

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Reserved on :** 24th January, 2023
Pronounced on: 26th April, 2023

+ O.M.P.(I) (COMM.) 389/2022

FEDDERS ELECTRIC AND ENGINEERING LIMITED

..... Petitioner

Through: Mr. Pradeep Aggarwal, Mr. Pawas
Agarwal and Mr. Arjun Aggarwal,
Advocates

versus

SRISHTI CONSTRUCTIONS

..... Respondent

Through: Mr. Sameer Abhyankar and Ms.
Nishi Sangtani, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter "Act") has been filed on behalf of the petitioner seeking the following reliefs:-

"(a) the reference is made to the Ld. Sole Arbitrator in terms of and on the basis of the original Bipartite agreement dated 29.3.2019 (coloured copy filed alongwith this petition) instead of the earlier reference in terms of and on the basis of the photocopy of the Bipartite agreement dated 29.3.2019 (which is forged and fabricated);

(b) the proceedings before the Ld. Sole Arbitrator be commenced de nova protecting the interim orders already passed;

OR IN THE ALTERNATE

(c) the issue with regard to the genuineness or otherwise of the photocopy of the forged and fabricated bi-partite agreement dated 29 .3.2019 and the original bi-partite agreement be first decided by the Ld. Sole Arbitrator in accordance with law before proceeding any further in the matter.

(d) pass such other or further orders as this Hon'ble Court may deems fit and proper in the facts and circumstances of the present case."

FACTUALMATRIX

2. The petitioner is engaged in the business of Engineering, Procurement and construction of Power Transmission, sub- station, and Rural Electrification. While the respondent is a Partnership firm and is an Electrical and Civil Contractor engaged in rural electrification, sub- station and construction of power transmission operating in the state of Chhattisgarh.

3. M/s. Chhattisgarh State Power Distribution Company Ltd. (hereinafter referred as "CSPDCL") is a government undertaking company which awarded the petitioner, the work of supply and Erection of Bilaspur region on Semi Turnkey Basis qua the Letter of Award dated 29th October, 2016.

4. A Tripartite Agreement dated 8th March, 2019 was entered between CSPDCL, petitioner and respondent wherein the work was sub-contracted to respondent. Pursuant to it, a letter dated 19th March, 2019 was issued by the CSPDCL for the approval of Tripartite Agreement and the exact amount of sub- contracted balance works to the respondent.

5. The respondent entered into Bi-partite Agreement dated 29th March, 2019 with the petitioner for the work of all 5 districts of Bilaspur package for various works. The total price of the work was Rs.68,32,51,637.20/- (Rupees Sixty-Eight Crores Thirty-Two Lakhs Fifty-One Thousand Six Hundred Thirty-Seven and Twenty Paise Only).

6. In the interregnum, State Bank of India filed an application under Section 7 of Insolvency and Bankruptcy Code against the petitioner and *vide* its order, National Company Law Tribunal admitted the said application and initiated Corporate Insolvency Resolution Process(CIRP). Resolution plan for petitioner (present management) was submitted by IM+ Capitals Ltd. which was approved by National Company Law Tribunal.

7. CSPDCL invoked Bank Guarantee of Rs.14,99,74,934/- (Rupees Fourteen Crores Ninety Nine Lakhs Seventy Four Thousand Nine Hundred and Thirty Four Only) of petitioner invoking the ground of incompetence of respondent in completion of works as per the contract and inability of the respondent to provide reconciliation statement of materials and documents. CSPDCL further invoked two more Bank Guarantees of the petitioner due to breach and non – compliance of the Terms of the Award Contract and Tripartite Agreement by the respondent. As a consequence of breach of the Agreement committed by the respondent, the petitioner terminated the Bipartite Agreement *qua* notice dated 19th February, 2022.

8. The petitioner filed a petition under Section 9 of the Act before this Court bearing OMP(I)(COMM.) No. 69/2022 wherein this Court *qua* its order dated 28th February, 2022 appointed the Sole Arbitrator to adjudge

the dispute between the parties and gave liberty to parties to seek interim measures before the Arbitral Tribunal.

9. In consonance with the directions of this Court, the petitioner filed an application on 10th March, 2022 under Section 17 of the Act read with Order XXXVIII Rule 5 of Civil Procedure Code, 1908 before the Arbitral Tribunal. After hearing the arguments, the Arbitral Tribunal passed an interim order dated 20th July, 2022 and disposed of the said application under Section 17 of the Act thereby passing directions for the respondent to deposit Rs. 2.50 crores in petitioner's account and submit a proof of such transfer.

10. On 15th September, 2022, both the parties argued on the aspect of directions passed in the order dated 20th July, 2022 passed by the Arbitral Tribunal. The Arbitral Tribunal directed that in continuation of the Order dated 20th July, 2022 the petitioner also has to forward the bills including Performa invoices that have been sent by the respondent to CSPDCL.

