* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 12.09.2024
Judgment delivered on: 24.09.2024

\+ CM(M) 3185/2024 & CM APPL. 47278/2024 & CM APPL. 48222/2024 & CM APPL. 49260/2024

DIRECTOR GENERAL, ...Petitioner
PROJECT VARSHA
MINISTRY OF DEFENCE (NAVY),
UNION OF INDIA, NEW DELHI

versus

M/S NAVAYUGA-VAN OORD JV .....Respondent

Memo of Appearance

For the Petitioner: Mr. K.K. Venugopal, Sr. Advocate with Ms. Aishwarya Bhati, ASG, Mr. Kapil Arora, Ms. Palak Nagar, Mr. Pravar Veer Mishra and Mr. Walid Nazir Latoo, Mr. Aryaman Vaccher and Mr. Siddharth Kohli, Advocates.

For the Respondent: Mr. Rajiv Nayar and Mr. B B Gupta, Sr. Advocates with Mr. Saurav Agarwal, Ms. Astha Mehta, Mr. Saurabh Seth, Mr. Shantanu Agarawal, Ms. Chandreyee Maitra, Ms. Allaka M., Mr. Manas Arora and Mr. Manan Mehra, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. The situation is somewhat unusual.

2. It needs to be weighed up whether a document which has been classified as ‘top secret’ and protected under *Official Secrets Act, 1923* can be directed to be produced during arbitral proceedings.

3. This Court is cognizant of the fact that the scope of judicial

interference under Article 227 of the Constitution of India is very narrow and restricted. And, when it comes to any matter pending adjudication before Arbitral Tribunal, it gets more squeezed.

4. The court should normally not interject unless, there is palpable element of 'exceptional rarity' or 'exceptional circumstance' or 'extreme perversity' or if there is hint of any 'bad faith'. Reference be made to and *IDFC First Bank Limited v. Hitachi MGRM Net Limited 2023 SCC OnLine Del 4052.*

5. According to petitioner herein, the situation in the case is also similar and, therefore, it is prayed that order dated 24.04.2024 be set aside.

6. A contract was executed between *M/S Navayuga-Van Oord JV* (claimant/respondent herein) and the *Director General, Project VARSHA* (employer/petitioner herein) on 19.12.2017. It was for construction of 'outer harbour for project VARSHA'.

7. Several disputes and differences arose between the parties in relation to the above said contract which resulted in issuance of 'notice of termination' by the employer on 06.07.2022.

8. Eventually, arbitration was invoked by the claimant.

9. During the pendency of such arbitration proceedings, an application was filed by the claimant seeking inspection and discovery/production of documents. It was contended therein that such documents were germane to the issues raised before the learned Arbitral Tribunal and were under possession, control and custody of the employer. The request was further

truncated to the inspection of following documents only :-

S. Nos.	***Description of document(s)***
5.	*Documents and correspondence exchanged between the Respondent and Halcrow – Respondent's Engineer under the subject Contract, including its predecessor or successor, relating to determination of the timeline for completion of the Project.*
6(c).	*Detailed Design Report prepared by the Designer – Halcrow (including its predecessor or successor).*
6(d).	*Numerical Modelling Reports, in particular but not limited to, wave modelling (offshore to nearshore translation, wave penetration studies), wave modelling on daily conditions (for workability assessments), hydrodynamic modelling (water levels, currents, discharges), morphological modelling reports, and siltation studies.*
9.	*Studies/Report(s) submitted by IIT Madras or any of its professors to the Respondent and/or Halcrow (including its predecessor or successor) relating to/concerning the design of Outer Harbour of Project Varsha and consideration of the time for completion of the Project.'*

10. It appears that the purpose of inspection and production of said documents was to ascertain the feasibility and attainability of the timeline which had been given to the claimant to complete the above contractual obligation.

