantees. However, this petition was subsequently withdrawn as the High Court was of the view that since the petitioner invoked the adjudication of High Court of Calcutta, any subsequent petition would lie before the same High Court. It is further stated that on 02.07.2007, the respondent-company invoked the bank guarantees of Rs.6.71 crore each, furnished by the petitioner and encashed Rs.11.72 crores

although in none of the previous meetings held between the parties there was even a whisper of any claim of the respondent-company against the petitioner.

6. On 03.07.2007, the petitioner requested the respondent-company to refer the disputes between the parties to the sole arbitrator named by the petitioner, but on 11.07.2007, the respondent-company declined to accede to the above-said request of the petitioner terming the invocation of arbitration clause by the petitioner as pre-mature without assigning any reason. The petitioner again attended several rounds of meetings with the respondent-company but the talks of amicable settlement failed.

7. In these circumstances, the petitioner is seeking appointment of a sole Arbitrator. These are the broad contentions of the petition. The respondent-company filed a counter affidavit through Subba Rao, Senior Project Manager. In para 2 thereof, it is stated as under:-

"Whilst the respondent is not opposing the aforesaid application for the appointment of an Arbitrator to arbitrate on the disputes that have arisen between the parties hereto, I say and submit that the various allegations made by the petitioner against the respondent on merits are wholly irrelevant for the purposes of the disposal of the present application and are therefore unwarranted. The petitioner has unduly burdened the section 11 Application with all sorts of allegations pertaining to respondent's alleged breaches etc. though these are not relevant or germane for the disposal of the present application. As such, all allegations in the applications pertaining to any alleged breach or non-fulfillment of obligations by the respondent are denied and the respondent reserves its right to deal with the said allegations if and when they are made by the petitioner in the arbitration proceedings."

8. On merits, the respondent-company stated that the petitioner continuously failed, refused and neglected to carry out the works with due diligence and delayed execution of the work, as a result of which the work of rehabilitation and up-gradation of the National Highway was way behind schedule. The respondent-company has furnished the details of the defaults allegedly committed by the petitioner in the counter affidavit in these proceedings which I think are not necessarily to be dealt with. Besides other averments made in the counter, the respondent-company submitted that it has grievances against the petitioner and therefore the respondent-company also seeks to join in with the request for an appointment of an Arbitrator.

9. A rejoinder was filed by the petitioner refuting the various allegations made in the counter.

10. It is not in dispute that the parties are governed by the terms of the Umbrella Agreement, copy whereof is placed on record. Clause 18.4 of the agreement reads as under:-

"In the event we fail to arrive at any amicable solution as referred to hereinbefore, the said claim, dispute or difference arising thereof between us shall be referred to arbitration to a sole arbitrator in accordance with the subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof."

11. In view of the fact that the respondent-company has

admitted the existence of disputes and differences arising between the parties which are the subject-matters to be referred to a sole arbitrator and in the circumstances of the case and in as much as the respondent-company has no objection for appointment of an arbitrator, I appoint Shri Justice H. L. Agrawal (Former Chief Justice of Orissa High Court) as the sole arbitrator in the case. The remuneration payable for the case and other costs payable may be fixed by the arbitrator after hearing the parties on both sides.

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12. This application has been filed by the petitioner seeking the following interim reliefs and direction against the respondent-company:-

- (a) to restrain the respondent from undertaking any further work at site, forming subject matter of the petitioner's agreement dated 19.11.2005 with the respondent, through any other person, agency or company whomsoever, or by itself, till such time the entire process of recording of measurements of the work done at site by the petitioner is finalized and completed;
- (b) to restrain the respondent from sub-contracting the work, in question, forming subject matter of the petitioner's agreement dated 19.11.2005 with the respondent, through any other person, agency or company whomsoever or by itself in violation of the terms of its main Contract dated 30.06.2005 with NHAI;
- (c) to direct the respondent\Sunway Construction Sdn Bhd to secure the petitioner for the amount in dispute by depositing in this Hon'ble Court the amount towards the petitioner's claims against the respondent;
- (d) pass ex-parte ad-interim orders in terms of prayers (a), (b) & (c) above, and confirm the same after notice to the respondent;
- (e) pass such other measures of interim measures of protection as may appear and deemed by this Hon'ble Court to be just and convenient.

