

IN THE HIGH COURT OF TELANGANA AT HYDERABAD

W.P. No. 21417 of 2023

Between:

M/s Suryodaya Infra Projects (I) Pvt. Ltd

... Petitioner

And

Union of India and others

... Respondents

JUDGMENT PRONOUNCED ON: 11 .09.2023

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

1. Whether Reporters of Local newspapers : yes
may be allowed to see the Judgment?
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : yes
3. Whether Their Lordships wish to
see the fair copy of the Judgment? : yes

SUREPALLI NANDA, J

THE HON'BLE MRS JUSTICE SUREPALLI NANDA**W.P. No. 21417 of 2023****% 11.09.2023****Between:**

M/s Suryodaya Infra Projects (I) Pvt. Ltd

..... Petitioner

And

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... Respondents

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> Head Note:

! Counsel for the Petitioner : Dr Anurag Kumar Agarwal
 Sr. counsel appearing on behalf of
 Mr Pasham Mohit

^ Counsel for Respondent No.1: Mr Gadi Praveen Kumar
 Dy Solicitor General of India

^ counsel for Respondent No.2 : Mr R.Raghavachary

^counsel for Respondent No.3 : Mr Damodar Mundra

? Cases Referred:

1. (2016) 10 SCC 767
2. (2021) 6 SCC 771
3. (2002) 2 SCC 216
4. (2020) 16 SCC 489
5. (1996) 9 SCC 309
6. (2008) 2 SCC 302
7. (2019) SCC online Delhi 9079
8. (1994) 4 SCC 711
9. (2004) 9 SCC 786
10. (2004) 6 SCC 254
11. (2017) SCC on line Bombay 9838

HON'BLE MRS JUSTICE SUREPALLI NANDA**W.P. No. 21417 of 2023****ORDER:**

Heard Dr Anurag Kumar Agarwal, Senior counsel appearing on behalf of Mr. Pasham Mohit, Learned Counsel representing the petitioner, Mr. Damodar Mundra, learned Counsel appearing for Respondent No.3. Sri Gadi Praveen Kumar, Deputy Solicitor General of India, learned Counsel appearing for Respondent No.1 and Sri R.Raghava Chary, learned counsel appearing for Respondent No.2.

2. This Writ Petition is filed praying to issue a Writ of Mandamus, declaring the actions of the 2nd Respondent in releasing and making payments to the 3rd Respondent in spite of being aware of the actions of the 3rd Respondent in not making payments to the Petitioner, i.e. the authorized sub-contractor contrary to the terms of the Work Order dated 06.12.2018 as illegal, arbitrary and unconstitutional and consequently direct the 2nd Respondent to make payments to the tune of IN 2,90,00,000/- to the Petitioner directly towards the outstanding amounts under the Work Order dated

06.12.2018 arising out of Contract dated 10.11.2016 vide Agreement No. ED/(E&P)/ SP-III/RWLS/PKG-10/132.

3. The case of the Petitioner, in brief, is as follows:

a) The Petitioner is a company incorporated under the provisions of Companies Act, 2013 and is *inter alia* engaged in the business of Construction/Civil works, Real Estate activities, Development and Sale of land and operation of apartments, hotels and residential mobile home sites. The 2nd respondent is a public limited Indian Non-government Company registered under the Companies Act, 2013 and is engaged in manufacturing material handling and mineral processing equipment, systems and components.

b) While so, the 2nd Respondent has awarded Contract dated 10.11.2016 vide Agreement No. ED/(E&P)/ SP-III/RWLS/PKG-10/132 for establishment of Rapid Wagon Loading System (RWLS) in the state of Chhattisgarh in favour of the 3rd Respondent on EPC basis. However, as the 3rd Respondent did not possess necessary credentials and experience to execute civil works components and had sub

contracted all civil works to one M/s. K.A. Pappachan Constructions on back-to-back sub-contract basis.

c) However, due to non-payment of outstanding dues against work done by the M/s. K.A. Pappachan Constructions and Petro (P), Kirandul, the said subcontractor left the project midway without finishing the work assigned and thus, the 3rd Respondent had approached the Petitioner and requested the Petitioner to carry out civil works for establishment of RWLS and feeding conveyer systems.

d) Pursuant to mutual discussion and deliberation, the 3rd Respondent issued a Work Order dated 06.12.2018 for construction of civil works at NMDC project for establishment of RWLS and feeding conveyer systems in favour of the Petitioner. Thereafter, the Petitioner had issued a letter dated 15.12.2018 to the 3rd Respondent communicating its acceptance of the Work Order dated 06.12.2018 subject to the conditions mentioned in the letter.

e) Subsequently, the Petitioner had commenced its works under Work Order dated 06.12.2018 and had further executed a Corporate Guarantee dated 26.03.2019 towards

advance payment of amount IN 20,00,000/- in favour of the 3rd Respondent. Therefore, the Petitioner has at all times acted in a bonafide manner and performed its contractual obligations in a timely manner.

f) The Petitioner had immediately commenced the initial work at project site and raised R.A. Bill No. 1 with regard to the initial work executed by the Petitioner. Accordingly, the Petitioner had issued letter dated 29.04.2019 requesting the 3rd Respondent to release amounts to the tune of IN 59,63,811/- due under RA Bill No. 1 in favour of the Petitioner and at no point in time the 3rd Respondent has disputed its liability to make payments pursuant to RA Bill No.1 and therefore the 3rd Respondent has at all times acknowledged its liability to pay such dues to the Petitioner.

g) Thereafter, the 3rd Respondent has sent an email dated 17.05.2019 seeking consent of the 2nd Respondent for engaging the Petitioner as sub-contractor to carry out the civil works under Contract Agreement dated 10.11.2016 and the same was approved vide its letter dated 23.05.2019 under Contract Agreement, dated 10.11.2016. The General

Conditions of Contract provide that the 2nd Respondent shall be authorized to release payments in favour of sub-contractor pursuant to certification of the bill by the 3rd Respondent.

h) In spite of being in receipt of the letter dated 24.09.2019, the 3rd Respondent had failed to clear dues payable by them in lieu of the work executed by the Petitioner. The Petitioner has also issued letter dated 14.12.2019 calling upon the 3rd Respondent to pay INR 16,170,595/- due and payable under RA Bill No. 3 and RA Bill No.4.

