

Nirbhay Pratap Singh vs Sumitomo Electric Industries Ltd & Anr on 11 September, 2020

Author: C. Hari Shankar

Bench: C. Hari Shankar

\$~5(original side)

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P.(I) (COMM.) 275/2020 & I.A. 8053/2020
NIRBHAY PRATAP SINGH Petitioner
Through: Mr. Ravi Ranjan, Adv.

versus

SUMITOMO ELECTRIC INDUSTRIES LTD & ANR.

..... Respondents
Through: Mr. Anoop George Chaudhari,
Sr. Adv. with Mr. Shantanu
Bhardwaj and Ms. Rupali
Srivastava, Advs. for R-1

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER

% 11.09.2020 I.A. 8053/2020 in O.M.P.(I) (COMM.) 275/2020

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

O.M.P.(I) (COMM.) 275/2020

1. This is a petition under Section 9 of the the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act").
2. For the purposes of this order, a brief allusion, to the facts, would suffice.
3. Respondent No. 2 contracted, with Respondent No. 1, for construction of HVDC terminals and DC XLPE Cable System between Chhattisgarh and Tamil Nadu. Thereafter, a back-to-back sub-contract agreement was executed, between the petitioner and Respondent No. 1, for carrying out certain civil works, in connection with the main contract. The date of completion of the contract was 31st May, 2019.

4. As required by the covenants of the sub-contract agreement, bank guarantees were submitted by the petitioner to Respondent No.1.

5. Various grievances have been ventilated in this petition, regarding the discontinuance of payment of running accounts bills submitted by the petitioner, consequent breach, by Respondent No.1, of Clause 3.3 of the sub-contract agreement and discontinuance of the allocation of work to the petitioner, by Respondent No.1. It is not necessary, for the present, to refer, in detail, to these facts.

6. Suffice it to state that, on 30th September, 2019, a payment adjustment sheet was issued by Respondent No. 1, calling upon the petitioner to terminate the sub-contract agreement, whereupon the petitioner addressed the following e-mail, on 7th November, 2019, to the respondents.

"Dear Sir, Now it is OK and acceptable. Proceed further to close the contract.

GST return will be filed by me on agreed time.

Thanks & Regards Nirbhay Pratap Singh"

(Emphasis supplied)

7. Thereafter, as per the averments in the petition itself, the respondents settled the bills of the petitioner and released his bank guarantees.

8. It is seriously disputable as to whether, after this, the present petition would be maintainable at all. Nevertheless, the case being sought to be made out by the petitioner is that the e-mail, dated 7th November, 2019, was issued under duress and coercion. This stand is reiterated by Mr. Ravi Ranjan, learned counsel appearing for the petitioner, in this court.

9. Needless to say, Mr Anoop G. Choudhary, learned Senior Counsel for the respondent, refutes the allegation and submits that, in view of the afore-extracted communication, this petition does not even deserve a preliminary consideration.

10. The prayer clause in this petition reads thus:

"In the aforesaid facts and circumstances, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:-

thereby directing it furnish a bank guarantee of Rs.3,61,39,925/-(Rupees Three Crore Sixty One Lakhs Thirty Nine Thousand Nine Hundred and Twenty Five) in favour of the Registrar General, Delhi High Court, New Delhi to secure the claim amount of the petitioner.

b. Pass a restraint order against the Respondent No. 2 thereby directing it not to clear the final Bills/Invoice of the respondent No. 1 or withhold payment of the respondent

No.1 to the extent of Rs.3,61,39,925/- (Rupees Three Crore Sixty One Lakhs Thirty Nine Thousand Nine Hundred and Twenty Five) to secure the recoverable amount of the petitioner.

c. Direct the respondents to file an affidavit giving full details and particulars of all their respective moveable, immovable, tangible and intangible assets including statement of accounts within such time as this Hon'ble Court deems fit and proper.

d. Pass an ad interim ex parte order/s in favour of the petitioner and against the respondents to secure the amount of Rs.3,61,39,925/- (Rupees Three Crore Sixty One Lakhs Thirty Nine Thousand Nine Hundred and Twenty Five) recoverable in arbitration proceeding in terms of clause 2.9 and clause 14 of the Sub-Contract agreement dated 10.01.2018 till the pendency of the proceeding of the present petition.

e). Pass any other further order(s) in favour of the petitioner as the Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

11. Prayer (a) in the petitioner seeks an interim direction, to Respondent No. 1, to furnish a bank guarantee of 3,61,39,925/-, to secure the purported claim of the petitioner, and prayer (d) seeks ad interim directions, to the said effect.

