

REPORTABLE

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CM Nos.15130, 3843, 3844/2007 in FAO No.104 of 2007

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ARB. A. No.12 of 2009

Reserved On: 12th July, 2010
Date of Decision: 14th July, 2010

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1) **CM Nos.15130, 3843, 3844/2007 in FAO No.104 of 2007**

NATIONAL HIGHWAYS AUTHORITY OF INDIA . . . Appellant

through : Mr. Sandeep Sethi, Senior
Advocate with Mr. Sumit
Gehlot and Mr. Juned Akhtat,
Advocates.

VERSUS

M/s. BSC-RBM-PATI (JV) . . . Respondent

through: Mr. P.H. Parekh, Senior
Advocate with Mr. Arjun Gard
and Mr. Vishal Prasad,
Advocates.

2) **ARB. A. No.12 of 2009**

M/s. B. Seenaiiah & Company ...Appellant

through: Mr. P.H. Parekh, Senior
Advocate with Mr. Arjun Gard
and Mr. Vishal Prasad,
Advocates.

VERSUS

NATIONAL HIGHWAYS AUTHORITY OF INDIA . . . Respondent

through : Mr. Sandeep Sethi, Senior
Advocate with Mr. Sumit
Gehlot and Mr. Juned Akhtat,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. CM No. 3844 of 2007

Exemption is allowed, subject to just exceptions.

CM stands disposed of.

2. CM Nos. 3843 & 15130 of 2007 in FAO No. 104 of 2007 and ARB. A. No. 12 of 2009

Both these matters are interconnected. For this reason, they were heard together and are being disposed of by this common order.

3. It may be mentioned that FAO No.104 of 2007 has already been decided vide orders dated 29.03.2007. It would be appropriate to take note of few facts in brief and the orders passed in FAO on 29.03.2007 before coming to the present proceedings.
4. M/s. B. Seenaiah & Company and Others (hereinafter referred to as 'the petitioner') was awarded a contract – II for four laning including strengthening of existing two lane pavement between Raniganj and Panagarh in West Bengal (474 Km to 515.236 Km on NH 2) by National Highways Authority of India (hereinafter referred to as 'the respondent'). It was one of the obligations of the petitioner to furnish the performance security in the form of a Bank Guarantee for an amount equaling 10% of the contract price. Four bank guarantees amounting to Rs.16,07,90,547/- were submitted in accordance with proforma prescribed in Clause 10.1 of the contract on 20.04.1996. Thereafter, contract-II was signed by the authorities on 24.07.1997. The petitioner executed the contract. The engineer, as per the contract, also issued defect liability certificate dated 23.09.2003 stating that the works

under the contract were fully completed and the defects therein had been rectified to his satisfaction in accordance with Clause 62.1. He also specified 18.09.2003 as the date on which the petitioner is deemed to have completed his obligations to execute and complete the works.

5. There was no quietus to the matter with the execution of the contract inasmuch as certain disputes erupted between the parties. According to the petitioner, the respondent did not make various payments which were due to the joint venture/petitioner. The petitioner, in these circumstances, invoked the Arbitration Clause and submitted claims of Rs.64.74 Crores before the Arbitral Tribunal, without intervention of the Court. The respondent denied and disputed those claims by filing its reply on 24.05.2005. Thereafter, on 12.06.2006, the respondent also submitted its contract claims for Rs.42.42 Crores.
6. According to the petitioner, the performance guarantees given by it were valid for a period of 28 days from the date of issuance of defect liability certificate. However, the respondent did not return the bank guarantees and on the contrary, threatened to encash the same. The petitioner, thus, filed petition (OMP No.233 of 2006) under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). This OMP was decided by the respondent and was ultimately disposed of on 22.08.2006 by this Court. The relief sought by the petitioner in the said OMP, viz., restraining the respondent from encashing the bank guarantee was sent to the Arbitral Tribunal directing the arbitrators to decide the

same within a period of six months from the date of the receipt of that order.

7. Armed with the said order, the petitioner moved an application under 17 of the Act for release of bank guarantees furnished by the joint venture/petitioner. On this application, the Arbitral Tribunal passed orders dated 08.02.2007 directing the respondents to release those bank guarantees.
8. At this stage, FAO No. 104 of 2007 was filed by the respondent under Section 37(2)(b) of the Act challenging the aforesaid orders dated 08.02.2007 passed by the Arbitral Tribunal. This appeal, as mentioned above, was disposed of by this Court on 29.03.2007. Relevant and operative portion of the said orders reads as under:

“Contention of learned counsel for the appellant is that such a direction for release of PSBG should not have been given by the Arbitral Tribunal under Section 17 of the Act. The order is challenged on merits as well. Learned counsel for the respondent, on the other hand, submits that after making a statement in this Court in the application filed by the respondent under Section 9 of the Act and agreeing for a decision on this aspect by the Arbitral Tribunal, it does not lie in the mouth of the appellant now to challenge the jurisdiction of the Arbitral Tribunal. Mr. Parekh also submits that as the contract was duly executed to the satisfaction of the appellant and the Engineer had issued Defect Liability Certificate (DLC), there is no question of retaining the said PSBG by the respondent.