i) Even after receiving payments from the 2nd Respondent, the 3rd Respondent has failed to remit such payments in favour of the Petitioner and the Petitioner has on various occasions requested the 3rd Respondent to clear the outstanding of the Petitioner. Thereafter, the Petitioner has issued letter dated 28.01.2020 intimating the 2nd Respondent that monies to the tune of Rs.1.18 Crores are outstanding against the work executed by the Petitioner and further requested the 2nd Respondent to directly release outstanding payments.

j) While so, the 3rd Respondent had issued letter dated 06.03.2020 requesting the 2nd Respondent to directly disburse outstanding payments of Rs 17,46,757/- due under Contract dated 10.11.2016 in favour of the Petitioner. Thereafter, the Petitioner had issued letter dated 08.03.2020 intimating the 2nd Respondent that, the 3rd Respondent vide its letter had duly authorized the Petitioner to directly receive payments from the 2nd Respondent with respect to the outstanding dues and vide the said letter the Petitioner had requested the 2nd Respondent to directly remit the outstanding payments in favour of the Petitioner.

k) Therefore, the 2nd Respondent had directly remitted monies to the tune of INR 53,57,322/- and INR 43,99,000/- against RA Bill Nos. 1 and 2 respectively, which were raised by the Petitioner. Thereafter, the Petitioner has issued letter dated 13.03.2020 requesting the 3rd Respondent to make early payments to enable the Petitioner to complete the civil works within the stipulated time period and thus, on 16.03.2020 the 3rd Respondent has made payments to the tune of INR 17,46,757/- towards the works executed by the Petitioner.

l) The petitioner had issued letter dated 05.06.2020 calling upon the 3rd Respondent to pay Rs.3,68,70,736/- under RA Bill No. 4 and the 3rd Respondent had deliberately avoided making payments due under RA Bills in spite of being in receipt of the bills. Moreover, the Petitioner was constrained to issue letter dated 10.07.2022 intimating the 3rd Respondent that it is seeking closure of work due to non-payment of outstanding payments by the 3rd Respondent in spite of receiving such payments from the 2nd Respondent.

m) However, upon receiving the above said letter, the 3rd Respondent has immediately visited the site and assured the Petitioner that such dues would be cleared in due course of time and the 3rd Respondent had issued letter dated 13.07.2020 requesting the 2nd Respondent to directly remit payments due in favour of the Petitioner. Thereafter, the Petitioner had requested the 3rd Respondent to certify the RA Bills raised by the Petitioner in order to facilitate release of outstanding monies due and payable to the Petitioner. However, the 3rd Respondent has at all times avoided certifying the pending bills raised by the Petitioner in order to illegally prevent the Petitioner from realizing such monies.

n) Later on, it was brought to the notice of the Petitioner that the 3rd Respondent had illegally appropriated amounts due and payable to the Petitioner. Thereupon, the Petitioner on various occasions requested the 3rd Respondent to release such monies in its favour. However, the 3rd Respondent has at all times avoided making such payments in favour of the Petitioner and aggrieved by such actions, the Petitioner had issued letter dated 21.07.2020 intimating the 3rd Respondent that work shall not be recommenced until outstanding payments are released in favour of the Petitioner.

o) While things stood thus, the 2nd Respondent had terminated Contract dated 10.11.2016 executed between the 2nd Respondent and 3rd Respondent owing to the material breaches committed by the 3rd Respondent. Thereafter, the 2nd Respondent had directly approached and requested the Petitioner to complete the pending balance work. Accordingly, the Petitioner had issued letter dated 21.06.2021 intimating the 2nd Respondent its willingness to complete the balance works under Contract dated 10.11.2016 and the Petitioner had intimated the 2nd Respondent that the 3rd Respondent purposefully avoided certifying bills raised by the Petitioner

owing to which the Petitioner is due to receive IN 2.9 Crores against the work completed by the Petitioner.

p) Later on, the 3rd Respondent had approached the Petitioner and requested for a One-Time Settlement with respect to the outstanding dues payable to the Petitioner and represented that it is facing severe financial losses. The Petitioner was promised immediate payments of such dues and under such circumstances alone the Petitioner had agreed to take a reduced amount. Thereafter, the Petitioner has issued letters dated 21.11.2022 and 29.11.2022 calling upon the 2nd Respondent to amicably settle the matter by paying outstanding dues, which are due and payable under Work Order in terms of oral understanding reached between the parties.

q) However, there was no consensus between the parties with respect to the agreed terms of the payment. Therefore, the said proposal was not accepted by the 2nd Respondent and 3rd Respondent. Since the Respondents herein had promised an immediate one-time payment of the outstanding dues, the Petitioner was agreeable to taking a reduced

amount that is payable to the Petitioner. However, though the negotiations have been conducted, the same had not materialized and hence the offers exchanged between the parties have never been crystallized. Therefore, the Respondents are liable to make payments towards entire outstanding amounts of Rs. 2.9 Crores.

r) Furthermore, the Petitioner has issued letter dated 06.07.2023 calling upon the 3rd Respondent to release INR 2,90,61,104/- towards full and final settlement of dues and the 3rd Respondent has issued letter dated 10.07.2023 to the Petitioner by alleging that an excess payment of INR 1,68,036/- was made in favour of the Petitioner. However, at the contemporaneous time, the 3rd Respondent did not raise any such disputes and therefore it is amply clear that the 3rd Respondent has levelled such allegations against the Petitioner as an afterthought in order to wriggle out its payment obligations.

s) Thus, the Petitioner had issued Legal Notice dated 18.07.2023 calling upon the 2nd Respondent to directly release outstanding payments due in favour of the Petitioner and to further refrain from releasing such payments in favour

of the 3rd Respondent. However, the 3rd Respondent has illegally issued Reply Notice dated 19.07.2023 refuting its liability to pay any outstanding dues to the Petitioner and through the said letter, the 3rd Respondent has illegally contended that the Petitioner has delayed the execution of the work and in fact called upon the Petitioner to pay INR 1,68,036/- by alleging that an excess amount has been paid to the Petitioner.

t) Since there was an imminent threat that 3rd Respondent may illegally invoke the bank guarantee issued in favour of the 3rd Respondent, the Petitioner was constrained to file O.M.P (I) (COMM) No. 235 of 2023 before the High Court of Delhi, to restrain the 3rd Respondent from invoking and encashing bank guarantee dated 26.03.2019 and to further refrain the 2nd Respondent from making any payments/amounts in favour of the 3rd Respondent. Thereafter, the court was pleased to pass Order dated 27.07.2023 in O.M.P (I) (COMM) No. 235 of 2023 appointing a sole arbitrator to adjudicate the disputes subsisting between the parties.