11. According to claimant, such timeline had been determined on the basis of inputs received by the employer from its engineer i.e. *M/s Halcrow Consulting India Pvt. Ltd*., further ratified by *IIT Madras* and, therefore, keeping in mind the nature and scope of the disputes raised before the learned Tribunal, there was no valid reason for the employer to have withheld such

documents. It was also claimed that there was no aspect related to involvement of any confidentiality either.

12. Such application was opposed by the petitioner herein.

13. The prime most objection raised by the petitioner was concerning National Security and the applicability of *Official Secrets Act, 1923* to the documents sought for. It was also averred that these documents, prior in time, were irrelevant as even otherwise the timeline, stipulated in the contract, had been willingly accepted by the claimant.

14. According to petitioner, the project has been classified as 'top secret' and, therefore, the statutory provision contained under *Official Secrets Act, 1923*, could not have been overlooked and keeping in mind the sensitive nature of the documents in question, which has evident potential of seriously jeopardizing the security of the country if shared with anyone during arbitral proceedings, the request of the claimant was totally unwarranted and was liable to be rejected.

15. The learned Tribunal, after consideration of the entire matter, observed that insofar as the relevancy of the documents was concerned, it would be decided at later stage as it did not deem it necessary to enter into the debate of any relevancy and admissibility of documents, while deciding the above application.

16. It also noticed that there was no dispute that such documents were in the possession of the petitioner and though these were of pre-contractual stage, these might still be required by the claimant for proving its case and

were not meant to disprove the case of employer.

17. In context of applicability of *Official Secrets Act, 1923*, the apprehension was dispelled by directing the employer to submit such documents in a 'sealed cover' to the learned Tribunal and if at any subsequent stage, the claimant was to make any request for disclosure, thereof, it would take appropriate call on such a request, after hearing the parties.

18. The petitioner is aggrieved by such order dated 24.04.2024.

19. It also needs to be highlighted, right here, that even the employer had sought certain documents and said request was also considered and allowed *vide* said common order but at the moment, the controversy relates to the documents sought by claimant.

20. This Court has heard both the sides.

21. Mr. K.K. Venugopal, learned Senior Counsel for petitioner contends that *"Project Varsha"* is for construction of Outer Harbour works of a greenfield naval base. It is a classified project of immense strategic and national importance to secure India's defence against foreign vulnerabilities. The project is for ensuring India's strategic preparedness for its defence and security and the contract itself declares that it is covered by the *Official Secrets Act*. It is submitted that the documents sought to be produced include *inter alia* the detailed design reports which are classified and sensitive documents and relate to a "prohibited place" under the *Official Secrets Act*. If these are permitted to be produced, it would be akin to providing the

blueprints of the project, which cannot be afforded to be disclosed due to national security. These documents are classified as *'top secret'* under the Manual for Security Instructions as well as the *Official Secrets Act*. Thus, it is contended that these should neither have been demanded nor should have been permitted to be produced before the learned Arbitral Tribunal, even in a sealed cover.

22. Mr. K.K. Venugopal, learned Senior Counsel also stresses that the competent authority, being the Rear Admiral of the Indian Navy has, in no uncertain terms, certified on 17.11.2023 that Project Varsha was a classified project of the Indian Navy having national importance and that the documents sought through discovery were classified in nature and disclosure of such documents was considered prejudicial to public interest, the affairs of the State, as also national security. Therefore, there was no point in allowing any such request which has serious implication of endangering the national security.

23. Petitioner has placed a reliance upon *Delhi Metro Rail Corporation Limited vs Delhi Airport Metro Express Private Limited: 2024 SCC OnLine SC 522*, *Soudamini Ghosh vs Gopal Chandra Ghosh: AIR 1915 Cal 745* and *Ramchandra Modak vs King-Emperor: 1925 SCC OnLine Pat 155.*

24. According to claimant (respondent herein), the present petition is belated and unsustainable as well and there is no reason to entertain the same.