13. In reply to the said application, the respondent-company contended that the petitioner is not entitled for any interim relief as this application for such measures is not maintainable in these proceedings. It is stated that the only provision under which interim measure is sought for is under Section 9 of the Act and for that the relevant "Court", as defined vide Section 2(1) (e) of the Act, has to be approached. It is further stated that the petitioner continuously has failed, refused and neglected to carry out its obligations under the Work Order and failed to carry out the work with due diligence in terms of Clause 3.1 of the General Conditions of the Work Order dated 19.11.2005. Further, the site management provided by the petitioner was extremely poor, thus, resulting in the petitioner defaulting in its obligations provided under Clause 5.9 of the General Conditions of the Work Order. The respondent-company has given many instances of defaults allegedly committed by the petitioner and also undue delay in execution of the contract work by the petitioner and it is also stated that the petitioner failed and neglected to take any proper action to protect the plants, equipments and material on the site. It is stated that the petitioner was in default of its obligations under the Work Order and the project which is of national importance and in public interest was very behind the schedule as a result of the act or omissions of the petitioner. It is stated that second application filed by the petitioner under Section 9 of the Act was dismissed by the High Court of

Calcutta by Judgment dated June 20, 2007 with cost of Rs.50,000/- imposed on the petitioner and no appeal was filed by the petitioner against the said order and thus the order has now become final. The respondent-company stated that the petitioner having failed to get the interim order from the High Court of Calcutta filed third application under Section 9 of the Act in the Delhi High Court. The said petition came to be dismissed as withdrawn in June 2007. On these premises, it is submitted that the balance of convenience is entirely in favour of the respondent-company and no irreparable loss would be caused to the petitioner, if interim relief as prayed for, is not granted to the petitioner. It is contended that in fact the respondent-company would suffer irreparable loss and would be liable to liquidated damages if timely completion of the EWC Project is not done in obedience of the commitment made with NHAI.

14. I have heard learned counsel for the parties. Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the petitioner, submitted that the mobilization advance was delayed by the respondent-company by a period of as long as 79 days after furnishing bank guarantee by the petitioner and mobilization advance of Rs.6.09 crores only was released by the respondent-company as against the bank guarantee of Rs.6.71 crores; the respondent-company also defaulted in paying the amounts due to the petitioner against various R.A. bills submitted by it from time to time and an amount to the tune of Rs.4.47crore was withheld against the petitioner's bills for no justifiable reasons and on flimsy pretext. He submitted that the respondent had promised and assured for immediate release of the outstanding amount for the works done, site establishment and material costs and it was agreed that the exercise of joint management shall immediately be carried out for recording the measurements of the work done by the petitioner as also to quantify the material available at site which would be taken over by the respondent on actual basis, but the respondent-company has failed to carry out its obligations. He also contended that the respondent-company fraudulently invoked the two bank guarantees furnished by the petitioner towards mobilization advance and towards Performance Bank Guarantee which shall be secured in these proceedings before the Arbitrator would pass the final award. According to the learned counsel, the Chief Justice or a person designated by him under Section 11 of the Act is competent and empowered to grant interim relief in these proceedings.

15. Per contra, learned counsel for the respondent-company submitted that no interim relief can be granted in the proceedings filed under Section 11(6) read with Section 11(12) of the Act, in view of the fact that the petitioner could not succeed in getting similar interim relief in A.P. No.1 of 2007 filed by it under Section 9 of the Act in the High Court of Calcutta on 03.01.2007 which came to be dismissed on 11.06.2007 and second attempt to obtain interim relief under Section 9 in A.P. No. 186 of 2007 filed in the High Court of Calcutta on 25.05.2007 which was also dismissed on 20.06.2007 with cost of Rs.50,000/- imposed on the petitioner and the interim order was vacated. The petitioner even could not get interim relief third time in O.M.P. No. 337 of 2007 filed by it under Section 9 of the Act in Delhi High Court which was dismissed as withdrawn in June 2007. In view of the conduct of the petitioner who has been dragging the proceedings for the last many years in different courts, the learned counsel submitted that the petitioner is not entitled to the interim relief and this application deserves dismissal.

16. Having considered the rival contentions of the parties and having taken into consideration the facts narrated

hereinbefore, taking into consideration the fact that the disputes and differences between the parties emanating from the contract are required to be resolved through an arbitration of sole arbitrator and further keeping in view the urgency of the Project to be completed by the respondent-company, and also the time-gap of about 3 years from the date of contract entered into between the petitioner and the respondent-company, I am of the view that at this stage granting of interim relief sought for by the petitioner in these proceedings will not be in the larger interest of both the parties and in completion of the time-bound Project of public importance.

The question whether the Chief Justice or his designate person is a 'Court' within the meaning of Section 2(e) of the Act, is left open for consideration and decision in some appropriate proceedings as in this case the petitioner has already approached High Court of Calcutta twice under Section 9 of the Act and third time in the High Court of Delhi for the grant of interim relief or measures. However, the petitioner is at liberty to approach the Arbitrator for seeking the interim measure or protection as warranted by the facts and circumstances in respect of subject-matter of the dispute in terms of Section 17 of the Act. It is made clear that any observation made in this order shall not be construed as an expression of opinion on the merits of the case which shall be decided by the Arbitrator in accordance with law.

17. The Arbitration Application is accordingly disposed of.