11. The orders dated 20th July, 2022 and 15th September, 2022 were challenged by the petitioner before this Court under Section 37(2) of the Act in appeals bearing Arb. (A)(Comm.) No. 70 and 72 of 2022.

12. The petitioner on 2nd December 2022, discovered that the Bi-Partite Agreement is forged and fabricated under which reference is made to the Arbitral Tribunal. The petitioner moved an application under Section 17 of the Act regarding the same before the Arbitral Tribunal. The Tribunal vide order dated 5th December, 2022 disposed of the application with the directions to raise such contention at the appropriate stage.

13. The instant petition is filed regarding the allegation of the petitioner that the Bi-partite agreement filed by the respondent forged and fabricated to the extent of the clause governing liability of delay in completion of work and the liquidated damages. The petitioner prays for reference to be made to Arbitral Tribunal made the Original Bi-partite Agreement instead of the present forged and fabricated Bi-partite Agreement filed by the respondent or the Arbitrator should decide first the validity and genuineness of the Bipartite agreement.

SUBMISSIONS

(Submissions on behalf of the Petitioner)

14. Mr. Pradeep Aggarwal, learned counsel for the petitioner submitted that it came to the knowledge of the counsels that the CFO under the old management, Mr. Neeraj Gupta, had signed the Bi-partite agreement and Tri-partite Agreement on behalf of the petitioner who informed the new management in the last week of November 2022 that a forgery has been committed and one of the page of the copy of the Bi-partite Agreement does not bear his signatures and the soft copy of the original of the Bi-partite Agreement is with him and sent the same to the new management. Thereafter, the original Bi-partite Agreement was found at the Noida Office of the petitioner.

15. It is submitted that till 2nd December, 2022, the photocopy of the Bi-partite Agreement, which is forged and fabricated, was filed by the respondent in every proceeding before this Court and even before the Arbitral Tribunal.

16. It is argued that the petitioner on 2nd December, 2022 discovered the original Bipartite Agreement dated 29th March, 2019. After

comparing the forged and fabricated photocopy of the bi-partite agreement dated 29th March, 2019 filed before this Court with the original Bi-partite agreement, to the utter shock of the petitioner, Clause no.9 at page no.9 of the delay damages has been forged and Clause no. 9.3 has been deleted in the photocopy of the bi-partite agreement.

17. To buttress the argument, it is submitted that the forgery is apparent from the fact that the said page does not even bear the stamp of the petitioner unlike in other pages of the Agreement. Moreover bi-partite agreement which is on record, has the signatures of two witnesses from Raipur on the last page, whereas the original bi-partite agreement did not bear any such signatures of any witnesses. It is furthermore submitted that the bi-partite agreement has been executed at New Delhi.

18. It is submitted that Clause 9.3 of the Original Bipartite Agreement, which is missing from the forged and fabricated photocopy of the bipartite agreement, read as follows: -

"9.3. In case of LD charges if occurred due to delay in work done by Sub Contractor after expiry of this contract i.e., 12 months from 29th March 2019, the same shall be borne by the Sub Contractor on account of that delayed period only and the reimbursement on the same shall be credited to Sub Contractor account. "

19. Learned counsel for petitioner further submitted that as per the Clause 9.3 of the original Bipartite Agreement, the liability of delay in completion of work and the liquidated damages post 29th March, 2019 shall be borne by the respondent. In the absence of the above-mentioned clause, it was being portrayed and alleged by the respondent before the

Arbitral Tribunal that the respondent will not bear any liability for any amount of delay in work.

20. It is therefore submitted, that the petitioner has filed claim of substantial amount against the respondent with respect to the delay in work caused by the respondent.

21. It is further stated that the petitioner after coming to know of the forged and fabricated document filed by the respondent filed an application under Section 17 of the Act dated 5th December, 2022 before the Arbitral Tribunal in the matter. The Arbitral Tribunal vide order dated 5th December, 2022 disposed of the application by holding that the question of forged and fabricated Bi-partite Agreement can only be decided after the parties have led evidence. It was further held that no orders can be passed on the Application at this stage and it is for the petitioner to take steps as per law to raise such contentions at the appropriate stage. In view of the foregoing averments, the learned counsel appearing on behalf of the petitioner submitted that the prayers in the present petition may be allowed.

(Submissions on behalf of the Respondent)

22. *Per Contra*, Mr. Sameer Abhyankar, the learned counsel for respondent vehemently opposed the averments raised in the petition. He submitted that the instant petition is not maintainable as the issue of forged and fabricated Bi-partite Agreement has been already taken up before the Arbitral Tribunal under Section 17 of the Act and the Tribunal has passed an order on it.