25. Mr. Rajiv Nayar, learned Senior Counsel for claimant submits that, even otherwise, the petition in question is premature as the learned Arbitral

Tribunal has already provisioned for sufficient safeguard by directing the documents in question to be provided only in a sealed cover and it has been also observed by the learned Tribunal that such documents would be provided to the claimant only if the claimant was to file application afresh and a decision in this regard would then be taken, after hearing both the sides.

26. According to Mr. Nayar, learned Senior Counsel, such stage has not reached yet and there is no reason to, therefore, feel aggrieved merely by a direction to submit the documents in a sealed cover. It has also been submitted that various other documents which were also having element of confidentiality were shared at various stages and, therefore, under the garb of expressing 'national security concern', the petitioner cannot be permitted to be selective in its approach and thus, in order to reach the truth of the matter, these documents were rightly directed to be produced, *albeit*, in a sealed cover.

27. It is also contended that both the parties to any such dispute should be treated equally and, therefore, the employer cannot seek a special and different treatment, merely, by claiming that the documents were classified and were protected under *Official Secrets Act, 1923*.

28. It also needs to be highlighted, right here, that during the course of the proceedings, the request with respect to the documents in question was further truncated as the request for production of documents mentioned at serial No. 5 and serial No. 6(c) of the chart, already extracted hereinbefore, has now been completely withdrawn and even with respect to documents

mentioned against serial No.6 (d) and 9, the claimant now no longer seeks numerical modelling reports as well as the design of outer harbour of Project Varsha.

29. Mr. Nayar, learned Senior Counsel for claimant has also supplemented that even if the *Official Secrets Act* was to apply to the documents sought to be produced, Arbitral Tribunal can always seek those, being at par with a *Court of Justice*.

30. Relying on *State of UP vs Raj Narain :1975 (4) SCC 428*, it has been contended that the Court is competent to examine any document in order to find out whether the disclosure of document would be injurious to the public interest.

31. Strong reliance has also been placed upon *Yashwant Sinha vs CBI*: *(2019) 6 SCC 1* wherein it has been held that there is no provision in the *Official Secrets Act* which may restrain publication of documents marked as secret or from placing such documents before a Court of Law which may have been called upon to adjudicate a legal issue concerning the parties.

32. Relying on *Madhyamam Broadcasting Limited vs Union of India*: *(2023) SCC OnLine SC 366*, Mr. Nayar, learned Senior Counsel submits that even if national security is legitimate aim for the purpose of limiting procedural guarantee, the same has not been established herein and, therefore, there cannot be any blanket immunity from disclosure.

33. It has been also argued that *Official Secrets Act* is an archaic British Law, the purpose of which is anti-espionage i.e. to ensure that any protected

material does not go in the hands of the enemy and since in the present case, the documents were merely directed to be produced before the learned Tribunal, that too in a sealed cover, there was no question of any prejudice and, therefore, interfere under Article 227 of Constitution of India is not warranted.

34. Mr. Nayar, learned Senior Counsel also submits that even as per the case of the employer, the designs and drawings were constructible and were well-executable within the contractual timelines, as has been ratified by the Engineer as well as by IIT Madras and, therefore, these documents were necessary to ascertain the basis of arriving at the contractual timeline and, therefore, these cannot be suppressed or withheld in the garb of 'Secrecy' and 'National Security', particularly, when the claimant has already further curtailed its request and the documents now being sought to be produced can easily be given.

35. I may also observe that the present matter, after conclusion of final arguments, was mentioned again on 23.09.2024 and learned counsel for both the sides had appeared. Mr. Brij Bhushan Gupta, learned Senior Counsel appeared from the side of the respondent and apprised that the petitioner herein had also filed an appeal under Section 37(2)(b) of Arbitration and Conciliation Act, 1996 challenging one order dated 10.01.2024 passed by the learned Arbitral Tribunal and during the course of arguments of said appeal, the petitioner herein had relied on the recommendation given by IIT Madras whereas herein, the petitioner has given up any reliance on such report of IIT Madras. Thus, it is contended that the petitioner has taken

conflicting stands. Fact, however, remains that there does not seem to be any relevancy of the same in context of the controversy in hand.