12. While Section 9(1)(ii)(b) of the 1996 Act unquestionably empowers the court to secure the amount in dispute in the arbitration, any such direction has, in principle, to conform to the discipline of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908. Further, it is not enough for the petitioner to establish a prima facie case, balance of convenience and irreparable loss; additionally, the petitioner would have to establish, on facts, that, were security not to be directed as prayed, the arbitral proceedings were likely to be frustrated. Section 9 is not intended to operate as an alternative to Section 17. The pre-eminence of the jurisdiction of the arbitral institution, to deal with arbitrable disputes, permeates the 1996 Act, and interference by Courts is required, statutorily, to be reduced to a minimum. Section 9, therefore, operates only as an emergency provision, to provide interim protection - as opposed to interim relief

- where, but for such protection, the corpus of the arbitration might vanish, or the arbitral proceedings frustrated even before they commence.

13. To a specific query from the Bench, as to whether any averment, demonstrating such imminent urgency, was contained in the petition, Mr. Ravi Ranjan, learned counsel appearing for the petitioner, submits that his client apprehended that as the contract may be completed in a month or two, Respondent No. 1 may possibly leave the country, thereafter, as it has no principal place of business in India. Were these eventualities to take place, Mr. Ravi Ranjan submits that execution of any award, which might ultimately be passed in favour of his client, would become a practical impossibility.

14. Prima facie, the concern expressed by Mr. Ravi Ranjan is purely in the realm of apprehension and conjecture at present. It hinges on several imponderables, with no supportive material forthcoming from the record.

15. That apart, the mere perceived difficulty in the enforcement of a possible arbitral award, which might ensue in favour of a party, cannot, prima facie, be a ground to direct the furnishing of security, in a proceeding under Section 9 of the 1996 Act. No case for grant of any ad interim relief, qua prayer (a) in the petition, as is prayed in prayer

(d) is, therefore, made out.

16. Prayer (b) in the petition is for a restraint against Respondent No. 2 from clearing the bills of Respondent No. 1.

17. It defeats comprehension as to how such a prayer can be made by the petitioner, especially in a petition under Section 9 of the 1996 Act. There is nothing to indicate that payment of the bills of Respondent No. 1, by Respondent No. 2, impacts, in any manner, the claims of the petitioner.

18. The response of Mr. Ranjan, on this issue, is that earlier payments, which were made by Respondent No. 2, to Respondent No. 1, and which ought to have been paid by Respondent No. 1 to his client, are still outstanding.

19. That, in my view, cannot be a ground for this Court to injunct Respondent No. 2 from making payments to Respondent No. 1, especially at the instance of the petitioner. In case the bills of Respondent No. 1 are cleared by Respondent No. 2, and the petitioner is entitled to the said payment from Respondent No. 1, that would constitute an independent claim, which would have to be examined in appropriate arbitral proceedings.

20. No occasion, therefore, arises, to issue notice on this petition qua prayer (b), which is rejected at the outset.

21. Prayer (c) in the petition is for a direction to the respondents to file an affidavit giving the details of their moveable, immovable, tangible and intangible assets. This, again, is not a prayer which can be granted under Section 9 of the 1996 Act, and is, accordingly, rejected.

22. Prayer (d) in the petition is for ad interim orders in terms of prayer (a) and prayer (b). In view of the above discussion, prayer (d) is rejected.

23. As a result, issue notice in this petition to the respondents only qua prayer (a).

24. Notice is accepted by Mr. Shantanu Bhardwaj, learned counsel appearing for the Respondent No.1.

25. Let notice issue to Respondent No. 2, through ordinary process as well as by e-mail at the e-mail ID provided in the memo of parties. Affidavit/proof of service be placed on record prior to the next date of hearing.

26. Counter affidavit be filed within a period of four weeks, with advance copy to learned counsel appearing for the petitioner, who may file rejoinder thereto, if any, within two weeks thereof.

27. Mr. Anoop G. Chaudhari, learned Senior Counsel appearing for Respondent No. 1, has also contended that this petition is bad for want of territorial jurisdiction. He submits that a strained effort, to bring the petition within the jurisdiction of this Court, has been made by the petitioner by introducing Respondent No. 2 as a party to the proceedings, even though Respondent No. 2 is not even a party to the arbitral agreement between the petitioner and Respondent No. 1.

28. This aspect would also be examined when the petition is heard.

29. Renotify on 19th November, 2020.

C. HARI SHANKAR, J.

SEPTEMBER 11, 2020 dsn