u) More so, the court had opined that since the 2nd Respondent is not privy to the contract executed between the Petitioner and the 3rd Respondent, the 2nd Respondent cannot be relegated to arbitration and further granted liberty to the Petitioner to pursue its claims against the 2nd Respondent as per law. Thus, the Petitioner had issued Legal Notice calling upon the 2nd Respondent to desist from releasing any payments in favour of the 3rd Respondent pending disposal of arbitration proceedings between the Petitioner and Respondent. However, the 2nd respondent has neither issued response to the same nor released any outstanding payments due to the Petitioner.

v) Furthermore, the 3rd Respondent had previously intimated the 2nd Respondent that outstanding dues at various times be paid directly to the Petitioner and the 2nd Respondent is aware that amounts to the tune of 2.9 crores are pending payment to the Petitioner. However, having knowing the same, if the 2nd Respondent releases the amounts to the 3rd Respondent, the same would cause irreparable loss to the Petitioner.

w) Therefore, the actions of the 2nd Respondent in seeking to release the monies to the 3rd Respondent though such monies are payable to the Petitioner is illegal, arbitrary and contrary to law and the said actions are also contrary to the fundamental rights of the Petitioner and are violative of the petitioner's rights under Articles 14 and 19 (1) (g) of the Constitution of India. Hence, this Writ Petition.

4. Vacate Stay Petition is filed by the Respondent No. 3 to vacate the interim order of the Status Quo granted in I.A. No. 1 of 2023 in W.P No. 21417 of 2023 on 09.08.2023.

5. Counter Affidavit filed by Respondent No. 3, in brief, is as under:

a) The relief sought by the petitioner for a direction to the 2nd Respondent for non-release of payment to the 3rd Respondent regarding its alleged claims against the 3rd Respondent is neither maintainable in law nor on facts. The alleged claims of the petitioner arise out of work orders dt.06.12.2018 & 12.03.2019 in respect of which a sole arbitrator has already been appointed by the High Court of

Delhi in O.M.P. (1) (COMM.) 235 of 2023 titled as M/s. Suryodaya Infra Projects (1) Put Ltd Vs. Ms. Kee Projects Ltd. & another vide order dated 27.07.2023.

b) The 2nd Respondent had awarded the contract dated 10.11.2016 to the 3rd Respondent after the 2nd Respondent found the 3rd Respondent eligible to execute the work in question as a whole including the civil work involved and therefore, it is denied that the 3rd respondent sub-contracted the civil work to one M/s.K.A. Pappachan Constructions on a back-to-back basis or the said contractor left midway due to any non-payment of work.

c) The first work order dated 06.12.2018 was issued to the Petitioner for a value of Rs.3,16,61,108/- which was subsequently reduced to Rs.1,94,65,350/- vide work order dated 12.03.2019 at the request of the petitioner as the petitioner declined to carry out all items of work reflected in the first work order and as per clause 6 of the said Work Order "On Account" payment up to the extent of 90% of R.A. Bill was payable subject to certain conditions.

d) The 3rd respondent received RA Bill No.1 from the Petitioner for an amount of Rs.59,63,811/-. However, the said bill was cleared by the 3rd Respondent for an amount of Rs.46,46,182/- vide its email dated 06.03.2020. The Petitioner has not made any mention of RA Bill No.2 in the present petition which was of Rs.1,61,73,244/- which included a sum of Rs.59,46,097/- pertaining to RA Bill No.1. Thus, effectively the amount for RA Bill No.2 was Rs.1,02,27,147/-. The said bill was passed for Rs.59,90,299/- by the 3rd Respondent vide email dated 06.03.2020. As such a cumulative amount of Rs. 1,06,36,481/- was payable to the Petitioner against RA Bill No.1 & 2.

e) Moreover, the 3rd Respondent had paid an amount of Rs. 1,04,53,971/- which is duly reflected in RA Bill No.4 relied upon by the Petitioner. As against this, the Petitioner had sent an email dated 28.12.2020 to the 3rd Respondent which contained his ledger account and the said ledger account the Petitioner had booked the RA Bill No. 1 for an amount of Rs.53,57,322/- and RA Bill No.2 for an amount of Rs.43,99,000/- which comes to Rs.97,56,322/-. Thus, resulting in excess payment of Rs.6,97,649/- to the Petitioner.

f) The Petitioner raised RA Bill No.3 for Rs.2,65,93,856. 17 which included RA Bill No. 1 &2. The Petitioner did not mention the value of RA Bill No. 1 & 2 in RA BillNo.3 deliberately to create confusion about any work done by him after raising of RA Bill No. 1 & 2. Moreover, the RA Bill No.3 is undated and it was received by the 3rd Respondent vide email dated 03.04.2020.The said bill was not accompanied by any certification and measurement. Thus, the said bill was not raised in accordance with mandatory requirements as laid down in clause 6 of the Work Order dt.12.03.2019. The petitioner relies upon a letter dated 13.03.2020 in respect of the said bill but the said bill was sent to the 3rd Respondent vide email dated 14.03.2020 and in the attachment of the said email only R.A. bill No.2 was sent and not the R.A. bill No.3

g) Furthermore, the Petitioner relies upon RA Bill No.4 for Rs.3,61,33,3221/- which is also undated and which was sent by the petitioner to the 3rd respondent vide email dated 05.06.2020. The said bill was also not accompanied by any certification and measurement as required under the aforesaid Work Order and the said RA Bill includes all three

previous bills without giving the individual breakup of the previous bills. Moreover, the said bills were raised by the petitioner during the Covid-19 pandemic lock down period.

h) The 3rd Respondent vide email dated 10.03.2021 had intimated the petitioner that the measurement sheet was received by the him, however, it is not in accordance with work order. The said measurements are required to be checked, verified and certified by the TCE/NMDC and the site engineer of the 3rd Respondent and the Petitioner failed to respond to the said email.

i) Thereafter, the Petitioner did not submit any pit pass to the 3rd respondent in order to obtain the royalty certificate issued by the State Government due to which heavy penalties have been imposed upon the 3rd Respondent. More so, while the petitioner has been claiming an amount of Rs. 1,61,70,595/- vide letter dated 14.12.2019 up to RA Bill No.2, the petitioner through vide letter dt.28.01.2020 has been raising a claim of Rs.1.18 Crore with a difference of Rs.80 lakhs approximately.