36. Let me now see as to what were the observations of the learned Arbitral Tribunal while allowing the above said request made by the claimant. Reference be made to paras No. 25 to 30 of the impugned order which read as under: -

> *"25. The defence of statutory provisions of the Official Secrets Act, 1923 and that the documents requested by the Claimant at S. Nos. 5, 6(c), 6(d) and 9 encroach on national security, the said apprehensions shall be allayed by asking the Respondent to submit the said documents in a sealed cover to the Tribunal, which shall remain in the custody of the Tribunal and if, at any stage, the Claimant request(s) for disclosure thereof for placing reliance thereon, the Tribunal can take a call on such a request(s) after hearing the Parties in this behalf.*
>
> *26. In making the aforesaid directions, the Tribunal is persuaded by the authorities cited by the learned Counsel for the Claimant to strengthen its requests for production of documents in possession of the Respondent, particularly the judgments in the case of* ***Reliance Industries*** *(supra) and* ***Yashwant Sinha*** *(supra). Neither the assertions of secrecy and/or national security nor the statutory provisions of the Official Secrets Act, 1923 form sufficient ground in commercial contracts between the Executive and private entities and consequent legal disputes for the Executive to withhold documents. Such contentions cannot be amplified way beyond proportion and equity. More importantly,*

the aforesaid directions constitute sufficient safeguard for maintaining confidentiality in the instant arbitration proceedings.

*27. That apart, the judgment in **Ex-Armymen's Protection Services** (supra), as cited by the learned Counsel for the Respondent, do not come to the aid of the Respondent for denying production of the documents requested by the Claimant at S. Nos. 5, 6(c), 6(d) and 9 of its Application, as the said pronouncement is not in the realm of commercial disputes in arbitration proceedings and merely holds that the principles of natural justice may be excluded when on the facts of the case, national security concerns outweigh the duty of fairness.*

28. Accordingly, the Tribunal directs the Respondent to place in a sealed cover before the Tribunal in- triplicate, the documents requested by the Claimant at S. Nos. 5, 6(c), 6(d) and 9 of the Claimant's Application for discovery and production of documents.

29. Suffice it to say that in case, the above said requested documents are not provided due to non-availability, a requisite affidavit to that effect shall be filed by the Respondent.

30. At the cost of repetition, the Tribunal reiterates that it does not intend to foreclose the rights of the Claimant to seek the indulgence of the Tribunal for production of the documents requested by the Claimant at S. Nos. 5, 6(c), 6(d) and 9 of its Application or opening of the sealed cover, which shall remain in the custody of the Tribunal. If at any stage of the hearing, the Claimant seeks to place reliance upon any of the aspects of (he said requested documents, the Claimant shall be at liberty to

move the Tribunal afresh and the Tribunal shall consider the same as per law."

37. There cannot be any doubt that any request for discovery and production of the documents can always be entertained by any such Tribunal and keeping in mind the purpose and objective of discovery of documents, there can always be a direction in this regard and as already observed, it is also not in dispute that the documents in question are in power and possession of the employer and the claimant seems to seek production thereof to prove its own case.

38. Of course, the safeguard seems implicit and inbuilt as the direction is to produce the documents in a sealed cover.

39. The question posed to this Court is, however, different and distinctive.

40. It is to be assessed whether a document which has been classified as 'Top Secret' and 'Protected' under *Official Secrets Act, 1923*, can, at all, be directed to be produced by the learned Arbitral Tribunal or not.

41. There is no denying the fact that Competent Authority i.e. Rear Admiral in its communication dated 17.11.2023 has, unequivocally, observed that Project Varsha is a classified project of Indian Navy having national importance and the documents related to said project, as sought by the contractor through discovery, are highly classified in nature and disclosure of such documents is considered prejudicial to public interest, the affairs of the state as also the national security and, therefore, it was mentioned in the aforesaid communication that the above said fact may be

brought to the kind knowledge of learned Arbitral Tribunal that the permission in this regard has been withheld.