23. It is further submitted that as per the order of the Tribunal it was directed by the Arbitral Tribunal that the issue of alleged forgery and

fabrication of the document can be raised by the Petitioner at the appropriate stage.

24. It is further argued that the instant petition is devoid of any merit as under Section 17 of the Act, the Arbitrator can render an efficacious remedy and does not warrant interference of this Court under Section 9(3) of the Act.

25. It is submitted that in view of the foregoing paragraphs, the petitioner has failed to make out any case for the grant of the prayer's made in the instant petition. The instant petition being devoid of merit is liable to be dismissed.

26. Heard the learned counsel for the parties and perused the record.

FINDINGS AND ANALYSIS

27. Before delving into the analysis this Court finds it necessary to briefly revisit the existing position of law with respect to the scope of Section 9 of the Act, which reads as under:

“Section 9 -Interim measures, etc., by Court.

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any

party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

28. Under Section 9 (3) of the Act only in exceptional circumstances, during the arbitration proceedings, the Court should intervene only when the Arbitral Tribunal cannot render an effective remedy under Section 17 of the Act This position of law of law has been held and reiterated in a plethora of judgments *Energ Engineering Projects Ltd. v. TRF Limited* 2016 SCC Online Del 6560, *M. Ashraf v. Kasim V.K* (2018) SCC OnLine Ker 4913, *Srei Equipment Finance Limited (Sefl) v. Ray Infra Services Private Limited & Anr.* (2016) SCC OnLine Cal 6765 , *Avantha Holdings Limited v. Vistra ITCL India Limited* 2020 SCC OnLine Del 1717. Recently held by the Hon'ble Supreme Court in the case of *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk*

Terminal Ltd., Special Leave Petition (Civil) No.13129 of 2021,
decided on 14th September 2021 as follows:

“62. Sub-Section (3) of Section 9 has two limbs. The first limb prohibits an application under sub-Section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.

63. To discourage the filing of applications for interim measures in courts under Section 9(1) of the Arbitration Act, Section 17 has also been amended to clothe the Arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1). The 2015 Amendment also introduces a deeming fiction, whereby an order passed by the Arbitral Tribunal under Section 17 is deemed to be an order of court for all purposes and is enforceable as an order of court.

64. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.”

29. The introduction of Section 9(3) by the Arbitration and Conciliation (Amendment) Act, 2015 was with the legislative intent that during the arbitration proceedings, the Court shall intervene only in exceptional circumstances when the Arbitral Tribunal cannot render an

effective remedy under Section 17 of the Act. Therefore, this Court in the present case is concerned only with the specific aspect that whether the relief which is rendered under Section 17 of the Act by the Arbitral Tribunal is inefficacious and requires the intervention of this Court.

30. In the present case, the Arbitral Tribunal passed the order under Section 17 of the Act regarding the alleged forged and fabricated document on 05th December 2022 as follows:

“4. In the above facts and circumstances no orders can be passed on application at this stage. It is for the claimant to take steps as per law and to raise such contention at the appropriate stage. The above application is disposed of with the above directions/liberty to the Claimant.”

31. The Arbitral Tribunal can arbitrate on the dispute whether the allegations of fraud of the Bi- Partite Agreement has been held in the judgment of **A. Ayyaswamy v. A. Paramasivan and Ors 2016 10 SCC 386** which is reiterated as under :-

“45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. Parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. Parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the

institutional efficacy of arbitration. Such a consequence must be eschewed.”

32. In the present petition, the Arbitral Tribunal is empowered to adjudicate upon the allegation of forgery and fabrication of the document. The Arbitral Tribunal can examine the Bi-partite Agreement and thereafter give a finding whether the alleged act of forgery and fabrication of the Bi-partite Agreement has been committed by the respondent. Hence, the Arbitral Tribunal can render efficacious remedy by passing an appropriate order at the appropriate stage regarding the admissibility of the Bi-partite Agreement.

33. However, the facts and circumstances of the present case does not merit any interference by this Court as the Arbitral Tribunal can provide an efficacious remedy at the stage of the evidence. Furthermore, it needs to be pointed out that under Section 9 the Court does sit as an appellate court against the decision of the Arbitral Tribunal. In the present facts the Arbitrator has already passed an order under Section 17 of the Act. The petitioner came to this Court against the order passed by the Arbitral Tribunal under Section 17. The petitioner has alternate efficacious remedy available under the Act to challenge the order of Arbitral Tribunal. Hence, under Section 9 of the Act, the Court cannot examine the order of the Arbitral Tribunal passed under Section 17 of Act.

34. In the light of the arguments, contentions made on behalf of the parties and foregoing analysis, the Court finds no cogent reasons to allow the instant petition. The petitioner hereby fails to make out his case under Section 9 of the Act.

35. Accordingly, the instant petition, being devoid of merits, is dismissed along with pending applications, if any.

36. The order be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 26, 2023
GS/DB