j) Furthermore, the petitioner neither exercised any due diligence nor discharged its obligations under the aforesaid Work Orders and the work were required to be completed by 29.01.2019 as per Work Order dated 06.12.2018 i.e., in a period of two months. However, the said work was never completed by the Petitioner which is also admitted by the Petitioner, that he directly approached the 2nd Respondent for completion of work in question. More so, the 3rd Respondent never acknowledged any liability under the R.A. Bill No.3 and R.A. Bill No.4 as mentioned in detail hereinabove.

k) The letter dated 05.06.2020 of the petitioner claiming an amount of Rs.3,68,70,76/- in respect of R.A. bill No.4 while as per the bill attached this figure is of Rs.3,61,33,3221/-. The said bill is showing an amount of Rs.2,56,79,351/- as payable after adjustment of payment already received till that date. As against this vide letter dated 21.07.2020, the petitioner is claiming an amount of Rs.3.50 Crores as "still outstanding" and through letter dt.21.06.2021 the petitioner is claiming an amount of Rs.2.90 Crores as "still outstanding".

l) Moreover, through letter dt.21.11.2022 the petitioner has been claiming an amount of Rs. 1.75 Crores towards amicable settlement and an amount of Rs. 1.60 Crores in its letter dated 29.11.2022. Also, the 3rd answering Respondent has not offered any such amount to the Petitioner towards amicable settlement as mentioned in these letters and there was no bank guarantee furnished by the petitioner to the 3rd Respondent and as such there was no occasion to approach the High Court of Delhi for restraining the invocation of any such bank guarantee.

m) However, the guarantee dated 26.03.2019 was only a corporate guarantee and not a bank guarantee as made out by the Petitioner. The said corporate guarantee had already expired on 25.03.2020. Thereafter, the 3rd respondent vide email dated 13.03.2019 requested the petitioner to submit the corporate guarantee for only 5% of the value of work reflected in Work Order dated 12.03.2019.

n) The Sole Arbitrator had already been appointed by the High Court of Delhi vide order dated 27.07.2023 and the Petitioner had not made any efforts to file any

claim/application before the said arbitrator and instead approached this Court bypassing the alternate remedy available to him. The Petitioner has been banned in respect of business dealing with the 2nd Respondent for a period of three years from 22.09.2020 to 21.09.2023. Hence, the Writ Petition is devoid of merits and is liable to be dismissed.

PERUSED THE RECORD :

6. Counter Affidavit filed on behalf of Respondent No.2, in particular, Paras 2, 4, 8, 9, 10, 12, 16, 21, 24, 25, read as under:

" 2. In reply to para No.1 to 4 I submit that the averments in these paras are statement submitted by petitioner hence, no comments. I further submit that the prayer of the writ petitioner cannot be maintained for want of jurisdiction and maintainability since the writ petitioner has already availed legal remedy by way of filing OMP on the file of the High Court of Delhi at New Delhi.

4. In reply to para no.6 I submit that the statement of the writ petitioner is partly incorrect. I further submit that the respondent mc.3 has credentials and experience as per the application submitted by it against open tender enquiry. I further submit that regarding the subcontracting of all civil works to M/s KAPCPL (Ms.KA

Pappachan Constructions) is matter of agreement between Respondent no. 03 and M/s KAPCPL, role of the respondent no.2 was limited to accept the request of Respondent no 3, to permit M/s KAPCPPL as subcontractor of Respondent 3 after due verification of credentials of M/S KAPOPPL as per the contractual provisions of the Contract entered between respondent 2 & 3. I submit that the respondent no.2 need not answer the issue regarding the non-payment dispute between Respondent no.3 and M/s KAPCPPL as it was their internal dispute and to be dealt by them as per their Agreement.

8. In reply to para No.13 I submit that respondent No.2 has released the payments to respondent No.3 in the manner as per terms and condition of their contract. I further submit that the claims made by petitioner are with respect to Respondent 03 and the Respondent 02 has no role in the dispute existing between them.

9. In reply to para no.14 I submit that Respondent 02 could not release any payment to the writ petitioner as the respondent no.3 did not certify/recommend as per GCC clause 18.4 of agreement between Respondent 02 and Respondent 03. I further submit that the writ petitioner is well aware of this contractual provision and the same is an admitted fact.

10. In reply to para no.15 & 16 I submit that after receipt of request and certification of work by Respondent 03, Respondent 02 has released direct

payment for RA bill 1 & 2 to the petitioner as per the contractual provision vide GCC clause 18.4 of agreement between Respondent 02 and Respondent 03.

12. In reply to para no. 21 & 22 I submit that Respondent 02 could not act upon the request of writ petitioner in absence of recommendation and certification by Respondent 03 for direct payment to the writ petitioner. I submit that the writ petitioner is well aware of this contractual provision.

16. In reply to para no.26 I submit that the contents in this para are false. I submit that the correspondence / discussions/ deliberations referred are between Respondent 03 and writ petitioner with a copy to Respondent 02. I further submit that Respondent 02 does not take the cognizance of the above dispute as the approval for subletting shall not establish any contractual relationship between Respondent 2 and the writ petitioner nor shall relieve the Respondent 3 from any obligation, duties or responsibilities under the contract.

21. In reply to para no 33 I submit that the writ petitioner moved High Court of Delhi and the Hon'ble High Court passed an order appointing an Arbitrator for resolution of dispute between writ petitioner and 3rd respondent and only these 2 parties are referred to arbitration Indicating that the 2nd respondent is not a party to the impending arbitration proceedings.

24. In reply to para no.36 & 38 I submit that it has been stated that 2nd respondent earlier paid amounts to the Writ petitioner on certification and request of 3rd respondent as per terms and conditions of contract vide GCC clause 18.4 of agreement between Respondent 02 and Respondent 03. I submit that the writ petitioner cannot claim any amounts from the 2nd respondent that amounts to the tune of Rs. 2.90 crores are pending to writ petitioner is false, as the issue is between writ petitioner and 3rd respondent and 2nd respondent is not connected and hence no comments. I submit that no payments have been made by respondent no.2 to respondent no.3.