After hearing the arguments for sometime, suggestion was given as to whether the respondent should continue to keep the bank guarantee alive till the disposal of arbitration proceedings before the Arbitral Tribunal subject to the condition that in case the respondent succeeds before the Arbitral Tribunal, expenses incurred by the respondent for getting the bank guarantee renewed from time to time shall be borne by the appellant. Mr. Parekh had accepted this suggestion. Learned counsel for the appellant took time to seek instructions. Mr. Sethi, learned senior counsel appearing for the appellant states that it would not be possible for the appellant to give any statement to this effect agreeing to this condition.

As is clear from the aforesaid and also the detailed order passed by the Arbitral Tribunal, the case of the respondent is that it is not obliged to keep the bank guarantee alive. The bank guarantee is in the sum of Rs.1,60,79,05,450/-. **Arbitration proceedings are still on and the matter is to be heard on merits.** If the respondent is asked to keep the bank guarantee alive, insofar as the respondent is concerned, it will have to bear the expenses for the same

which will have to be paid to the Bank for renewal of the bank guarantee from time to time. **Therefore, in a matter like this, equities would demand that the PSBG is kept alive so that interest of the appellant is secured in case ultimately the appellant succeeds in the matter.** On the other hand, if ultimately respondent succeeds in its claims and it is held that there was no need for keeping the bank guarantees alive, the respondent can be compensated by burdening the appellant with the expenses which the respondent would have incurred in renewing the bank guarantee.

This appeal is, accordingly, disposed of with directions to the respondent to keep the PSBG alive **during the pendency of the proceedings before the Arbitral Tribunal.** It is made clear that in the event of the respondent succeeding before the Arbitral Tribunal, the Arbitral Tribunal shall be competent to award the amount incurred by the respondent in renewing the bank guarantee. However, it is made clear that the appellant shall also not encash the said bank guarantee.

The Arbitral Tribunal may also **endeavour to conclude the proceedings and give its award as early as possible and preferably within four months from today."**

9. CM 15130 of 2007 is filed in this FAO by the petitioner (respondent in the said FAO). It is, *inter alia*, averred that after the aforesaid order was passed and the matter went back to the Arbitration Tribunal, the additional application was filed before the Arbitration Tribunal on 10.07.2007, *inter alia*, submitting that the Tribunal should pass two distinct and separate award for each of the reference before the Arbitration Tribunal, viz.:

- a) Reference before the Arbitration Tribunal filed before the parties; and
- b) Reference before the Arbitration Tribunal by this Court vide orders dated 22.08.2006 as to whether Bank Guarantee kept should be released or be decided in OMP filed.

10. The Tribunal has, however, passed vide orders dated 12.09.2007 directing that the bank guarantee should be kept in force till all the disputes between the parties raised before

the Arbitration Tribunal are finally resolved. Submission of the petitioner is that while passing this order, the Arbitral Tribunal has not appreciated the true nature of the orders passed on 29.03.2007 in FAO No.104 of 2007 inasmuch as the intention behind that order was to give the award in respect of bank guarantee, separately.

11. Arbitration Application No.12 of 2009 is filed under Section 37(2)(b) of the Act challenging the same order dated 12.09.2007 of the Tribunal. It is stated by way of this petition, the petitioner, by way of abundant caution, laying independent challenge to the said order. Insofar as this application is concerned, Mr. P.H. Pareksh, learned Senior counsel was candid in conceding that the orders dated 12.09.2007 of the Arbitral Tribunal are not appealable orders and no such appeal is maintainable. Even otherwise, the contention based on the purported reference "is misconceived that there is no provision of making 'reference' under the Arbitration and Conciliation Act, unlike the position which existed in Arbitration Act, 1940. He, therefore, did not press this petition and submitted that since same prayer was made in CM No.15130 of 2007 in FAO No.104 of 2007 as well. This Arbitration Application is dismissed as not maintainable.

12. Coming back to CM No.15130 of 2007, prayers made by the petitioner are as under:

- (i) To direct the Arbitral Tribunal to dispose the BG main claim statement filed by the respondent on 02.09.2006 passed by this Court in OMP No.233 of 2006 for release of the Bank Guarantees for

Performance Security forthwith without linking it to other claims referred under the Contract.

- (ii) Direct the appellant to discharge, release and return to the respondent the said BGs numbers 30/97, BSC-04, 316020008535-HP, 316020008492-HP in terms of the order of AT dated 08.2.2007.
- (iii) To pass any further orders that this Court deems fit and proper.

