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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION NO. 1 OF 2019
IN
COMM ARBITRATION PETITION NO. 74 OF 2017**

Nahar Builders Ltd ...Petitioner
Versus
Housing Development and Infrastructure Ltd ...Respondent

Mr Janak Dwarkadas, Senior Advocate, with Mr Mustafa Doctor, Senior Advocate, Ms Sonam Mhatre & Ms Radhika Nair, i/b Dhaval Vussonji & Associates, for the Petitioner.
Ms Gaurangi Patil, with Mr Amit Mishra, i/b GP & Associates, for the Respondent.

CORAM: G.S. PATEL, J.
DATED: 21st January 2020

PC:-

1. The Interim Application is for the following reliefs:

“9(a) That this Hon’ble Court be pleased to permit the Applicant to withdraw the amount of Rs. 8,00,00,000 deposited with the Prothonotary and Senior Master along with the interest accrued thereon to the extent payable under the Award up to the date of withdrawal.”



2. It arises this way. In 2016, there were disputes between the two parties under a Memorandum of Understanding (“**MoU**”) dated 11th August 2011 that pertained to the sale of some TDR by the now-beleaguered Respondent, Housing Development and Infrastructure Limited (“**HDIL**”) to the Applicant, Nahar Builders Limited (“**Nahar Builders**”). That MoU had an arbitration clause. Nahar Builders filed the present Arbitration Petition No. 74 of 2017 and sought *inter alia* an order against HDIL to provide security. That came before me on 3rd February 2017 when I made the following order:

“1. Ms Panda makes a statement on instructions from Mr Sarang P, Vice Chairman of the Respondent, that on or before 10th March 2017 the Respondent will furnish an unconditional bank guarantee in the sum of Rs. 8 crores payable on demand to the Petitioner. The terms of the bank guarantee will be as approved and will be to the satisfaction of the Prothonotary & Senior Master of this Court. There will be no extension of time and the Respondent agrees and undertakes not to apply for any such extension. This undertaking is accepted as one to the Court.

2. The furnishing of bank guarantee is entirely without prejudice to the rights and contentions of both sides. All contentions are expressly kept open.

3. In the meantime, parties have agreed to refer their disputes between this Petitioner, Nahar Builders Ltd and this Respondent, Housing Development & Infrastructure Ltd under the MoU dated 11th August 2011, Exhibit “B” to the Petition, to the sole arbitration of Mr Shailesh Shah, learned Senior Counsel of this Court.

4. The Petitioner will file Mr Shah's statement of disclosure as required by Section 11(8) and Section 12 of the Arbitration & Conciliation Act, 1996 within one week from today.

5. Upon the bank guarantee being furnished as agreed, the present Petition will be filed as an application for interim relief before Mr Shah. I have every confidence that Mr Shah will dispose of this application as soon as possible. The submission to his arbitration will commence not from today but from the date he holds his first meeting, and which will be on a date convenient to him after 11th March 2017.

6. If the Respondent does not furnish the bank guarantee, the Respondent will deposit the sum of Rs. 8 crores with the Prothonotary & Senior Master by 11th March 2017, with no extension. On such a deposit being made, the Prothonotary & Senior Master will invest the amount in accordance with his usual practices.

7. Both sides will bear their own costs in the arbitration. They will share equally all arbitration costs, including Mr Shah's fees.

8. The Petition is disposed of in these terms with no order as costs."

3. That order referred the matter to the sole arbitration of the learned senior counsel of this Court.

4. HDIL did not comply with paragraph 1 of this order of 3rd February 2017. It made no deposit. It furnished no bank guarantee. Nahar Builders filed Contempt Petition (I) No. 4 of 2017. On 7th April 2017, when that Petition was called out, HDIL furnished a Pay

Order for Rs. 8 crores in favour of the Prothonotary & Senior Master. The deposit was accepted. That disposed of the Contempt Petition.

5. Then the Arbitrator entered upon the reference to his arbitration and concluded the proceedings on 13th August 2019. He awarded Nahar Builders an amount of Rs. 8 crores and directed HDIL to pay this amount with interest of 8% per annum from 23rd March 2016. The time for challenge to that Award has passed. No Petition under Section 34 was ever filed.

6. The application by Nahar Builders is, therefore, for leave to withdraw the deposited amount of Rs. 8 crores. Since there is an Award in favour of Nahar Builders of this amount plus interest, clearly the withdrawal of this amount and accrued interest will be in partial or perhaps even complete satisfaction of Nahar Builders' award.

7. The opposition from HDIL is that since there is a moratorium that has come in to play in view of the insolvency proceedings under the Insolvency & Bankruptcy Code, 2016, the amount of Rs. 8 crores deposited in this Court is 'the property of HDIL' within the meaning of Section 14 of the IBC. That submission does not commend itself. Once an amount is deposited in this Court, it is placed beyond the reach of either party without permission of the Court. It is, therefore, not 'the property' of either party pending an adjudication as to entitlement by the Court. Once the Arbitrator held that it was Nahar Builders that was entitled to this amount, and

that award became enforceable as a decree of this court, then no question remained of the amount being claimed by HDIL. In another manner of speaking, from the time the deposit was made until the time withdrawal is ordered, that amount is not the property of either party to the dispute.

8. It is true that an execution against HDIL is presently stayed but this is not an application for execution, nor is it, within the meaning of Section 14(1)(d), an application for 'the recovery of any property by an owner or lessor where such property is occupied by or is in the possession of corporate debtor'. To read only the words 'recovery of any property' as Ms Patil does, but not to read the rest of clause (d) is materially incorrect.

9. The provisions regarding a moratorium cannot possibly apply to such cash deposits made in this Court. As Mr Dwarkadas for Nahar Builders put it, money has no colour. Once it is deposited in Court no party can automatically claim any right to it without an adjudication by a Court. There is no dispute that there is an unchallenged and unsatisfied award in favour of Nahar Builders against HDIL. There is also no dispute that an amount of Rs. 8 crores is available with this Court.

10. There is no bar to this application for withdrawal. The application for withdrawal cannot be conceivably be considered a suit, proceeding or execution within the meaning of Section 14(1)(a).

11. Accordingly, the present application is made absolute in terms of prayer clause (a). There will be no order as to costs.

12. The Prothonotary & Senior Master will effect the transfer by RTGS to the bank account to be communicated by the Advocates for Nahar Builders.

(G. S. PATEL, J)