25. In reply to para no.40 I submit that the writ petitioner sought payment of Rs.2.90 crores directly to it against the work order between writ petitioner and 3rd respondent which is no way related to the 2nd respondent as the writ petitioner is only a sub-contractor of the 3rd respondent against a work order issued by 2nd respondent to the 3rd respondent which is not possible without following proper procedure laid down L.e., certification and request of 3rd respondent as per terms and conditions of contract vide GCC clause 18.4 of agreement between Respondent 02 and Respondent 03. I further submit that since the respondent no.2 has no role to play since the dispute is in between the writ petitioner and respondent no.3 and the writ petitioner has already moved appropriate forum and got an

Arbitrator appointed to resolve the dispute between them and hence the interim order dated 09.08.2023 in LA No 1 of 2023 is liable to be vacated against the answering respondent.

7. Rejoinder filed on behalf of the Petitioner to the counter filed on behalf of Respondent No.3, in particular, Paras 7, 8, 9, 13 and 14, read as under:

"7. It is denied that instead of raising claims before the arbitrator the Petitioner has filed the present Writ Petition by indulging in forum shopping. Further, it is denied that when an alternative remedy is duly availed no writ petition is maintainable. It is submitted that the 2 Respondent is not party to the arbitration proceedings and therefore filing of the present Writ Petition is only efficacious legal remedy available to the Petitioner. It is submitted that the Hon'ble Delhi High Court vide its Order dated 27.07.2023 granted liberty to the Petitioner to pursue its claims against the 2 Respondent without expressing any opinion on the merits of the matter. Therefore, since no orders on merits were passed by the Hon'ble Delhi High Court the plea that the Petitioner has availed its alternative remedy is liable to be rejected. It is humbly submitted that forum shopping would entail when litigant approaches one court for relief but does not get desired relief and thereafter approached another court for the same relief. It is submitted that in the present matter the Hon'ble Delhi High Court had not

considered the matter on merits. Therefore, in the absence of judicial finding either granting/rejecting the relief sought by the Petitioner it cannot be said that the Petitioner has already availed its alternative remedy and has engaged in forum shopping by filing the present Writ Petition. Therefore, the plea that the Petitioner has approached this Hon'ble Court by engaging in forum shopping is misconceived and liable to be rejected.

8. The contents of para 2(b) are false, baseless and therefore denied. It is denied that main relief sought in the writ petition is in the nature of recovery which can only be sought either in civil suit or in arbitration proceedings and the same cannot be sought for in writ petition. Further, it is denied that the present writ petition is not maintainable and deserves to be dismissed. It is submitted that the present Petition is being filed by the Petitioner aggrieved by the unlawful actions of the 2nd Respondent in releasing and making payments to the 3rd Respondent in spite of being aware of the actions of the 3rd Respondent in not making payments to the Petitioner, ie, the authorized sub-contractor contrary to the terms of the Work Order dated 06.12.2018. It is submitted that the 2nd Respondent being an instrumentality of the state must at all times act in a fair and transparent manner. However, contrary to the same, the 2nd Respondent has failed to release such monies in favour of the Petitioner. Aggrieved by such illegal and vexatious actions the Petitioner was

constrained to file the present Writ Petition. It is submitted that since the 2nd Respondent is a statutory body its actions are amenable to the sole Jurisdiction of this Hon'ble Court and therefore the present writ is maintainable.

13. The contents of para 5 are a matter of record and the answering Respondent is put to strict proof of the same. It is submitted that the Respondents have deliberately avoided certifying the bills raised by the Petitioner since upon certification of such bills liability of the 2nd Respondent to make payments due under RA Bills would become alive. Therefore, the answering Respondents have avoided certifying the bills raised by the Petitioner to keep its liability towards such outstanding dues pending.

14. The contents of para 7 are false, baseless and therefore denied. **It is submitted that admittedly there exists no privity of contract between the Petitioner and 2nd Respondent and therefore no interim relief can be sought against the 2nd Respondent in the arbitration proceedings. Therefore, the only remedy available to the Petitioner is by way of filing the present Writ Petition.**

8. Clause 3.8.1, Clause 3.8.3, Clause 3.9.2 of General Conditions of Contract (GCC), read as under:

“Clause 3.8.1: The contractor shall be an independent Entity performing the Contract. The Contract does not create any agency, partnership, joint venture or other joint relationship between the parties hereto.

Clause 3.8.3: All employees, representatives or Sub-Contractors engaged by the Contractor in connection with the performance of the Contract shall be under the complete control and supervision of the Contractor and shall not be deemed to be employees of the owner, and nothing contained in the Contract or in any Sub-contract awarded by the Contractor shall be construed to create any Contractual relationship between any such employees, representatives or Sub-Contractors and the owner.

Clause 3.9.2: All employees, representatives or sub-contractors engaged by the Consortium in connection with the performance of the Contract shall be under the complete control and supervision of the Contractor and shall not be deemed to be employees of the owner, and nothing contained in the Contract or in any Sub-Contract awarded by the Contractor shall be construed to create any Contractual relationship between any such employees, representatives or Sub-contractors and the owner.

DISCUSSION AND CONCLUSION :

DISCUSSION :

9. The prayer sought for by the Petitioner is as under:

"to issue a Writ of Mandamus, declaring the actions of the 2nd Respondent in releasing and making payments to the 3rd Respondent in spite of being aware of the actions of the 3rd Respondent in not making payments to the Petitioner, i.e. the authorized sub-contractor contrary to the terms of the Work Order dated 06.12.2018 as illegal, arbitrary and unconstitutional and consequently direct the 2nd Respondent to make payments to the tune of IN 2,90,00,000/- to the Petitioner directly towards the outstanding amounts under the Work Order dated 06.12.2018 arising out of Contract dated 10.11.2016 vide Agreement No. ED/(E&P)/ SP-III/RWLS/PKG-10/132".

10. The grant of prayer sought for by the Petitioner in the present writ petition extracted above is opposed by the 3rd Respondent mainly on the following grounds:

- i. The Petitioner having filed Section 9 petition before the Hon'ble High Court of Delhi claiming identical relief and having failed before the High Court of Delhi approached this Court by filing the present writ petition and thereby indulged in forum shopping.

- ii. The remedy of the Petitioner is to file a civil suit or to avail the arbitral remedy and the present writ petition would not lie.
- iii. Disputed questions of facts arise in the present writ petition therefore the present writ petition is not maintainable.
- iv. The Petitioner under the guise of seeking the present relief as prayed for in the present writ petition is indirectly seeking a garnishee order which amounts to attachment before judgement without establishing his claim in arbitral proceedings.
- v. Though the Sole Arbitrator have already been appointed vide order dt. 27.07.2023 by High Court of Delhi, the Petitioner had not made any efforts to file any claim/application before the said Arbitrator and instead approached the Court bypassing and without availing the alternate remedy available to the Petitioner.
- vi. A bare perusal of two communications dt. 06.07.2023 and 10.07.2023 filed as material documents by the Petitioner along with the affidavit filed in support of the present writ petition clearly indicate that the claim of the Petitioner is not alive.