13. Submission of Mr. Parekh was that the earlier orders passed by the Tribunal on 08.02.2007 was challenged by the respondent/NHAI primarily on the ground that such an order under Section 17 was not in the nature of award and direction to release bank guarantee could not have been given by the Arbitral Tribunal under Section 17 of the Act. His submission that because of this reason, the order was set aside and when the directions were given to dispose of the matter within four months, it was but natural that the question of bank guarantee, which was referred to by any proceedings under Section 9 of the Act could be adjudicated separately and the Arbitral Tribunal could pass the award thereon independently and other disputes, which were referred to by the parties.
14. I do not agree with the aforesaid contention of Mr. Parekh. The order passed on 29.03.2007 has already been reproduced above. It is clear that earlier order dated 08.02.2007 passed by the Arbitral Tribunal directing the respondent to release the bank guarantee was not only challenged on the ground that such an order was not permissible under Section 17 of the Act, but was challenged on merits as well. During the arguments, suggestion was given as to whether the petitioner would

continue to keep bank guarantees alive “till the disposal of the arbitral proceedings before the Arbitral Tribunal”. Even the condition was put that in case the petitioner herein succeeds, the expenses incurred in renewal of the bank guarantee shall be borne by the NHAI. The petitioner had accepted this suggestion. However, NHAI was not agreeable to the suggestion of bearing the cost. Still this stipulation was added in the order that in case the petitioner succeeds, NHAI shall bear the expenses incurred for keeping bank guarantee alive during the pendency of the arbitral proceedings. It was categorically recorded:

“Arbitration proceedings are still on and the matter is to be heard on merits. If the respondent is asked to keep the bank guarantee alive, insofar as the respondent is concerned, it will have to bear the expenses for the same which will have to be paid to the Bank for renewal of the bank guarantee from time to time. **Therefore, in a matter like this, equities would demand that the PSBG is kept alive so that interest of the appellant is secured in case ultimately the appellant succeeds in the matter.** On the other hand, if ultimately respondent succeeds in its claims and it is held that there was no need for keeping the bank guarantees alive, the respondent can be compensated by burdening the appellant with the expenses which the respondent would have incurred in renewing the bank guarantee.

This appeal is, accordingly, disposed of with directions to the respondent to keep the PSBG **alive during the pendency of the proceedings before the Arbitral Tribunal.**

15. Reference was clearly to the entire arbitration proceedings and not limited to the issue relating to bank guarantee. The counsel for the petitioner had even agreed to keep the bank guarantee alive. In view of the fact that the orders was passed and suggestion given by the petitioner in prayers made in this application cannot be allowed.
16. This application is accordingly dismissed.
17. One aspect, however, still remains to be adverted to. In the order dated 29.03.2007, it was observed that endeavour shall be made by the Arbitral Tribunal to conclude the proceedings

and giving the awards as early as possible and preferably within four months from the date of receipts of the order. More than three years have passed. During the course of hearing, it was informed that proceedings are still half way through. No doubt, Arbitral Tribunal has specifically observed in its order dated 12th September, 2007 that the case involves lengthy nature of disputes and large number of claims and counter claims and, therefore, it would not be possible to comply with the direction/orders dated 29.03.2007. However, that would not be a ground to continue and prolong the arbitration proceedings infinitive or endlessly. As pointed out above, even from 29.03.2007 more than three years have passed. Mr. Parekh informed that more than Rs.1 crore expenses have already been incurred in getting the bank guarantees renewed.

18. The very purpose of arbitration is defeated if these proceedings are protracted abnormally. These proceedings have already taken number of years. Efforts should be made to conclude the same expeditiously. The very fact that lengthy nature of disputes are involved as observed by the Arbitral Tribunal, itself provides justification for regular hearings, preferably on day to day basis. However, the Arbitral Tribunal, it was informed by the counsel for the parties, is fixing dates after every two months or so and hearing does not last for more than two hours or so. If the proceedings in future continue in this fashion, it will take many years before the award is rendered. This cannot be countenanced.

19. In these circumstances, I am of the opinion that Arbitral Tribunal should fix hearings at a stretch for one week. It can be from Monday to Friday and for each day hearing should be in pre-lunch and post lunch session with each session of two and half hours. If the arguments are not concluded in that week, hearings can be fixed again for one week in a similar manner, after a short gap. Learned counsel for the parties informed that if hearings are fixed for two weeks in the aforesaid manner, they would be able to complete their entire submissions.
20. Accordingly, the Tribunal is directed to fix the hearings in the aforesaid manner and finish the matter within four months.
21. All the applications as well as Arbitration Petition are dismissed.

(A.K. SIKRI)
JUDGE

JULY 14, 2010.
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