42. There is also no doubt that the above said communication dated 17.11.2023 of Rear Admiral was placed before the learned Arbitral Tribunal.

43. The said project is located on the Eastern Coast of India and this Court does not wish to elaborate other fine and minute details of said project. Nonetheless, fact remains that in context of India's defence, the project is highly sensitive and critical which fact cannot be undermined from any angle whatsoever.

44. Undoubtedly, there has to be a level-playing field in any such proceedings and both the sides should get fair opportunity to present its case and also to refute the case of other but at the same time, the aspect related to *National Security* is paramount in nature and cannot be crucified.

45. It is the duty of the Court to strike a right kind of balance while considering dispute related to any commercial obligation, wherein issue of National Security also crops up. Keeping in mind the nature of dispute between the parties, where the prime issue solely seems to be the manner in which the timeline was stipulated and when the claimant must have entered into the contract voluntarily after comprehending all the terms and its own ability to meet the deadline offered, the insistence for production of 'classified documents' seems unfounded and fanciful.

46. Importantly, the claimant had, while entering into contract, given an undertaking on 21.06.2017, mentioning therein to abide by *Official Secrets*

Act.

47. The claimant cannot be permitted to dig out any real advantage from *Yashwant Sinha and Ors.* (supra). Therein, though question with respect to government's privilege regarding official secrecy of documents was raised, but the facts were distinguishable. In the above matter, when a review petition was filed by the petitioners, an objection was raised by Union of India claiming that such review petition lacked *bonafide* inasmuch as the documents, relied upon in the review petition, had been unauthorisedly removed from the office of the Ministry of Defence, Government of India which was not permissible in view of the provisions contained under *Official Secrets Act*. However, such documents were already, undeniably, available in public domain as those were earlier published in '*The Hindu',* newspaper on different dates. Here no such situation exists, as the documents in question have neither been published anywhere nor available in public domain.

48. In *Union Of India vs Reliance Industries Limited*: *(2018) SCC OnLine Del 13018,* Union of India was aggrieved by the order passed by the Arbitral Tribunal directing disclosure of the documents which they claimed as internal documents and privileged inasmuch as they referred to intra-governmental discussions. Indubitably, while dismissing the above said petition, filed by Union of India, the learned Single Judge observed as under in para 44:-

> *"44. Insofar as the objection as regards privilege available to UOI under Section 123 of the Indian Evidence Act, 1872 (in short 'Evidence Act') is concerned, the Arbitral*

Tribunal rejected the same on the ground that in the present times, the archaic doctrine of crown privilege was no longer available, especially, where it related to commercial dealings that the Government may have had with the private entity. The Arbitral Tribunal, in this behalf, observed that justice was better served, rather than undermined when there was openness, transparency and accountability. The exceptions carved out by the Arbitral Tribunal to these observations were where documents, whose disclosure was sought, related to State security, diplomacy and such like aspects. In coming to this conclusion, the Arbitral Tribunal relied upon the dicta and down in the following judgments : Conway v. Rimmer, [1968] A.C. 910 (HL); S.P. Gupta v. Union of India, 1981 Supp SCC 87; State of U.P. v. Raj Narain, (1975) 4 SCC 428; Burmah Oil Company Limited v. Bank of England, (1979) 3 All ER 700; and lastly, People's Union for Civil Liberties v. Union of India (2004) 2 SCC 476."