11. The 3rd Respondent on the above said grounds prays for vacating the interim orders of the Court dated 06.09.2023 passed in W.P.No.21417/2023 and further dismiss the writ petition with costs and compensatory costs.

12. The 2nd Respondent NMDC putsforth the following grounds and seeks dismissal of the present writ petition with exemplary costs:

- a. On the point of jurisdiction the present writ petition is not maintainable since the writ petitioner has already availed legal remedy by way of filing OMP on the file of the High Court of Delhi at New Delhi.
- b. The 2nd Respondent is not a Public Limited Indian Non-Government Company, registered under The Companies Act, 2013 as specifically contended and pleaded by the Petitioner in the affidavit filed in support of the present writ petition and the 2nd Respondent is a Government of India Public Enterprise under Ministry of Steel.
- c. Petitioner without obtaining prior approval as sub-contractor by Respondent No.2 had entered into legal agreement with Respondent No.3 which is a gross violation of contractual norms both by Respondent No.3 and the Petitioner and the Respondent No.2 is no way responsible for disputes between the Petitioner and the 3rd Respondent.
- d. The claims made by the Petitioner are with respect to Respondent No.3 and the Respondent No.2 has

absolutely no role in the dispute existing between the Petitioner and the 3rd Respondent.

- e. Respondent No.2 could not release any payment to the writ petitioner as the Respondent No.3 did not certify/ recommend as per GCC clause 18.4 of Agreement between Respondent No.2 and Respondent No.3.
- f. Respondent No.2 has terminated the contract with Respondent No.3 due to non-performance of Respondent No.3 following due procedure as per contract with the approval of the competent authority.
- g. The writ petitioner moved High Court of Delhi and the Hon'ble High Court passed an order appointing an Arbitrator for resolution of dispute between the writ petitioner and 3rd Respondent and only these two parties are referred to arbitration indicating that the 2nd Respondent is not a party to the impending arbitration proceedings.
- i. The writ petitioner is only a subcontractor of the 3rd Respondent against a work order issued by the 2nd Respondent to the 3rd Respondent and the 2nd Respondent cannot resolve the dispute between the Petitioner and the 3rd Respondent.

13. The learned counsel appearing on behalf of the Petitioner on the other hand would contend that the writ petition is maintainable since admittedly there exists no privity of contract between the Petitioner and 2nd Respondent and therefore no interim relief can be sought against the 2nd Respondent in the arbitration proceeding and therefore the only remedy available to the Petitioner is by filing the present

writ petition. In view of the fact that the Sole Arbitrator has been appointed to adjudicate the disputes subsisting between the Petitioner and the 3rd Respondent, it is imperative that such amounts are not released in favour of the 3rd Respondent pending adjudication of the arbitration proceedings. The 3rd Respondent was avoiding release of payments due to the Petitioner and if the amounts are released by the 2nd Respondent to the 3rd Respondent, the Petitioner would not be able to recover the amounts from the 3rd Respondent and the very purport of initiation of the arbitration proceedings would be lost in the event such amounts are released in favour of the 3rd Respondent.

CONCLUSION :

14. On perusal of the record and duly considering the specific averments made in the counter affidavit filed by the Respondents No.2 and 3 in relation to the facts as borne on record in the present case this Court opines that the Petitioner is not entitled for grant of relief as prayed for in the present writ petition for the following reasons :

i. The Petitioner had already availed an alternative remedy under the Arbitration and Conciliation Act, 1996 by filing a petition u/s.9 of the said Act before the High Court of Delhi claiming the identical relief i.e., seeking direction to the Respondent No.2, not to release the payment due to the 3rd Respondent in view of the alleged claims raised by the Petitioner in respect of work allegedly executed by the Petitioner pursuant to the work orders dt. 06.12.2018 and 12.03.2019 and the Hon'ble High Court of Delhi did not grant any such relief as sought for by the Petitioner and instead appointed a Sole Arbitrator permitting the Petitioner to establish its claim in the arbitral proceedings. **The order dated 27.07.2023 passed by the High Court of Delhi in OMP (I) (COMM) 235 of 2023 titled as M/s. Suryodaya Infra Projects (I) Pvt., Ltd., vs. M/s. Kee Projects Ltd., & Another at para 9 it is observed as under :**

"It is further made clear, that since the arbitration agreement pursuant where to, this court is appointing a Sole Arbitrator is between the Petitioner and Respondent No.1, it is only these parties which are being referred to arbitration. This would, however, not amount to the petitioner waiving its claim against the Respondent No.2, if any, as per law".

15. This court opines that the Petitioner instead of raising claims before the said Arbitrator, had approached this High Court in the present writ petition. It is settled law that when there is an alternative remedy, no writ petition is maintainable.

a) The Apex Court in the judgment reported in (2016) 10 SCC 767 in Satyapal Anand Vs. State of Madhya Pradesh & Others at paras 25 and 28 observed as under :

"25. It is a well-established position that the remedy of writ under Article 226 of the Constitution of India is extraordinary and discretionary. In exercise of writ jurisdiction, the High Court cannot be oblivious to the conduct of the party invoking that remedy. The fact that the party may have several remedies for the same cause of action, he must elect his remedy and cannot be permitted to indulge in multiplicity of actions. The exercise of discretion to issue a writ is a matter of granting equitable relief. It is a remedy in equity. In the present case, the High Court declined to interfere at the instance of the appellant having noticed the above clinching facts. **No fault can be found with the approach of the High Court in refusing to exercise its writ jurisdiction because of the conduct of the appellant in pursuing multiple proceedings for the**

same relief and also because the appellant had an alternative and efficacious statutory remedy to which he has already resorted to. This view of the High Court has found favour with Dipak Misra, J. We respectfully agree with that view.

28. The decision of the Society to cancel the allotment of a plot to its member or to rescind his membership and to allot the plot to another member, is undoubtedly the business of the society. Any cause of action in that behalf, indeed, can be pursued before the competent forum by the aggrieved member or his legal representative. That will require examination of the governing co-operative laws and the bye-laws of the society to ascertain whether it is open to the society to cancel the allotment of a plot to its members including to cancel the membership of such person. If that action of the society is held to be just and permissible in law, the appellant may not be entitled to any other relief much less the declaration as sought. **Further, remedy of writ cannot be used for declaration of private rights of the parties or enforcement of their contractual rights and obligations.**

b) The Apex Court in a judgement dt. 20.04.2021, reported in (2021) 6 SCC 771 in M/s. Radhakrishan Industries vs. State of Himachal Pradesh referring to Whrilpool Corporation vs. Registrar of Trade Marks

(reported in 1998 (8) SCC 1) at para 27 observed as under:

"The principles of law which emerge are that

27.1 The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

27.2 The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

27.3 Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

27.4 An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

27.5 When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

27.6 In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the

exercise of its writ jurisdiction, such a view would not readily be interfered with.

c) This Court opines that the petitioner's case does not attract any of the principles of the law laid down by the Apex Court, as explained by the Apex Court in M/s. Radhakrishan Industries vs. State of Himachal Pradesh reported in 2021 (6) SCC 771 in the said judgment, which warrants interference under Article 226 of the Constitution of India.

16. The present writ petition involves disputed questions of fact and law relating to contractual matter between the Petitioner and the Respondent No.3 which cannot be adjudicated in a writ petition under Article 226 of the Constitution of India and hence the writ petition needs to be dismissed.

17. This Court opines that in the present case disputed questions of facts are involved and Courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may

become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. The Apex Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts.

a) The Apex Court in the judgment reported in *State of Bihar vs. Jain Plastics & Chemicals Ltd.*, reported in (2002) 1 SCC 216 observed as follows :

“Settled law writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceeding for adjudicating such disputes. Under the law, it was

open to the Respondent to approach the Court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not effect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226".

b) The Apex Court in the judgement reported in (2020) 16 SCC 489 in Silppi Constructions Contractors vs. Union of India & Another very clearly observed that the Court should exercise a lot of restrain while exercising their powers of judicial review in contractual or commercial matters. The Apex Court at para 19 observed as under :

"The Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case

of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realize their limitations and the havoc which needless interference in commercial matters can cause."

17. This Court opines that in the present case no arbitrariness, irrationality, malafides and bias is made out as against the 2nd Respondent against whom mandamus is sought for.

18. As per Clause 27 of the Work Order dt. 06.12.2018, for construction of civil works at NMDC project for establishment of Rapid Wagon Loading Systems assigned by the 3rd Respondent and accepted by the Petitioner at Clause 27, it is clearly stipulated that the Court in Delhi alone shall have exclusive jurisdiction in respect of any matter, claim or dispute

arising out of or in connection with matter. This Court opines that in view of the fact that the work order clearly stipulates that the Court in Delhi alone should have exclusive jurisdiction in respect of any matter claim or dispute arising out of or in connection with the matter as per the contract entered into between the 3rd Respondent and the Petitioner, the Petitioner who is a sub-contractor of the 3rd Respondent cannot agitate his grievance before the High Court of Telangana at Hyderabad, contrary to Clause 27 of the work order dt. 06.12.2018.

18. In view of the fact that there is no privity of contract between the Petitioner and the 2nd Respondent as borne on record, this Court opines that the Petitioner cannot seek any mandamus against the 2nd Respondent not to release payments towards the outstanding amounts payable by the 3rd Respondent to the Petitioner under work order dt. 06.12.2018 arising out of contract dt. 10.11.2016, in view of the simple fact that under the constitution a mandamus can be issued by the court when the applicant establishes that

he has a legal right. In the present case the Petitioner does not have any legal right to the performance of the legal duty by the 2nd Respondent against whom the mandamus is sought for, since there is no privity of contract between the Petitioner and 2nd Respondent herein.

a) The Apex Court in the judgment dt. 12.04.1996 in State of U.P. & Others vs. Harish Chandra & Others reported in (1996) 9 SCC 309 at para 10 observed as under :

"Under the constitution a mandamus can be issued by the Court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom mandamus is sought and the said right was subsisting on the date of petition. The duty that may be enjoyed by mandamus may be one imposed by the constitution or a statute or by rules or orders having the force of law, but no mandamus can be issued to direct the Government to refrain from enforcing the provisions of law or to do something which is contrary to law".

19. The prayer sought for by the Petitioner is for a direction to the 2nd Respondent to pay an amount of Rs.2,90,00,000/-

to the Petitioner in respect of work allegedly executed by the Petitioner. This Court opines that the said relief is in the nature of recovery which can be sought either in a civil suit or in arbitral proceedings and not in a writ petition and therefore the present writ petition is not maintainable.

20. A bare perusal of Clauses 3.8.1, 3.8.3 and 3.9.2 of the General Conditions of the Contract (GCC) between the NMDC and the 3rd Respondent (referred to and extracted above) it is very clear that nothing contained in the contract or in any subcontract awarded by the contractor shall be construed to create any contractual relationship between any such employees, representatives or sub-contractors and the owner. On perusal of the above said clauses it is apparently evident that there is no privity of contract between the Petitioner and the 2nd Respondent herein and hence the present writ petition filed by the Petitioner seeking relief against the 2nd Respondent is not maintainable against the 2nd Respondent.

a) The Apex court in Yeswanth Sinha & Others vs. Central Bureau of Investigation & Others reported in Manu/SC/1564/2019 in judgment dated 14.11.2019 at para 86 observed as below :

"86. Where a party institutes a proceeding, if the proceeding is of a civil nature, there would be a cause of action. There would be reliefs sought on the basis of the cause of action. Materials are produced both in support and against the claim. The Court thereafter renders a judgement either accepting the case or rejecting the case. When the Court rejects the case, it necessarily involves refusing to grant the relief sought for by the plaintiff/petitioner. It may transpire that the petitioner may not press for certain reliefs. The Court may, after applying its mind to the case, find that the petitioner is not entitled to the relief and decline the prayers sought. It may also happen that the court does refer to the reliefs sought but thereafter does not undertake any discussion regarding the case for the relief sought and proceeds to non-suit the party. It is clear that in this case, it is the last aspect which is revealed by the judgment sought to be reviewed."

b) The Apex Court in the judgment reported in (2008) 2 SCC 302 in RAMANTECH & PROCEESS

ENGINEERING COMPANY & ANOTHER VS. SOLANKI**TRADERS at para 4, 5 and 6 observed as under :**

"4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of order 38 rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before

judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should

show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, **before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See - Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.)**