49. The said observation would rather go on to indicate that in said case, even the Arbitral Tribunal had carved out exceptions for the documents related to state security, diplomacy and such like aspects. As is evident, the documents herein relate to National Security and, therefore, it falls within such exception and, therefore, the above said precedent also does not come to the rescue of the claimant. Moreover, the nature of request in said case was different as what was being sought was mere *disclosure of notes made in government files by lower functionaries.*

50. In *Madhyamam Broadcasting Limited (supra)*, the Union Ministry of Information and Broadcasting had, citing denial of security clearance based on intelligence inputs, revoked the permission granted to Madhyamam Broadcasting Limited to uplink and downlink a news and current affairs

television channel called "Media One". Hon'ble Supreme Court while allowing the appeal of the broadcaster and holding that non-renewal of permission amounted to a restriction on freedom of press, also went on to observe that the confidentiality and national security were legitimate aims for the purpose of limiting procedural guarantees, however, it also noted that the state was unable to prove that those considerations existed therein. Here, whereas, the fact-scenario is absolutely different.

51. Respondent cannot take away any solace from *Manohar Lal Sharma Vs. Union of India: (2023) 11 SCC 401*, known as *Pegasus Spyware case* as in said case, the Hon'ble Supreme Court had itself observed that it was not interested in any information that may have a deleterious impact on the security of the country, though, the Respondent Union of India could still place on record facts pertaining to the events highlighted by the Petitioners therein, without disclosing information adjudged to be sensitive by the relevant authorities. *It was also observed that Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute.* It was further observed that it was incumbent on the State to not only specifically plead such constitutional concern or statutory immunity but they must also prove and justify the same in Court on affidavit. It was also observed that Union of India must justify the stand that they take before a Court and mere invocation of national security by the State does not render the Court a mute spectator. Fact remains that, in said case, even the petitioners, and very fairly so, had stated that they too were also concerned about the national interest and would not press for any such

information. Eventually, in said case, noticing the conduct of Union of India which did not place on record any facts while simply citing defence of national security, only an Expert Committee was formed. Here, as noted already, the documents are protected and classified under *Official Secrets Act* and, therefore, the concern of national security does not seem to be in air either and, therefore, the insistence to produce those is totally unwarranted.

52. Being mindful of the narrow scope of appreciation in such type of matters, there cannot be any qualm with respect to the observation appearing in *Deep Industries* Limited vs *Oil and Natural Gas Corporation Limited*: *(2020) 15 SCC 706* as the objective of the Arbitration and Conciliation Act, 1996 is, indisputably, to ensure speedy disposal of arbitration. Holding that though a petition could be filed under Article 227 of Constitution of India against judgment of District Court allowing or dismissing the first appeal under Section 37 of Arbitration and Conciliation Act, it was observed that the High Court should be *extremely circumspect* in interfering in such matters.

53. Thus, though the scope of judicial intervention in such type of matters may be somewhat curbed and curtailed, it does not stand effaced or obliterated altogether.

54. If any such order contains even the slightest of the hint indicating possibility of compromising with the National Security, any such concern can always be permitted to be tested under Article 227 of Constitution of India, which would, certainly, be akin to a case of *exceptional circumstance*.

55. Needless to say, there are certain aspects which are better left to the wisdom of Union of India. If any information is stated to be protected and classified as 'Top Secret' by Government of India and directly relates to defence of India, the due importance to such crucial fact ought to be given. Therefore, learned Arbitral Tribunal, in my humble opinion, should not have insisted for production of any such document in a sealed cover either, as at any subsequent stage also, it is, virtually, beyond its purview to open such sealed cover and to ponder over whether these were rightly labelled as 'classified' or not. Even if these were to be opened and evaluated, it could not have been 'declassified' in the proceedings of this kind. To venture into any such exercise and to scrutinize and evaluate any such thing does not seem permissible.

56. That being so, the moment these were labelled as confidential and classified, that should have been the end of the matter as in the given factual matrix, national security concern, apparently, outweighs and eclipses the contractual obligation.

57. In view of the above, the petition is allowed and, resultantly, the petitioner i.e. employer is relieved of its obligation to produce these documents before the learned Arbitral Tribunal.

(MANOJ JAIN)
JUDGE

SEPTEMBER 24, 2024/*sw*