21. This Court opines that in the present case the Petitioner by seeking a restrained order against the 2nd Respondent is thereby asking the 2nd Respondent not to release payment due to the 3rd Respondent and is trying to convert unsecured debt into a secured debt by seeking attachment before judgment.

a) The Apex Court in the judgment reported in Manu/DE/2389/2016 in Natrit Implementation Society Vs. IVRCL Ltd referring to Section 9(1) (ii) of Arbitration and Conciliation Act, 1996 referring to interim measures of protection observed that the same

**could be granted only if it is necessary and equitable,
at paras 17 and 18, read as under:**

"17. It is also clear from the opening sentence of section 9(1)(ii) of the Act that the measures that can be ordered are "interim measures of protection". It, plainly, follows that the principles that would be applicable for grant of orders under section 9(1)(ii) of the Act would be the principles that may be applicable to grant of such orders as are applicable to proceedings before the Court. An order for securing the amount claimed prior to an arbitral award is essentially in the nature of attachment before judgement and thus, the principles as applicable for grant of such orders in proceedings before the Court - that is, as applicable under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereafter „the CPC“) - would be equally applicable for grant of relief under Sections 9(1)(ii)(b) or 17(1)(ii)(b) of the Act (as amended by Act 3 of 2016) prior to the publishing of the arbitral award. In Rite Approach Group Ltd. v. Rosoboronexport: 111 (2004) DLT 816, Global Company v. M/s National Fertilizers Ltd.: AIR 1998 Delhi 397 and Gatx India Pvt Ltd. (supra), this Court held that it would take guidance from the principles given in Order XXXVIII Rule 5 of the CPC for grant of orders under Section 9 of the Act.

18. It is also well settled that the granting of orders under section 9 of the Act are discretionary in nature and equitable considerations would apply for grant of

such orders. Thus, orders as prayed under section 9(1) of the Act would be granted only if it is necessary and equitable.

22. This Court opines that in the present case admittedly no equitable considerations exists that warrants or necessitates passing of orders in favour of the Petitioner herein.

a) The Apex Court in the judgment reported in (2019) SCC Online Delhi 9079 in BMW India Pvt. Ltd., Vs. Libra Automative Pvt., Ltd., &Others observed that an order for securing the amount claimed prior to an Arbitral Award is certainly comparable to the nature of relief provided for under order 38 Rule 5 CPC and further observed at paras 27 and 29 as under :

"27. A careful analysis of the judgment in Ajay Singh (supra), reveals that in the said case, the Division Bench has held that Section 9 of the Act grants wide powers to the Court in fashioning an appropriate interim order. It has also been held that Court should not find itself unduly bound by the text of those provisions and should rather follow the underlying principles. Essentially, the Division Bench has held that the discretion should be exercised appropriately while

granting an interim order and such discretion must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection. Even in *Huawei Technologies* (supra), the Court has recognized that all the requisite conditions of Order 38 Rule 5, CPC are required to be satisfied for considering the prayer of securing the amount and the Court should exercise its discretion very carefully. It was also held that where it appears that there are exceptional circumstances; it has ample power to secure the amount, if it is just and convenient. However, the aforementioned judgments do not seem to suggest that while exercising power under Section 9 the necessary conditions and ingredients under Order 38 Rule 5 CPC, are not required to be insisted upon. The judgments relied upon by the Petitioner only stress that the power should be principled and premised on some known guidelines and hence the analogy of Order 38 and 39, CPC is certainly applicable. At this stage, the judgments relied upon by the learned counsel for the Respondents also need to be mentioned. Respondents have relied upon C.V. Rao & Ors v. Strategic Port Investment, (2015) 218 DLT 200, *Lanco Infratech Ltd. v. HCC Ltd.* (2016) 234 DLT 175, *Intertoll ICS Cecons O&M v. NHAI*, ILR (2013) II Delhi 1018, Raman Tech v. Solanki Traders, 2008 (2) SCC 302 and *Kopastin Holding Ltd. v. Uday Bahadur & Ors*, MANU/DE/2867/2018.

29. All the above noted judgments listed above invariably echo the same principles. The imperative that emerges is that the court should not ignore the principles or the well known guidelines, but at the same time it should be unduly bound by the text . There is thus no perceptible difference in the views expressed by the Division Bench as sought to be highlighted by Mr. Krishnan. An order for securing the amount claimed prior to an arbitral award is certainly comparable to the nature of relief provided for under Order 38 Rule 5, CPC. Keeping the well known principles in mind, I am of the view that it is necessary that Petitioner No. 1 satisfies the Court that (a) Petitioners have a reasonably strong prima facie case for succeeding in the arbitration proceedings and (b) that the Respondent is acting in a manner so as to defeat the realization of the future award that may ultimately be passed. Such orders cannot be passed mechanically as the exercise of power in the nature of Order 38 Rule 5, CPC is a drastic and extraordinary power. There is no doubt in my mind that the underlying basis of Order 38 Rule 5, CPC has to be borne in mind while deciding an application under Section 9 (ii) (b) of the Act.

23. In the present case, this Court opines that even if the averments in the writ petition are taken as true, it cannot be said that a part of the cause of action arose within the jurisdiction of the Telangana High Court.

a) The Apex Court in the judgment dt. 23.07.1994, reported in (1994) 4 SCC 711 in Oil & Natural Gas Commission Vs. Utpal Kumar Vasu & Others dealing with territorial jurisdiction observed at para 6 as under:

"6. It is well settled that the expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. In Chand Kour v. Partab Singh' Lord Watson said:

"... the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must

be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition. Therefore, the question whether in the instant case the Calcutta High Court had jurisdiction to entertain and decide the writ petition in question even on the facts alleged must depend upon whether the averments made in paragraphs 5, 7, 18, 22, 26 and 43 are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court.

24. Taking into consideration the above said facts and circumstances of the case and the specific averments made by the Respondents No.2 and 3 in the counter affidavits filed before this Court and duly considering the law laid down and also the observations made by the Apex Court in various judgments referred to and extracted above and in view of the discussion arrived at as above, this Court opines that the Petitioner is not entitled for the relief as prayed for in the present writ petition and the writ petition is dismissed since the same is devoid of merits. The interim order dated 17.08.2023 passed in WP No.21417/2023 stands vacated. However, there shall be no order as to costs.

Miscellaneous petitions, if any, pending, shall stand closed.

SUREPALLI NANDA, J

Date: 11.09.2023

Note: L.R.Copy to be marked.
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